

Adjudicator's Decision

Pursuant to the Building and Construction Industry Payments Act 2004

**Sea-Slip Marinas (Aust) Pty Ltd (Claimant)**

**and**

**Abel Point Marina (Whitsundays) Pty Ltd  
(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 27 October 2005 is **\$183,026.46**
- b. The date on which the amount became payable is **31 October 2005**
- c. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
- d. The Respondent is liable to pay the ANA's fees of \$385 and the adjudicator's fees.

## Table of Contents

Adjudicator's Decision .....	1
Background .....	3
Appointment of Adjudicator .....	3
Material provided in the adjudication .....	4
Claimant's Material .....	4
Respondent's Material .....	6
Threshold jurisdictional issues .....	7
Scope of the determination .....	12
Matters regarded in making the Decision .....	13
Material considered .....	13
Material not considered .....	13
Requirements of an adjudication decision .....	16
Basic and Essential Requirements .....	16
The Construction Contract .....	16
Documents forming the contract .....	17
Chronology of Service of Documents .....	18
More detailed Requirements .....	20
Payment Claim .....	21
Payment Schedule .....	21
The Claimant's Case and the Respondent's Case in brief summary .....	34
Substantive Issues .....	35
Decision on the issues .....	35
Material that the Claimant and Respondent may rely upon .....	36
Whether the Superintendent unilaterally delegated its valuation obligations .....	52
Whether the Claimant had consented to valuation by others .....	53
Whether the valuation by T&TR was correct .....	54
Whether there was a further agreement reached between the parties .....	54
What is the true value of the claim .....	58
The adjudicated amount .....	61
Due date for payment .....	61
Rate of interest .....	61
Authorised Nominating Authority and Adjudicator's fees .....	62
Appendix 1 Payment claim and payment schedule summary .....	63

## **Background**

1. Sea-Slip Marinas (Aust) Pty Ltd (referred to in this adjudication as the “Claimant”) was engaged by Abel Point Marina (Whitsundays) Pty Ltd (referred to in this adjudication as the “Respondent”) to design and construct marina berths and ancillary works Stages 2 & 3 at Abel Point Marina at Airlie Beach in Queensland 4802 (the “work”).
2. The material (as identified below) provided by the Claimant and Respondent (collectively known as the “parties”) did not identify the date of the design and construct contract for the works (the “contract”). However, the tender for the works was dated 7 October 2004.
3. The work comprised off site construction of pontoons and walkways and delivery of these components to Airlie Beach and the installation of piles to which the pontoons and walkways were then affixed.
4. Progress Claims and Certificates of Payment (“Certificates”) were issued progressively throughout the project and Progress Claim 9 is the subject of this adjudication.
5. However, Progress Claim 7 was the subject of an earlier adjudication application dated 26 August 2005 regarding a payment claim of \$1,620,427.44.
6. The parties corresponded with one another on 1 and 2 September 2005 through their solicitors and agreed that this adjudication be held in abeyance pending a payment of \$1,432,175.21 to be made by the Respondent to the Claimant on or before 9 September 2005. It appears that this payment was made and the adjudication did not proceed.
7. There are matters in dispute regarding whether the 1 and 2 September 2005 correspondence between solicitors constituted a binding agreement which capped the quantum of the claims payable for certain items under the contract.
8. Progress Claim 9 dated 30 September 2005 for \$258,086.39 was served on the Respondent on 3 October 2005 and the Respondent served a payment schedule on 13 October 2005 in which it asserted that the quantum of certain items had been agreed and that no monies were payable because the Claimant had already been overpaid.
9. The payment dispute was referred to adjudication and on 4 November 2005 at the same time as serving the adjudication response, the Respondent served a Notice to Show Cause on the Claimant to remedy a substantial breach of contract, and also asserted that it was entitled to withhold payment under the contract.

## **Appointment of Adjudicator**

10. The Claimant applied to the Institute of Arbitrators and Mediators Australia (“IAMA”) on 27 October 2005 for adjudication. By letter dated 31 October 2005 IAMA referred the adjudication application for me to determine. Attached to the nomination letter was a copy of a cheque from the Claimant payable to IAMA for \$385.00 as the adjudication application fee.
11. 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.

12. By letter dated 2 November 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**

13. Each party provided me with a lever arch folder of material for consideration, and I consider it prudent to list these documents for identification so that the parties are able to identify the relevant documents referred to in these reasons.
14. After the response was served, the Claimant's solicitors wrote to me on 8 November 2005 by facsimile (copied to the Respondent's solicitors) stating that they could not respond to the adjudication response, but identifying material that should not be considered by me. I refer to this document in the "Material Not Considered" heading below, and will now proceed to list the contents of the lever arch folders.

#### *Claimant's Material*

A lever arch folder divided into folios constituting the adjudication application documents comprising the following:

- (i) Adjudication Application dated 27 October 2005 for \$258,086.39 (including GST) with the Claimant's submissions (the "application").
- (ii) Tab 1 - Payment Claim No. 9 dated 30 September 2005 claiming \$258,086.39 (including GST) (the "payment claim") comprising:
  - (a) a Tax invoice for \$258,086.39 (including GST);
  - (b) a detailed breakdown of the tax invoice;
  - (c) details of items incorporated into the works/unfixed plant & materials/variations;
  - (d) a letter from the Sea-Slip Manufacturing Pty Ltd to MH Palmer Consulting Engineers Pty Ltd ("Palmer") confirming fabrication, assembly and unencumbered title of the products claimed with attached invoice SSM-004.
- (iii) Tab 2 – Payment Schedule dated 13 October 2005 stating that the Respondent proposed to pay \$0.00 on 31 October 2005 (the payment schedule").
- (iv) Tab 3 – Undated but signed Formal Instrument of Agreement referring to documents comprising a contract.
- (v) Tab 4 – the Contract documents starting with a cover sheet titled "Contract Document" and initialled and then:
  - (a) Divider A - Specification 800/2004/1 for Stages 2 and 3 of Abel Point Marina expansion (the "Specification");
  - (b) Divider B – Annexure Part A to AS4300-1995;
  - (c) Divider C – Design criteria;
  - (d) Divider D – Tender letter dated 7 October 2004;
  - (e) Divider E – Plan of a marina?
  - (f) Divider F – Superseded Progress Claim Schedule dated 1.11.04;
  - (g) Divider G – Project Programme dated 12 October 2004;
  - (h) Divider H - Project Programme dated 12 October 2004;
  - (i) Divider I – Pricing Schedule dated 22.12.04.

- (vi) Tab5 – AS4300-1995 General Conditions of Contract (“GCC”).
- (vii) Tab 6 – Drawing (unnumbered) Revision A titled “Abel Point Marina”, as well as costings for aluminium composite system, 2.0 walkways, 3.0 connections, 4.0 brackets, 5.0 accessories, 6.0 gangways, 7.0 services, 8.0 moorings, 9.0 Labour, 10.0 Administration, Total Project Costs.
- (viii) Tab 7 – No document in this tab
- (ix) Tab 8 – Correspondence from Bennett & Philp to Colin Biggers & Paisley dated 1 September 2005 relating to an adjudication application served on 26 August 2005.
- (x) Tab 9 – Progress Certificate 7a dated 6 September 2005.
- (xi) Tab 10 – Palmer’s letter dated 16 October 2005 to the Respondent attaching Progress Certificate No. 9 certifying nil being payable.
- (xii) Tab 11 - Palmer’s letter to the Claimant dated 28 September 2005 relating to Progress Certificate No. 8 and Variation No. 1.
- (xiii) Tab 12 – “Without Prejudice” Emails from Respondent’s managing director to Michael Keevers and Palmer and responses from Michael Keevers on 14 October 2005.
- (xiv) Tab 13 – not used
- (xv) Tab 14 – Daily diary notes between 1 September and 30 September 2005.
- (xvi) Tab 15 – Tony Makin Associates Quantity Surveyors report to Colin Biggers & Paisley dated 26 October 2005 relating to the dispute between the parties.
- (xvii) Tab 16 – Extract of Progress Claim No.4 with Variation 1 – Downtime Due for Dredging delays.
- (xviii) Tab 17 – Respondent’s payment schedule dated 15 September 2005 relating to Progress claim 8 which was the subject of an earlier adjudication application.
- (xix) Tab 18 – Claimant’s letter to the Respondent dated 22 September 2005 in relation to Progress Claim No. 8.
- (xx) Tab 19 – Correspondence between Claimant and Respondent relating to dredging and piling delays.
- (xxi) Tab 20 – Palmer’s letter to the Claimant granting a 17 day extension of time.
- (xxii) Tab 21 – Claimant’s letter to Palmer relating to restricted access to O and P arms of the marina claiming for 13 weeks extension of time and foreshadowing a claim for extra remuneration.
- (xxiii) Tab 22 – Undated Payment Schedule from the Respondent to the Claimant relating to Progress Claim No. 7 with facsimile date printed at top of document of 12/08/2005.
- (xxiv) Tab 23 – 17 Photographs of the marina on various dates from 5 July 2005 to 28 July 2005.
- (xxv) Tab 24 – Invoice No. 2123.1 for \$43,642.50 (including GST) dated 22 July 2005 from Engwirda Marine to Claimant.
- (xxvi) Tab 25 - Tony Makin Associates Quantity Surveyors report on progress claim No.9 to Colin Biggers & Paisley dated 26 October 2005

The documents contained in the application will be identified in the decision below as in “Tab 1, Tab 2” etc.

Respondent's Material

1 lever arch folder constituting the adjudication response (the "response") comprising the following documents:

- (xxvii) Annexure 1 – Claimant's Progress Claim No.7 dated 1 August 2005.
- (xxviii) Annexure 2 – Respondent's Payment Schedule sent on 12 August 2005 in response to Progress Claim No.7.
- (xxix) Annexure 3 – Claimant's Adjudication Application submissions relating to Progress Claim No.7.
- (xxx) Annexure 4 – Letter from Bennett & Philp to Colin Biggers & Paisley dated 1 September 2005 (identical to Tab 8).
- (xxxi) Annexure 5 – Letter from Bennet & Philp to Colin Biggers & Paisley dated 2 September 2005.
- (xxxii) Annexure 6 – Letter from Colin Biggers & Paisley to Mr. Warren Fischer, Adjudicator, advising that dispute had been resolved in accordance with letters from Bennett & Philp dated 1 September and 2 September 2005.
- (xxxiii) Annexure 7 – Superintendent's Certificate 7(a).
- (xxxiv) Annexure 8 – Claimant's Progress Claim No. 8.
- (xxxv) Annexure 9 – Respondent's Payment Schedule to Progress Claim No.8.
- (xxxvi) Annexure 10 – Letter from Claimant to Respondent dated 22 September 2005.
- (xxxvii) Annexure 11(a) - Palmer's letter dated 25 August 2005 to Claimant regarding appointment of Rawlinsons as Quantity Surveyor for Progress Claim No.8
- (xxxviii) Annexure 11(b) – Email dated 5 September 2005 from Claimant to Palmer including reference to preparedness to assist to facilitate expeditious of payment certificate.
- (xxxix) Annexure 11(c) – Palmer's letter to the Claimant relating to Progress Claim No.8.
- (xl) Annexure 12 – Matthew Palmer's Statutory Declaration dated 4 November 2005 relating to Rawlinsons valuation of the works.
- (xli) Annexure 13 – Email from Respondent to Claimant dated 19 July 2005 regarding contractual mechanisms to dispute the Superintendent's decision.
- (xlii) Annexure 14 – Letter from Palmer to the Claimant dated 17 October 2005 requesting evidence of insurances.
- (xliii) Annexure 15 – Letter from Palmer to Claimant dated 2 November 2005 requesting evidence of insurances.
- (xliv) Annexure 16 – Letter from Claimant to Palmer dated 4 November 2005 attaching confirmation of insurances dated 2 November 2004.
- (xlv) Annexure 17 – Letter from Respondent dated 4 November 2005 attaching a Notice to Show Cause under Clause 44 of the General Conditions of Contract.
- (xlvi) Annexure 18 – Letter from Palmer to Claimant dated 28 September 2005 requesting documents relating to Contract Payment of Workers and Subcontractors.
- (xlvii) Annexure 19 – Letter from Bennett & Philp to Colin Biggers & Paisley dated 4 November 2005 enclosing adjudication response and Notice to

Show Cause and advising that the respondent entitled to withhold payment under Clause 43.3 of the General Conditions of Contract.

The documents contained in the response will be identified in the decision below as “Annexure 1, Annexure 2” etc.

### **Threshold jurisdictional issues**

15. There are two threshold issues contained in s3 of the Act (parts of which are extracted below) regarding:

- (1) the date of the contract, and
- (2) construction work being carried on in Queensland,

that must be satisfied before I have jurisdiction to adjudicate this dispute. I have therefore considered these matters first, as there would be no point in canvassing the substantial merits of the claim, if there is no jurisdiction for all or part of the payment claim.

#### ***“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....; or*
- (b) a construction contract for the carrying out of domestic building work...; or*
- (c) a construction contract under which it is agreed that the consideration payable for construction work.. is to be calculated other than by reference to the value of the work carried out .....*

*(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.. as an employee of the party....; or*
- (b) provisions under which a party undertakes to carry out 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.”*

16. 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.
17. At this stage I am only interested in the date of the *construction contract* as defined by the Act, so as to ensure that it is after 1 October 2004, thereby attracting jurisdiction. Paragraph 3 of the application referred to the contract and attached Tab 3 and Tab 4 documents, and in paragraph 3 of the response, the Respondent does not take issue with these documents.

Although I can infer that there is therefore agreement between the parties as to the contract documents, I have to be independently satisfied that there is a *construction contract* entered into after 1 October 2004, because the parties cannot agree that an adjudicator has jurisdiction. If jurisdiction is established, I will then need to review these documents to find what constitutes the contract.

18. As to the pertinent issue of dates at this stage, Tab 3 attached the signed Formal Instrument of Agreement, which referred to the contract documents, but it was undated. Although there are dates on the documents in Tab 4, there is no definitive date that I find for the contract. I am content, however, because there is no material to the contrary, to find that the date of the Claimant's tender letter was 7 October 2004 as identified in Tab 4(d); which allows me to infer as a matter of commonsense that the contract could not have been entered into any earlier than this date.

The tender letter was addressed to the Respondent c/- Palmer of PO Box 5773, Mackay Mail Centre Queensland 4741, for attention Mr. M.H. Palmer, and the Respondent does not dispute this. I find that this letter is an offer by the Claimant to carry out work to a consulting engineer, Palmer. It is necessary to determine whether Palmer was the agent of the Respondent at that time, which would then mean that the offer was made to the Respondent.

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*, 8<sup>th</sup> ed, Butterworths para [20.02], p540. I can refer to a common practice in the construction industry of a consulting engineer acting as agent for a Principal in communications prior to

the entry in a construction contract. In this case, Tab 4, which is titled “Contract Document” and Tab 4(a), which is the Specification, were documents which I infer as a matter of logic were created by Palmer because they contain Palmer’s address or letterhead. The documents each refer to the work at Airlie and name the Respondent. Without contrary material from the Respondent, I therefore find by inference that the tender sent to Palmer was for it to act in its capacity as agent for the Respondent, so that it constituted an offer by the Claimant to the Respondent.

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.

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

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

I have confirmed that the contract was after 1 October 2004. Given that there is no material to the contrary, I find that Tab 3 is the signed but undated Formal Instrument of Agreement that establishes a contract between the parties. This document refers to the tender dated 7 October 2004 [Tab 4(d)], AS4300-1995 General Conditions of Contract [Tab 5] and Annexure [Tab 4(b)], Specification 800/2004/1 [Tab 4(a)], Drawings as defined in the Specification, and other documents as listed in the Specification. Tab 4(a) clearly refers to Construction of Marina Berths and Ancillary works Stages 2&3 at Abel Point Marin, Airlie Beach in Queensland.

I find that the above documents form part of the contract because the Claimant has provided these documents in the application and the Respondent does not dispute that they are contract documents in paragraph 3 of the response. Further reference to the contract documents will be made in the reasons below. For the moment I am satisfied that these documents evidence a *contract*, within the first part of the definition of *construction contract* in the Act.

I must also be satisfied that the contract falls within the meaning of *construction work* within the meaning in the Act.

*Construction work* is defined in s10 of the Act as:

*“... (b) the construction, alteration, ... forming, or to form, part of land, including docks and harbours...; ...  
(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-...  
(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site;...”*

The Collins Concise Dictionary (2001), 5<sup>th</sup> Australian edition (the “dictionary”) definition of dock is *a wharf or pier*, and the dictionary definition of a pier is *a structure with a deck that is built out over water*. The Specification in paragraph 3.0 Scope of Work, subparagraph 2 refers to “*All works included in the letter from Sea-Slip Marinas Pty Ltd dated the 7<sup>th</sup> October 2004 including walkways, deck mats, flotation, pontoons, walkway units, fendering, piling, services, fuel services, security gates...*” It is clear from this scope of works that the *marina berths* include structures with a deck built out over water, so I find that the marina berths fall within the meaning of *docks*.

The Specification refers to design and construction of components for the marina such that the work falls within the meaning of s10(b) *construction forming part of land* because it is evident from the tender dated 7 October 2004, and the photographs therein, and the drawing at Tab 4(e) (which was not controverted by the Respondent), that the marina connects to the land. In addition, the tender dated 7 October 2004 referred to assembly of components, which I find falls within the meaning of s10(c)(iv) *prefabrication of components to form part of any structure*. Accordingly, I find that the contract was for *construction work* as defined in s10 of the Act.

I infer from the tender [Tab 4(d)] that no work had started before the contract was concluded, as it was an offer to carry out the work, 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.

20. I need to determine whether the *construction work* was carried out in Queensland in order to satisfy threshold issue 2. Although the Respondent has not taken issue with the Claimant as regards this threshold jurisdictional issue, I must be satisfied that the work was carried out in Queensland because if the work, or part thereof was not in Queensland, then I have no jurisdiction to adjudicate payment for that work or part thereof. I find that the Abel Point Marina is at Airlie Beach, which is in Queensland. However, in the material there are numerous references to New South Wales, so it is important to determine whether New South Wales is the locus of any *construction work*.
21. The Respondent did not challenge the existence of a tender letter from the Claimant which displayed addresses in New South Wales, one of which was P.O.Box 2435 Taren Point NSW 2229. The Respondent also did not take issue with the range of contract documents in Tab 4 put forward by the Claimant. I find therefore that the Claimant was based in New South Wales and that it had ACN103 644 640 as identified in this letter and Item 5 of the Annexure to AS4300-1995 General Conditions of Contract [Tab 4(b)]. It is also not disputed that Item 1 of the Annexure to AS4300-1995 General Conditions of Contract [Tab 4(b)] stated that the law applicable to the contract was Queensland law, but Item 2 provided that payments under the contract were to be made in New South Wales. Furthermore, in Item 3 the Respondent

was named as the Principal, with its address in Item 4 as Level 4, 350 Kent Street, Sydney New South Wales. Accordingly, I find that the Respondent was based in New South Wales. With reference to this uncontroverted material, I also find that the parties entered into a construction contract under Queensland law with payment to be made in New South Wales.

I will turn to establishing further terms of contract later in this decision, but the significant connection to New South Wales established in the documents above requires me to now carefully scrutinise the payment claim [Tab1] to see if any of the work claimed was done outside Queensland. This is a jurisdictional point, so it does not matter that the Respondent has not challenged the payment claim in this regard.

A covering letter from Sea-Slip Manufacturing Pty Ltd of Nowra New South Wales to Palmer dated 30 September 2005 in Tab 1(c) referred to fabrication and assembly of product claimed in Progress Claim No.9. Tax Invoice #SSM-004 in Tab 1(d) is an invoice from Sea-Slip Manufacturing Pty Ltd (ACN 110 239 195) of Nowra New South Wales to Sea-Slip Marinas (Aust) Pty Ltd of Kieraville New South Wales dated 23 September 2005, most of which is reproduced below:

**TAX INVOICE #SSM-004**

<b>Quantity</b>	<b>Description</b>	<b>Unit Price</b>	<b>Total</b>
2	FP12 Pontoons	\$9,419.58	\$19,781.12
6	FP7 Pontoons	\$6,6714.22	\$42,299.59
10	FF Connections	\$155.66	\$1,643.43
5	FW Connections	\$1,708.01	\$8,967.05
20	Corner bumper units	\$88.60	\$1,860.60
	Gangways		\$3,780.00
	Assembly, handling & loading at Nowra		\$8,064.00
	Transport – Nowra to Whitsundays		\$23,644.45
		<b>Subtotal</b>	\$110,031.24
		GST	\$0.00
		<b>Total</b>	<b>\$110,031.24</b>

I cannot find any material to suggest that this off-site prefabrication was carried out in Queensland. Accordingly, I draw the inference from the covering letter to Palmer and the attached invoice that Sea-Slip Manufacturing Pty Ltd carried out the fabrication and assembly work in Nowra because of the reference to “Assembly, handling and loading at Nowra”. At first blush this would fall within the definition of *construction work* above, because the definition includes off-site fabrication. However, in my view I need to determine who carried out this work, and how these items have been characterised in the payment claim before deciding that it is *construction work* as defined in the Act. I turn firstly to the identity of the person carrying out the fabrication and assembly work.

Although this tax invoice claims no GST on the sale to the Claimant, I am unable to infer from that fact alone that Sea-Slip Manufacturing Pty Ltd was the same entity as the Claimant because they have different Australian Company Numbers: ACN 110 239 195 and ACN103 644 640 respectively. I find therefore that they are separate persons consistent with the principles of company law. I further find that these items identified in Tax Invoice #SSM-004 were fabricated and assembled by another entity and supplied to the Claimant. The Claimant characterised these items in the payment claim as Product Supply in its Details of Items incorporated into the Works. Accordingly, even though there is reference to fabrication and assembly work carried on in New South Wales, I conclude that this work was carried on for the purposes of supplying the Claimant, which then supplied these items to the Respondent's site in Queensland and incorporated them in the works in Queensland. This means that I find, as far as the claim between the Claimant and Respondent is concerned, that there is no *construction work* in the payment claim that was carried out outside Queensland, and I therefore find that I have jurisdiction to consider the whole payment claim which satisfies threshold issue number 2.

22. I also need to deal with the other exclusionary provisions in s3(2) and 3(3) of the Act in order to be satisfied that the Act applies to this work. 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.

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.

23. Consequently, I find I have jurisdiction to adjudicate this matter as it relates to *construction work carried out in Queensland*.

### **Scope of the determination**

24. 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.
25. 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 ANA's fees and adjudicator's fees and expenses. I will exercise that discretion after dealing with the substantive issues.

## Matters regarded in making the Decision

26. 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

27. 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 30 September 2005 to which the application relates.
- (iii) The payment schedule dated 13 October 2005 to which the response relates.
- (iv) The adjudication application and the relevant documentation.
- (v) The adjudication response and the relevant documentation.

### Material not considered

28. In making this decision I have reviewed all the material provided, and have then referred to what was not taken into consideration in my reasons below. At this point, however, I considered it important before proceeding further, to deal with a number of documents that I did not consider, giving the reasons why. This was to ensure that the parties are quite clear at this stage that the adjudication did not consider the Claimant’s solicitors facsimile dated 8 November 2005, and the Respondent’s show cause notice for breach of contract dated 4 November 2005, and the Respondent’s assertion of its contractual rights to withhold payment. I refer to these documents in more detail.

29. The facsimile from the Claimant’s solicitors dated 8 November 2005 was not in response to any request from me under s25(4) of the Act, in which I am entitled to ask either party for written submissions. I reviewed this facsimile to ascertain whether it contained material which I was obliged to consider, and

decided that it should not be considered in the adjudication for the following reasons. It was provided to me without any request from me under s25(4)(a) of the Act to do so. Although I am at liberty to ask the Respondent to make further written submissions in response to this facsimile under s25(4)(a) of the Act, so as to afford the Respondent natural justice, this would be in response to documentation that I had not requested.

In my view it was not appropriate to ask for submissions, because that would be prompted by material unilaterally introduced into the adjudication by one party who acknowledged that it had no entitlement to do so under the Act. If I considered this material then I would be obliged to accord the Respondent natural justice and ask for its submissions in response. It was not material in my view that an adjudicator should consider because it was not *properly made by the claimant in support of the claim* as required by s26(2)(c) of the Act. I do not consider it appropriate that an adjudicator be confronted with material that is not contemplated by the legislation, thereby compelling them to seek submissions from the Respondent because of the need to accord natural justice, and then having to again request material in response from the Claimant, also for natural justice reasons. To adopt such an approach in rapid adjudications, would in my view defeat the object of the legislation, and render an adjudicator captive to the tactics employed by both parties in a dispute, resulting in continual requests for submissions, all within the space of 10 business days.

The better view, and the one that I have adopted, is to not consider this material. This means that I was not compelled (to comply with the rules of natural justice) to seek submissions from the Respondent, and thereafter the Claimant, because there was no need to hear from the Respondent on material that was not going to be considered by me.

30. Furthermore, I did not consider the Respondent's show cause notice for breach of contract dated 4 November 2005, and the Respondent's assertion of its contractual rights to withhold payment. I have called the issues arising out of documents Annexures 14 through to 19 (apart from the response contained in that document) as "*November 2005 issues*" and my reasons for not considering them are as follows.

31. In the response documentation, the Respondent attached:

- (i) Annexure 14, which was a request from Palmer to the Claimant dated 17 October 2005 for evidence of insurances;
- (ii) Annexure 15, which was a further request from Palmer dated 2 November 2005 for evidence of insurances;
- (iii) Annexure 16, which was a letter from the Claimant to Palmer attaching evidence of insurances;
- (iv) Annexure 17, which was the Respondent's Notice to Show Cause to the Claimant under Clause 44 of the General Conditions of Contract dated 4 November 2005 claiming the Claimant had substantially breached the contract by failing to provide satisfactory evidence of insurances;

- (v) Annexure 18, which was a letter from Palmer to the Claimant dated 28 September 2005 requesting documents relating to Contract Payment of Workers and Subcontractors;
  - (vi) Annexure 19, which was a letter from Bennett & Philp to Colin Biggers & Paisley dated 4 November 2005 enclosing the response, as well as the Notice to Show Cause referred to above, and asserting the Respondent's rights to withhold payment.
32. The above documents relate to issues that do not arise out of the payment claim and payment schedule, which are the subject of this adjudication. If this were an arbitration, then it would be necessary to provide the Claimant with the opportunity to deal with the *November 2005 issues* in order to afford the Claimant natural justice. 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..*"
33. However, this is not an arbitration but an adjudication which under s26(2) of the Act, which I have already said, limits matters to which an adjudicator may have regard. The above documents, Annexures 14 to 19 (apart from the response to which I had had regard) in the response do not in my view constitute *relevant documentation, that have been properly made by the respondent in support of the schedule* as required by s26(2)(d). These documents create fresh issues regarding breach of contract and rights to withhold payment which were not canvassed in the payment schedule. The payment schedule essentially asserted that the Claimant had already been overpaid, so that no monies were payable in this payment claim.
34. There is no reference in the payment schedule to the Claimant's breach of contract or failure to provide statutory declarations relating to payment of workers and subcontractors. Accordingly, it would not be a bone fide attempt to exercise the relevant power under the Act if these *November 2005 issues* were considered in this adjudication. Therefore, these documents described above have not been considered in this decision. I have already qualified the acceptance of Annexure 19 by saying I have had regard to the response in these reasons, but not the other documents attached there. However, I have not had regard to paragraph 11 of the response because these submissions are in support of the *November 2005 issues* which I have found cannot be considered.
35. The Respondent is referred to s100 of the Act, which preserves the parties' rights. 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.*" Accordingly, the *November 2005 issues* can be dealt with elsewhere, but they will not form part of this adjudication.

## Requirements of an adjudication decision

36. Queensland Courts have not yet had the opportunity to provide much 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 in *Brodyn*, referred to above, has provided a very useful guide for adjudicators.

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

37. Whether a contract existed between the Claimant and Respondent, and if so whether the contract is a *construction contract* to which the Act applies, and in particular sections 7 and 8 of the Act (“*B&ER 1*”).
38. Whether the Claimant served the Respondent with a payment claim as required by section 17 of the Act (“*B&ER 2*”).
39. Whether the Claimant made an adjudication application to an authorised nominating authority as required by section 21 of the Act (“*B&ER 3*”).
40. Whether there was reference of the application to an eligible Adjudicator who accepted the application as required by sections 22 and 23 of the Act (“*B&ER 4*”).
41. That this decision by the Adjudicator requires the determination of the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable, all of which are to be decided in writing as required by section 26 of the Act (“*B&ER 5*”).

### The Construction Contract

42. 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.
43. The material provided by both the Claimant and Respondent identified in “Material provided in Adjudication” includes potential contract documents

together with other documentation leading to this adjudication. These will now be reviewed to decide which documents formed part of the contract.

Documents forming the contract

44. I have found that a contract was made after 7 October 2004.
45. I have already indicated that there were no objections for the Respondent regarding the documents purporting to be the contract documents and I have reviewed them and the context in which they were created. It is of fundamental importance that an adjudicator consider the provisions of the construction contract, as this is explicitly required by s26(2)(b) of the Act.
46. It is my view that even if a respondent does not take issue with what is asserted to be the terms of the contract, it is still incumbent upon the adjudicator to decide what constitutes the real provisions of the contract by objectively considering the material provided by the parties. The reason for adopting such an approach arises because of what Hodgson JA said in *Coordinated Construction Co. Pty. Ltd. v. J.M. Hargreaves (NSW) Pty. Ltd. & Ors. [2005] NSWCA 228* (“Hargreaves”). This case dealt with s22(2) of the NSW legislation (the equivalent of s26(2) of the Act), and Hodgson JA pointed to an adjudicator having to consider the true merits of a claim. At para 52 Hodgson JA said “*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.*” I will therefore have to decide which documents form part of the contract.
47. I have already found that Tab 3, the Formal Instrument of Agreement (the “Agreement”) formed part of the contract and I have reviewed the documents referred to in that document and in Tabs 4 to 6 and find the following documents as also forming the contract, unless specifically stated otherwise below:
- (i) Tab 4(a) – The Specification 800/2004/1. I find this is part of the contract because it was referred to in the Agreement and describes the work at Airlie Beach and I find that 800/2004/1 is the contract number as described by the Claimant.
  - (ii) The Specification, in paragraph 2.0, refers specifically to the GCC AS4300-1995 [Tab 5]. I find that Tab 5 is part of the contract.
  - (iii) Tab 6 – A plan drawing, which I am prepared to infer is drawing number 3121/2-02 Rev A, which was specifically referred to in paragraph 4.0 of the Specification, although it is not marked as such. The plan drawing can be considered as a matter of common sense to be that of a marina, and it carries the Title Abel Point Marina, and it has Rev A marked as well. I find that it forms part of the contract. In addition, the costings in the tables relating to individual item quantities for the aluminium composite system, 2.0 walkways, 3.0 connections, 4.0 brackets, 5.0 accessories, 6.0 gangways, 7.0 services, 8.0 moorings, 9.0 Labour, 10.0 Administration, Total Project Costs, which were all initialled, I find also forms part of the contract because it provided the detailed breakdown of the prices for the various components and totalled \$7,940,811.00, excluding GST, that is consistent with the tender amount stated in Tab 4(d) below.

- (iv) Tab 4(c) – Design Criteria. The Agreement makes no reference to it, but paragraph 6.0 of the Specification refers specifically to this document. As it is a design and construct contract, and design criteria are specifically required to be used in its design, I find that this is a contract document.
- (v) Tab 4(d) I have already found that this document forms part of the contract. I find that the tender figure contained therein of \$7,940,811.00, excluding GST, was the *contract sum* because it correlates with the Total Project Costs identified in Tab 4(b) above.
- (vi) Tab 4(e) – A drawing. There are no references on this drawing, and although it appears to be a plan drawing of a marina, I am unable to be satisfied that it formed part of the contract documents.
- (vii) Tab 4(f) – Progress Claim Schedule. A document is referred to in paragraph 13.0 of the Specification as “a (sic) indicative payment schedule” and is dated 1.11.04, which is after 7 October 2005 (sic). Although it has “Superseded” stamped on it, I infer that it is the document being referred to in the Specification and find that it is a contract document.
- (viii) Tab 4(g) – Project Programme dated 12 October 2004. I find that this document does not form part of the contract, because paragraph 11.0 of the Specification refers to a detailed program provided by the contractor on 22 December 2005 (sic). This program refers to contract award on 1/11/04, and a later document in Tab 4(h), also dated 12 October 2004 refers to contract award on 24/12/04. I find the latter is therefore more likely to be the program provided on 22 December 2004.
- (ix) Tab 4(h) – Another Project Programme dated 12 October 2004. I find that this forms part of the contract for the reasons identified above.
- (x) Tab 4(i) – Pricing Schedule dated 22.12.04. I have already made reference to a document in paragraph 13.0 of the Specification, which refers to an “*indicative payment schedule...showing indicative claimed amounts*”. It is unclear whether Tab 4(g) of Tab 4(i) is this document being referred to, but it was also initialled, so I am prepared to infer that this is also a contract document.

The documents specifically identified above and found to form the contract therefore comprise the contract.

48. Accordingly, the first basic and essential requirement is satisfied.

49. *B&ER 2* requires the service of the payment claim on the Respondent in accordance with s17 of the Act.

### **Chronology of Service of Documents**

50. A chronology of service of documents relevant to this adjudication is now developed, 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.

Tab 1 contains the payment claim dated 30 September 2005 and paragraph 1 of the application asserts it was served on the Respondent on 3 October 2005.

The Respondent in paragraph 1 of the response does not take issue with this, so I find that it was served on 3 October 2005, which satisfies *B&ER 2*.

51. Paragraph 2 of the application stated that payment schedule was received by the Claimant by email on 13 October 2005 and was attached in Tab 2, and the response does not take issue with this, so I find that the payment schedule was served on 13 October 2005.
52. Under cover of a letter dated 27 October 2005, the application was received by IAMA on 28 October 2005, and I deal with this matter further below.
53. IAMA nominated me as the adjudicator on 31 October 2005, and I accepted the nomination by facsimile to both parties and IAMA on 2 November 2005. Given that I received the nomination and sent the acceptance, I find that the nomination and acceptance took place on those dates.
54. On 4 November 2005, the Respondent delivered the response to me, which identified in Annexure 19 that a copy had been served on the Claimant.
55. On 8 November 2005 the Claimant's solicitors sent a facsimile to me (copied to the Respondent's solicitors) regarding the Respondent's material to which I have already referred above.

**Further analysis on the *basic and essential requirements***

56. *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(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.."*

57. The ANA provided me with the Claimant's lever arch folder containing documentation described above as Tab1 through to Tab 25, which I have already described as the application, and I find this satisfies the requirements of writing in s21(3)(a). There is a stamped date of 28 Oct 2005 with a handwritten note 8:05AM on the adjudication application. I draw the inference that this stamp and the note were those of IAMA in receiving the documents. There is no material to the contrary so I find that the date the application was received by IAMA was 28 October 2005. Accordingly, I find that an application was made to an ANA satisfying s26(3)(a) & (b) of the Act.
58. 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.

59. *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 31 October 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 31 October 2005. In the chronology above, I identified that I accepted the application in writing to the parties by facsimile on 2 November 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.

60. *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 referred to above). I paraphrase these requirements below:

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

62. 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*”).
63. Whether the time required under section 25 of the Act has been adhered to for the Adjudicator to make a decision (“*MDR 3*”).
64. Whether the Adjudicator has considered the matters required to be considered under section 26(2) of the Act (“*MDR 4*”).
65. Prior to giving consideration to *MDR 1*, it is useful to identify 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. I have also annexed a table in Appendix 1, that I have derived from the payment claim and the payment schedule to compile a summary of the amount claimed with relevant comments from either or both parties.

*Payment Claim*

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

*Date: 30 September 2005*

*Contract Num: 800/2004/1*

*Abel Point Marina Expansion Project Expansion Project Stages 2&3 – Arms O to Z*

*Item contract amounts were identified, % ages claimed and Project to date Claimed amount was identified*

*Amount due and payable \$258,086.39*

*Payment due: 28 October 2005*

*... Qld Projects This claim is made under the Building and Construction Industry Act (2004) (Qld)*

It also contained on the pages following; a Detailed Breakdown of Tax Invoice, Detail of Items incorporated into the Works, Details of Unfixed Plant and Materials, Variations, and a letter from Sea-Slip Manufacturing Pty Ltd of Nowra NSW.

*Payment Schedule*

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

An express reference was made to Payment Claim – Tax Invoice no 3160/9 dated 30 September 2005 referring to the work.

In the payment schedule, the following was written in the 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs:

*“That progress claim is expressed to be a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) and the Building and Construction Industry Act 2004 (QLD) (sic) – we presume that what is meant by this is the “Building and Construction Industry Payments Act 2004 (QLD)”.*

*“...Furthermore, the progress payment expressed to be a Payment Claim does not reference the Queensland Act correctly and this, in our view, means that the progress claim is not a proper Payment Claim for the purposes of the Building and Construction Industry Payments Act 2004 (QLD). However, for the sake of caution, this response is a Payment Schedule as defined in those Acts.”*

The schedule stated that the Respondent proposed to make a \$0.00 payment on 31 October 2005 and reasons were attached for non payment comprising a one page spreadsheet. There was a statement *the amount that will be (or has been) certified for payment by the Superintendent* and that the Superintendent had sought advice from Turner & Townsend Construction & Management Consultants who advised that \$400,000 over certification had been made in Certificate No. 8.

The schedule also stated *“The Superintendent has indicated that he will provide you with a copy of their advice when he prepares Progress Certificate No. 9 in the next few days. The Superintendent has advised us of the over-certification and we as an act of goodwill requested that a nil certificate be issued rather than a negative certificate.”*

The attached spreadsheet referred to the specific items claimed in the payment claim and identified the amount to be withheld and the reasons for withholding payment were provided in Notes 1 to 6, both of which are reproduced below in a table because I need to have regard to these reasons in making my decision:

<b>Amount withheld</b>	<b>Reasons for withholding payment</b>
\$7,032.32	<i>Turner &amp; Townsend Rawlinsons have valued the works and indicated to the Superintendent that the previously certified Claim #8 is an amount in excess of the completed works</i>
\$110,031.23	<i>Turner &amp; Townsend Rawlinsons have valued the works and indicated to the Superintendent that the previously certified Claim #8 is an amount in excess of the completed works</i>
\$8,316.00	<i>Turner &amp; Townsend Rawlinsons have valued the works and indicated to the Superintendent that the previously certified Claim #8 is an amount in excess of the completed works</i>
\$65,786.77	<i>Turner &amp; Townsend Rawlinsons have valued the works and indicated to the Superintendent that the previously certified Claim #8 is an amount in excess of the completed works</i>
\$43,850.00	<i>Payment in respect of dredging downtime claim made previously in Claim #7a was as agreed in full and final certification and satisfaction relating to that item and claim</i>
\$33,283.77	<i>Turner &amp; Townsend Rawlinsons have valued the works and indicated to the Superintendent that this item is valued at \$101,297.96. Had a positive Progress Certificate been issued an amount of \$21,297.96 would have been certified for this item</i>
\$2,850.00	<i>This amount was agreed not to be paid as a condition of Progress Claim No. 7a and that agreement is still applicable</i>

- <i>\$11,344.27</i>	<i>As a nil certificate is to be issued given over-certification previously in excess of \$400,000 this items (sic) have not been deducted but will be in future certificates if applicable</i>
- <i>\$27,700.00</i>	<i>As a nil certificate is to be issued given over-certification previously in excess of \$400,000 this items (sic) have not been deducted but will be in future certificates</i>

**Analysis of the more detailed requirements**

68. 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.”*

As to s17(2)(a), I note that the payment claim makes reference to the Contract No. 800/2004/1, which I have found is the contract that the parties entered into, and there is further reference to the works and then a list of items describing the works with the contract amount for each item & the project to date amount claimed. In addition, the further details provided in the detailed breakdown spreadsheet, together with the further details provided of specific items, is in my view sufficiently comprehensive for the Respondent to know what work is being claimed for in this claim. Attached to the payment claim is supporting material for the claim for construction work, which follows the progress claim requirements, identified in Clause 42.1 of the GCC relating to progress claims. This was the 9<sup>th</sup> Progress Claim, and it was in the same format as Progress Claim No. 8 which was included by the Respondent in Appendix 8 of its material. Although Progress Certificate No.8 was not provided in the material, I can infer that it was issued in response to Progress Claim No. 8, and further infer that this format satisfied the requirements of the contract.

I have been referred by the Claimant to the decision of Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited [2003] NSWSC 1103* (“Leighton”) which stated that I must be satisfied, as a matter of fact, that adequate information has been provided in this payment claim. I find 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 \$258,086.39, which in my view satisfies s17(2)(b), because it expressly states the “Amount Due & Payable \$258,086.39.” The invoice formed part of payment claim and the amount is calculated under the contract, because the attached Progress Claim No. 9

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 s14(1)(a) of the Act. Without material to the contrary, I therefore find that \$258,086.39 is the “**claimed amount**” as identified in s17(2)(b).

The Respondent takes issue in the payment schedule with the endorsement because in its third paragraph it claims that that reference to *Building and Construction Industry Act 2004*, instead of *Building and Construction Industry Payments Act 2004* is erroneous, from which I infer that it claims non-compliance with s17(2)(c). I refer again to Leighton, and in particular to paragraph 65, in which His Honour said, “*Ultimately, I have come to the conclusion that notwithstanding the above described anomalies in the unnecessary use of the tail end words in the first paragraph of the covering letter and the attachment of the so-called “Statutory Declaration for this claim” a reasonable person reading the covering letter and the attachments as a whole would have been left in no material doubt as to its meaning essentially conveyed by the last sentence in the covering letter.*” I find that the Respondent in its payment schedule had no doubt as to the meaning of the payment claim with its incorrect reference to the Act, because in the second paragraph of the payment schedule the Respondent stated “...- we presume what is meant by this is the “Building and Construction Industry Payments Act 2004 (QLD)”. I find that the Respondent was not misled by matters raised in the payment claim, as regards the endorsement, which means that it complies with s17(2)(c).

Accordingly, I find that *MDR 1* is satisfied.

69. 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.

I have already found that the payment schedule was served on 13 October 2005, and I must have recourse to the Act to determine the time within which the application is required to be made.

70. 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..”*

“...(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.”*

71. The payment schedule states that the Respondent proposes to pay “\$nil” and there is no material to the contrary, so I find that the amount of \$nil in the payment schedule is less than the “**claimed amount**” of \$258,086.39. This activates the Claimant’s rights to apply for adjudication of a payment claim under s21(1)(a)(i) of the Act, which is then governed by s21(3) of the Act as to the timing of the application.

72. I have found that the application was dated 27 October 2005, but it was received by IAMA on 28 October 2005. With reference to the 2005 diary, 28 October 2005 is 11 business days after 13 October 2005, the date of service of the payment schedule found by me. 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. If the words *an adjudication application must be made*, means that it is not made until it is received by the Authorised Nominating Authority, then, on the material provided, it may be that the application was outside the time provided in the Act. However, the Respondent did not take issue with the timing of the application in its response, which means that it not a live issue between the parties.

73. Nevertheless, I need to grasp this nettle, because if it is a matter that goes to jurisdiction, then proceeding with adjudication in the face of an application that may be outside the time provided by the Act, renders the decision void. Such an outcome does not serve either parties’ interests, nor does it serve the interests of the construction industry as a whole. Adjudication is a rapid decision-making process governed by the Act, and it involves complex analysis and evaluation of the correct amount to be paid, if any, to a claimant.

In my opinion, it is not possible for an adjudicator within the short 10-day time frame to consider every matter that is not a live issue between the parties. The Act does not oblige the adjudicator to become an inquisitor, and the provisions of the Act actually point the other way and, in particular, to an adjudicator having to afford the parties' natural justice. The adjudicator is required to evaluate the merits of the payment claim strictly between the narrow confines of what is prescribed by s26(2) of the Act.

74. It is important to look for authority on this important point because it will govern the future extent of the adjudication. I will turn firstly to Brodyn, because it deals directly with this point, and it is useful to refer in more detail to the decision surrounding the basic and essential and more detailed requirements, because of the critical importance in deciding this point.

At para 53 and following, Hodgson JA in Brodyn said with reference to the NSW legislation:

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

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

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

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

[56] *It was said in the passage in Anisminic quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in Craig v. South Australia (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is “duly made” by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)) (my **underlining**). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140.*

75. It is clear from Brodyn [paragraphs 54 & 55] that the timing of an application is a more detailed requirement, and that exact compliance with the more detailed requirements is not essential to the existence of a decision. Furthermore, in paragraph 55, His Honour said, “*If a question is raised before*

*an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power...*” In this adjudication, the Respondent has not raised the question as to whether the adjudication timing requirement has been satisfied, nor has the respondent disputed the time as provided in paragraph 56, where His Honour said, “... *or by a respondent, if there is a dispute as to the time when a relevant document was received...*” I have already found that adjudication timing is not a live issue between the parties, and I have found that my role is not that of an inquisitor. I have made no finding as to whether the adjudication application was made outside the 10 day period, because I have not been asked by the Respondent to do so. If the Respondent had put this matter in issue, it would have been necessary for me to seek submissions from the Claimant on this point.

76. It would in my view be inappropriate to make findings on this point because it is not a live issue and neither party has made submissions on the point. If I made such a finding, it would in my opinion, constitute a breach of natural justice, because I would be considering a more detailed requirement that is not in issue. In my view it is not for the adjudicator to enliven additional issues in dispute, because the statutory progress payment regime already involves an adversarial process, and it should be left to the parties to decide what points they wish to legitimately take in advancing their respective positions before an adjudicator. Accordingly, I will proceed to adjudicate the matter on the basis that the first limb of *MDR 2* has been satisfied, because there is nothing from the parties to suggest otherwise.
77. 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 in paragraph 1 of the application and it is found in Tab 1. The Payment schedule is referred to in paragraph 2.1 and 2.2 of the application and it is found in Tab 2. The Respondent in the response specifically made “No comment” to paragraphs 1, 2.1 and 2.2 of the application, so I find that both have been sufficiently identified in compliance with s21(3)(d).
78. s21(3)(e) also needs to be satisfied. I note from the application that a fee of \$385 was paid by cheque because IAMA in its nomination letter, dated 31 October 2005, stated that this was the applicable adjudication fee. I find therefore that this was the adjudication application fee such that s21(3)(e) has been satisfied.
79. I now refer to s21(3)(f) and have noted in the Claimant’s material above that the Claimant before Tab 1 has provided submissions relevant to its application in accordance with this subsection. Given that there is no material to the contrary, 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.

80. 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 4 November 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.”*

An adjudication response was provided to me on 4 November 2005. I have already found that I provided the parties with notice of acceptance of my nomination on 2 November 2005. Having regard to the 2005 calendar, 4 November 2005 is within 2 business days of notice of my acceptance of the nomination, which satisfies s24(1)(b) under the Act and I therefore do not need to calculate the time under s24(1)(a). I commenced to decide the adjudication on 5 November 2005, the day after receipt of the adjudication response. Accordingly, *MDR 3* is satisfied.

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

82. 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 Payment *due date* of 28 October 2005. The Respondent in the payment schedule identifies the *payment date* as 31 October 2005, and the application also identifies this as the date, however, I need to determine the reference date.

83. The *reference date* for the progress claim 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, Tab 4(b) - Annexure to AS4300-1995, at page 55, with reference to Item 46(a) referred to:

“46(a) *Times under the Contract for payment claims (Clause 42.1)*

*First claim 7 days after contract execution and monthly thereafter.”*

I have already found that the payment claim was dated 30 September 2005. Annexure 1, which contained Progress Claim No. 7, was dated 1 August 2005 and Annexure 8, which contained Progress Claim No.8, was dated 1 September 2005. Without material to the contrary, I find that these were the dates for those claims. I infer from the dates of these progress claims that a progress claim is made under the contract on the first day of every month. This inference leads me to the conclusion that the *reference date* under this contract was the first day of every month. This means that I find that the reference date for this payment claim is 1 October 2005. The Respondent has not asserted that the 30 September 2005 claim was made too early. s12 of the Act gives a claimant rights to progress claims, “*From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry...*”

84. I am satisfied that although the payment claim was dated 30 September 2005, it was made on 3 October 2005, to both the Superintendent and the Respondent, because this was asserted by the Claimant in paragraph 1.1 of the application and not contested in paragraph 1 of the response. Accordingly, without contrary material, I find the claim was made from the reference date of 1 October 2005 and complied with Item 46(a) of Tab 4(b), whereby a payment claim had to be made monthly to satisfy Clause 42.1 of the GCC. Although this date is slightly over a month later than Progress Claim No.8, the Respondent did not take issue and argue that this progress payment had not been made in accordance with the contract. In any event, Cl.42.1 of the GCC at page 39 of Tab 5 merely regulates early claims, and does not require precise monthly timing for the progress claims. I therefore find that progress claim No. 9 satisfies Item 46(a) of Tab 4(b) and therefore Clause 42.1 of the GCC.

This means that under the contract the *reference date* for this claim was 1 October 2005, as defined by Schedule 2 of the Act.

85. Accordingly, I am satisfied that the Claimant has entitlement to this progress claim under s12 of the Act because it contains a claim for construction work carried out and the claim was made after 1 October 2005.
86. 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 already 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.
87. 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....”*

88. 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 marina works, 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 Schedule 2 “Dictionary” above refers to the construction of a building, but does not include work that is excluded by regulation (my emphasis).

89. 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—...*

*(p) construction, maintenance or repair of harbours, wharfs and other maritime structures, unless the structures are buildings for residential purposes, or are storage or service facilities ...”*

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 construction of *docks*, and I found that a dock is also known as a *wharf or pier* in the dictionary, which falls within the exclusion of building work in Regulation 5(p) above. There is no material provided to me, and indeed the Respondent does not take issue to suggest that the wharf structures are to be used for residential purposes, or are storage or service facilities. I therefore find that this *construction work* 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.

90. 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 than one payment claim in relation to each reference date. There is no material to suggest that there is another payment claim for 1 October 2005. However, 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.*

91. 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."*

At all times, 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 brief summary**

92. The Claimant asserts that:

- (i) it is entitled to the amount of the progress claim identified from the calculations in the payment claim of \$258,086.39;
- (ii) the Respondent provided very limited reasons for withholding payment in the payment schedule such that it was not entitled to raise fresh reasons for withholding payment;
- (iii) the Superintendent could not unilaterally delegate his valuation functions to a quantity surveyor T&TR;
- (iv) valuation by T&TR was on a "cost to complete basis", to facilitate payments under a finance agreement, and excluded unfixed material on site;
- (v) there had not been overpayment.

93. The Respondent asserts that:

- (i) it has in fact overpaid the Claimant the monies it is entitled to under the contract at this stage;
- (ii) some amounts for work claimed were the subject of an earlier agreement relating to Progress Claim 7a such that there was an agreed limitation of the quantum of some claims
- (iii) the Superintendent had not abrogated its role under the contract.

### **Substantive Issues**

94. 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 best way to consider and present the material, I now put forward my reasons on the true merits of the payment claim within a framework of substantive issues.

95. Adjudication does not involve the use of pleadings that facilitates the identification of issues. This means that an adjudicator needs to exercise special care in distilling the issues in a dispute, and in properly considering them in the decision. To my mind this means that properly considered and reasoned adjudication decisions are likely to be lengthy so that the parties are confident that the dispute has been adequately considered. In addition, there are strict time constraints within which the adjudication function is carried out, so it often not possible to revisit decisions so as to make them more succinct.

96. I consider that the following issues need be dealt with in this adjudication:

- (i) What material may be relied upon by the Claimant in making the claim and the Respondent in withholding payment?
- (ii) Whether the Superintendent unilaterally delegated its valuation functions to T&TR?
- (iii) Whether the Claimant had consented to the valuation by T&TR?
- (iv) Whether T&TR had valued the work on a cost to complete basis, for a financier's valuation, and excluded unfixed materials on site?
- (v) Whether there was an enforceable agreement between the parties in early September 2005, which limits the amounts that the Claimant may claim for certain items of work?
- (vi) The correct value of the claim having regard to the Claimant's legal onus in substantiating the claim, and the Respondent's evidentiary onus with respect to reasons for withholding payment?

### **Decision on the issues**

97. 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.

98. After having dealt with the jurisdictional hurdles and the necessity to comply with the requirements of Brodyn, my responsibility is to now value the claim using the material before me. I have reviewed all documents, and have already stated that 2 categories were not considered in the adjudication and I gave reasons for doing so. There are a number of documents introduced into the adjudication, ostensibly to support the claim or to support reasons for non payment. Some of these documents also provide information on the history of the dispute between the parties arising out of the construction contract, and it is important for the parties to understand what use I have made of the various documents in reaching the adjudication decision.
99. An adjudicator is required to make value judgements about the material provided in ascertaining the merits of the claim, and it is my view that it is permissible to have regard to some facts within a document to provide a factual context for the dispute, without having to accept that the document is also probative in support of the payment claim or schedule, providing of course that it is admissible. If this were not possible, it would make the adjudicator's task very difficult, because it would be an artificial, sterile valuation exercise quite remote from the facts in the dynamic construction environment in which the dispute arose. This point will be illustrated in the reasons below.
100. However, this is not to say that an adjudicator is entitled to have regard to material that is prohibited by the Act, and I do not propose to do so. Accordingly, it would seem appropriate to commence the valuation exercise by deciding which of the Claimant's and Respondent's documents and submissions are required to be considered by me. The documents that I may not consider will be identified and then not relied upon, whereas the balance may then be used to determine the factual matrix of the contract, if required, as well as evaluated to decide if they are probative in supporting a reason for claiming or withholding payment.
101. Prior to considering these documents, I need to make a finding in relation to Palmer, whom I have abbreviated from MH Palmer Consulting Engineers Pty Ltd. I had earlier found that Palmer acted as the Respondent's agent in receiving the tender prior to entry into the contract. I refer to Tab 4(b) which is Part A of the Annexure to the GCC, which on page 50 provided that the Superintendent was MH Palmer Consulting Engineers Pty Ltd in accordance with Clause 2 of the GCC. I therefore find that Palmer is the Superintendent for this contract. I further find that Cl.23 of the GCC identifies the duties of the Superintendent and that Cl.24 of the GCC deals with the appointment of and duties of a Superintendent's Representative.

*Material that the Claimant and Respondent may rely upon*

102. Although I will focus mainly on the "admissibility" of documents in this part of the decision, it is necessary to deal with the attendant submissions so as to make a proper judgement. Sometimes this will mean that the submissions are dealt with in detail so that there can be some order to evaluating all the material. Adjudication is by its nature a rapid process, not only for the adjudicator, but also for the parties to the adjudication, and the

various submissions of parties can sometimes be difficult to gather together in an order that is easy to follow.

103. I have already found that there was an adjudication application with the payment claim found in Tab 1, and the payment schedule found in Tab 2. I have also found the documents forming the contract in Tabs 3, 4, 5 and 6.
104. Tab 8 and Annexure 4 are identical documents put forward by each party regarding correspondence from Bennett & Philp to Colin Biggers & Paisley dated 1 September 2005 relating to an earlier adjudication application. Given that the payment schedule refers to an agreement between the parties arising out of Progress Claim 7a which arose after this adjudication application, it may be relevant in providing a factual matrix, as well as assisting in deciding whether there was an agreement between the parties. I accept that this document forms part of the adjudication bundle to which I will make further reference and scrutinise later. At this stage I have not made any findings on the documents, apart from the fact they form part of a bundle of documents to be considered. This approach will for the sake of efficiency, be applied to other documents referred to below
105. Tab 9 and Annexure 7 refer to Progress Certificate 7a, which is specifically identified in the payment schedule, and I accept that this document forms part of the adjudication bundle. I make a further finding below on which document I prefer.
106. Annexures 1, 2 and 3 are the Respondent's documents relating to Progress Claim No.7, the payment schedule in response and the adjudication application submissions regarding this payment claim. Paragraphs 5.1, 5.2 and 5.3 of the application referred to issues surrounding this payment claim and I accept that these documents form part of the adjudication bundle.
107. Annexures 5 and 6 of the Respondent's documents refer to correspondence surrounding the earlier adjudication and agreement, if any, and I accept that these documents form part of the adjudication bundle.
108. Annexures 8 and 9 of the Respondent's documents refer to Progress Claim No. 8 and the payment schedule in response. Given that there is specific reference to Progress Claim No. 8 in the payment schedule, I accept that these documents form part of the adjudication bundle.
109. Annexure 10 of the Respondent's documents refers to correspondence in relation to the alleged agreement made in early September 2005, and I accept this forms part of the adjudication bundle.
110. I recap that the documents in Annexures 14 through to 19 (apart from the response contained in Annexure 19) do not form part of the adjudication bundle. I need to now make some value judgements about further documents and the attendant submissions.

111. The Claimant in paragraph 2.3 of the application stated that the Respondent had provided very limited reasons for withholding payment, which therefore prevented further reasons from being advanced in the adjudication under s24(4) of the Act. The Claimant's paragraph 7.4 of the application related to Items 2, 4, 5 & 6 in the Summary Table 7.1, totalling \$179,822.04 in which it said that the only reason the Respondent withheld payment was because T&TR's valuation of Progress Claim #8 established that it was over certified. With reference to the payment schedule, I find that Note 1 referenced these 4 items and stated that over certification in Progress Claim 8 was the only reason for withholding payment.
112. This amount of \$179,822.04 in the payment claim constitutes nearly 70% of the amount of money in dispute, and I have therefore decided to closely analyse the submissions in support of the contending views, in order to decide what documents I am entitled to consider. This may appear tedious, but it demonstrates my reasoning, which allows the parties to understand how the adjudication decision is reached. Furthermore, it objectively demonstrates that I have had regard to the submissions and supporting documentation of the payment claim and schedule, which is required by s26(2)(c) and (d) of the Act.
113. The Respondent, in paragraph 7.4.1 of the response, agreed that the basic reason for withholding payment is T&TR's valuation that Progress Claim #8 was over certified, but stated that the Claimant was "...fully aware of all matters supporting APM's reason for withholding payment. Put simply, APM was informing Sea-Slip (as it had done so on numerous previous occasions – see documents at Annexure 12) that Sea-Slip had not completed works up to the value of what had already been paid by APM and also allocated as retention monies." Furthermore, the Respondent argued that the Claimant ought to have kept accurate records of all work completed under the contract such that they would or should be able to respond to the reasons.
114. It is useful at this stage to refer to the documents in Annexure 12, which is a Statutory Declaration of Mr. Matthew Palmer of the Superintendent, exhibiting correspondence between himself and T&TR. The documents marked 'A' comprised:
- (i) 2 emails dated 7 September 2005 with 4 attached photographs with a handwritten dates of 5/9/05
  - (ii) Email dated 10 September in which the Superintendent requested T&TR to assess the claim based on the work *you can see in the photographs taken on 5 September 2005*. T&TR were advised that the Superintendent would not confuse the issue with materials off site. He attached:
    - (a) Progress Certificate #7a Breakdown
    - (b) Progress Certificate 7a,
    - (c) Correspondence between him and the Respondent dated 6 September 2005 in which he wrote, "*This certificate has been issued as requested by yourselves as a result of an agreement reached between yourselves and the contractor and includes the amounts shown in the attached summary with narrative as applicable. I understand that the certified amount of \$1,442,202.22 GST inclusive is payable on or before the 9<sup>th</sup>*

*September as a result of the agreement you have with the contractor.*

- (iii) The Superintendent's letter to T&TR attaching the Claimant's Progress Claim No.9 in which he requested, "*Could you please prepare Progress Certificate No.9*"
115. Furthermore, Annexure 12 exhibited documents marked 'B', which was a Cost Report No. 1 from T&TR dated 9 September 2005 for the month of August in order that the Superintendent could issue Certificate No. 8, and Cost Report No. 2 from T&TR dated 11 October 2005 for the month of September, together with 6 photographs, in order that the Superintendent could issue Certificate No. 9.
116. Annexure 12 also exhibited a document marked 'C' from the Claimant's Lyn Brighton to the Superintendent offering assistance to enable certification of Progress Claim No. 8 and the proposed variations.
117. The Claimant's application paragraph 7.4.2 submissions that the Respondent had incorrectly calculated the amount withheld of \$65,786.77 instead of the \$54,442.50 that was claimed, were essentially accepted by the Respondent in the response.
118. The Claimant, in paragraph 7.4.3 of the application, further maintains that commentary by Turner & Townsend Rawlinsons ("T&TR") was not provided until after the payment schedule was issued, so that any T&TR reasons given to the Respondent for non payment cannot be relied upon in this adjudication. The Respondent in paragraph 7.4.3 of the response, repeated the matters it had set out in paragraph 7.4.1, and stated that it was up to the Adjudicator to assess the value of the works for the payment claim
119. The Claimant's line of argument continued in paragraph 7.4.4 of the application in stating that, "*... the value of work carried out is what has been claimed and there has been no overpayment. There are no specific reasons beyond this which Sea-Slip is able to respond to.*" In response, in paragraph 7.4.4, the Respondent repeated what it had said in paragraphs 7.4.1 and 7.4.3.
120. In paragraph 7.4.5 of the application, the Claimant referred to the decision of *Multiplex v Luikens* [2003] 1 NSWSC 1140 ("Multiplex"), at paragraphs 76-78 and emphasised some extracts of Palmer J's decision to which I will make reference below.
121. The Claimant in paragraph 7.4.6 of the application stated that T&TR's reasons had not been agitated in previous correspondence and that the Claimant could not guess as to the reasons why the work previously certified was now incorrect and inappropriate. The Respondent, in paragraph 7.4.5 and 7.4.6 of the response reiterated that, "*... the reason given is clearly specific enough, especially given the circumstances of this Contract and the background between the parties, and particularly as Sea-Slip is supposedly experienced in the building and construction industry, for Sea-Slip to understand the reason given for the purposes of the Act (and in accordance*

*with how the relevant section of the Act is to be interpreted as explained in Multiplex v Luikens [2003] 1 NSWSC 1140).*”

122. Furthermore, in paragraph 7.4.7 of the application, the Claimant referred to the letter from the Superintendent, dated and received on 6 October 2005 [Tab 10], that it said was not part of the payment schedule, and which attached Progress Certificate No. 9, together with a detailed schedule undertaken by T&TR which demonstrated that overcertification had occurred, and that the work completed to date was actually \$5,230,487.78, instead of the certified amount of \$5,452,689.65. In this letter the Superintendent then stated that Progress Certificate No. 9 was for \$nil. In this submission the Claimant also canvassed the inappropriate valuation method by T&TR of “cost to complete” [which was continued in paragraph 7.4.8 of the application]; that it was prepared for facilitating draw-down payments for financiers [which was further advanced in paragraph 7.4.9 of the application], and excluded the value of unfixed materials on site [which was further expanded in paragraphs 7.4.10 through to 7.4.13]. These issues will be touched on in the next paragraph, but explored more fully in relation to discussion on this point later in the decision.
123. In its response, at paragraph 7.4.7, the Respondent accepted that, “...the TTR valuation report is expressed in the terms indicated. However, in light of the matters set out in paragraphs 7.4.1, 7.4.3, 7.4.4 and 7.4.5-7.4.6 hereof, it is submitted that the specific details of the TTR valuation are largely irrelevant.” The Respondent then went on to assert that it was not a “cost to complete report” and that the Claimant had been advised by Palmer on 25 August 2005 [Annexure 11(a)], that an independent quantity surveyor would be engaged to value the work completed so far up to Progress Claim 8. Furthermore, the Respondent attached an email dated 5 September 2005 [Annexure 11(b)], which is the same as document ‘C’ in Annexure 12, in which the Claimant stated it was available to assist to essentially facilitate expeditious certification.
124. In this same paragraph of the response, the Respondent attached a letter from The Superintendent to the Claimant [Annexure 11(c)] dated 28 September 2005 reiterating that T&TR were valuing works claimed in progress claim 8. In this letter, The Superintendent said, “*They have advised that the amount they would certify including GST would be the amount of \$62,227.95 which is considerably less than the 500,655.77 (sic) GST inclusive that has been certified. This of course confirms what has been advised previously that I have over-certified and is of considerable concern to me and no doubt on receipt of this letter the principal to the contract (sic). Unfortunately their advice was received later than the date of certification of the claim and this should not be the case for Progress Claim No.9.*”
125. This is an appropriate stage to pause and conduct an evaluation of the documents produced in Annexure 11 and 12 to determine whether I may have regard to them in conducting this adjudication. If the documents are excluded by the Act, in particular s24(4) of the Act, as I have stated previously, they will not longer be considered in the adjudication. However, those that remain will form part of the bundle of adjudication documents to be further

scrutinised later. I may be able to glean facts surrounding the contract from these documents, as well as to determine whether they are logically probative in support of either parties' submissions.

126. I will start with Annexure 12's documents, as the Respondent states that these documents support the proposition that the Respondent had informed the Claimant on numerous previous occasions that it had been overpaid. The Claimant is unable to take issue with the documents in Annexure 12, and indeed in any of the Annexures, as the response is the "last shot" in the volley of documents in the adjudication process, unless I ask for further submissions under s25(4) of the Act, and I have exercised my discretion to not require further submissions.
127. I turn firstly to Annexure 12A documents, which I find from their contents, consists of correspondence between The Superintendent and T&TR sent for the purposes of valuing an unnamed variation, Progress Claim No.8 and Progress Claim No.9. I cannot find that these documents support the Respondent's contention that the Claimant had been informed on numerous previous occasions of having been overpaid, because they comprise correspondence between the Superintendent and T&TR. I also find that they do not advance any other reasons for withholding payment, as the issues contained within these documents relate to valuation of a variation and 2 existing claims. The documents themselves do not indicate detailed valuation, which means that they are not excluded by s25(4) of the Act, and I will have regard to them later in my reasons.
128. As to Annexure 12B documents, I find that these are T&TR's Cost Reports 1 and 2, dated 9 September 2005, and 11 October 2005 respectively, which were sent by T&TR to the Superintendent. Again, it is not possible to find that these are evidence of the Claimant having been informed of having been overpaid because they are between the Superintendent and T&TR. I find they deal with valuation of claims because that is what the documents refer to. However, I need to scrutinise both documents in more detail before allowing them into the adjudication, because the Claimant has taken issue with the fact that the reasoning of T&TR did not form part of the payment schedule.
129. T&TR Cost report No.1 on page 2 under the heading "*Statement of Cost to Complete the Works under the Contract*" provided "*Total Amount Recommended for this Payment \$62,227.95*" This amount accords with the amount noted in the Superintendent's letter to the Claimant dated 28 September 2005 [Annexure 11(c)] referred to above. As to Annexure 11(c), I am able to find that this was a document sent to the Claimant because it was attached in Tab 11 of the application. In Tab 11 there was also a valuation by T&TR of R, S, T & U Arm Extension Variation No.1 in the sum of \$215,178.99, and I find that the Claimant was in receipt of this document on or about 28 September 2005 because it formed part of the application.
130. The critical issue is, however, whether it was clear to the Claimant from the schedule and the surrounding circumstances of the project that the "*essence of "the reason" for withholding payment is made known sufficiently*"

*to enable the claimant to make a decision whether or not to pursue the claim and understand the case it will have to meet in an adjudication*”, as identified by Palmer J in Multiplex at paragraph 78. The Claimant submits in paragraph 7.4.6 of the application that it, “*cannot guess the reasons why the value of the work which was previously certified by the Superintendent is now, in APM’s view, incorrect and inappropriate.*” The Respondent contends at paragraph 7.4.5-7.4.6 that the reasons are specific enough in the context of the surrounding circumstances of the contract and the Claimant’s supposed experience in the industry.

131. I find that the Claimant was aware that T&TR had valued the work for Progress Claim No.8 at \$62,227.95 because it was in Superintendent’s letter to the Claimant [Annexure 11(c)] and this is not disputed by the Claimant. I find that Tab 11 also includes a valuation of Variation No. 1 by T&TR because it was in the Claimant’s material and was not controverted by the Respondent. However, I cannot find from the material that the Claimant was made aware of T&TR’s calculations used to derive the progress claim figure of \$62,227.95, because the Respondent did not assert that T&TR’s Cost Report No.1 was given to the Claimant.
132. I appreciate that the legal onus on this point remains with the Claimant, and I find that it identified the documents that it received on or about 28 September 2005, and T&TR’s Cost Report No.1 was not part of those documents. The Superintendent’s comments in the 28 September 2005 letter that, “...*they [T&TR] would certify...\$62,227.95..*” and the reference to the concerns to the Superintendent and the Respondent of overcertification is apparent. However, there is nothing in this letter to show that the Superintendent attached the Cost Report No.1. In the other letter in Tab 11 referring to the valuation of Variation No.1, the Superintendent said it attached the valuation, and it did so. I am prepared to infer from this latter document that, as a matter of practice, the Superintendent would have said it was attaching the Cost Report, if it had done so.
133. Accordingly, I find that the Claimant has satisfied the onus that it was not aware of the breakdown of the lower valuation for Progress Claim No.8. The evidentiary onus then shifts to the Respondent to show that the Claimant was aware of the details of the lower valuation for Progress Claim No.8 because it asserts that the Claimant had been advised on numerous previous occasions about this fact. I find that it has not satisfied this onus, because it has attached no documents in support of such an assertion, and in paragraph 7.4.5-7.4.6 of the response said, “...*it is submitted that the specific details of the TTR valuation are largely irrelevant.*” In making this submission, I infer that the Respondent recognised that the specific details of the valuation had not been given to the Claimant and I therefore find that T&TR’s Cost Report No. 1 was not given to the Claimant. I further find, by inference, without material to the contrary, that the Claimant was unaware of *the circumstances surrounding the contract* as regards the precise calculations demonstrating over certification in Progress Claim No.8.

134. The difficult question is whether documents establishing a more detailed breakdown of a valuation, which were not given to the Claimant, and which resulted in the payment schedule stating that T&TR's valuation established over certification, are *reasons* that were not included in the payment schedule. If they are, then I am compelled by s24(4) of the Act to exclude T&TR's Cost Report No. 1 from the material. I have found that the reasons in the payment schedule included over certification, but did not include the detailed breakdown made by T&TR. Does this make a detailed breakdown a *fresh reason*?
135. Before returning to Multiplex for guidance, I need to refer to 2 other cases from New South Wales that dealt with the equivalent of s24(4) of the Act. In *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited* [2004] NSWSC 258, ("John Holland") Einstein J had to consider the point, but in the context of a claimant advancing fresh reasons in the application in support of the payment claim. His Honour, at paragraph 31 stated that the analysis throws up particular difficulties and that the "devil lies in the detail". He then posed the question as to, "...*what may be properly described as 'reasons not already [included] in the payment schedule'*"? Unfortunately, this question was not answered in a way that would assist me in this adjudication, because the adjudicator's decision was considered to have miscarried because he took into account fresh grounds in support of the application and failed to invite the respondent in that case to make submission.
136. In *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823 ("Contrax"), McDougall J was also asked to consider whether a Respondent was prevented by the equivalent of s24(4) of the Act from making submissions on a point not dealt with in the payment schedule, but made in response to point raised in the application. At paragraph 51, His Honour referred to John Holland and referred to Einstein J's judgement in the context of the equivalent of s24(4) of the Act preventing new reasons. He said, "*But in other cases, as Einstein J pointed out, there will be questions of fact and degree involved: for example, when no new basis is advanced for a claim but further documentation or other material is relied upon in support of it. The test would appear to be whether s20(2B) [equivalent of s24(4) of the Act - my comment] would prevent the respondent from dealing with that new material; and, if it did, whether that would amount to a denial of natural justice...*" This case is also considering the matter from the point of view of an applicant providing further documentation or other material in support of a claim. Nevertheless, I distill a line of reasoning from McDougall J that suggests one should look at the introduction of further or other material from the point of view of whether the other party has the right to make submissions in response. I extrapolate that it does not matter whether that party is a claimant or respondent, and one must look at the provisions of the Act to see if further submissions are permitted. I shall return to this point shortly.
137. I refer back to Multiplex, because it deals specifically with an adjudicator precluding material characterised by him as falling foul of the equivalent of s24(4) of the Act. Multiplex, in its payment schedule had rejected a payment claim on the basis that the contract required notification of

variations within a particular time frame, which had not been complied with. Multiplex's adjudication response, in addition, however, included a detailed assessment of the value of the variations claimed.

138. Palmer J at paragraph 71 held that the adjudicator had correctly rejected the submissions and evidence in the adjudication response that had not been provided in the schedule. Earlier, at paragraph 67, His Honour said, "*The evident purpose of s13(1) and (2), s14(1), (2) and (3), and s20(2B) [equivalent of s17(1) & (2), s18(1), (2) and (3) and s 24(4) of the Act – my comment] is to require the parties to define clearly, expressly and as clearly as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s22 [equivalent of s26 of the Act – my comment]. It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing [my underlining]. In my opinion, the express words of s14(3) and s20(2B)[equivalent of s18(3) and s24(4) of the Act – my comment] are designed to prevent this from happening.*"

139. His Honour went further to state, "[69] A subsidiary argument which Mr Rudge appeared to advance in his oral submissions was that Multiplex had given a sufficient reason in its Payment Schedule for withholding payment of the claim in respect of Item 8 simply by stating that the claim was 'rejected', Multiplex had thereby complied with the requirements of s14(3) [equivalent of s18(3) of the Act – my comment] and was permitted to amplify that reason in its Adjudication Response by giving particulars of valuations and calculations on the basis of which the claim had been rejected. [70] I am unable to accept this submission. For a respondent merely to state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of the claim is 'withheld': the result is stated but not the reason for arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication."

140. The Multiplex case is not directly analogous, because in this adjudication the Respondent has specifically identified that there had been over certification in Progress Claim No.8, so to that extent, the Claimant knew that this was the basis of rejection of payment. However, the Claimant did not know the precise basis of the over certification, as I have found T&TR's Cost

Report No. 1 was not given to it. I have already found that the Claimant knew that T&TR valued the work under Progress Claim No.8 at \$62,227.95. However, T&TR is not the Superintendent, as I have found the Superintendent to be Palmer. Cl.42.1 of the GCC requires the Superintendent to certify the value of work, and more particularly, “...*The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference...*” Given that the Claimant was unaware of T&TR’s breakdown of the over certification, and the fact that the contract required the Superintendent to advise the Claimant of the differences between claimed and certified amounts, I would have expected some details of the differences in Progress Claim No.8 to which I could have turned my attention. Furthermore, the payment schedule refers to the previously certified Progress Claim No.8, and yet the Respondent did not provide a copy of Progress Certificate No.8 in the material.

141. In addition, although I have not found that the Superintendent was empowered under the contract to provide a revised certificate No.8, he did so in relation to Progress Certificate No.7 by issuing Progress Certificate 7a, and yet he did not do so in relation to an over certification in excess of \$400,000. Both parties provided me with a copy of Progress Certificate 7a in Tab 9 and Annexure 7 respectively, so I am able to find that this document was issued. I prefer the Respondent’s material in Annexure 7, because it had a breakdown attached to the certificate, and the certificate specifically referred to the breakdown, whereas that of the Claimant was without the breakdown. This document is referred to in the payment schedule and I should have regard to it in the ensuing valuation.

142. I need to determine what is meant by the word *reasons* in s24(4) of the Act, because the T&TR documents in issue provide supporting calculations to the reason that there has been overpayment. The *literal rule* of statutory interpretation demonstrated in the case of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161, requires that I have to read the meaning of the Act as a whole, and I am not permitted to go behind the plain ordinary meaning of the words of s24(4) in determining what is meant by the word “*reasons*”, unless there is some ambiguity. Courts have recourse to dictionaries in determining what is considered the ordinary meaning of words: *R v Peters* (1886) 16 QBD 636 at 641 [cited in DC Pearce (1981) “Statutory Interpretation in Australia”, 2<sup>nd</sup> Ed, Butterworths, Sydney.] With reference to the meaning of the word *reason* in the dictionary, the 3<sup>rd</sup> and 4<sup>th</sup> meanings appear most apposite to this context where the word means: “3 *a cause or motive, as for a belief, action, etc.* 4 *an argument in favour or a justification for something..*” Is the detailed breakdown of over certification a fresh reason or part of the reason of over certification?

143. If one applies definition 3 or 4 above, it could be argued that the *motive or argument* is over certification, so that *more details of over certification* are not new reasons, but merely justification for the *motive or argument*. However, this analysis needs to be conducted within the context of the adjudication process created by the Act. I have distilled from the 2 cases of

John Holland and Contrax (particularly the latter), which were heard after Multiplex, but to which they referred, that there is thread of *natural justice* running through the considerations that an adjudicator must make as to what material is excluded by the equivalent of s24(4) of the Act. This thread appears to constrain one party from introducing new material into the adjudication which the other party is unable to rebut because of the provisions of the Act. I accept that these 2 cases were dealing with a claimant introducing new material in the application, which could not be rebutted by the respondent because of the presence of the equivalent of s24(4) of the Act. However, the Court's argument in disallowing such fresh material, which was not expressly prohibited by the Act, was based on the respondent being specifically prohibited from introducing fresh material itself in rebuttal, because these may not be reasons relied upon in the payment schedule.

144. If a Supreme Court is prepared to find, in the absence of a specific legislative provision, that fresh material cannot be introduced by a claimant for reasons of natural justice, then I feel that I am constrained to follow that reasoning in this case relating to the Respondent in relation to this thorny problem of *reasons*. It is evident from the material that the Superintendent had been relying upon T&TR to conduct valuation of the Claimant's work. T&TR's Cost Report No. 1, which recommended an amount of \$62,227.95 for payment for work for the month of August, so that Progress Certificate No.8 could be issued, was dated 9 September 2005. I find that it was sent by facsimile to the Superintendent on 21 September 2005 because it was classified as a facsimile, and it had facsimile markings at the top of the document "21-Sep-2005 08:33 FROM RAWLINSONS TO 0749546748". I have found that Annexure 11(c) was a letter from the Superintendent to the Claimant, and on that document the facsimile number for the Superintendent is 07 4954 6748, which is the same number as that on the Cost report No.1.

145. This means that the Superintendent knew of the over certification at least by 21 September 2005, and he conveyed this fact to the Respondent in the letter in Annexure 11(c) because the letter says so. In the circumstances of alleged over certification, I am prepared to infer, as a matter of commonsense and logic in the construction industry, that the Respondent would have asked for details of the over certification, and further infer that it is likely that the Superintendent would have provided T&TR's Cost Report to the Respondent. The Superintendent stated that over certification would be of considerable concern to the Respondent, and in those circumstances, it is more likely than not that the Respondent would have wanted to know the details of over certification. Even if the Respondent had not asked for this report immediately, which I cannot find by inference on the scarce material available, I am prepared to infer that these details would have been provided to the Respondent, shortly after it received the payment claim on 3 October 2005. The Respondent knew it had to provide reasons for withholding payment, so I am prepared to find by inference that it knew T&TR's details of the over certification by the time it delivered its payment schedule.

146. I note from the emails in Tab 12 of the application that the Respondent emailed Michael Keevers on 13 October 2005 and 14 October 2005. I find

Michael Keevers worked for Sea-Slip Manufacturing Pty Ltd from his covering letter to the Superintendent dated 30 September 2005 signed by him enclosing invoice SSM-004 that was attached to this payment claim. I appreciate that these emails were to a person working for a company separate from the Claimant, as identified by Mr. Keevers in his response email to Mr. Robinson of the Respondent dated 14 October in which he said, “..I am neither in a position nor authorised to your concerns in relation to the contract or process of same.” The Respondent’s emails voice concern over poor progress, liquidated damages and replacement builders, but these matters are not relevant to my valuation of the payment claim, as they have not been raised in the payment schedule. Nevertheless, it is interesting to note that on 13 October 2005, the date of the payment schedule, the Respondent raised concerns about T&TR’s report of over certification to another person. I accept that this was not to the Claimant because I have found Sea-Slip Manufacturing Pty Ltd a separate person from the Claimant, but it demonstrates that the Respondent was aware, of the details of over certification. I accept the Claimant’s submission in paragraph 7.4.15 that the *without prejudice* heading on these emails does not preclude me from having regard to the documents. They were communications between the Respondent and another person, and do not appear to be in the context of settlement negotiations. I note in addition that in paragraph 7.4.15, the Respondent did not take issue with the Claimant’s submission on the admissibility of the document.

147. Despite the Respondent being aware of the detailed reasons, it chose not to provide these detailed reasons in the payment schedule, which may have prevented the Claimant from making a value judgement as to whether to continue with adjudication. In my view this is precisely what Palmer J was referring to in paragraph 67 of *Multiplex* when he said, “*It would be entirely inimical to the quick and efficient adjudication of disputes which the scheme of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule which said nothing except that the claim was rejected, and then “ambush” the claimant by disclosing for the first time in its adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant has had no prior opportunity of checking or disputing [my underlining].*” I do not find that the Respondent, by failing to provide these detailed reasons, was deliberately “ambushing” the Claimant because there is no basis for doing so. However, I am prepared to find that the subsequent attempt in the response to introduce T&TR’s Cost Reports in Annexure 12, particularly Cost Report No.1, effectively prevents the Claimant from specifically addressing this material.

148. Moreover, it also prevented it being clear to the Claimant from the schedule and the surrounding circumstances of the project that the “*essence of the reason*” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and understand the case it will have to meet in an adjudication”, as identified by Palmer J in *Multiplex* at paragraph 78.

149. In these circumstances, I infer that it would have been difficult for the Claimant to know what case it has to meet in the adjudication, apart from the fact that there was some overvaluation, to which it made reference in its application. Accordingly, I feel constrained by the Supreme Court of New South Wales in relation to essentially similar legislation, by authority and analogous reasoning used by that Court, in interpreting that s24(4) of the Act prevents me from having regard to T&TR's Cost Report No. 1. I appreciate that this is not Full Court authority, as in the case of Brodyn, but it is authority nevertheless, to which I believe adjudicators must have regard until the Queensland Supreme Court makes a finding on point.
150. I appreciate that this may cause problems for the Respondent in this adjudication on which it might wish to make submissions, and that course is open to me under s25(4)(a) of the Act. However, I exercise my discretion to not call for further submissions, because I see no utility in such an approach as both parties have already made submissions on this point. Furthermore, the Respondent on page 7 in paragraph 7.4.7 of the response stated that, "*..it is submitted that the specific details of the TTR valuation are largely irrelevant.*" Accordingly, to ask for further submissions, may then introduce inconsistent submissions, to which I would then need to have regard, and adjudication is in my view not designed to facilitate an extensive game of submission "ping pong", which I feel is likely to result.
151. This means that I am prevented from having regard to T&TR's Cost Report No. 1 in Annexure 12B. I will turn to T&TR's Cost Report No.2 shortly, but I need to consider the other documents in Annexure 12A, as to whether they form part of the bundle of adjudication documents. The principal document is Mr. Palmer's affidavit (the "affidavit"), to which documents were attached, which constituted communications between the Superintendent and T&TR, including Progress Claims No.'s 7a and 9 and the attendant covering letters. They do not support the Respondent's submissions that they demonstrate that the Claimant had been advised on numerous previous occasions of the reasons for withholding payment.
152. However, the affidavit deals with the issues raised by the Claimant in the application in relation to T&TR's basis of valuation and their status in relation to their valuation function. This is the last volley, to which the Claimant cannot respond. S26(2)(d) of the Act confines me to only considering the payment schedule, submissions and relevant documentation properly made in support of the schedule. It is arguable that the affidavit, in particular, was documentation provided by the Respondent to deal with the Claimant's submissions, rather *than properly made in support of the schedule*, thereby requiring it to be excluded under s26(2)(d) of the Act. I will look at the Claimant's submissions and documents, to which the Respondent had responded before making a finding on this difficult point.
153. The payment claim did not deal with T&T's status and valuation, so it could be argued that the Claimant's submissions on these issues fell foul of s26(2)(c), *as being not properly made in support of the claim*. This would mean that the Claimant's submissions and supporting documents would be

required to be excluded under s26(2)(c) of the Act, and the Respondent's submissions and documents in the response, referred to above, would also be required to be excluded under s26(2)(d) of the Act. However, I feel that such a narrow construction of the meaning of the provisions of s26(2) as a whole, would be somewhat artificial in this case, because it was evident from the circumstances surrounding the contract, that T&TR's status, and basis of valuation had been an issue between the parties for some time. The problem was that the Claimant was not made aware of the precise details of the valuation. Neither party has made submissions to me that I should exclude this material, so I consider it would be a breach of natural justice for me to do so. However, I will make some further observations on this difficult issue which I have gleaned from the analysis of the material, and not from any parties' submissions.

154. Characterisation of this material is not a basic and essential requirement, according to Brodyn. In fact, at paragraph 56 of Brodyn, His Honour said, "... *The matters in s22(2) equivalent of s26(2) –my comment, especially in pars. (b), (c), and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provisions, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant...In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s22(2), or bona fide addresses the requirement of s22(2) as to what is to be considered..*" I am prepared to find that this material on both sides is not excluded by the operation of the respective provisions referred to above, because the parties have not made this an issue, and it is not something that goes to jurisdiction, and both parties addressed these issues in their respective submissions in circumstances where the issue of T&TR's status and valuation surrounded the dispute. In my view, the exclusionary requirements in s26(2)(c) and (d) of the Act are more elastic than the specific prohibition in s24(4) of the Act, on which I felt compelled to excluded T&TR's Cost Reports No's 1 and 2. I am therefore prepared to add Annexure 12A's documents to the adjudication bundle.

155. A more detailed series of calculations were also provided in Tab 10, in which the Claimant included the Superintendent's letter to it dated 16 October 2005, which attached Progress Certificate No.9 and which also specifically attached T&TR Cost Report No.2 [this document is also in Annexure 12B]. I find that this document was delivered to the Claimant on 16 October 2005 because there is no material to suggest otherwise. However, this document was delivered after the payment schedule of 13 October 2005 and it specifically refers to Progress Claim No.9, whereas the payment schedule only refers to over certification in Progress Claim No.8.

156. I therefore find that in accordance with s24(4) of the Act, I am unable to consider the documents in Tab 10, because they were not referenced at all in the payment schedule, which related to Progress Claim No.8 and they came after the payment schedule. Accordingly, any reasons described as a *cause or motive, or argument in favour or a justification for* Progress Certificate No.9 is not a reason canvassed in the earlier payment schedule, so these documents

must be excluded under s24(4) of the Act. These documents comprise all those in Tab 10. The exclusion of both T&TR's Cost Reports under s24(4) of the Act, therefore precludes the documents in Annexure 12B.

157. I need to turn to the document in Annexure 12C [which was also in Annexure 11(b)] relating to an email from the Claimant dated 5 September 2005 indicating a willingness to cooperate so as to facilitate rapid valuation of its claim. This document deals with the live issue of whether the Claimant consented to T&TR's valuation of the claims. It cannot be excluded by s24(4) of the Act and is in the Claimant's application so it will form part of the adjudication bundle.
158. For sake of completeness, I refer to the document in Annexure 11(a) dealing with the Superintendent's advice that T&TR would be engaged to value the work, and cannot be excluded for the same reasons and forms part of the adjudication bundle.
159. In paragraphs 7.4.14 through to 7.4.18 of the application submissions deals with the duties of the Superintendent and its alleged delegation of valuation obligations and the role that T&TR played in the valuation process, which was countered by the Respondent's submissions 7.4.14 through to 7.4.18 to which I will turn under the heading dealing with the Superintendent below. Suffice is it so say that the documents at Tab 11 and Tab 12 in this part of the application, and Annexure 12 in this part of the response have been dealt with. I have already found that there is no document in Tab 7.
160. The Claimant's submissions in paragraph 7.4.19 & 7.4.20 of the application deal with the work done by the Claimant, and the Respondent appears to concede in paragraphs 7.4.18-20 that work had been done by the Claimant. It merely reiterated that essentially the work to date had been overvalued.
161. As to the Claimant's submissions in paragraph 7.5 of the application and the Respondents paragraph 7.5 response in which it referred to its paragraphs 7.6, 7.7 and 7.8 of the response, I have made reference to some aspects of the valuation of variations in the following few paragraphs. Given that the documents associated with these issues are already in the adjudication bundle, I have dealt with the substance of these submissions under the valuation heading below.
162. In addition, in paragraph 7.6 of the application relating to the variation claim of \$33,283.77, the Claimant canvassed its inability to understand the reasons why an amount of \$21,297.96 would have been certified, if there had been a positive Progress Certificate. It added that in any event this reason was inappropriate because, inter alia, T&TR's valuation had not been given to the Claimant and related to a previous payment claim which was not referable to the additional work associated with the variation. The Respondent in paragraph 7.6 contended that the parties had entered into an agreement on 1 September 2005 as to the value of this variation, and that it was subject to final valuation by T&TR, but that in the interim a figure of \$80,000 would be paid.

This amount of \$21,297.96 was specifically referred to in the payment schedule, and the Claimant in submission 7.6.2 conceded that it had been given the reasoning of T&TR regarding variation No.3 [Claimant's numbering]. I am therefore prepared to consider these submissions and the associated documents further in the valuation heading below.

163. In paragraph 7.7 of the application, the Claimant makes various submissions in relation to the variation claim of \$43,850 associated with dredging downtime and attached a number of documents starting with Tab 16, which contained an extract from Progress Claim No.4 highlighting a figure of \$233,840 for Variation No. 2 relating to 5 extra piles, and a copy of an invoice from a piling contractor, Waterways Constructions Pty Ltd of \$73,850 (excluding GST). These documents are properly made in support of the claim because they relate to Variation 2 dredging downtime and go to the adjudication bundle.
164. Furthermore, in paragraph 7.7.5 of the application, Tab 17 attached a payment schedule for Progress Claim No.8 relating to a refusal at that time to pay for dredging costs, which were the same reason as advanced by the Respondent in this payment schedule. I feel obliged to exclude this document from consideration, because it is not made in support of the payment claim, and relates to an earlier payment schedule, which is not in issue in this adjudication. I am only responsible to deal with this payment schedule, and in order to not get confused about which payment schedule to which I am referring, it is excluded under s26(2)(c) of the Act.
165. As to Tab 18's document in paragraph 7.7.5 of the application, which relates to correspondence regarding Progress Claim No.8 from the Claimant to the Respondent dated 22 September 2005; it appears to me that it relates to the issues raised in the payment schedule regarding an agreement that had previously been entered into. It is of course dealing with a previous payment claim and payment schedule, but provides facts regarding the contract history, and I will allow this document into the adjudication bundle on the basis that it is not objected to by the Respondent, who had the opportunity to take issue with its existence in this adjudication. The weight attached to the document will be dealt with under the valuation heading below.
166. As to Tab 19's documents in paragraph 7.7.7 of the application, I allow these documents to go to the adjudication bundle because they relate to the claim for dredging costs which is Variation No.2 in the payment claim. The Respondent took no objection to this document in its response.
167. As to Tab 20's document in paragraph 7.7 of the application, which relates the extension of time granted by the Superintendent on 29 August 2005, I allow this document to the bundle because it relates to the delay costs associated with the dredging which is part of Variation No.2 in the payment claim. The Respondent took no objection to this document in its response.
168. As to Tab 21, Tab 22, Tab 23 and Tab 24 documents in paragraph 7.8.3 of the application, I allow these document to the bundle because they

relate to the extension of time claim and possible delay costs associated with the dredging which is part of Variation No.2 in the payment claim. The Respondent took no objection to this document in its response.

169. As to paragraph 7.9 of the application and the response, I will discuss these in more detail under valuation below. I now need to turn to the other important issues gleaned from the material, before conducting the valuation, because these issues may have a bearing on what value should be attached the various items.

Whether the Superintendent unilaterally delegated its valuation obligations

170. Neither party referred me to authority as to whether a Superintendent was able to unilaterally delegate its certifying function, so I will start by reference to Halsbury's Laws of Australia, Chapter 65, Building and Construction. At paragraph [65-850], the learned authors dealt with a 'Certificate' and stated that, "*The certificate may only be given by the person authorised in the contract to do so, unless this requirement is waived or the parties acquiesce by another procedure.*" I must then turn to analyse the contract.

171. Clause 23 of the GCC empowers the Superintendent to carry out its functions under the contract. Cl.42.1 provides that the Superintendent must assess a payment claim and issue a payment certificate within 14 days and set out calculations to explain how the amount is arrived at, and must give reasons for any difference between the certificate and the claim. I therefore find that only the Superintendent had this certifying function, unless it was expressly delegated under the contract to another, or there was a waiver or some other acquiescence. [I will turn to the waiver and acquiescence points under the next heading.]

172. Clause 24 of the GCC provides that the Superintendent is empowered to appoint others to carry out any functions under the contract as a Superintendent's Representative. It appears from the reading of the clause that this can extend to valuing and certifying payment claims. I have already found that the Superintendent advised the Claimant on 25 August 2005 of the assistance that it was to obtain from T&TR. However, I do not find that this letter constituted an appointment of T&TR as a Superintendent's Representative because the letter spoke about *quantity surveying assistance in respect to the assessment of Progress Claim No.8 when it is lodged*. There was no specific reference in this letter to what of the Superintendent's functions had been delegated, which is required by Cl.24 of the GCC

173. However, there is a letter that the Superintendent wrote to T&TR in Annexure 12A, in which in the covering facsimile to T&TR dated 4 October 2005 stated, "*Please find attached Sea-Slip (Australia) Pty Ltd's Progress Claim No.9. Could you please prepare Progress Certificate No.9.*" This statement suggests a delegation of a function, of which the Claimant would not have been aware, because it was not privy to this correspondence, as it was not copied to the Claimant. However, the affidavit on Annexure 12 by Mr. Palmer explains at paragraph 3 that he engaged T&TR to assist him by giving him

independent valuation reports that objectively valued the works so as to diffuse the Claimant's concerns that he was not objective in claim certifications.

174. I find that there are mixed messages in this affidavit. On the one hand T&TR are to assist him, and then they are objectively assessing the value of the works because the Claimant has complained about his objectivity. In addition, although I may not have regard to the contents of the Progress Claim No.9 valuation details in Tab 10 because they do not relate to the payment schedule, the Superintendent in his correspondence of 16 October 2005 said that he attached the detailed schedule from T&TR and said he had relied on their advice in preparation of *this certification* and that this may allay the Claimant's fears as to his 'unfair certifications.' I am prepared to draw the inference, on balance, without further material and in the knowledge that this letter from the Superintendent was in the Claimant's Tab 10 documents (such that it could have made submissions on this point), that the Superintendent had not unilaterally delegated its certification functions.

175. I think that, on the material provided, the Superintendent came close to delegating this function, but the 16 October 2005 correspondence to which I refer, satisfactorily explained T&TR's role in the certification process, such that I find that the Superintendent did not delegate its valuation functions to T&TR. In any event, I am now obliged to carry out the valuation function, so whatever finding is made on this issue, does not detract from the valuation in this decision. Nevertheless, this was a live issue between the parties that needed to be addressed by me.

*Whether the Claimant had consented to valuation by others*

176. I have gleaned that this is an issue because the Respondent twice introduced the email from the Claimant to the Superintendent dated 5 September 2005 [Annexure 11(b) and Annexure 12C in response submission 7.4.7], which I find was sent in response to the Superintendent's letter to the Claimant dated 25 August 2005 [Annexure 11(a) in response submission 7.4.7]. This latter document I have found was from the Superintendent advising the Claimant of the appointment of T&TR to assist in quantity surveying for assessment of Progress Claim No.8 when it was lodged. I find that the email expressed the Claimant's willingness to provide whatever assistance necessary to facilitate expeditious certification in relation to Progress Claim No.8 and the valuation of the R,S, T & U extension variations.

177. This issue and the email "sail somewhat close to the wind" in possibly falling foul of s24(4) of the Act, in that it could be characterised as a new *reason* for withholding payment, if it used to provide support to the T&TR valuations. However, there is no express submission by either party to this end, so I am content to consider the submission and document in the context of the Claimant being aware of T&TR's appointment, such that it is not now able to complain about the status of T&TR and the work that it did. It is quite clear throughout the Claimant's application submissions that it had complaints about T&TR's status, its methodology of using a 'cost to complete valuation approach', its reporting on the basis it was to assist a financier, and the failure

to take into account unfixed materials. This puts the T&TR's issues in the adjudication ring, and the Respondent has used this issue as one answer.

178. I have already found the Claimant's preparedness to assist, but in the context of ensuring quick certification. I find by inference that the email can be characterised as consent to providing T&TR with whatever information it needed for valuation purposes. However, I cannot find any further than this level of consent on the material provided to me, such that it did not extend to consenting to the Superintendent delegating its valuation functions to T&TR, which I have already considered above. If I had gone this far on the material, I would have had to seek submissions from the Claimant on this point, because it had not had the opportunity to do so after the last volley had been made by the Respondent's response.

179. I have not distilled from the submissions that the Respondent asserts that the Claimant waived the requirement that the Superintendent carry out the certification functions, as contemplated by Halsbury's paragraph [65-850] referred to above, and have been content to consider the *consent* as the *acquiescence* concept in this paragraph of Halsbury's. Although I do not consider the issue of waiver, it is useful to note that Cl.48 of the GCC precludes waiver of the terms of the contract unless the Respondent to specifically consents to do so in writing.

180. Accordingly, I find that the Claimant was prepared to cooperate with T&TR for it to carry out the valuation activities to assist the Superintendent, but did not consent to T&TR taking over the Superintendent's valuation functions. I have already found that the Superintendent retained its valuation functions.

*Whether the valuation by T&TR was correct*

181. There is a great deal of material in the submissions (to which I have made reference already in the decision) supporting the application and the controverting response in relation to T&TR's methodology of using a 'cost to complete valuation approach', its reporting on the basis it was to assist a financier, and the failure to take into account unfixed materials. The affidavit of Mr. Palmer was put in by the Respondent to clear up some of these issues and it is part of the adjudication bundle of documents.

182. Elsewhere in the decision, I have carried out a close analysis of the issues, and evaluated the material with respect to its probative value in order to make findings. However, I have not done so in relation to this issue, as I believe it serves no purpose because I have found that I am unable to consider T&TR's valuation since they were excluded by s2(94) of the Act. Accordingly, I have dealt with this issue on the basis that it need not be considered further in the adjudication.

*Whether there was a further agreement reached between the parties*

183. This is an important issue, because it deals with the Respondent withholding payment of \$79,983.77. The basis of the Respondent's argument is that the parties entered into an agreement whereby the amounts for the

variations in this payment claim were agreed in September 2005, from which the Claimant is now not able to resile, resulting in no amounts payable under these Items in the circumstances of overpayment. The Respondent has made this assertion, and I am content under this heading to consider that it must discharge the onus. The Claimant retains the legal onus to prove that it is entitled to the variation claims, but I am only considering the further agreement at this stage.

184. I have been referred to the correspondence between the parties on this point, and I have had regard to the following documents in making a decision, viz. Annexures 4, 5 & 6 as advanced by the Respondent, and Tab 18 as advanced by the Claimant [although this was advanced in the context of Item 7(b) relating to dredging downtime].

185. In the commercial context of this dispute it is my view that there is an intention to create legal relations: Willmot, Lindy, Sharon Christensen & Des Butler (2005): *Contract Law*, Oxford University Press, South Melbourne, 2<sup>nd</sup> Ed., page 121, such that I am required to analyse whether an agreement was reached between the Claimant and the Respondent. The point of departure for this analysis is whether one party made an offer, which was accepted by the other: Willmot, et al, page 31.

186. Annexure 4, a letter dated 1 September 2005 from Bennett & Philp to Colin Biggers & Paisley, whom I find are the respective solicitors for the Respondent and Claimant respectively, is where the analysis must start.

187. The letter lists a table of items, based on the Claimant's format, in which amounts are listed against each item, with comments attached to some items. The total of the items is \$1,432,175.21, which the Respondent through its solicitors stated would be certified for payment by the Superintendent and which the Respondent would pay on 9 September 2005. The letter goes on to say that in the circumstances there was no need for the adjudication application to go ahead.

188. At this stage, without descending into the particulars of the items and the other paragraphs of the letter, it would appear to me that this document constituted an offer by the Respondent to settle the adjudication on the terms identified in the letter, and without controverting material from the Claimant, I find such an offer. In fact, the letter [Annexure 6] from Colin Biggers & Paisley to Mr. Warren Fischer, adjudicator for the first adjudication, in which they attached Annexures 4 and 5 and stated that the matter will be resolved on the basis of the attached letters, strongly points to me finding that the Claimant accepted it was an offer. An offer is an expression to another of the willingness to be legally bound by stated terms: Willmot, et al, page 32. I find further that this offer was communicated to the Claimant, through its solicitors on 1 September 2005, and communication is a requirement for its validity: *Cole v Cottingham* (1937) 173 ER 406: cited in Willmot, et al, page 50.

189. I now need to analyse whether the Claimant accepted this offer. There are two rules regarding acceptance, viz. (1) that the offeree accepts the terms

of the offer; and (2) that acceptance is communicated to the offeror: Willmot, et al, page 56. Turning to the first requirement, it is my view that Annexure 5, which was a letter from Bennett & Philp to Colin Biggers & Paisley dated 2 September 2005 confirming a telephone conversation between the respective solicitors on 2 September 2005, together with Annexure 6, referred to above, in which Annexures 4 and 5 were attached, and the statement by the Claimant's solicitors that the matter will be resolved in accordance with the attached letters, strongly indicated that the Claimant accepted the terms of the offer, and I find accordingly. I also find that this acceptance was communicated in the telephone conversation between solicitors on 2 September 2005, as evidenced by Annexure 6 enclosing this letter confirming the verbal agreement.

190. I now need to consider the most important issue of consideration. Consideration is an act or forbearance (or promise thereof) by one party which is the price for the other party's promise: *Dunlop Pneumatic Tyre Company v Selfridge & Company Ltd* [1915] AC 847 at 855: cited in Willmot, et al, page 144. Consideration in this context can be analysed on the basis of compromise or forbearance to sue: Willmot, et al, page 175. Whilst it is the case that adjudication is a statutory process and not litigation in the true sense of the word, I find that it is akin to litigation. I accept that parties' other rights are preserved in s5 of the Act and s100 of the Act preserves the parties' rights under the contract etc.
191. However, it is my view that an adjudication decision that one party pay another money, which is able to be converted into a judgement of a court through the certification mechanism in s31 of the Act, is sufficiently similar to litigation to attract the same principles of consideration. In this event, the giving up of a right to continue with an adjudication which could result in a better or worse outcome than that achieved in a settlement, is in my view sufficient consideration, even though I have no authority to substantiate this point. I have deduced this result as a matter of principle and find that the Claimant provided consideration for the Respondent's offer.
192. This means that I find that a binding contract was reached on 2 September 2005 that \$1,432,175.21 would be paid on 9 September 2005. Whilst I am unable to find that this money was paid on that date, I draw the inference that this happened because that earlier adjudication appeared as if it did not proceed. The parties were at liberty to vary their contract by mutual agreement, and I find they did so, and the fact that the Superintendent needed to carry out a certifying function under the agreement, did not preclude the agreement from becoming enforceable, once it had certified. I find that this certification took place, as evidenced by Payment Certificate 7a.
193. Consideration must move from the Claimant: *Dunlop Pneumatic Tyre Company v Selfridge & Company Ltd* [1915] AC 847 at 855: cited in Willmot, et al, page 146. I have found that the Claimant through its solicitors had provided consideration which moved from the Claimant, in this case to the Respondent. This means that the Claimant is bound by the 2 September 2005

agreement provided it ripened into payment on 9 September 2005, which I have inferred actually took place.

194. I need to consider the terms of this agreement as far as they impact on this adjudication. The first variation item is Item 7(a) in the adjudication summary below. The Claimant asserts that it is entitled to \$33,283.77, and the Respondent valued the amount owing as \$21,297.96, which would have been payable if there had been a positive progress certificate. I find that the agreement of 2 September 2005 specified an amount of \$80,000 initially payable under that agreement, with an agreement that any amount subsequently certified by T&TR, would be certified for payment. The Claimant accepts in paragraph 7.6.2 that it had received the reasoning of T&TR, and this amount had been specifically referred to in the payment schedule. I am obliged to give effect to the terms of the contract in the adjudication, and I find that this 2 September 2005 agreement formed part of the contract. Given that T&TR valued the balance of the amount owing at \$21,297.96, I find that this was the balance due under the 2 September 2005 agreement, and this is then payable under this claim.
195. In Tab 15 of the application, the Claimant had provided an expert report from Tony Makin dated 26 October 2005 regarding the valuation of variation No.1 to which I may have regard. Unfortunately, I am unable to discern from this report how I can use it to compare it to T&TR's valuation of \$101,297.96, or for that matter the Claimant's claim of \$113,283.77. This report refers to the Claimant's value for Variation No.1 of 337,952.57, T&TR's value of \$236,696.88 and Mr. Makin's figure of \$333,583.45. I cannot safely extrapolate what these figures mean in relation to the balance of the amount being claimed by the Claimant, and therefore prefer T&TR's valuation. Given that the Claimant bears the legal onus on valuation of the claim, I find that it has not discharged this onus, and I will use the figure of \$21,297.96 in the adjudication. At this point, I note that I will not have regard to Mr. Makin's other report in Tab 25 because it deals with T&TR's valuation of Progress Claim No.9, which I have excluded. Therefore, it is only proper that I exclude this report.
196. I now refer to Item No. 7(b) of the adjudication summary below. I find that an amount of \$30,000 was offered as a show of good faith in full and final satisfaction of this variation claim, as stated on page 6 of Annexure 4. This means that I find that the Claimant is bound by this claim, and I reject the Claimant's submissions in paragraph 7.7.2 of the application that there was no reason to suggest that the Claimant was not entitled to a balance of the total amount claimed.
197. I am permitted to refer to Annexure 1 in the adjudication bundle, which was Progress Claim No.7, which ripened into the earlier adjudication application. In this claim the Claimant referred to this variation as *a latent condition – downtime due to dredging delays \$73,850..Latent condition (invoice cost)*. I am unable to accept that having compromised this item for \$30,000, the Claimant was then allowed in another adjudication application to

press for the balance of monies of \$43,850 it had already claimed earlier. I find therefore that no further monies are payable under this item.

What is the true value of the claim

198. I need firstly to be satisfied that the Claimant satisfies the onus of proof of each item in the payment claim. I will turn to each item and discuss it in the context of the provisions of the contract.

199. Using the Claimant's numbering system in the application, which I have eventually understood, and which the Respondent responded to (albeit with reference to it not making sense), I refer firstly to Item 2 of the claim of \$7,032.31 for Project Management. In the Detailed Breakdown of Tax Invoice, this item is based on the work being 85% complete. Further details in the payment claim do not explain how this percentage is arrived at. There is little support for this claim in the Tab 14 Daily Diaries, which I find represent the work carried out in the month of September 2005, because they were put forward by the Claimant and not controverted by the Respondent. This item is slightly better described on the first page of the payment claim as "Project Management, Scheduling, Site Inspections". In the Daily Diary of 14 September 2005, I find reference to Peter Crowe, site inspection, but it is not clear who Mr.Crowe is, and what he inspected.

200. I have obtained some assistance from the payment schedule because it lists the Certified Progress Certificate No.8 ("PrCt8") amounts. I have said that I was unable to find Progress Certificate No. 8 in the material, but I find that the payment schedule accurately replicates the amounts certified therein, because this is not controverted by either party. The item "Project Management, Scheduling, Site Inspections" in PrCt8 was certified by the Superintendent to be \$112,517.02, and the amount claimed in this payment claim is \$119,549.34. I have found that Annexure 8 is the Progress Claim No.8 (P/C8) and the amount claimed in that document for this item was \$119,549.34. I draw the inference therefore, that this work having been claimed previously, was for work prior to September 2005. This is supported by the Daily Diaries not specifically referring to such work. The Claimant has the onus in demonstrating that this amount is payable, even though s17(6) of the Act allows the payment claim to include amounts previously claimed. I cannot find any material to support this claim. In other items, the Claimant provided information on page 3 of the payment claim in the *Detail of Items incorporated into the works included in the Claim & Unfixed plant included in the Claim and Variations*. In this instance there was no supporting information, so I draw the inference that none was available, and disallow this part of the claim.

201. Turning to the item 4 of the claim relating to Product supply – walkways, fingers, pile brackets & gangways incorporated into works amounting to \$110,031.23. This item is substantiated by page 3 of the payment claim in the *Detail of Items Incorporated Into The Works Included in the Claim* in so far as there were 8 finger pontoons referred to, 10 finger to finger connections, 5 finger to walkway connections, gangways, 20 complete corner bumper units, assembly and handling and loading on to trucks and 4

trailer loads. The Daily Diary refers to installation work of fingers, walkways, brackets, transport, craneage, fixing tiles etc, so I am satisfied, without any material to the contrary from the Respondent that this work was carried out in September 2005. This is further substantiated by the payment schedule, which identifies that the total amount of work in PrCt8 for this item was \$1,725,303.60, whereas this claim was for a total amount of work of \$1,835,334.83, which results in a difference of \$110,031.23.

202. As to valuation of this work, I referred to Tab 6 Costing's for Sea-Slip marina system, to see if I could obtain any assistance from this document, but was unable to correlate the amounts claimed in the payment claim to the costs/unit in this document. However, in adjudication, it is my view that the Claimant merely needs to tip the scales in discharging its onus, because the Respondent has the opportunity in the payment schedule to put forward its argument's in withholding payment. Given that the adjudicator is bound by the parties' material, it is not appropriate to carry out a full valuation exercise, because this could lead to a breach of natural justice. Accordingly, on balance I am satisfied that the Claimant has discharged its onus, which means the Respondent is required to provide material in rebuttal.

203. There is no detailed valuation material from the Respondent to which I may have regard, because the payment schedule merely provides a broad statement that T&TR had confirmed that PrCt8 was over certified. T&TR's material is unable to be considered, and I am unable to dissect from the assertion in the payment schedule and any of the remaining material from the Respondent that this value is incorrect. Accordingly, I am satisfied that the Claimant is entitled to this item amounting to \$110,031.23.

204. As to Item 5, Installation – walkways, fingers, pile brackets, gangways there is reference on page 3 of the payment claim to 11 pontoons, and the Daily Diary refers to this work, so I am satisfied that this work was carried out in September 2005. There is further substantiation derived from the payment schedule, which identifies that the total amount of work in PrCt8 for this item was \$152,712.00, whereas this claim was for a total amount of work of \$161,028.00, which results in a difference of \$8,316.00. I am satisfied therefore, without any material to the contrary from the Respondent, that this work was carried out in September 2005.

205. As to valuation of this work, I again say that on balance I am satisfied that the Claimant has discharged its onus, which means the Respondent is required to provide material in rebuttal. Again, there is no detailed valuation material from the Respondent that I may refer to, and the payment schedule merely provides the same broad statement that T&TR had confirmed that PrCt8 was over certified. Again T&TR's material is unable to be considered, and I cannot find any remaining material from the Respondent to substantiate that this value is incorrect. Accordingly, I am satisfied that the Claimant is entitled to this item amounting to \$8,316.00

206. As to Item 6 – Supply and install services, there is reference on page 3 of the payment claim under *Details of Items Incorporated Into the Works*

*Included in the Claim to Comsen Units in the sum of 100% of \$54,442.50. There are some notes alongside, but slightly above that states, "61 single phase units stored at Roebuck Plumbing Cannonvale (postcode 4802). Units remain uninstalled due to ongoing restrictions with access due to dredging delays."* I have referred to Tab 6's costings again for guidance as to what is meant by Comsen Units, and they are found under 7.0 Services, which is consistent with the claim, and I infer that they are some sort of electrical units because of the term *single phase* used in the payment claim and Tab 6. If the notes refer to 61 of these items not installed due to ongoing restrictions with access due to dredging delays, then it is open to conclude that they remain uninstalled.

207. It is incumbent upon the Claimant to discharge its onus, before this onus shifts to the Respondent, and I have had to scrutinise documents in the bundle to determine the merits. I draw the inference that despite this item being positioned under the heading of items incorporated into the works, the notes to the side indicate that the units may remain uninstalled due to access problems. There is no material from the Respondent to controvert that these 61 units are at Cannonvale, nor that the value claimed is incorrect. Whilst the cost per unit in the Tab 6 costings do not agree with the payment claim, I am obliged to accept the Claimant's valuation because there is no reliable material on which to base another valuation.

208. I must value in accordance with the provisions of the contract under s14(1)(a), if I am able to do so. If I make a finding that these items are unfixed and therefore incorrectly classified as incorporated into the works, I would need to reduce the values of these items by 30% because they are not fixed. This reduction would be in accordance with Item 47 of Annexure A to the GCC referring to 70% of the invoice amount under Cl.42.2 of the GCC. There is reference in the payment claim to making a deduction of 30% for unfixed plant and materials of \$11,344.27, but curiously there are no such items in the payment claim on page 3 to which I can make a cross reference.

209. The Respondent has seen fit to acknowledge that the amount it withheld is incorrect in paragraph 7.4.2 of the response, so I am confined to dealing with the sum of \$54,442.50, and not some larger sum. Furthermore, the Respondent made no submissions in relation to paragraphs 7.9.1-7.9.8 of the Claimant's application submissions, which explained that the 30% unfixed plant and materials figure was not to be deducted in this claim. The Respondent does not comment on the grounds that the Claimant's submissions appear to be irrelevant. With respect, to my mind they were not irrelevant, and if there had been some submissions by the Respondent on point, I would have been obliged to conduct a further inquiry into whether these units were unfixed, for which I probably would have sought submissions.

210. However, no challenge to this item was made by the Respondent, and I therefore find that the Claimant, on balance and without controverting material, has satisfied the onus that these Comsen Units were installed. I am bound by the Claimant's valuation, because no issue is taken by the Respondent. I therefore find that \$54,442.50 is the amount for this item.

211. As to Item 7 regarding the variations, I refer back to my findings about the agreement and my decisions under that heading.

**The adjudicated amount**

212. I provide a summary table of the **adjudicated amount of \$183,026.46** is calculated in order to assist the parties.

<b>Description</b>	<b>Amount</b>	<b>Reason</b>
2. Project Management, Scheduling, Site Inspections	\$0.00	Claimant did not discharge onus
4. Product supply – walkways, fingers, pile brackets & gangways incorporated into works	\$110,031.23	Claimant discharged onus and no probative material from Respondent to rebut
5. Installation – walkways, fingers, pile brackets, gangways	\$8,316.00	Claimant discharged onus and no probative material from Respondent to rebut
6. Supply and install services	\$54,442.50	Claimant discharged onus and no probative material from Respondent to rebut
7. Variations (a) Additional piles arms R,S,T,U (b) Latent condition – downtime (c) Direction from Marina Manager	\$21,297.96 \$0.00 \$0.00	Superintendent’s valuation 2 Sept 2005 agreement 2 Sept 2005 agreement
8. Less unfixd plant and materials	\$0.00	Claimant discharged onus
9. Less Workcover Levy reimbursement	-\$27,700	Both parties agree about this value
<b>SUBTOTAL</b>	\$166,387.69	
<b>GST</b>	\$ 16,638.77	
<b>TOTAL ADJUDICATED AMOUNT</b>	\$183,026.46	

**Due date for payment**

213. I refer to s15 of the Act because it deals with 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.

214. I therefore have regard to s15(1)(a) of the Act, because the contract makes provision about the due date for payment. Progress payments (under clause 42.1 of the GCC) are required to be made with 28 days after the receipt of a progress claim, which I have found was on 3 October 2005. This means that the due date for payment for this claim is 31 October 2005.

**215. I find that the due date for payment is 31 October 2005.**

**Rate of interest**

216. 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 49 of Annexure Part A to the GCC [Tab 4(b)] provides a contractual rate of interest of 10% 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. Both rates are 10%, and I find this is the applicable interest to apply to the adjudication

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

#### **Authorised Nominating Authority and Adjudicator's fees**

218. The Claimant has obtained 70% of what it claimed. The default provision contained in s34(3)(a) of the Act makes the parties jointly and severally liable to pay the ANA's fees. This liability is in equal proportions, unless I decide otherwise s34(3)(b). The same joint and several liability approach applies to the adjudicator's fees in s35(2) of the Act, with equal contributions in s35(3), unless I decide otherwise. There is evidence from the material that the parties have been in dispute since August 2005 about the valuation of work, which resulted in the first adjudication application, and this has continued in this application. I am only empowered to deal with this application, but the surrounding circumstances can be taken into account in my view in exercising the discretion.

219. In this adjudication I have found that the T&TR valuations had not been given to the Claimant until after the process of the payment schedule had been delivered, so that this material was unable to be considered by me. I make no finding in relation to the probative value of T&TR's valuations as it would not be proper to do so. However, a substantial amount of time would have been saved in the adjudication, if this material had been given to the Claimant as soon as it was available, because the issue of the "admissibility of this material" took a considerable amount of legal analysis and evaluation. Furthermore, the payment claim and payment schedule could have dealt in detail with an item by item valuation, and may have resolved matters, which have otherwise had to be adjudicated. I am therefore of the view that I should exercise my discretion in deciding that costs should follow the event, because the Claimant has substantially succeeded in the adjudication.

220. Accordingly, I decide that the Respondent is liable to pay the ANA's fees of \$385 under s34(3)(b) of the Act and my fees under s35(3) of the Act.

Chris Lenz  
Adjudicator

10 August 2007

Appendix 1 Payment claim and payment schedule summary

**Appendix 1 Sea-Slip Marina v Abel Point Marina Adjudication No: 30022**

#	Item	Contract amount	%	\$ paid to date	P/C No. 9	P/S No. 9 withheld	Reasons for non payment
1	Prelim, Design, Drawings & Prep	\$626,159.85	97.5	\$610,505.85	\$0.00	\$0.00	
2	Proj Man, Scheduling & Site Insp	\$140,646.28	85	\$119,549.34	\$7,032.31	-\$7,032.32	T&TR say PC No.8 overcertified
3	Establishment	\$193,146.28	95	\$183,488.97	\$0.00	\$0.00	
4	Prod supply - Piles sleeves & Caps	\$1,616,012.45	100	\$1,616,012.45	\$0.00	\$0.00	
5	Installation - Piles, sleeves & caps	\$816,769.80	100	\$816,769.80	\$0.00	\$0.00	
6	Prod supply - Walkways, fingers, Pile brackets, Gangways	\$3,303,408.34	55.6	\$1,835,334.83	\$110,031.23	-\$110,031.23	T&TR say PC No. 8 overcertified
	Ditto - unfixed plant & materials		0	\$0.00	\$0.00		
7	Installation - Walkways, Fingers, Pile brackets, Gangways	\$420,336.00	38.3	\$161,028.00	\$8,316.00	-\$8,316.00	T&TR say PC No.8 overcertified
8	Supply and instal services inc in work	\$790,082.00	18.9	\$111,142.50	\$54,442.50	-\$65,786.77	T&TR say PC No.8 overcertified
	Ditto - unfixed plant & materials		4.79	\$37,814.23	\$0.00		
9	Connection of Power, Fire & Water	\$8,000.00	0		\$0.00	\$0.00	
10	Contingency	\$26,250.00	0		\$0.00	\$0.00	
	<b>Sub total</b>	<b>\$7,940,811.00</b>		<b>\$5,491,645.97</b>	<b>\$179,822.04</b>	<b>-\$191,166.32</b>	
	<b>Variations</b>						
1	Rock drilling for piles			\$42,210.00		\$0.00	
2	Dredging downtime			\$30,000.00	\$43,850.00	-\$43,850.00	PC #7a agreement
3	R, S, T, U arm extension			\$80,000.00	\$33,283.77	-\$33,283.77	T&TR valuation \$101,297.96 & \$21,297.96 payable if +ve cert
4	Direction from Marina Manager - pont			\$0.00	\$2,850.00	-\$2,850.00	PC #7a agreement
	<b>Total of variations</b>			<b>\$152,210.00</b>	<b>\$79,983.77</b>	<b>-\$79,983.77</b>	
	<b>Sub total</b>			<b>\$5,643,855.97</b>	<b>\$259,805.81</b>	<b>-\$271,150.09</b>	
	<b>GST</b>				<b>\$25,980.58</b>		
	<b>Progress Claim</b>				<b>\$285,786.39</b>		
	<b>Other items</b>						
1	less 30% retain for unfixed PI & mat				-\$11,344.27	-\$11,344.27	Nil cert, so not deducted now
2	Reimb Work Cover Levy				-\$27,700.00	-\$27,700.00	Nil cert, so not deducted now
	<b>Total of other items</b>					<b>-\$39,044.27</b>	
	<b>Sub total</b>						
	<b>Claimant or Respondent total</b>				<b>\$258,086.39</b>	<b>\$232,05.82</b>	