

Adjudicator's Decision

Pursuant to the Building and Construction Industry Payments Act 2004

Fine Form Building Services Pty Ltd (Claimant)

and

Gedoun Constructions 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 13 February 2006 is **\$5,500.00**
- b. The date on which the amount became payable is **19 January 2006**
- c. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
- d. The Claimant and Respondent are liable to pay the ANA's fees of \$242 and the adjudicator's fees in equal proportions.

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Background

1. Fine Form Building Services Pty Ltd (referred to in this adjudication as the “Claimant”) was engaged by Gedoun Constructions Pty Ltd (referred to in this adjudication as the “Respondent”) to supply scaffolding to the Respondent’s project at 34 Golf Links Drive, Kirwan, QLD (the “work”).
2. The Claimant and Respondent entered into a written Hire/Sales Agreement on 3 May 2005 (the “contract”) for the contract sum of \$50,000.
3. The work comprised the hire of scaffolding, including site erection and dismantling, between 3 May 2005 and 11 November 2005.
4. Progress Claims were issued progressively throughout the contract.
5. Progress Claim (Invoice 79) dated 19 August 2005 for \$15,500 was paid by the Respondent, except for a figure of \$50.
6. The Progress Claim dated 12 September 2005 (Invoice 106) for the sum of \$5450 was not paid by the Respondent and is the subject of this adjudication.
7. A further progress claim dated 11 November 2005 (Invoice 109) for \$4400 was not paid by the respondent and is the subject of this adjudication.
8. On 20 December 2005 the Claimant faxed a Tax Invoice claiming the unpaid amounts of \$9,900 and endorsed this Tax Invoice and described it as a Payment Claim under the *Building and Construction Industry Payments Act 2004* (the “Act”).
9. The Respondent did not provide a payment schedule in response to this Payment Claim.
10. On 25 January 2006 the Claimant faxed a notice under Section 21(2) of the Act to the Respondent, stating that the Claimant intended to proceed to adjudication and inviting the Respondent to provide a Payment Schedule within 5 days.
11. On 2 February 2006 the Respondent, through its solicitors Connolly Suthers Lawyers, provided a Payment Schedule by way of facsimile, in which it stated that the Respondent was not indebted to the Claimant and that the Claimant was, in fact, indebted to the Respondent.

Appointment of Adjudicator

12. The Claimant applied to the Queensland Law Society (“QLS”) on 13 February 2006 for adjudication. By letter dated 14 February 2006 QLS referred the adjudication application to me to determine.
13. QLS is an Authorised Nominating Authority under the Act with registration number N1061878. I am a registered adjudicator under the Act with registration number J622914.
14. By Notice of Acceptance of Adjudication Referral in Form 3, dated 17 February 2006 sent by facsimile to the Claimant and to the Respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.
15. Notice of Acceptance of Adjudication Referral was also sent by Express Post to the Claimant and Respondent on 17 February 2006.

Material provided in the adjudication

16. I list the Claimant’s material and the Respondent’s material separately.

Claimant’s Material

This material comprised the following:

- (i) Adjudication Application dated 13 February 2006 claiming \$9,900 (including GST) (the “application”) comprising the following documents:
 - (a) Covering letter dated 13 February 2006;
 - (b) Form 1 Adjudication Application by Claimant;

- (c) The Claimant's quotation to supply scaffolding to the project dated 25 April 2005 for the total price of \$50,000 (the "quote"), together with a signed hire/sales agreement dated 3 May 2005 (the "agreement") called "Attachment A";
- (d) Tax Invoice dated 20 December 2005 for the sum of \$9,900, called a Payment Claim and endorsed under the Act (the "Payment Claim"), called "Attachment B";
- (e) Letter from Connolly Suthers Lawyers on behalf of the Respondent, dated 2 February 2006, identified as the Respondent's Payment Schedule (the "Payment Schedule"), called "Attachment C";
- (f) The Claimant's submissions dated 13 February 2006, called "Attachment D";
- (g) Affidavit of Martin Brooke, sworn on 10 February 2006, with attached exhibits "MB1" through to "MB7", called "Attachment E";
- (h) The Claimant's letter to the Respondent, dated 25 January 2006, sent by facsimile stating to be a notice under Section 21(2) of the Act, called "Attachment F";
- (i) Respondent's facsimile to the adjudicator dated 27 February 2006, attaching further submissions in response to my further request for submissions dated 23 February 2006.

Respondent's Material

The Respondent's material comprised the following:

- (ii) Respondent's letter dated 22 February 2006, sent by facsimile comprising the following:
 - (a) Adjudication Response dated 22 February 2006 (the "response");
 - (b) Affidavit of Paul Gedoun sworn 22 February 2006;
 - (c) Affidavit of Jo Gedoun sworn 22 February 2006;
- (iii) Letter from the Respondent's solicitors dated 27 February 2006 enclosing the Respondent's written submissions responding to my request for submissions dated 23 February 2006;
- (iv) Letter from Respondent's solicitors dated 3 March 2006 sent by facsimile, enclosing written submissions in response to my request dated 23 February 2006.

Threshold jurisdictional issues

17. There are two threshold jurisdictional 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 if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the owner resides or intends to reside...; 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."*

18. 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.
19. 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. Attachment A comprised the quote and the agreement dated 3 May 2005 and the Payment Schedule at paragraph 3 refers to the quote, conversations between the Claimant and the Respondent on 28 or 29 April 2005 and the agreement dated 3 May 2005. Although the parties agree about the existence of the quote and the agreement, I need to be satisfied that there was a contract under the Act for jurisdiction to attach to this adjudication. The parties cannot give me jurisdiction by agreement.
20. I am satisfied that the date of the quote was 25 April 2005 and that of the agreement was 3 May 2005, both of which are after 1 October 2004, so that the Act applies thus far, providing it involves a "Construction Contract".
21. 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 quote and agreement were after 1 October 2004. For present purposes the quote and the agreement fall within the first part of the definition of *construction contract* in the Act, because it is a “*contract, agreement or other arrangement...to supply related goods and services...*”

I must also be satisfied that they fall within the meaning of *supply related goods and services* within the meaning of the Act.

Related goods and services are defined in s11 of the Act as:

“(1) **Related goods and services**, in relation to construction work, means any of the following -

- (a) *Goods of the following kind –*
 - (i) *Materials and components...;*
 - (ii) *Plant or materials (whether supplied by sale, hire, or otherwise) for use in connection with the carrying out of construction work;*
- (b) *Services of the following kind –*
 - (i) *The provision of labour to carry out construction work;...*”

The quote refers to scaffolding and the general specification within the quote identifies decks, planks, hand-rails, scaffolds, mesh-guards and mid-rails which I find constitutes *scaffolding*. The quote in paragraph B also refers to labour to erect and dismantle scaffolding, and I find as a matter of commonsense that this activity falls within the term *provision of labour*. Furthermore, I find that the agreement is between the Claimant and Respondent and is a Hire/Sales Agreement signed by the Claimant and Paul Gedoun of the Respondent. The agreement at clause 4(b) refers to the quote, so I find that the agreement deals with the hire of scaffolding.

At this stage I have not assessed the extent to which the quote and the agreement form part of the contract to which the Act applies. I am merely addressing a threshold jurisdictional issue, so that if there is no jurisdiction, there is no utility in evaluating the terms of the contract at this stage.

I find that *scaffolding* as a matter of commonsense falls within the definition of plant or materials supplied by hire, as provided in s11(1)(ii) of the Act because it would fall within one of those categories, and I have found that it was supplied for hire. As to whether the scaffolding is *for use in connection with the carrying out of construction work*, I refer to the definition of *construction work* referred to below, which at s10(1)(e)(iii) includes *the erection, maintenance, or dismantling of scaffolding*.

Construction work is defined in s10 of the Act as:

“**10 Meaning of construction work**

- (1) **Construction work** means any of the following work –
 - (a) *The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;...*
 - (e) *any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including-*

- (i) *Site clearance...*
 (iii) *The erection, maintenance or dismantling of scaffolding...*”

Erection, maintenance or dismantling of scaffolding forms part of the definition of *construction work* provided *it is preparatory to, or is for completing work of the construction of buildings forming part of land* (my paraphrasing) [s(10)(1)(a) of the Act]. The quote refers to 5 dwellings and the affidavit of Martin Brooke, in exhibit MB2” attaches drawings of residences to be constructed at the site. I am satisfied therefore that work at the site was construction of buildings forming part of the land at the site. It is reasonable to infer that scaffolding would be categorised as either preparatory to, or for completing the construction of building, such that it would fall within the meaning of *for use in connection with carrying out of construction work*. Accordingly, I am satisfied that the hire of the scaffolding falls within the definition of *related goods* under s11(1)(a) of the Act.

22. I also need to be satisfied that the labour for the erection and dismantling of scaffolding falls within the definition of *related services* under s11 of the Act. “Services” include *the provision of labour to carry out construction work* and I am satisfied that the labour contained within the quote was labour for the erection and dismantling of scaffolding. Furthermore, I have already found that erection, maintenance or dismantling of scaffolding forms part of *construction work* because it was linked to construction of the dwellings, such that I am therefore satisfied that the labour identified in the quote falls within the meaning of related services under s11 of the Act. Accordingly, I am satisfied that the first threshold issue has been satisfied and that the *contract* as defined in the Act was for construction work, which part satisfies threshold issue 2. However, it is necessary for me to be satisfied that the construction work was carried out in Queensland to fully satisfy threshold issue 2.
23. I have already found the existence of the quote and the agreement between the Claimant and Respondent. In the quote there is reference to *Project 34 Golf Links Drive – 5 Dwellings*. In the Affidavit of Jo Gedoun sworn on 22 February 2006 at paragraph 2, which formed part of the Respondent’s material, I note that Mr Gedoun stated that he was the site supervisor *in respect of the project at 34 Golf Links Drive, Kirwan, QLD, 4817, the project the subject of these proceedings*. I am therefore satisfied that the quote, together with the agreement and Mr Gedoun’s material establishes that the construction work was carried out in Queensland, thereby satisfying threshold jurisdictional issue no. 2.
24. 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.

I will start with s3(3) of the Act, because there is one aspect in s3(2) that needs further consideration. 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.

As to s3(2) of the Act there is nothing in the material to suggest that the construction contract formed part of a loan agreement, nor was there any agreement to pay for construction work other than by reference to the value of the work. However, I need to consider whether it was for the carrying out of domestic building work if a resident owner is a party to the contract. *Resident owner* is defined in s3(5) as a resident owner under the *Domestic Building Contracts Act 2000*, but excludes (b) a person who is a *building*

contractor within the meaning of the *Queensland Building Services Authority Act 1991* (the QBSA Act”).

I refer to Form 1 of the application, identified below and the Respondent is identified as Gedoun Constructions Pty Ltd with BSA Licence No 23628. *Building contractor*, under the BSA Act means *a person who carries on a business that consists of or includes carrying out building work, and includes a subcontractor who carries out building work for a building contractor*. I find, without material to the contrary, that the Respondent’s name together with the fact that it had a BSA license allows me to infer that it carried on the business of building work. Therefore I am satisfied that the Respondent was not a resident owner and consequently the contract did not fall within the exclusion in s3(2)(b).

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

Scope of the determination

26. The Act at s 26(1) requires that I am to determine:
- The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the “**adjudicated amount**”); and
 - The date on which any such amount became or becomes payable; and
 - The rate of interest payable on any such amount.
27. 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

28. 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

29. 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 20 December 2005 to which the application relates.
- (iii) The payment schedule dated 2 February 2006 to the extent that I am allowed to consider this material under the Act as identified below, to which the response relates.
- (iv) The adjudication application and the relevant documentation.
- (v) The adjudication response and the relevant documentation.

Material not considered

30. I have reviewed all the material provided to me. I did not have regard to the Respondent's first copy of the further submissions dated 27 February 2006 because they had been erroneously delivered before the Claimant had provided its submissions, and I had not asked for this to be done. I have considered the Respondent's second copy of the further submissions dated 3 February 2006 for the reasons identified below.
31. Having established jurisdiction, it is necessary at this early stage to deal with an important issue raised by the Claimant, at paragraphs 22, 23 and 24 of its adjudication submissions. The Claimant essentially submits at paragraph 22 of its submissions that I cannot take the reasons in the Respondent's payment schedule into consideration in this adjudication because:
- (a) the payment schedule was not delivered within 10 business days of receiving the payment claim; and
 - (b) ss18(4) and (5) of the Act deems the Respondent liable for the claimed amount in the payment claim.
32. If the Claimant is correct then I am obliged to take a restricted view of what I can consider in relation to the payment schedule, and this has an effect in also constraining the extent to which I may have regard to the material in the adjudication response.
33. I considered this was a vitally important question that governed the ambit of the adjudication and on 23 February 2006, I wrote to both parties pursuant to s25(4)(a) of the Act requesting submissions regarding the extent to which I could have regard to the payment schedule if it was not served within the time prescribed by the s18(4) of the Act. In this letter I stated that I had made no finding as to the timing of the service of documents at that stage as the adjudication had just commenced. My request was for the Claimant to provide submissions within 2 days and the Respondent to then respond within a further 2 days.
34. I received submissions firstly from the Respondent on 27 February 2006, within the 2 day period, which were not requested, and then later that day from the Claimant. The Respondent did not provide its submissions in response to that of the Claimant by 1 March 2006 as requested, but sent them on 3 March 2006 apologising for erroneously believing that they were only due on that date. The Respondent's errors in responding to my request resulted in the Respondent providing two sets of submissions to the Claimant's one.
35. I am obliged to do natural justice to the parties. 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..”

36. I am prepared to accept that the Respondent as it stated in its covering letter to me dated 3 March 2006, erroneously provided submissions out of order initially and then 2 days late. Having considered the matter, I did not see any utility in asking for further submissions from the Claimant, because in my view there was no disadvantage likely to be suffered by the Claimant because the Respondent was always going to have the last submission in response to my request. I did not consider that the fact that the submissions were 2 days later resulted in any disadvantage to the Claimant.
37. I now consider the submissions of the parties as to the extent to which I may have regard to the payment schedule and in making these deliberations I am required to consider the provisions of the Act pursuant to s26(2)(a). I have merely summarised and extracted salient parts of the submissions in the adjudication, but I have had regard to the submissions and the further submissions in reaching the adjudication decision.

Claimant's submissions on the Payment Schedule

38. I have already referred in summary to the Claimant's arguments in paragraphs 22 of its submissions. The Claimant asserts that the Respondent is limited in its challenge in this adjudication to denying liability to pay all or any amount to the Claimant, only in respect of the application of the Act to the contract and the validity of the Payment Claim. The Claimant further contends at paragraph 24 of its submissions that because the Respondent in the Payment Schedule did not challenge the application of the Act to the contract or the validity of the Payment Claim, it was not entitled now to raise any such challenge in the response.
39. In the further submissions of the Claimant, dated 27 February 2006, (the further submissions) the Claimant expands upon its assertions, by stating that there is a distinction between a payment schedule under Division 1 of Part 3 of the Act and a payment schedule under Division 2 of Part 3 of the Act. A Division 1 payment schedule, the Claimant asserts, arises out of service of a payment claim within the time prescribed under s18(4) of the Act, which is in Division 1 of the Act. The Claimant asserts that there is a difference between this Division 1 payment schedule and one that is delivered in response to a notice given under s21(2)(b) of the Act, which is found in Division 2, insofar that the latter payment schedule is more restricted in the extent of matters that can be raised within it.
40. The Claimant referred in Paragraph 14 of the further submissions, to a case of *Amflo Constructions Pty Ltd v Anthony Jefferies* [2003] NSWSC 856 (“Amflo”). The Claimant asserts that this case deals with the NSW equivalent of QLD s18, 19, 20 and 21 of the Act. The Claimant conceded that the issue in the Amflo case was whether or not adjudication had been commenced within time, but Campbell J discussed at some length whether there was a difference between a Division 1 and a Division 2 payment schedule. I find that therefore that what His Honour said was obiter, but it is persuasive. The Claimant extracted part of paragraph 40 of His Honour's judgement in which he said:

“A construction of the Act which gives the words “under Division 1” work to do is to be preferred to a construction which gives them no work to do. And there is no strained or artificial use of language if “under Division 1” is construed as an adverbial phrase.”

41. The Claimant extracted 2 further extracts from the judgement, which essentially concludes that adjudication under the Queensland equivalent of the NSW legislation differs depending on whether a Division 1 payment schedule or a Division 2 payment schedule had been served. I have found that the decision was obiter, and His Honour did not go further and state what was allowable in the Division 2 payment schedule, because he had no reason to do so.
42. The Claimant then contended at paragraph 18 of the further submissions that a payment schedule under Division 2 limited the scope of matters that may be raised to those going to jurisdiction as to whether or not:
- (a) the payment claim was valid;
 - (b) the contract at the centre of the dispute is a contract to which the Act applies; and
 - (c) The Respondent has not paid some or the entire amount claimed in the payment claim.

Respondent's submissions on the payment schedule

43. The Respondent's further submissions accepted that the Payment Schedule was delivered in response to a notice pursuant to s21(2) of the Act. Accordingly, I find that it was a Division 2 payment schedule.
44. The Respondent argues at paragraphs 20 and 21 of its further submissions that Amflo was concerned with circumstances as to whether an adjudication application was made within time, and the Respondent conceded that there were different time frames for adjudication depending on the whether the adjudication arose out of a Division 1 or Division 2 payment schedule.
45. The Respondent at paragraph 23 of its submissions did not concede that there was any constraint on what matters could be raised in a Division 2 payment schedule. It then went on to say in paragraphs 24, 25 & 26 that the definition of payment schedules in Schedule 2 of the Act, referred one to s18 of the Act, and did not provide any separate definitions for payment schedules to justify an argument that there was any difference in the materials that could be provided in either payment schedule.
46. The Respondent at paragraphs 27 and 28 referred to the case of *Taylor Projects Group Pty Limited v Brick Dept Pty Limited & Ors* [2005] NSWSC 439 ("Taylor") and referred to Einstein J as authority that a respondent must be given another opportunity to provide a payment schedule in response to the s21(2)(a) notice. Having regard to this authority, I do not feel that it advances the Respondent's case particularly far, except to confirm what is already apparent from the Act, i.e. s21(2) requires a notice to be given before an adjudication application can be made. However, Einstein J did emphasise that a payment schedule as defined under the equivalent provision of the NSW Act must comply with the statutory requirements. With respect, I do not accept again that this advances the Respondent's case, because the Act certainly defines the minimum of what must be in a payment schedule, but does not canvass what other matters should be in it to best position a Respondent in defending its actions or inactions.

Decision on the extent to which I may have regard to the Payment Schedule

47. There is no direct authority on this difficult question, so I am obliged to discern the correct approach from a matter of principle. Before I do so, however, it is useful to note that the issue about the extent to which one may have regard to a Division 2 payment schedule has been canvassed by the learned authors of the Institute of Arbitrators and Mediators Australia Adjudication Guide, which was published in 2005 (the “Guide”). With respect, the Guide is considered an authoritative text for Adjudicators in Australia and I have extracted the relevant passages from the on-line text, as follows:

“What work does a payment schedule delivered under Division 2 (s21(2)(b)) of BCIPA do?”

The requirement in BCIPA s21(2)(b) that a claimant give a respondent who fails to deliver a payment schedule within ten business days from receipt of a payment claim another five business days to serve a payment schedule has been described as giving the respondent a 'second bite at the cherry'. However, there are two alternate arguments as to the work any such payment schedule (referred to in this discussion as a 'Division 2 schedule') has to do:

- It has the same work to do as a payment schedule delivered under BCIPA s18(2) (referred to in this discussion as a 'Division 1 schedule'), so that the adjudicator will consider substantive reasons advanced by the respondent for non-payment; or*
- Because a Division 2 schedule will only be delivered when there has been no Division 1 schedule, s18(5) of BCIPA applies (so that the respondent is liable to pay the full amount claimed), unless the respondent can demonstrate by the Division 2 payment schedule that the relevant BCIPA provisions do not apply (for example because the relevant contract was signed before 1 October 2004, is not a 'construction contract' as defined by BCIPA, or there was no relevant entitlement to deliver a payment claim under BCIPA etc).*

If the second argument prevails, a Division 2 schedule is not a 'second bite at the cherry' at all: merely a provisional nibble.

It is not yet clear which of these arguments will ultimately prevail. However, there was some discussion as to whether there is a relevant difference between any payment schedule delivered following a notice delivered under s21(2)(b) (a 'Division 2 schedule') and a payment schedule delivered under s18 (a 'Division 1 schedule'). The discussion was directed to the meaning of 'under Division 1' in BCIPA s17 (ie BCIPA s21) and the court said:

A construction of [BCIPA] which gives the words “under Division 1” work to do is to be preferred to a construction which gives them no work to do. And there is no strained or artificial use of language if “under Division 1” is construed as an adverbial phrase. Amflo Constructions Pty Ltd v Jefferies [2003] NSWSC 856 at [39]–[40].

Accordingly, it seems that there may be a difference between a Division 1 schedule and a Division 2 schedule. However, s18 is the only section of BCIPA that provides requirements as to the content of payment schedules and that section does not differentiate between Division 1 and Division 2 payment schedules.

Critics of the second argument say that it results in an adjudication where an adjudicator has no work to do, or nothing to decide. However, the adjudicator will still have to decide:

- *the due date for the progress payment to which the payment claim relates [BCIPA ss18(5) and s26(1)(b)]; and*
- *the relevant rate of interest payable [BCIPA s26(1)(c)].*

The adjudicator should also consider whether the 'basic and essential' requirements of BCIPA have been satisfied, and that any purported decision by the adjudicator will not be void.

Accordingly, if the second argument prevails and if the Claimant raises the s18(5) entitlement in its adjudication application, the matters which might be raised in a Division 2 schedule that an adjudicator may consider are likely to be limited to matters relating to the three matters listed above which an adjudicator must decide.”

48. With respect, I agree with Campbell J’s view in *Amflo* that there is a difference between the Division 1 and Division 2 payment schedules in so far as they relate to adjudication. In my opinion the Respondent has adopted an interpretation of the contents of a payment schedule based purely on the definition in s18, which does not take into account the context within which the payment schedules operate. I have recourse to the literal rule of statutory interpretation to justify my reasons for casting the net a bit wider to discern whether the contents of payment schedules should be any different.
49. 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. Higgins J stated at page 161:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that the intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient, impolitic or improbable.”
[cited in DC Pearce (1981) “Statutory Interpretation in Australia”, 2nd Ed, Butterworths, Sydney.]

50. I am embarking on a voyage without authority on point, but am content to accept the authority of *Amflo* as setting the compass direction for this journey. This compass direction is that there is a difference between Division 1 and Division 2 payment schedules, so to this extent I reject the Respondent’s submissions for the reasons outlined above, and accept those of the Claimant. What is the difference in the 2 payment schedules? The Respondent correctly states that s18 of the Act governs the payment schedules, but in my view this section only prescribes the minimum requirements of what should be in the schedule. There is nothing in the Act that prevents there being other matters referred to in the payment schedules.
51. Either a Division 1 or Division 2 payment schedule is used to clearly identify to a Claimant, firstly the payment claim to which it relates, and then what the Respondent is likely to pay, and, if applicable, the reasons why there is a difference from the payment claim. I cannot see that it strains anything within the Act, if a Division 2 payment schedule stated in the reasons for the difference resulting in no payment or less payment, *jurisdictional points* like:

- (a) The payment claim is invalid, so we owe nothing, or less than the claim;
- (b) The contract does not attract apply to the Act so this payment claim mechanism is inappropriate to claim money from us; or
- (c) We have already paid you some or all of this money, so why are you making this claim?

52. It is evident that a Division 1 payment schedule could also say these things, but it is possible that the Division 2 payment schedule is for those respondents who do not wish to engage in the document exchange at the early stages for tactical, commercial or cost reasons, but who genuinely believe that non payment is justified. If they are then confronted with an adjudication application or a summary judgement application, they of course run the risk of having an adverse finding against them, particularly in a court proceeding, but adjudication in my view allows the merits of the case, so far as the Act allows, to be ventilated rather quickly.
53. If there is a difference between the two payment schedules as identified by Amflo, what then does the Act allow by way of a difference between the two payment schedules? In my view the *jurisdictional points* do not contravene the provisions of the Act, and if the matter is considered from the point of view of liability to pay money, it is feasible that the adjudication process in dealing with a Division 1 and a Division 2 payment schedule can differ in its approach. It is clear that if a Division 1 payment schedule is not delivered, then s18(5) is invoked and the Respondent is liable to pay the claimed amount. If the Claimant goes to court seeking summary judgement under s19(2), the Respondent has limited grounds for defence in court provided under s19(4)(a). It must satisfy a court that it is not liable to pay this money, when s18(5) has already given this liability to the Respondent! To my mind the only escape hatch available to the Respondent in these circumstances are the jurisdictional points referred to above, e.g. "I am not liable to pay you because your payment claim is invalid, the contract does not attract the jurisdiction of the Act, or we have already paid you." If the Claimant for whatever reason follows the adjudication route under s19(2)(ii), the constraints to the defence in s19(4) do not apply, but does this mean that it is "open season" in the adjudication? I have the view that the characteristics associated with the limited types of defences available in the court in s19, sufficiently influence the type of adjudication under s19. However, to justify this approach one needs to read the Act as a whole, and it is necessary to have regard to s20 of the Act.
54. If one looks at the s20 consequences of not paying a claimant under a payment schedule, the Act does not automatically render the Respondent liable for the unpaid claimed amount as it does in s18(5). If a Claimant proceeds to court under this section, then s20(4)(a) allows different defences to be raised by the Respondent. Under this provision the Respondent can try and argue any or all of the requirements under s20(1) have not been adhered to, and these are more procedural issues such as service of payment claims etc. This is a vastly different series of defences that may be mustered. The Respondent is not having to overcome the deeming provision of s18(5) that it already owes money and therefore has to explain to the court that it only owes money if the Act applies, and that it has good reasons to suggest that the Act does not apply. In this instance, even though defending a summary judgement application in court is by no means easy, the Respondent's hands are not so tightly tied. Adjudication is also available under s20(2)(a)(ii), and I am of the view that because this adjudication sits in a separate section, it is a different type of adjudication to that under s19(2)(ii). Support for this proposition is further gleaned from s21 of the Act to which Amflo referred and I now discuss this issue.

55. s21(1) of the Act provides for adjudications, but it distinguishes between Division 1 and Division 2 payment schedules by having them differently positioned in the Act. A Division 1 payment schedule adjudication falls within s21(1)(a) and a Division 2 payment schedule is under s21(1)(b). This additional distinction lends support to my view that the Act provides adjudications with different characteristics because they are situated in different parts of the Act, they sit next to summary judgement court processes that provide for different defences to be raised, and they are governed by payment schedules that are also situated in separate parts of the Act. If these factors are taken into account with the recognition by a Supreme Court in NSW that there is a difference between a Division 1 and Division 2 payment schedule, then the *jurisdictional issues* approach identified above, and advanced by the Claimant is logical and consistent with the objects of the Act in s7 of allowing a person to receive and recover progress payments. In my view to allow a “second bite at the cherry” as identified by the Guide is not the correct approach as it slows down the process of a person receiving or recovering progress payments, and that the better view is that a Division 2 payment schedule, which is the one in this adjudication, is “merely a nibble”.
56. Accordingly, I am constrained to not consider the Payment Schedule except insofar as it may deal with the jurisdictional issues referred to above. In my reasons I have then had regard to the Payment Schedule for material facts that fall within the jurisdictional points to a sufficient degree so as to assist me to adjudicate the matter. However, the Payment Claim does not directly take any of the jurisdictional points above, so there is limited referral to the Payment Claim and the supporting documentation as a result, because these matters dealt with the more detailed issues which should be associated with a Division 1 payment schedule. I have, however, attached the Payment Schedule in the reasons together with the Payment Claim for ease of reference for the parties. I now turn to adjudicate the matter

Requirements of an adjudication decision

57. The Court of Appeal in Brodyn, referred to above, has provided a very useful guide for adjudicators. 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; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator’s

determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

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

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

Chronology of Service of Documents

58. Before considering the basic and essential requirements it is preferable to refer to a chronology of service of documents relevant to this adjudication, 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.

59. The Form 1 Application identified that the Payment Claim was served on 20 December 2005 and I have inspected the Tax Invoice dated 20 December 2005 (Attachment B) and noted that there was a stamp on the document stating that it had been faxed on 20 December 2005 and also posted. In Attachment E, which is the Affidavit of Martin Brooke, exhibit "MB7" attached the Respondent's Payment Schedule dated 2 February 2006. In the Payment Schedule, the Respondent refers to the Payment Claim dated 20 December 2005 and responds thereto. Accordingly, I find that the Payment Claim was served on the 20 December 2005 which satisfies the second basic and essential requirement of Brodyn.
60. The Form 1 Application identified that the Payment Schedule was served on the Claimant on 2 February 2006 and this is confirmed by the exhibit to Martin Brooke's Affidavit, attaching a Payment Scheduled signed by Paul Gedoun dated 2 February 2006, which was under cover of a letter from the Respondent's solicitors of the same date. Accordingly, I find that a Payment Schedule was served on the Claimant on 2 February 2006 as it was identified in the covering letter of the Respondent's solicitors that it had been sent by facsimile to the Claimant's facsimile number.
61. Under cover of the letter dated 13 February 2006, which was identified as being sent by courier, the application was made to QLS. I have already made reference to the chronological sequence of my appointment elsewhere, together with the request for and receipt of further submissions.

Detailed consideration of each Basic and Essential Requirement

The first basic and essential requirement

62. I need to be satisfied that there was a contract between the Claimant and Respondent, and if so whether the contract is a *construction contract* to which the Act applies.
- The Construction contract
63. 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.
64. I have found that a contract was made after 7 October 2004.
65. It is now necessary to decide the extent of the documents comprising the contract and its relevant terms.

Documents forming the contract

66. The Claimant provided the quote and the agreement in the application and asserts in paragraphs 1, 2 & 3 that these 2 documents constituted the contract. I have already found that the agreement in paragraph 4b referred to the quote, and I must have regard to what the Respondent says before deciding what material constituted the contract. I am limited in what use I can make of the Payment Schedule for the reasons stated above. However, I am able to consider the contents of the Payment Schedule as to the validity of the contract in which payment is claimed, so I refer to Payment Schedule to glean what the Respondent asserts is the contract.
67. The Respondent essentially agrees in paragraph 3(a) & (c) of the Payment Schedule that the quote and the agreement form part of the contract, but states at paragraph 3(b) that oral conversations between Mr. Paul Gedoun of the Respondent and Mr. Ted Turner of the Claimant on or about 28 or 29 April 2005 also formed part of the contract. I therefore find that the quote and the agreement formed part of the contract because the parties agree on this point.

68. However, I must now consider whether the oral conversations were terms of the contract. There is sworn evidence in the Affidavits of Paul and Joe Gedoun dated 22 February 2006 that these conversations took place on 28 or 29 April 2005 and without contrary material, I find that these conversations did take place. However, these conversations took place before the agreement was signed on 3 May 2005. Essentially the Respondent is asserting that I should have regard to oral evidence to add to the contract.
69. The parole evidence rule is a well known exclusionary rule of evidence the “*operates to exclude oral evidence to subtract from, add to, vary or contradict the written document*”: Vermeesch & Lindgren (2005): *Business Law of Australia*, 11th ed, paragraph 7.18, p152. The Respondent needs to assert that the oral conversations fall within one of the exceptions to the parole evidence rule, and in this instance, although it has not been raised by the Respondent, the exception would most likely be that the written document does not constitute the whole of the contract: Vermeesch & Lindgren (2005): *Business Law of Australia*, 11th ed, paragraph 7.19, p152.
70. I am not prepared to find that such an exception exists in this case. Clause 1 of the agreement states that:

*“1. **General** These Terms of Hire constitute the entire agreement between Fine Form Building Services Pty Ltd (“Fine Form”) and Hirer concerning the hire of formwork and scaffolding equipment (“Equipment”) and the supply of services by Fine Form to the Hirer, and shall prevail over all conditions appearing on any document of Hirer.”*

71. Although the tenor of Clause 1 appears to merely prevail over written conditions of the Hirer, and the Hirer, whom I find from the words in the agreement, means the Respondent, it is my view that it goes further in being an entire agreement clause. There is a rule that if a written contract is executed after the making of an oral statement, this will lessen the likelihood of the statement being treated as a term: Vermeesch & Lindgren (2005): *Business Law of Australia*, 11th ed, paragraph 7.3, p145. The written contract was entered into a few days after the alleged oral conversations, and I find no reference in the agreement to these oral terms. I have already found that the quote is incorporated by reference into the agreement, and I find that both these documents constituted the entire contract between the parties.
72. Accordingly, the first *basic and essential requirement* is satisfied as I have found a contract between the Claimant and Respondent and I have already found that it is a *construction contract* to which the Act applies.

The second basic and essential requirement

73. The *second basic and essential requirement* requires the service of the payment claim on the Respondent in accordance with s17 of the Act. Service of notices or other documents under the Act is governed by s103 of the Act, which provides for the contract requirements under s103(1), if the contract provides for service, otherwise s103(2), which refers to the provisions of s39 of the *Acts Interpretation Act 1954* as being able to apply. S39(1)(b) deals with service on a body corporate and allows service by facsimile to the head office, registered office, or a principal office of a body corporate.
74. The affidavit of Paul Gedoun, director of the Respondent stated that its offices were at 763 Sturt St, Townsville, which is consistent with the address on the contract. Furthermore, I

may have regard to the Payment Schedule to deal with the issues associated with whether the Payment Claim was valid, and in paragraphs 1 and 2 of the Payment Schedule the Respondent refers to the Payment Claim dated 20 December 2005, without taking issue that it had not been served. Accordingly I am satisfied that the Payment Claim was served by facsimile on the Respondent at its office on 20 December 2005 and that this constituted service under the Act, so that the *second basic and essential requirement* is satisfied.

The third basic and essential requirement

75. *The third basic and essential requirement* is for 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 QLS is an Authorised Nominating Authority (“ANA”) under the Act with registration number N1061878. 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..”

76. The ANA provided me with the Claimant’s material, which I have already described as the application, and I find this satisfies the requirements of writing in s21(3)(a). There is a Queensland Law Society Brisbane stamp on the application dated 14 February 2006. There is no material to the contrary so I find that the date the application was received by QLS was 14 February 2006. Accordingly, I find that an application was made to an ANA satisfying s26(3)(a) & (b) of the Act.

77. Accordingly, *the third basic and essential requirement* is satisfied.

The fourth basic and essential requirement

78. *The fourth basic and essential requirement* is for me to be satisfied that there was compliance with the Act regarding the reference to an eligible adjudicator: s21(6) of the Act. I have stated that the ANA referred the adjudication to me in writing on 14 February 2006, and this constitutes compliance with s21(6), providing I am an eligible adjudicator under s22 of the Act.

I am an 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 14 February 2006. In the chronology above, I identified that I accepted the application in writing to the parties by facsimile on 17 February 2006, and also by express post and 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, *the fourth basic and essential requirement* has been satisfied.

The fifth basic and essential requirement

79. *The fifth basic and essential requirement* is 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 merits of the case, to which I now turn. I restate that my approach in this adjudication follows what Hodgson JA stated in Hargreaves, and that is to consider the true construction of the contract and the true merits of the claim. I now turn to the Payment Claim and Payment Schedule (as far as I may, consistent with my earlier finding) to consider the true merits of the claim.

Payment Claim

80. A scanned copy of the Payment Claim is inserted below because it will be easier for the parties to follow the analysis relating to the Payment Claim :

"Attachment D"

TOTAL P.05



FINE FORM BUILDING SERVICES PTY LTD

PO BOX 7924 GARBUTT BC TOWNSVILLE QLD 4814

TEL 07 4774 4311 FAX 07 4774 4355

Email ffbs@bigpond.net.au

ABN 39 112 569 749

FORMWORK	HIRE	SCAFFOLD	SALES	PRECAST
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 **FAXED**
20 December 2005
Posted

TAX INVOICE

TO: Gedoun Constructions Pty Ltd
763 Sturt Street
PO Box 1138
TOWNSVILLE QLD 4810

FROM: Fine Form Building Services Pty Ltd
653 Ingham Road
MT ST JOHN QLD 4810
PO Box 7924
GARBUTT BC QLD 4814

CONTRACT DATED 3 MAY 2005 FOR HIRE OF SCAFFOLD FOR CONSTRUCTION PROJECT AT 34 GOLF LINKS DRIVE, KIRWAN ("the Contract")

This Payment Claim is for the supply of related goods and services in relation to construction work being the hire of scaffolding (including on site erection and dismantling) during the period between 3 May 2005 and 11 November 2005 pursuant to the Contract.

This Payment Claim is for the amount of **\$9,900.00** (inclusive of GST) and is due for payment 30 days after service hereof. The amount claimed includes amounts previously invoiced but not paid, particulars of which are as follows:

DESCRIPTION OF WORKS	AMOUNT PAID	AMOUNT PAYABLE ON THIS PAYMENT CLAIM
Progress Claim (invoice 79) dated 19 August 2005- Units 9 and 10 Amount of progress claim \$15,550.00	\$15,500.00	\$50.00
Progress Claim (invoice 106) dated 12 September 2005- Units 9 and 10 dismantled Amount of progress claim \$5,450.00	NIL	\$5,450.00
Progress Claim (invoice 199) cleaning fee pursuant to clause 8 and 9 of the Contract. 2 men x 40 hrs @ \$50 per hour (ex gst) Amount of progress claim \$4,400.00 inc. gst	NIL	\$4,400.00
TOTAL		\$9,900.00

This is a **Payment Claim** made under the *Building and Construction Industry Payments Act 2004*.

25-JAN-2006 15:22 FROM FINE FORM TO 47729222 P.05/0

Payment Schedule

A scanned copy of the Payment Schedule is inserted below, so that the parties can follow whatever analysis is necessary in relation to this document. It is clear, however, that limited recourse to this document is available because of my findings about the allowable contents in the Payment Schedule.

02/02 06 THU 15:44 FAX 07 47725742 CONNOLLY SUTHERS LAWYERS 002

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004

SECTION 18

PAYMENT SCHEDULE

This Payment Schedule is provided by GEDOUN CONSTRUCTIONS PTY LTD ("the Respondent") in relation to the Payment Claim dated 20 December 2005, issued by FINE FORM BUILDING SERVICES PTY LTD ("the Claimant"), in respect of the hire and provision of scaffolding for the project at 34 Golf Links Drive, Kirwan, Queensland.

The Payment Claim dated 20 December 2005 is in the amount of \$9,900.00 (inclusive of GST) and provided for payment to be due within thirty (30) days of service, being by 19 January 2006. The amount claimed in the Payment Claim is described as follows:-

Description of works	Amount paid	Amount payable on this payment claim
Progress Claim (invoice 79) dated 19 August 2005 - units 9 and 10 Amount of progress claim - \$15,550.00	\$ 15,500.00	\$ 50.00
Progress Claim (invoice 106) dated 12 September 2005 - units 9 and 10 dismantled Amount of progress claim - \$5,450.00	\$ Nil	\$ 5,450.00
Progress claim (invoice 199) cleaning fee pursuant to clause 8 and 9 of the Contract. 2 men x 40 hours @ \$50.00 per hour (exclusive GST) Amount of progress claim - \$4,400.00 inc. GST	\$ Nil	\$ 4,400.00
Total of the progress of this claim		\$ 9,900.0

In respect of the above Payment Claim, dated 20 December 2005, the Respondent hereby advises that it does not propose making any payment with respect to that Payment Claim, dated 20 December 2005, for the following reasons:-

- The Respondent is not indebted to the Claimant as alleged or at all.
- The Claimant is in fact indebted to the Respondent in relation to the contract the subject of the matter.
- The Contract the subject of the matter was comprised as follows:-
 - Claimant's quotation No. SC030/05 dated 25 April 2005;
 - Conversation between Paul Gedoun (on behalf of the Respondent) and Ted Turner (on behalf of the Claimant) at the offices of the Respondent held on either 28 or 29 April 2005;
 - Hire/Sales Agreement dated 3 May 2005.
- The contract provided for a hire of scaffolding equipment for a period of 9 weeks per building (there being 5 buildings in respect of such hire), at a lump sum price of \$50,000.00 (including GST).
- It was a term of the contract that in circumstances where the Respondent had the use of the scaffolding for a period of time less than that provided for by the contract (that is, 9 weeks per building), the Respondent would be entitled to a pro rata discount on the contract price, calculated in accordance with that part of the quotation which provides as follows:-

This has been capped for a period of 9 weeks per building after which time if any scaffold remains erected a cost of \$2.00 per face square metre will be charged per week.

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6. The 5 buildings which required scaffolding were residences numbered 1, 4, 5, 9 and 10.
7. In accordance with the contract, the lump sum contract price of \$50,000.00 was in respect of scaffolding hire of 63 days per building (9 weeks x 7 days per week), being in respect of the entire 5 buildings a total of 315 days (9 weeks x 7 days per week x 5 buildings).
8. In fact, the Respondent utilised the hire scaffolding to a total of 148 days, as follows:-
 - (a) Building No. 1 - 24 days;
 - (b) Building No. 4 - 34 days;
 - (c) Building No. 5 - 42 days;
 - (d) Building No. 9 - 24 days;
 - (e) Building No. 10 - 24 days.
9. On the basis that the lump sum contract price of \$50,000.00 equates to a daily hire rate of \$158.73, the Respondent became obliged to pay to the Claimant, and in relation to the hire of the scaffolding, an amount of \$23,492.04 (148 days x \$158.73 per day).
10. In relation to the contract, and in relation to the scaffolding hire, the Respondent has paid to the Claimant the sum of \$44,500.00.
11. As a consequence of the foregoing, the Respondent is therefore entitled to a refund from the Claimant, and by way of moneys paid under a mistake of fact, of the sum of \$21,007.96.
12. The Claimant's tax invoice numbered 109 (11 November 2005) is for an amount of \$4,400.00, said to arise on the following basis:-

Cleaning fee. 2 men x 40 hours @ \$50.00 per hour

\$ 4,000.00

Under the terms of our hire and sales agreement, signed by your company on 3 May 2005. A cleaning fee applies under terms of hire point 8, for scaffold returned from site

GST

\$ 400.00

\$ 4,400.00

13. Clause 8 of the written aspect of the contract is in the following terms:-

8 Return of Equipment by Hirer

Unless [the Claimant] agrees otherwise in writing, [the Respondent] shall be responsible for the return of the equipment to [the Claimant]. Return of the equipment upon expiry of the hired period will only be accepted by [the Claimant] at the depot from which it was obtained, during normal business hours. At the same time as returning the equipment, [the Respondent] may provide a representative to check the quantity and description of equipment and time of return is as stated on the return docket. If no representative of [the Respondent] is provided, the return docket shall be conclusive evidence as to the quantity, description, date, condition, state of repair, and time of return. In all cases of returns whether by [the Respondent] or [the Claimant], the equipment should be stacked, cleaned and sorted in the manner as received when delivered. Any restacking and sorting will be at the cost of [the Respondent]. [The Respondent] agrees that it will return all equipment hired by it without any chemical, concrete, paint, and hazardous or dangerous substances affecting the equipment. No damaged equipment will be accepted by [the Claimant], and [the Claimant] retains the discretion to continue to charge hire costs until the equipment is returned in a clean and safe condition.

14. Tax invoice No. 109 was rendered by the Claimant in the order of two months after the return of the scaffolding equipment to the Claimant.
15. The Claimant did not ever provide the Respondent with a return docket of the sort referred to in clause 8 of the agreement.

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16. Clause 8 of the written aspect of the contract does not entitle or allow the Claimant to levy any charge to the Respondent in respect of the cleaning of the scaffolding equipment.
17. The scaffolding equipment returned by the Respondent to the Claimant was in precisely the same condition as it was when first provided by the Claimant to the Respondent, such that:-
 - (a) cleaning of the scaffolding equipment was unnecessary; and
 - (b) such cleaning of the scaffolding equipment as the Claimant saw fit to undertake was the responsibility of the Claimant and not the Respondent.

DATED at Townsville this 2nd day of February 2006



Paul Gedoun
For and on behalf of Gedoun Constructions Pty Ltd

slr1118702/kw

Analysis of the more detailed requirements

81. Turning now to the *first more detailed requirement*, 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.”

The Tax Invoice refers to the contract dated 3 May 2005 for hire of scaffolding, including site erection and dismantling, at the site and identifies unit numbers, as well as some cleaning work.

Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited* [2003] NSWSC 1103 (“Leighton”) 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, being supply of related goods and services, is identified sufficiently enough for the Respondent to respond with a payment schedule (which the Respondent provided without querying the adequacy of the identification of the material), which I find satisfies s17 (2)(a) of the Act.

The table in the invoice provided the calculation of the amount payable of \$9,900, which I find to be the **claimed amount**, and satisfies s17 (2) (b) of the Act.

There is an endorsement at the foot of the payment claim which I find satisfies s17 (2) (c) of the Act.

Accordingly, I find that the *first more detailed requirement* is satisfied.

82. I must now turn to the *second more detailed requirement* 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 20 December 2005, and I must have recourse to the Act to determine the time within which the application is required to be made.

83. 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...
- (b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

- (2) An adjudication application to which subsection (1)(b) applies can not be made unless –
 - (a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim;

(b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice.

(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--

... (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."

84. The Respondent did not serve a payment schedule on the Claimant in response to the Payment Claim. However, the Claimant had to wait until the due date for payment before it could decide whether to seek summary judgement in Court or commence adjudication, see s19(1)(b) of the Act. The contract at Clause 4 of the Terms of Hire provided that all invoices were to be paid strictly within 30 days of date of invoice. S15(1)(a) of the Act determines the meaning of the due date for payment if the contract contains a provision in this regard that is not void under s16 of the Act or under ss67U or 67 W of the *Queensland Building Services Authority Act 1991* which relates to construction management contracts and subcontracts. There is no material to suggest it falls foul of s16 of the Act or that it was a construction management subcontract, so I find that the *due date for payment* in accordance with s15(1)(a) of the Act is **19 January 2006**.

85. I have earlier referred to the service of notices under the Act and that the Payment Claim was validly served on the office of the Respondent. The Respondents further submissions at paragraph 3 stated that it received the notice on 25 January 2006. The Claimant had 20 days after the *due date for payment* to submit the notice under s21(2)(a) of the Act, and I find that it served the notice by facsimile on 25 January 2006, which is within the 20 day period.

86. I find that the 26 January 2006 was the statutory holiday of Australia Day, which fell on a Thursday, so that the first of the 5 business days, according to s21(2)(b) of the Act, within which the Respondent had time to deliver a Division 2 payment schedule was the 27 January, and the last day of the 5 day period within which to deliver the Payment Schedule was 2 February 2006, which I find is within time.

87. The Claimant's application was required within 10 business days of after 2 February 2006, and so its delivery on 14 February 2006 was on the 8th day and also within time.

88. I must now deal with the adjudication application's contents for the second limb of *the second more detailed requirement*, 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 Form 1 of the application and on paragraph 3 of the Adjudication Claim Check list attached to the Form 1. The Payment Schedule also is referred to in Form 1 of the application and paragraph 4 of the Adjudication Claim Check list. The Respondent in the response took no issue with the identification of the Payment Claim and Payment Schedule in the application, so I find that both have been sufficiently identified in compliance with s21(3)(d).
89. s21(3)(e) also needs to be satisfied. I note from the covering letter to the application dated 13 February 2006 that a fee of \$242 was paid by cheque and I am therefore satisfied that an adjudication application fee was paid such that s21(3)(e) has been satisfied.
90. I now refer to s21(3)(f) and have noted in the Claimant's material above that the Claimant in Attachment D provided its submissions. The Respondent does not challenge this so I find that submissions relevant to the application have been provided. And I am therefore satisfied that *the second more detailed requirement* has been satisfied.
91. I now need to turn to *the third more detailed requirement* which deals with the time when an adjudication decision may be made under s25 of the Act. 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 22 February 2006 by facsimile. s24(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."*

I provided the parties with notice of acceptance of my nomination on Friday 17 February 2006 by facsimile and express post. Although the facsimile transmissions showed that transmission of acceptance was effected, at the start of an adjudication, I prefer to rely upon the express post service as governing the date that notice of acceptance was received. I noted that the express post envelopes stated that the post would be delivered on the next business day. Accordingly, I am satisfied that the acceptance was received by the Respondent no later than Monday 20 January 2006. This means that the adjudication response had to be delivered within 2 days thereafter, and this was achieved by facsimile on 22 February 2006. This 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 23 February 2006, the day after receipt of the adjudication response. Accordingly, *the third more detailed requirement* is satisfied.

92. I must now satisfy *the fourth more detailed requirement*, which requires me to deal with those matters to be considered under s26(2) of the Act. In considering whether s26(2)(a) is complied with, I consider that it is firstly necessary to 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 identified that payment was due 30 days after service of the Payment Claim of 20 December 2005. The Respondent in the Payment Schedule identifies that the payment was due on 19 January 2006, and the application also identifies this as the date, and I have already found that this was the due date for payment. However, I need to determine the *reference date*.

93. 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...”

Although, I have already found the due date for payment as defined in s15 by reference to clause 4 of the terms of the contract, there is no reference date in the contract, as it appeared that invoicing could take place at any time. 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...”* Accordingly, I have regard to Schedule 2(b) definition of *reference date* because the contract does not provide for the matter. This definition provides that the reference date is the last day of the named month in which the related goods and services were first supplied; and then the last day of each later named month.

94. The Payment Claim was dated 20 December 2005, so it would be too early for related goods and services supplied in December 2005. Having regard to the Payment Claim, I note the hire period asserted was from 3 May 2005, to 11 November 2005. This means that the reference date for the November claim would be 30 November 2005. The Payment Claim was dated 20 December 2006, and I am satisfied that it is from 30 November 2005, i.e. it was not earlier than that date for the November construction work. This means that under the contract the *reference date* for this claim was 30 November 2005, as defined by Schedule 2 of the Act.

95. 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 30 November 2005.

96. To further satisfy *the fourth more detailed requirement* I now need to turn to essentially the merits of the application, and to so do I must be mindful of only those matters which arise 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.
97. 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....”

98. 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 the supply on hire of scaffolding and labour to erect and dismantle this scaffolding, 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).

99. 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—...
(w) erection of scaffolding ...”*

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 supply for hire and erection of scaffolding. 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.

100. 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, viz invoice 79 and invoice 106 at least. 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.*

101. Adjudication is essentially the valuing of debt arising from work done under a construction contract. This function is critical because s26(1)(a) requires a decision on the amount of the progress payment. I am dealing with the merits of the claim and note that 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 so that the parties are clear as to how the adjudication amount is arrived at:

“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."

102. 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. It is incumbent upon the Claimant to discharge its onus, before this onus shifts to the Respondent. This means I must closely scrutinise the Payment Claim and the contract to assess what the appropriate progress payment should be. I have already found that I may have limited regard to the Payment Schedule but the Claimant must still satisfy me that its claim is valid.

103. The three amounts claimed in the Payment Claim comprise the following in summary:

Description of works	Amount paid	Amount payable on this payment claim
Invoice 79 – Units 9 & 10 Claim \$15,550.00	\$15,500.00	\$50.00
Invoice 106 - Units 9 & 10 dismantled Claim \$5,450.00	\$nil	\$5,450.00
Invoice 199 - cleaning 2 men x 40 hours @\$50.00 per hour (excl GST) Claim \$4,400.00	\$nil	\$4,400/00
	Total	\$9,900.00

104. If the Claimant had sought to recover the payment claim as a debt owing in a court of competent jurisdiction under s19(2)(a)(i), a court may have simply given judgement on the amount under s19(4)(a), providing it was satisfied that the Respondent is liable to pay the claimed amount under s18, and that the Respondent failed to pay any or part of the claimed amount, as provided in s19(1).

105. I am satisfied that because the Respondent failed to provide a Division 1 payment schedule as required by s18(4), the Respondent was liable to pay the claimed amount on 19 January 2006 because s18(5) applies. However, the Claimant elected to have the matter adjudicated under the provisions of s19(2)(b), which required the Claimant to follow other procedural steps under the Act. I have already stated the extent to which I may have regard for the Payment Schedule, and have determined this adjudication on the merits with those constraints in mind.

106. I am obliged to value the claim in accordance with the Act, and I have encountered some difficulty in following the Claimant's figures, because it is not clear how it arrived at the figures of \$5,450 for Units 9 and 10 and how it justifies valuing the cleaning work. In valuing related goods and services, I must value them under the terms of the contract, s14(2)(a), or if the contract does not provide for valuation, I can have regard to the contract price for the goods and services and any other rates or prices stated in the contract and any variations agreed, as provided by s14(2)(b) of the Act.

107. It is not clear to me how the claim for \$15,500 for Units 9 and 10 was derived. The rates provided under the description payment terms in the quote do not assist me. If the Claimant asserts that it had not been paid at all for Units 9 and 10 under the contract by my

calculation based on the rates provided below, the figure to be claimed would be as follows per building: $\$6,000 + \$1,500 + \$1,500 = \$9,000$ per building x 2 buildings = $\$18,000$. This figure is not reflected in the claim amount of $\$15,500$, and indicates to me there is some other basis that was used for valuing this amount, and it may not be in accordance with the rates that I have identified. The rates per building were as follows:

Once erected	\$6,000
Seven days after	\$1,500
21 days after	\$1,500
Dismantling	\$1,000

Furthermore, the dismantling of Units 9 and 10 resulted in a figure of $\$5,450$, which does not accord with using the dismantling figures in the contract of $\$1,000 \times 2$ buildings = $\$2,000$. Accordingly, I am unable to value the claim for Units 9 and 10 on this basis because it differs significantly from the Claimant's figures, suggesting that there may have been variations agreed, of which I am not aware.

108. I must value the claim, however, and I am prepared to follow s14(2)b(i), which allows me to have regard to the contract price for the goods and services. The contract price was $\$50,000$ in the Invoice under paragraph B. I may refer to the Payment Schedule for support for this fact, and paragraph 4 of the Payment Schedule refers to a Lump Sum Price of $\$50,000$. I therefore find that this was the contract sum. The Claimant in its submissions 25(k) states that only $\$45,500$ of the contract price had been paid. This is verified by recourse to paragraph 10 of the Payment Schedule, to which I am entitled to refer in this regard, so I find that $\$5,500$ of the contract price has not been paid. I am prepared to value this as part of the amount of the progress payment under s13(b) of the Act. The fact that this amount coincides with the addition of the first two items in the payment claim, viz $\$50$ and $\$5,450$, totalling $\$5,500$ may be coincidental. However, I am content with my calculation.

109. I was unable to find a term of the contract that provided that the Claimant could claim for cleaning costs, except Clause 19 with reference to a Hirer's default allowed "*Upon termination, Fine Form may continue to charge hire at the current rate until the equipment is returned to Fine Form's depot and/or charge Hirer for repair of damages or cleaning of the Equipment that may be required..*" There is no material suggesting that the Respondent was in default such that the contract was terminated. Furthermore, the contract makes no mention of hourly rates for cleaning equipment and how many people were required to carry out this function. However, much the Claimant may feel justified in claiming for this sum, I am unable to value this work under the contract, or with regards to the contract price, other rates or any variation agreed between the parties because there were no such rates or variation in the material.

110. Accordingly, the adjudication amount based on the amount of progress payment is $\$5,500.00$.

The adjudicated amount

111. I have already found that the **adjudicated amount of $\$5,500.00$**

Due date for payment

112. **I have already found that the due date for payment is 19 January 2006.**

Rate of interest

113. 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 found that there was no rate of interest identified in the contract. Accordingly, I have recourse to s15(2)(a) and refer to s48(1) of the *Supreme Court Act 1995* which refers to the rate of interest as prescribed by Regulation and currently Regulation 4 has fixed interest at 10% per annum. I find this is the applicable interest to apply to the adjudication

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

Authorised Nominating Authority and Adjudicator's fees

115. The Claimant has obtained approximately 50% 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. Valuation of the Claimant's Payment Claim was extremely difficult because there were not easily identified rates in the contract against which one could allocate amounts of hire or labour. The Claimant has to prove its case, and it has adhered to its obligations under the Act in bringing the matter to adjudication, it has succeeded only in part. However, the Respondent failed to deliver a Division 1 payment schedule, and then did not deal with the limited jurisdictional points that I have found are allowed under a Division 2 payment schedule.

116. It is not appropriate to speculate as to what would have happened in this dispute if the Division 1 payment schedule had been given. It is up to the Claimant to prove its case and then for the Respondent to satisfy its evidentiary onus. To that end the Respondent was unable to make many inroads in relation to the evidentiary onus, because I was only able to have limited regard to the Payment Schedule. Nevertheless, I am obliged to value the claim on its merits and the Claimant only received half of its claim. Accordingly, I decline to exercise my discretion to alter the default provision in s34(3) and 35(3) that the parties share in equal proportions the ANA's fees of \$242.00 and my fees.

Chris Lenz
Adjudicator

8 March 2006