Adjudicator's Decision

Pursuant to the Building and Construction Industry Payments Act 2004

Shield Contractors Pty Ltd (Claimant)

and

R G & M Carroll (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 23 February 2006 is **$127,859.05 incl GST**

b. The date on which the amount became payable is **8 February 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 $385 and the adjudicator's fees in the following proportions. The Claimant to pay 25% of the ANA's and my fees and the Respondent to pay 75% of the ANA's and my fees.

Signed: ……. Date:……

Chris Lenz Adjudicator

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Background

1. Shield Contractors Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by R G & M Carroll (referred to in this adjudication as the "Respondent") to undertake civil engineering works, comprising earthworks, roadworks and drainage ("the works") at Kooroomba Estate Rural Subdivision (the "site").
2. The Claimant and Respondent entered into a Formal Instrument of Agreement on 21 July 2005 (the "contract") for the contract sum of $922,598.49.
3. The work commenced on 1 August 2005 and practical completion was achieved on 16 December 2005.
4. Progress claims were issued progressively throughout the contract.
5. Progress Claim #1 dated 31 August 2005 for $183,341.40 was paid by Progress Payment #1 dated 12 September 2005.
6. Progress Claim #2 dated 30 September 2005 for $357,285.61 was paid by Progress Payment #2 dated 7 November 2005.
7. Progress Claim #3 dated 1 November 2005 for $418, 775.94 was part paid in Progress Payment #3 dated 30 November 2005 for the sum of $303,824.00.
8. Progress Claim #4 dated 3 December 2005 for $342, 508.13 was part paid by Progress Payment #4 dated 9 January 2006 for $232, 771.25.
9. Progress Claim #5 dated 11 January 2006 for $170,383.51 is the subject of this adjudication and comprised:
    i. Variations to the contract arising out of directions of the Superintendent under Clause 40 of the contract;
    ii. Costs of delays for which extensions of time had been awarded under the contract.
10. Progress Claim #5 contained the words, "This is a Payment Claim made under the *Building and Construction Industry Payments Act 2004"* (the "Act") and I call this document "the Payment Claim".
11. Kellogg Brown and Root Pty Ltd ("KBR") provided a Payment Schedule dated 15 February 2006 ("the Payment Schedule").
12. The Claimant made an application for adjudication on 23 February 2006.

Appointment of Adjudicator

13. The Claimant applied to the Institute of Arbitrators and Mediators Australia ("IAMA") on 23 February 2006 for adjudication. By letter dated 23 February 2006 IAMA referred the adjudication application to me to determine.
14. IAMA is an Authorised Nominating Authority under the Act with registration number N1057859. I am a registered adjudicator under the Act with registration number J622914.
15. By letter dated 28 February 2006 sent by facsimile to the Claimant and to the Respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.

Material provided in the adjudication

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 23 February 2006 claiming $170,383.51 (including GST) (the "application") comprised the following documents:
    (a) Covering letter dated 23 February 2006;

(b) Adjudication Application dated 23 February 2006;
(c) Cheque No. 003074 in the amount of $385.00 for the adjudication application fee;
(d) Annexure "A" relating to the to the Claimant's submissions relevant to the application (the "Claimant's submissions");
(e) Annexure "B" - Bundle of supporting documents comprising:
i. TAB 1 – The Payment Claim #5 dated 11 January 2006 including attachments;
ii. TAB 2 – Facsimile Transmittal confirmation of Payment Claim delivery dated 11 January 2006;
iii. TAB 3 – s21(2) Notice under the Act dated 9 February 2006 (the "notice");
iv. TAB 4 – Facsimile Transmittal confirmation of the notice;
v. TAB 5 – Formal Instrument of Agreement dated 21 July 2005 ("FIA");
vi. TAB 6 – relevant extracts from the contract documents relating to Clauses 35, 36, 40 and 42 of AS2124-1992 General Conditions of Contract ("GCC");
vii. TAB 7 - Annexure to the GCC;
viii. TAB 8 – Certificate of Practical Completion dated 12 January 2006;
ix. TAB 9 – "Payment Schedule" dated 15 February 2006 issued by Kellogg Brown and Root Pty Ltd ("KBR") called "the Payment Schedule".

Respondent's Material

The Respondent's material comprised the following:

(ii) Respondent's letter dated 2 March 2006, (the "response") which was hand delivered to me comprising the following:
(a) Attachment A: The Payment Claim #5 dated 11 January 2006;
(b) Attachment B: The Payment Schedule #5 dated 15 February 2006;
(c) Attachment C: Payment Claim #4 dated 3 December 2005;
(d) Attachment D: Payment Schedule #4 dated 5 December 2005;
(e) Attachment E: Payment Claim #3 dated 1 November 2005;
(f) Attachment F: Payment Schedule #3 dated 15 November 2005.

Threshold jurisdictional issues

17. There are two threshold jurisdictional issues contained in s3 of the Act regarding:
(1) the date of the contract, and
(2) construction work being carried on in Queensland,
that must be satisfied before I have jurisdiction to adjudicate this dispute. 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. I have to refer to the parties' material to discern the existence of a *construction contract.* The Claimant asserts in paragraphs 2-4 of its submissions that the contract comprised the FIA (attached in Tab 5), with attached documents (some of which were included in Tabs 6 & 7). I have looked at the response to determine whether the Respondent takes issue with this assertion, and although there were objections to interpretation of the contract, I could find no material denying the existence of these documents, and their application to this adjudication.

20. However, I am obliged to find jurisdiction, so that even if there is no objection by the Respondent to the Claimant's submissions, I need to be satisfied of the existence of a *construction contract* to which the Act applies. I refer to the Payment Claim in Tab 1, and Attachment 1 of that document attaches the FIA. Tab 1, Attachment 2 attaches a Tender Form relating to Contract BEV420/1, which I find is for the works as it refers to the Respondent, and works at the site. Attachment 3 attaches a Bill of Quantities for Contract No. BEV420/1, which I find is the same contract number as that identifying works at the site. The Respondent's material also attaches the Payment Claim, with the same documents attached, and did not controvert their existence. Therefore, I am prepared to accept that the FIA, and other documents referred to above, evidence a contract. This is not a finding about the contents of the contract, but merely a finding as to the existence of a written contract,

which I find from Tab 1, Attachment 1 was dated 21 July 2005. This is after 1 October 2004 thereby ensuring that the Act applies thus far, providing it involves a *construction contract.*

21. I find that the FIA referred to the Respondent, called the Principal in this document *"…is desirous that certain Works should be undertaken, viz: Earthworks, Roadworks and Drainage and has accepted a Tender by the Contractor for undertaking completion and maintenance of such Works…"* I find that these words satisfy part of the definition of *construction contract*, to which I will now refer, insofar as it demonstrates that *one party undertakes to carry out construction work for…another party.* I need now to establish whether the works constitute *construction work* within the meaning of the Act.

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

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

I have found that the contract was made after 1 October 2004. I have had regard to the FIA and note that it specified the Claimant was to carry out earthworks, roadworks and drainage works for the Respondent at the site viz. "Karoomba", FM Bell Road, Mount Alford, in the State of Queensland. I find therefore that the contract was for works in Queensland.

For present purposes the contract falls within the first part of the definition of *construction contract* in the Act, because it is a "*contract, agreement or other arrangement…*"

23. I must also be satisfied that the contract falls within the meaning of *undertakes to carry out construction work* within the meaning of the Act. I have already found that one party has undertaken to carry out for another party, so it is necessary to look at the meaning of *construction work.*

24. *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;*
> *(b) The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines…pipelines, reservoirs,…and instillations for land drainage or coast protections;…*
> *(e) any operation that forms an integral part of, or is preparatory to, or is for completing work of the kind referred to in paragraph (a), (b) or (c), including-*
> *(i) site clearance, earth-moving, excavation, tunnelling and boring; and*
> *(ii) the laying of foundations; and …*
> *(v) site restoration, landscaping and the provision of roadways and other access works;…*

(g) carrying out the testing of soils and road making materials during the constructions and maintenance of roads; …"

25. The contract refers to earthworks, roadworks and drainage and referring to each one of these elements in turn, I find that they all fall within the definition of *construction work.* The rules of statutory interpretation require that words should be taken to be used in their ordinary sense: *R v Peters* (1886) 16 QBD 636 at 641 [cited in: DC Pearce (1981) *Statutory Interpretation in Australia*, 2nd Ed, Butterworths, Sydney at page 30]. s10 (1)(e)(i) refers to *earth-moving, excavation*. I am satisfied by giving these words their ordinary meaning in the construction industry and using commonsense, that earthworks falls within the definition of *earth-moving, excavation*. Furthermore, "roadworks" falls directly within the definition of s10(1)(b) of the meaning of *construction work.* Moreover, "drainage" falls within the meaning of *installations for land drainage* in s10(1)(b) of the Act. Therefore I find that all the activities described in the works are *construction work.*

26. I have already found that the works were for the site in Queensland. I find that the contract date was after 1 October 2004, and it related to *construction work* being carried out in Queensland, thereby satisfying threshold issues numbers 1 & 2 providing that the exclusions in ss3(2) and 3(3) do not apply.

27. Turning firstly 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. Both the Bill of Quantities (Attachment 3 in Tab 1) and the tender form (Attachment 2 in Tab 1) refer to Contract BEV420/1 with a contract amount of $922,598.49. Whilst there is some controversy in the parties' material about the contractual significance of the Bill of Quantities, to which I will refer later, I am satisfied that the construction contract contained an agreement to pay this sum, which appears to be the value of the work. However, I make no further analysis of the contract terms at this stage, as I do not yet have jurisdiction.

28. s3(2)(b) of the Act needs to be considered in a little more detail, because it appears that the Respondent lived at the site and I need to be satisfied that the *construction contract* was not for the "carrying out of domestic building work", because if this is the case, then the *construction work* falls outside the ambit of the Act. Schedule 2 of the Act identifies *domestic building work*, which in turn refers to s8 of the *Domestic Building Contracts Act 2000* ("DBCA"). s8 of the DBCA defines *domestic building work* as either the erection or construction of a detached dwelling [s8(1)(a)], or the renovation, alteration, extension, improvement or repair of a home [s8(1)(b)], or the removal or resiting work for a detached dwelling [s8(1)(c)]. Schedule 2 of the DBCA defines *detached dwelling* as a single detached dwelling or a duplex. I am satisfied that the work relating to earthworks, roadworks and drainage, as described by the Bill of Quantities (whether they form part of the contract, or are merely a mechanism for valuing variations), could not be considered as associated with a detached dwelling, nor do they appear to be with reference to *a home* as described in s8(1)(b) of the DBCA. Accordingly, I am satisfied that the *construction contract* is not excluded by the *domestic building work* exclusion.

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

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

Scope of the determination

31. Now that I have jurisdiction to proceed, the Act at s26(1) requires that I am to determine:
    a. The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the "**adjudicated amount**"); and
    b. The **date** on which any such amount became or becomes payable; and
    c. The **rate of interest** payable on any such amount.

32. 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."*

33. 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.

Requirements of an adjudication decision

34. The Court of Appeal in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 394* ("Brodyn") has provided a very useful guide for adjudicators in relation to the requirements of an adjudication decision. At para 53 and following, Hodgson JA said with reference to the similar 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

35. The application states that the Payment Claim was served on 11 January 2006, and I will deal with its contents and the timing of service in the decision below.

36. The Claimant's submissions paragraph 47 stated that no Payment Schedule was issued within the time required by s18(4) of the Act. Consequently, the Claimant contends at paragraph 54 and 56 that it served a notice under s21(2) of the Act on 9 February 2006, and it is attached at Tab 3.

37. Although the application stated that no payment schedule was served on the Claimant, there is a document that I have defined as the Payment Schedule, which the Claimant concedes was served on it on 15 February 2006. The Respondent, on page 2 of the response, states that this document is a payment schedule under the Act, and was submitted in accordance with s21(2)(b) of the Act, and it will require careful consideration in this decision.

38. Under cover of the letter dated 23 February 2006, the application was made to IAMA, and IAMA's nomination letter to me dated 23 February 2006 stated that the application was received at IAMA on 23 February 2006.

39. I accepted the nomination by facsimile to the parties on 28 February 2006, and the response was delivered to me on 2 March 2006 by KBR.

Detailed consideration of each Basic and Essential Requirement

The first basic and essential requirement

40. 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

41. I have already found that there was a contract, characterised as a *construction contract* under the Act, which was made after 1 October 2004.
42. It is now necessary to decide the extent of the documents comprising the contract and its relevant terms. However, closer scrutiny of the contract will take place only if required, when the merits of the claim are analysed in more detail.

Documents forming the contract

43. TAB 5 of the Claimant's documents refers to the Formal Instrument of Agreement dated 21 July 2005 (the "FIA"), and without material to the contrary in the Respondent's material, I found that it formed part of the contract. The FIA referred to other documents which were purportedly part of the contract ('the listed documents"), comprising:
    (a) The said Tender dated **[no date entered – my comment]**
    (b) The Condition (sic) of Tendering
    (c) Notice to Tenderers No. 1
    (d) The General Conditions of Contract
    (e) Letter of Acceptance
    (f) The drawings and specifications.

44. In the application at TAB 5, the Claimant did not provide me with any of the listed documents, apart from the General Conditions of Contract extracts, in TAB 6, relating to clauses 34 through to 42. In TAB 7, the Claimant provided Part A to the GCC.

45. However, in TAB 1 of the Claimant's material, I found attachments to Progress Claim #5, listing a Schedule of Attachments to which I now refer comprising:

    i. Attachment 1 - the FIA
    ii. Attachment 2 - a Tender Form dated 18 July 2005 signed by the Claimant and addressed to the Respondent
    iii. Attachment B - Notice to Tenderers No. 1
    iv. The various other attachments which referred to specific extracts of the job specification, some standard drawings from Boonah Shire and other correspondence together with reference to Clause 36 of the GCC.

46. I have already mentioned that the Payment Schedule and the response do not take issue with the Claimant's submissions 2 through to 4, as to what constituted the contract. In the Payment Schedule and the response, there are references to differences in interpretations of the contract. However, apart from paragraph (ii) of the response on page 3, which denies that the Bill of Quantities formed part of the contract, the Respondent does not take issue with the documents the Claimant asserts constitute the contract. I find therefore that the contract comprises the FIA, to which are attached the following documents, only some of which have been provided in the adjudication:
    i. the Tender dated 18 July 2005 – Attachment 2 to Tab 1
    ii. the Condition of Tendering – not attached to the parties' material
    iii. Notice to Tenderers No. 1 – Attachment B to Tab 1
    iv. the General Conditions of Contract – only extracts provided throughout the material, including Part A Annexure to the GCC (in Tab 7)
    v. Letter of Acceptance – not attached to the parties' material
    vi. The drawings and specifications – only some of which were attached.

47. I am satisfied that there was a contract between the Claimant and Respondent which is a *construction contract*, to which the Act applies and therefore I have established the *first basic and essential requirement*.

The second basic and essential requirement

48. 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 service under the contract requirements under s103(1), if the contract provides for service. S103(2) of the Act otherwise applies, which refers to the provisions of s39 of the *Acts Interpretation Act 1954* ("the AIA") as being applicable. s39(1)(a) of the AIA deals with service on an individual, and s39(1)(a)(ii) specifically refers to service being allowed *by leaving it at, or by sending it by post, telex, facsimile, or other facility to, the address of the place of residence or business of the person last known to the person serving the document…*

49. TAB 1 in Annexure B of the Claimant's document attached Payment Claim #5, and Attachment A of the response also included this document which I have called the Payment Claim. It was addressed to the Respondent at Karoomba, 168 FM Bell Road, Mount Alford QLD 4310. I find that this is the address of the Respondent because it agrees with the

address of the Principal in Part A of the Annexure to the GCC. The Payment Claim also made reference to a facsimile number 07 5463 0041 (the "facsimile number") and Express Post. Given that both parties attached the Payment Claim to their documents, without controversy regarding its existence, I find that it is a payment claim under the Act. I will refer later to a *more detailed requirement* for the contents of the Payment Claim.

50. I must now establish that the Payment Claim was served and ascertain the date of service, because the timing of service of documents under the Act is critical: *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWC 903.

51. The Payment Claim makes reference to the facsimile number, and in Tab 2 of the Claimant's material there is a Transmission Verification Report dated 11 January 2006 with the time of 15.47 confirming that 13 pages had been sent to the facsimile number. The contract documents provided in the adjudication material did not provide the facsimile number. However, without material from the Respondent to the contrary, I am prepared to find that the Payment Claim was sent by facsimile to the Respondent. The fact that the Respondent has engaged in the adjudication and made reference to the Payment Claim suggests, on balance, that the Payment Claim was received by facsimile.

52. The extracts from the GCC provided in the adjudication material did not contain a clause dealing with *service of notices*, so I am unable to find that the contract provided for service. Accordingly, s103(2) of the Act applies and I am satisfied that the Payment Claim was served by facsimile on the Respondent on 11 January 2006. This constituted service under the Act because s39(1)(a) of the AIA allows service by facsimile, so that the *second basic and essential requirement* is satisfied.

The third basic and essential requirement

53. *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 s21 of the Act. I have already found that IAMA is an Authorised Nominating Authority ("ANA") under the Act with registration number N1057859. s21(3) of the Act provides:

> *"(3) An adjudication application—*
> *(a) must be in writing; and*
> *(b) must be made to an authorised nominating authority chosen by the claimant; and…"*

54. 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). The ANA advised me that it received the application on 23 February 2006 and without contrary material, I find that this is the date the application was received by IAMA. Accordingly, I find that an application was made to an ANA satisfying s26(3)(a) & (b) of the Act.

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

The fourth basic and essential requirement

56. *The fourth basic and essential requirement* requires 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 23 February 2006, which I received on 24 February 2006, and this constitutes compliance with s21(6) of the Act, providing I am an eligible adjudicator under s22 of the Act.

57. 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 received by me on 24 February 2006. In the chronology above, I identified that I accepted the application in writing to the parties by facsimile on 28 February 2006, 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.

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

The fifth basic and essential requirement

59. *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. My approach in this adjudication is to consider the operation of the contract and the merits of the claim.

60. Before I refer to the Payment Claim and Payment Schedule, which are the framework documents for determination of the true merits of the dispute, it is incumbent on me for the benefit of the parties, to identify the substantive issues arising out of the material in this adjudication.

The substantive issues in this adjudication

(a) Whether there is a difference between a Division 1 and Division 2 payment schedule?

(b) Whether the Payment Schedule provided by KBR is a payment schedule under the Act?

(c) Whether any estoppel arises to prevent the Claimant from denying the existence of the Payment Schedule because the Claimant had accepted 2 previous documents from KBR as payment schedules?

(d) The valuation of the claim after determination of the previous issues

61. Prior to discussing the Division1/Division 2 payment schedule issue, it is useful to identify the salient points associated with the Payment Claim and the Payment Schedule, so as to put that issue, and the adjudication in its correct context.

a. Payment Claim

62. The Payment Claim was sent under cover of a letter dated 11 January 2006, which annexed Attachments 1 to 6, Attachments B through to G, Attachments J through to Q, Attachments DC 1 – 3, and Attachments EOT 1 – EOT 6. The letter explained the format of the Payment Claim and the Annexures supported the Payment Claim.

63. The fourth paragraph of the letter claimed $24,036.38 for the balance of the contract sum because practical completion had been achieved. I call this the **Contract Balance Claim.**

64. Paragraphs (a) to (r) of the letter dealt with claims for additional costs of $111,499.13 including GST, associated with Variations 3, 4 and 7 which dealt with base-course gravel, sub-base gravel and final trimming of roads, which had been claimed in earlier progress claims but not paid. I call this the **Disputed Variations claim.**

65. The second last paragraph of the letter dealt with Variations 18 and 19 which were for delay costs associated with extensions of time totalling $34.848.00. I call this the **Delay Costs claim.**

66. I summarise the Payment Claim amounts incl GST as follows:

i.	Contract balance claim	**$ 24,036.38**
ii.	Disputed Variations Claim	**$111,499.13**
iii.	Delay costs Claim	**$ 34,848.00**
	TOTAL	**$170,383.51**

67. The letter and Progress Claim No. 5 – December 05 (comprising pages 1 to 7), carried the endorsement that it was made under the Act. Pages 1 to 7 and 1 other document comprised the following:
    - Summary of claim, with endorsement claiming $170,383.51 – (Page 1 of 7)
    - Bill of Quantities - Section A - 17 items totalling $865,764.50 – (Pages 2-4)
    - Bill of Quantities – Section A – Variations totalling $253,011.13 – Pages 5-6
    - Bill of Quantities – Section A – Testing Fees totalling $15,411.00 – Page 7
    - Bowler Geotechnical Tax invoice for $739.20

b. Payment Schedule

68. KBR sent the Payment Schedule dated 15 February 2006 under cover of a letter of the same date in which it asserted that it had prepared the document on behalf of the Respondent in reply to the claims for variations 3, 4, 7, 9, 13(a-d), 15, 18, 19, 20 and 21.

69. In the letter KBR asserted that the Claimant's Variation Claims 3 and 4 had earlier been claimed on the basis that the Bill of Quantities ("BoQ") were incorrect, but that the claim now advanced in relation to these 2 variations is that the BoQ were not incorrect.

70. KBR's letter then went on to:

(i) respond to each basis of claim in the Payment Claim using the same numbering system;
(ii) assess Variation Numbers 18 and 19;
(iii) summarise the list of items which formed the basis for "KBR's rejection of Shield Contractors claim for additional pavement material costs";
(iv) Listed a "Schedule of Items not certified".

71. Attached to the letter was a document headed "Payment Schedule", which comprised 9 folios, all of which had a footer on the bottom left hand corner of the page with words that included "Progress certificate 5.xls". The folios were as follows:
    i. Folio 1 – A document that certified an amount for payment, and which is scanned into this decision;
    ii. Folio 2 – Summary of amounts which was cross referenced to the relevant folios;
    iii. Folios 3, 4 and 5 which was the BoQ containing completed quantities and extended to total an amount for Schedule A of $857,484.50;
    iv. Page ("Folio?") 6 identifying an Authorised Extras table for Section A with no amounts filled in;
    v. Page ("Folio?") 7 identifying an Deductions table for Section A with no amounts filled in;
    vi. Pages ("Folios?") 8 & 9 identifying Section B of Variations Non-Scheduled Items using a Bill of Quantity layout containing completed quantities which extended to an amount of $108,802.53;
    vii. Page ("Folio?") 9 identifying Section C for Testing Fees which extended to $15,411.00.

72. Various drawings comprising some standard details, plans, cross sections of the road profile at various chainages, intersection details; some correspondence and emails between KBR and the Claimant, and between KBR and Boonah Shire; 2 photographs of the subgrade & 4 photographs of drainage structures were then attached to the letter.

73. Before analysing these documents and the issues raised by them in further detail, I need to consider whether there is a difference between the 2 types of payment schedules, and then decide whether the KBR document is a payment schedule, as well as deciding whether any estoppel arises preventing the Claimant from asserting that the KBR is not a payment schedule. I firstly attach the first Folio of the Payment Schedule so that the parties can follow the reasoning associated with this important document in the decision below.

HALLIBURTON KBR

Payment Schedule

File No. BEV420

Folio 1 **of** 9

Principal RG & M Carroll
Project Kooroomba Estate **Contract No.** BEV420/1
Contract BEV420
Contractor Shield Contractors Pty Ltd
Work Executed To : 11-Jan-06

This is to certify that in respect of a payment claim by the Contractor dated the 11th of January 2006 Shield Contractors Pty Ltd is entitled to a payment of: Two Thousand, Six Hundred and Forty Six dollars and Five cents ($6,646.05 including GST) calculated as shown below.

1	Contract Sum: (Refer Letter of Acceptance (21/07/05))			$	922,598.50
2	Variations Authorised (All include GST):				
	Scheduled Additions	$	0.00		
	Scheduled Deductions	$	0.00		
	Non Scheduled Additions	$	136,634.88		
			Total Add	$	136,634.88
				$	1,059,233.38
3	Adjustments (Rise and Fall etc.) authorised :				
			Total Add/Deduct	$	Nil
4	**Contract Value as Varied and Adjusted Including GST**			** $	**1,059,233.38** **
5	Value of Work completed to Date (Including GST) :			$	1,079,867.83
6	Less Retention (on other than rise and fall)	$	0.00		
			Total Deduct	$	0.00
			Total Certified For Payment	$	1,079,867.83
7	Less total of Payment previously authorised:			$	1,077,222.26
8	**Progress Payment now due (Including GST) :**			$	2,646.05

Progress certificate 5.xls

for **Kellogg Brown Root**
Date: 15/2/06

Whether there is a difference between a Division 1 and Division 2 payment schedule?

c. Claimant's submissions on the Payment Schedule

74. The Claimant generally deals with the Payment Schedule in paragraphs 44 to 50 of its submissions. It referred in paragraph 59 of the submissions, to the case of *Amflo Constructions Pty Ltd v Anthony Jefferies* [2003] NSWSC 856 ("*Amflo*") and it extracted paragraphs 39 to 41 of the case. The Claimant asserted that this case deals with the NSW equivalent of QLD s18, 19, 20 and 21 of the Act. The Claimant stated that there was a difference between a Division 1 and Division 2 payment schedule by reference to Campbell J's discussion about this point. Although what His Honour said was obiter, because the case dealt with whether an adjudication application was made in time, it is persuasive. 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.

75. s18(4) of the Act requires that a payment schedule in response to a payment claim is to be served within the earlier of (i) the time provided in the contract, or (ii) within 10 business days of the payment claim being served. s18 of the Act, which deals with the requirements of payment schedules, is found in Division 1 of part 3 of the Act. If a payment schedule is served within the time identified in s18(4), *Amflo* calls this a Division 1 payment schedule. *Amflo* calls a payment schedule served in response to a claimant's s21(2)(a) notice, and within 5 business days of receipt of the notice as required by s21(2)(b), a Division 2 payment schedule.

76. The Claimant specifically asserted in paragraph 47 that the Respondent's failure to provide a Division 1 payment schedule renders the Respondent liable to pay the claimed amount on the due date for progress payments.

77. The Claimant stated at paragraph 48 that the Respondent had failed to pay the whole or any part of the claimed amount on or before the due date for the progress payment. In paragraph 49 the Claimant then said that s19 of the Act was enlivened because the Claimant was liable to pay the claimed amount as a result of the Claimant's failure to provided a Division 1 Schedule.

78. The Claimant further contended at paragraph 67 of the submissions that even if KBR's document is a Division 2 payment schedule, it was ineffective because it raised nothing of a jurisdictional nature, in regard to the due date for payment or the rate of interest payable. Before analysing these submissions, I will turn to the Respondent's submissions.

d. Respondent's submissions on the payment schedule

79. The Respondent's submissions in the third paragraph on page 2, accepted that "KBR did not submit a division 1 response as the previous 2 payment schedules #3 and #4 had been accepted by the Claimant". Accordingly, I find that the Payment Schedule, if it is a payment schedule under the Act (which is not yet decided), having been delivered within time, could only be classified a Division 2 payment schedule.

80. The Respondent did not join issue with the Claimant about:

    i. the difference between a Division 1 and 2 payment schedule, and
    ii. that the latter is limited to raising jurisdictional points only.

This is unfortunate because it is an important point. Although I am obliged to accord the parties natural justice, it is not my duty to tell the Respondent that I may be persuaded by Amflo and the Claimant's submissions on this point. *Austrac v ACA; ACA* v *Sarlos* [2004] NSWSC 131, which was a decision of McDougall J at para 74, is authority that if material is properly presented, it is not incumbent on an adjudicator to tell one party that he regards particular parts of material, supporting the other party's case, as having particular significance.

81. Given that the Claimant has raised the issue and submits that a Division 2 payment schedule can only raise jurisdictional issues, I have a duty to interpret the meaning of the Act on this point, despite the Respondent not joining issue. Adjudication is still adversarial in nature and although the adjudicator has the discretion to ask the parties for submissions under s25(4) of the Act, the adjudication must be completed within 10 business days. There are a number of important issues raised in this adjudication, and to afford natural justice, I must consider the submissions and material advanced in support thereof. If one party decides to not take issue with the other's legitimate submissions and material on a point, the authorities do not require me to chase up the other party to say that I need submissions, because I am inclined to be persuaded by those submissions and material.

82. The matter would be different if I was deciding an issue that had not been canvassed by either party, and I then did not offer both the opportunity to address me on the point: *Musico v Davenport* [2003] NSWSC 977. I find that I must consider the Claimant's submissions and its reference to *Amflo* on the extent of what can be allowed in a Division 2 payment schedule.

Decision on the Division1/Division 2 payment schedule issue

83. There is no direct authority on this point so I must discern the correct approach from a consideration of principle. There is some reference to this point by the learned authors of the Institute of Arbitrators and Mediators Australia Adjudication Guide, which was published in 2005 (the "Guide"). The Guide is considered, with respect, the 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 BCISPA s17 (ie BCIPA s21) and the court said:

> *A construction of [BCISPA] 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."

84. Although the Guide identifies the contending views of the characteristics of a Division 1 and Division 2 payment schedule, it does not provide an answer as to the preferred view. With respect, although Campbell J's view was obiter in *Amflo*, I am persuaded that that there is a difference between the Division 1 and Division 2 payment schedules in so far as they relate to adjudication. The Claimant' submissions stated that there was a practical difference between the two payment schedules, and that the latter could only raise jurisdictional points regarding the due date for payment or the rate of interest payable: see paragraph 67 of the Claimant's submissions, in particular. In paragraphs 68 and 69, the Claimant further asserted, that the Act did not provide a provision for a Division 2 payment schedule to remedy the Respondent's failure to deliver a Division 1 payment schedule, such that the liability to pay the claimed amount on the due date was not extinguished (the "*liability to pay obligation*").

85. s18 of the Act does not differentiate between a Division 1 or Division 2 payment schedule. s18(2) specifies that the document must identify to a Claimant, firstly the payment claim to which it relates: s18(2)(a), and then what the Respondent is likely to pay: s18(2)(b), and if this is less than the claimed amount, the reasons why there is a difference from the payment claim: s18(3) of the Act. *Amflo*, however, suggests that there is a difference between the two types of payment schedules. I find that such difference is not found in s18(2) of the Act, which deals with the requirements of the contents of the document, and I must look elsewhere.

86. In my view, if one considers the matter from the point of view of liability to pay money then it is feasible that the adjudication process in dealing with a Division 1 and a Division 2 payment schedule can differ in its approach. If a Division 1 payment schedule is not delivered as in this case, then s18(5) of the Act is invoked, and the Respondent is liable to pay the claimed amount to the Claimant on the due date for the progress payment as advanced by the Claimant in paragraph 47. It would appear to me that a Division 1 payment schedule prevents the *liability to pay obligation* from arising under s18(5) because it is the lack of provision a Division 1 payment schedule with time that triggers the operation of s18(5) of the Act. KBR on page 2 of the covering letter to the Payment Schedule stated that "*KBR did not submit a division 1 response…*" It went on to explain why it had not done so, later in the sentence, to which I will turn in discussing the estoppel issue below. This confirmation of my finding that no Division 1 payment schedule was provided, results in me finding that the Respondent attracted the *liability to pay obligation* by virtue of s18(5) of the Act. I must now look at how the Act operates to determine if it has provisions to extinguish this liability.

87. The Claimant's paragraphs 49 and 50 argued that because no Division 1 payment schedule was provided, then s19 (2) of the Act applies, allowing the Claimant to elect to go to adjudication. s19(2)(ii) of the Act enables an adjudication application to be made, but in defending the application, the Respondent appears not to be as constrained in its defence, as it would be if the Claimant had sought summary judgement in court.

88. If the Respondent had to defend a summary judgement application in court, s19(4)(a) of the Act requires the court to be satisfied of the existence of all the s19(1) circumstances before granting judgement. These circumstances are that the *liability to pay obligation* has arisen, and that the Respondent has failed to pay in whole or in part by the due date for payment (the "*pay by due date obligation*"). Furthermore, in s19(4)(b)(i), the Respondent is not entitled to bring a counterclaim, or in s19(4)(b)(ii) raise any defence to matters arising under the construction contract. These specific constraints in defence do not apply to an s19(2)(a)(ii) adjudication application, and it is this application to which I must turn my mind. Nevertheless, I must have regard to the provisions of the Act in reaching my decision, and this requires me to read the Act as a whole.

89. The question in issue in this complex analysis is the extent to which the Respondent can defend this application, and this defence under the Act has to be provided by a payment schedule? Is it "open season" in the adjudication, in that its Division 2 payment schedule can raise counterclaims and any defence relating to matters arising under the construction contract, because they are not specifically excluded? This requires me to canvass the principles of the rules of statutory interpretation. I refer to a rule that is probably closest to the issue that I am considering. I have tried to distil the principle from the rule to apply to this adjudication. The rule is known as *Expressio unius est exclusio alterius: an express reference to one matter indicates that other matters are excluded* (the "*expression unius rule*") [cited in: DC Pearce (1981) *Statutory Interpretation in Australia*, 2nd Ed,

Butterworths, Sydney at page 44]. The author at pages 44 and 45 states as follows, "*The legislature may have included specific references to a certain subject matter with the intention of limiting the scope of the Act to those matters. Or it may, on the other hand, have simply overlooked other possible matters to which the Act could have extended or have thought that they were included in the subjects specifically mentioned. Much will depend upon the view that is taken of the particularity with which the legislature has addressed its mind to the subject matter of the legislation.*"

90. The author referred, at page 45, to two High Court cases, one which applied the rule strictly, and the other which rejected the *expressio unius* rule. The author suggests at the same page that the rule is largely one of impression and is applied by the courts with extreme caution. If I strictly applied the rule by analogy to this case, it could be argued that the specific defence requirements in s19(4) regarding summary judgement in court do not apply to adjudications, and therefore defences to adjudications under s19(2)(a)(ii) have no such constraints. I am not prepared to go this far, and will follow the more cautious approach adopted by courts, and will look further in the Act to try and establish in the context of the whole legislation what defences may be mounted by the Respondent in the payment schedule. To this extent I am taking the view that I must determine whether the legislature, *"..have simply overlooked other possible matters to which the Act could have extended or have thought that they were included in the subjects specifically mentioned* **[my underlining]**. *Much will depend upon the view that is taken of the particularity with which the legislature has addressed its mind to the subject matter of the legislation."* The Claimant states that the defences contained within the Division 2 payment schedule are limited, and the Respondent has said nothing on the point.

91. The Claimant's paragraph 67 states that a Division 2 payment schedule essentially must raise matters of a jurisdictional nature relating to the due date for payment or the amount of interest payable, or it will be ineffective. The Claimant's approach leads one to conclude that it suggests that the characteristics associated with the limited types of defences available in the court in s19(4), influence the type of defences available in an adjudication under s19(2)(a)(ii). In particular, the Claimant contends that the *pay by due date obligation* and the "rate of interest payable" are jurisdictional points that are the only ones that can be raised in a Division 2 payment schedule. The *pay by due date obligation* is contained within s19(1)(b) and is an issue that can be raised in a s19(4) defence. However, support for the Claimant's approach would need to be found elsewhere in the Act, and I now have regard to s20 of the Act.

92. The s20 consequences of not paying a claimant under a payment schedule, does not automatically render the Respondent liable for the unpaid claimed amount as it does in s18(5). s20 arises when a Division 1 payment schedule has been provided in which the schedule identifies that an amount is payable, but then this amount is not paid by the due date. 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 that any or all of the requirements under s20(1) have not been adhered to, and these include more procedural issues such as service of payment claims etc. This is a vastly different series of defences that may be mustered to that available under s19(4) of the Act. 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 s20 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)(a)(ii). Support for this proposition is further gleaned from s21 of the Act to which *Amflo* referred and discussion on this issue follows below.

93. 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 under s21(1)(a). A Division 2 payment schedule arises under s21(1)(b). This additional distinction lends support to my view that the Act provides adjudications with different characteristics because:

    i. they are situated in different parts of the Act, viz. s21(1)(a) and s21(1)(b) of the Act;
    ii. they sit next to summary judgement court processes that provide for different defences to be raised, viz. s19(4) and s20(4); and
    iii. they are governed by payment schedules that are also situated in separate parts of the Act, viz ss18(1) to (4) and s21(2)(b).

    Furthermore, a Division 1 payment schedule is to be provided to each legitimate payment claim, and such a payment schedule may well result in the parties being satisfied with the outcome of the issues raised in the payment claim and schedule respectively. This follows the "How the object is to be achieved" in s8(a) of the Act by firstly granting an entitlement to progress payments, whether or not a contract provides for this, and then establishes procedures in ss8(b)(i) and (ii) of the Act to facilitate this process. I find that s17 and s18 of the Act provides for this process to ensure that a person is entitled to receive and able to recover progress payments.

94. Having regard to the Act, as a matter of logic, for a Division 1 payment schedule to do its job, it would need to outline in some detail why the Respondent is not prepared the amount of the claim as required by ss18(2) & (3) of the Act. This means that this payment schedule would have to delve deeply into the merits of the payment claim, and provide sufficient reasons for not intending to pay. In this way the Claimant is then aware of the issues it would need to overcome, should it decide to use the dispute mechanisms available in court, or by way of adjudication. If the reasons are sufficient, then the matter may be resolved by the Claimant being content with what it is paid by the due date and nothing further needs to be done under this payment claim and schedule. In this sense the Division 1 payment schedule has done its job.

95. If the Claimant is still unhappy with what is identified in the payment schedule as not intended to be paid, or they are not paid what the payment schedule states is payable, then the disputed claim route may be followed. In this event the adjudication must involve the full details of the dispute arising out of the payment claim and the detailed payment schedule because they are the subject of the dispute. If no Division 1 payment schedule is provided, however, there is the *liability to pay obligation* that arises by virtue of s18(5) of the Act, and the matter follows the disputed claim route referred to in s8(b)(iii) of the Act, and at first blush it appears that the adjudication portion of the disputed claim route is the same whether or not it arises out of a Division 1 payment schedule, because adjudication is housed in s21 of the Act.

96. However, s8(b)(iii) of the Act enables procedures to refer the disputed claim to an adjudicator, and the route to be followed differs depending on whether there has been a Division 1 payment schedule or not.

97. If a Division 1 payment schedule has been provided, the claim follows the adjudication route as follows:

    i. If the payment schedule amount is less than the amount claimed;
    ii. Only adjudication then follows under s21(1)(a)(i), as the court is not referred to;
    iii. If the payment schedule provides for payment, and no payment is made on the due date, the consequences arise under s20 of the Act that summary judgement in court or adjudication may be followed;
    iv. Adjudication, if chosen, then follows in this case under s21(1)(a)(ii).

98. If no Division 1 payment schedule is provided, I have already stated that the consequence is that s19 of the Act is invoked, allowing summary judgement in court s19(2)(a(i) or adjudication s19(2)(a)(ii) of the Act. If the court procedure is followed, a claimant is not required to ask for a payment schedule as it simply proceeds to court, which has its own rules regarding its summary judgement processes. The Act, as I have said constrains the extent to which a respondent may defend in that case. It essentially precludes the court dealing with the details under the contract for non payment. Accordingly, the Act expressly provides that a court does not have the benefit of a Division 2 payment schedule, whatever it may contain. An adjudicator, however, may have the benefit of a Division 2 payment schedule, because the Claimant must provide the s21(2)(b) notice and invite the respondent to provide one.

99. This still begs the question as to what may be contained within a Division 2 payment schedule. The Supreme Court in NSW has stated that there is a difference between a Division 1 and Division 2 payment schedule. I have already decided that a Division 1 payment schedule should be comprehensive in canvassing the payment claim issues, and providing reasons why a lesser amount is payable. This may forestall the need to go to court or adjudicate and provides for progress payments to be received regularly, which in my view promotes the objects of the Act.

100. When adjudication takes place under s21(2)(b), there has been no Division 1 payment schedule provided within time, and most importantly to my mind, s18(5) then has already created the *liability to pay obligation* and to *pay by the due date*. The Claimant advances the proposition that the Division 2 payment schedule can only raise jurisdictional issues, essentially as a defence to the liability to pay. I am inclined to agree after having conducted a detailed analysis of the Act in relation to this issue. I am of the view, having interpreted the Act on this issue, that the legislature simply overlooked or thought that the differences between the two payment schedules were already evident by the words of the legislation and the placement of the payment schedules in different parts of the Act. Furthermore, in my view I have identified in the analysis above that there a number of differences that should apply to adjudication arising out of the two different payment schedules.

101. s26(2) of the Act confines adjudication to a list of matters referred to in the Act. S26(2)(a) requires me to consider the provisions of the Act, and I can see some difficulties as to how an adjudicator can overturn the *liability to pay obligation* arising under s18(5) to *pay by the due date* unless the Division 2 payment schedule refers the adjudicator to a jurisdictional point that denies the very foundation of the *liability to pay obligation*. The liability has arisen before adjudication is even commenced, and if a claimant goes for summary judgement under s19, essentially only jurisdictional issues can be raised by way of defence. To my mind, some similar constraints ought to apply to adjudication that is

facilitated by s19 of the Act, even though they are unlikely to be as harsh as the summary judgement route.

102. The objects of the Act include ensuring the recovery of progress payments under s7. If a claimant seeks summary judgement in court under s19 of the Act in the absence of a Division 1 payment schedule, only jurisdictional defences are possible. However, if one took the view that a Division 2 payment schedule was not confined in its contents, then if a claimant elected to proceed to adjudication, it could be confronted with a Division 2 payment schedule, which could essentially take issue with the merits of the payment claim. Taking issue with the full merits is required in a Division 1 payment schedule, so adopting this approach would fly in the face of *Amflo* which recognises a difference between the two documents. In addition, as a matter of practicality, a Respondent could then always wait until the claimant applied for adjudication before taking issue with the full merits of the payment claim. This would have following consequences:

i. s18(5) of the Act would be rendered impotent if an adjudicator by considering the merits of the claim could extinguish the *liability to pay obligation* that had already arisen;
ii. An adjudicator could therefore have power to extinguish the *liability to pay obligation* by considering the merits of the case, which a court could not do, unless it was dealing with a jurisdictional issue that was raised by the respondent;
iii. If a claimant preferred to use the adjudication route to recover its money, which it is entitled to do under s19(2)(a(ii) of the Act, it would always have to wait for the full merits to be canvassed in a Division 2 payment schedule before knowing the respondent's arguments to its payment claim. By then the claimant has already decided to "buy its ticket on the *adjudication train*". If the full merits issues are raised by the respondent in the Division 2 payment schedule, the claimant ought sensibly to not climb on the *adjudication train* but rather "buy a ticket on the *court's summary judgement train*" because the defences to the liability to pay on that train are much more confined;
iv. This may result in forum shopping, where claimants would be wise to proceed to summary judgement under s19(2)(a)(i) of the Act from the outset, whereas respondents would be delighted with the adjudication route under s19(2)(a)(ii) of the Act;
v. Consequently, the Act could provide possibly different and inconsistent outcomes under s19 of the Act, where the *liability to pay obligation* had already arisen:
    a. If the matter proceeded to court, the respondent is confined in its defence to jurisdictional issues, and the narrower defences may lead to the *liability to pay obligation* being affirmed by the court with the respondent bearing the costs of the court proceedings;
    b. If the matter proceeded to adjudication, the respondent could canvass all issues, which may lead to the adjudicator (if they had power to do so) extinguishing the *liability to pay obligation* on non-jurisdictional grounds, and the respondent may not have to bear any of the cost of the adjudicator's and ANA's fees;
    c. Claimants who had not received a Division 1 payment schedule, would tend to follow the court route, when the Act specifically allows another avenue of adjudication in the same section of the Act.

103. In my view such an approach is inconsistent with the objects of the Act, and whilst adjudication is not a judicial process, but an administrative one, it appears unlikely that the legislature would allow a "second bite at the cherry" as identified as one option by the Guide. The consequences of such an approach have been canvassed at some length in the analysis above, and I find that a Division 2 payment schedule may only raise jurisdictional issues. I am not allowed in adjudication to go outside what the parties have raised as issues, so I confine the jurisdictional issues that need to be raised in the Division 2 payment schedule to the *pay by due date* obligation and the *rate of interest payable* canvassed by the Claimant. None of these issues were raised in the Payment Schedule, so I am unable to give much consideration to the Payment Schedule, if I indeed find that it is a payment schedule under the Act. This means that I find the preferred view is that a Division 2 payment schedule, which is the one in this adjudication, to use the words in the Guide is "merely a nibble".

104. Accordingly, I am constrained to not consider the Payment Schedule except insofar as it may deal with the jurisdictional issues referred to above, which means I am constrained to ignore the issues raised within it that go to the merits of the Payment Claim. In my reasons below, I have had regard to the Payment Schedule in order to decide whether it is a payment schedule under the Act as canvassed by the Claimant and to consider the estoppel point raised by KBR.

105. After the analysis of the Payment Schedule in dealing with the next two issues, I will need to identify the extent to which I have had regard to the material in this adjudication, so that the parties can follow the reasons. I now turn to deal with whether the Payment Schedule is a payment schedule under the Act, because this has been raised by the Claimant in paragraphs 63 to 67 of its submissions and by KBR on the third paragraph of page 2 of the response.

Whether the Payment Schedule provided by KBR is a payment schedule under the Act?

106. KBR is identified as the Superintendent in Part A of the GCC (Tab 7), with reference to clause 2 of the contract that defines the Superintendent. I was not provided with a copy of clause 2 of the GCC and other clauses relating to the Superintendent's functions so I cannot be certain of the functions of the Superintendent in this contract. Nevertheless, the Claimant in paragraphs 65 and 66 has put KBR's functions as a certifier in issue. In paragraph 65 the Claimant states, *"There is no place for a certifier under the BCIPA, that function only arises under the Contract. In making that statement, despite any protestations to the contrary, KBR have confirmed that they are acting in the role of Superintendent under the Contract rather than the Principal's agent under the Act."*

107. In the covering letter to the Payment Schedule on page 13, KBR signed the document as Superintendent, and attached the Payment Schedule prepared by KBR on behalf of the respondent. I refer to instances where the word certification or certify arises in the Payment Schedule as follows:

i. Page 1: *"Shield Contractors stated in progress claim number 5 that, "KBR have certified all Shield's previous claims for this work as claimed." However, with reference to KBR's prior progress claim assessments dated the 9th of December 2005 and the 5th December 2005 respectively it is clear that KBR have not certified all Shield Contractor's previous claims for this work as claimed."*

ii. On page 13, *"Based on the information provided, KBR on behalf of the Principal, respectfully rejects your claim for variations No's 3, 4, 7, 9, 13(a-d), 15, 18, 19, 20 and 21 in the amount of $143,280.60 (excluding GST). Based on this KBR certify the contract in the amount of $1,079,867.85 (incl. GST). The amount to be paid (scheduled amount) by the respondent R.G. and M.Carroll for the attached payment schedule is $2,646.05"*

108. Until I have properly characterised the Payment Schedule, it is inappropriate to canvass issues raised in the response because a payment schedule confines what may be contained within the response: s24(4) of the Act. If the document is not a payment schedule under the Act, then I may not have regard to the response at all: s24(3) of the Act.

109. Folio 1 of the Payment Schedule has been scanned into these reasons, and it carries the heading "Payment Schedule", whereas the footer of the document refers to Progress certificate 5. It contains the words:

> *"This is to certify that in respect of a payment claim by the Contractor dated the 11th of January 2006 Shield Contractors Pty Ltd is entitled to a payment of: Two thousand six hundred and forty six dollars and Five cents ($6,646.05 (sic) including GST) calculated as follows….Total certified for payment $1,079,867.83…Progress Payment now due (Including GST): $2,646.05".*

110. s18(2)(a) of the Act provides that a payment schedule must identify the payment claim to which it relates. I find that the words *"…that in respect of a payment claim by the Contractor dated the 11th of January 2006.."* sufficiently identifies the Payment Claim, thereby satisfying this provision.

111. s18(2)(b) of the Act requires the amount of the payment the respondent proposes to make (the **scheduled amount**). I find there is no scheduled amount identified in the document headed the "Payment Schedule" comprising folios 1 to 9 that states the amount the respondent proposes to make. The only amount is on Folio 1, referring to money due, is found in the words, *"8 Progress Payment now due (Including GST) $2,646.05"* This does not satisfy the requirements of the Act because nowhere is it stated that this is the amount the respondent proposes to make, and that qualification together with the amount, makes it the **scheduled amount**

112. s18(3) of the Act provides for the provision of reasons if the scheduled amount is less than the claimed amount. So far, I have found no scheduled amount, which I conclude is less that the claimed amount, so I have had regard to the covering letter to the Payment Schedule because it may contain the respondent's reasons for withholding payment. This is where I am confronted with difficulty. The reasons contained within the covering letter are signed by KBR as Superintendent in which in the second last paragraph of the letter on page 13, KBR is referring to certified contract amounts of $1,079,867.85 (incl GST) and "*the amount to be paid by the Respondent for the attached schedule is $2,646.05.*" This letter does not say that the Respondent proposes to pay this amount.

113. In my opinion this statement, "*the amount to be paid by the Respondent for the attached schedule is $2,646.05*" is a certificate because it is stating an amount to be paid by a principal, the Respondent in this case. It is not a statement by the Respondent that I will pay this amount, which in my view is what is required by the Act. According to the general law relating to construction contracts, as identified by DJ Cremean (2004): *Brooking on Building Contracts*, 4th ed, LexisNexis Butterworths, p125, an

architect/engineer/superintendent may certify work that has been done to their approval or satisfaction such that, *"When this is so and approval given, usually by a certificate, the issue arises what subsequent complaint can be made about the quality of the work? If a certificate is issued entitling a builder to payment, what challenge can a proprietor make to resist paying the amount certified?*

114. Furthermore, the extensive reasons contained within the letter dealing with each of the Claimant's items in its covering letter to the Payment Claim are under cover of a letter by the Superintendent. I find therefore that these reasons are those of a Superintendent. The Claimant's reference to the case of *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited* [2003] NSWSC 1103 (3 December 2003) ("Leighton") constrains me even further in this analysis. Leighton makes reference to the case of *Karimbla Construction v Alliance Group Building* [2003] NSWSC 617 (9 July 2003), and I have referred to that case, at paragraph 2, to confirm the proposition that a payment schedule may be provided by an agent, which is as good as one provided by the respondent itself. To that extent I find that it is possible for the Respondent to use an agent to provide a payment schedule under the Act.

115. However, in Karimbla, the payment schedule was on the letterhead of the agent and signed by the agent, Meriton Apartments Pty Ltd, but specifically stated that, *"Karimbla will pay nothing in response to your payment claim dated 3 January 2002 that you state is made under the Building and Construction Industry Security Payment Act 199. Karimbla allowed you access to the site from 14 December 2001 on the basis that you would not claim payment for the amounts referred to in the payment claim other than in relation to blocks A to D and the pool, and you agreed to this."* In this adjudication, there is no reference in the Payment Schedule to the Respondent proposing to make any payment, or any reasons why it would not do so. Everything is done by the Superintendent KBR, which asserts that it is acting as agent for the Respondent.

116. Turning back to Leighton which the Claimant referred me to, Einstein J in paragraph 107(b)(i) referred to another case of the Full Court of NSW in *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd* ("Abigroup") [2002] NSWCA 211, para 50. This case dealt with AS2124-1992, which are the GCC in this adjudication, where Hodgson JA (with whom Mason P and Stein JA agreed) held,

> *"The authorities... are not altogether clear as to whether a person in the position of a superintendent of a building contract is the owner's agent in exercising all the functions of the superintendent. However, in my opinion the better view (supported by Perini, Dixon, Egan and London Borough of Merton and not refuted by Sutcliffe) is that the superintendent is the owner's agent in matters only in a very loose sense, and that, when exercising certifying functions in respect of which the superintendent must act honestly and impartially, the superintendent is not acting as the owner's agent, in the strict legal sense.."*

117. It would be unwise for any adjudicator in circumstances where there is no material from the Respondent themselves, but only from the Superintendent, ostensibly on behalf of the Respondent, to find that the Superintendent was acting as the Respondent's agent to bind the Respondent in the Payment Schedule. Furthermore, Abigroup, a Full Court authority does not allow agency in the strict legal sense when the superintendent is carrying out its certifying function, and page 13 of the letter specifically refers to the Superintendent certifying the contract amount of $1,079,867.85. Furthermore, Folio 1 refers to certification twice in the document, and with reference back to Leighton, at paragraph [107](b)(ii) which

referred to Dorter and Sharkey considering that it is, *"almost unreasonable and unrealistic to expect a person in such a situation to wear two hats simultaneously and be a professional contortionist…"*

118. I am constrained by the material with the various references in the Payment Schedule (including the reasons in the letter) to *certifying and certified* made by KBR as Superintendent, as well as by authority to find that KBR was acting as superintendent in its certifying role, and not as agent of the Respondent. This means I find that the Payment Schedule was not a payment schedule under the Act. Accordingly, I find that no payment schedule was provided by the Respondent, not even a Division 2 payment schedule.

119. The effect of that finding is that s24(3) precludes me having regard to the response because no payment schedule, neither a Division 1 or Division 2 payment schedule was served. Furthermore, s24(4) prevents the Respondent from providing reasons for withholding payment unless they have been included in the payment schedule.

Whether there is an estoppel arising preventing the Claimant from denying that a payment schedule had been delivered?

120. A response was provided to me and I had to review it during the preliminary scan of all the material. It raises the issue of an estoppel because KBR claimed that the Claimant had accepted previous payment schedules from KBR, with the effect that the Clamant could not now deny the Payment Schedule as a payment schedule under the Act. I am unable to canvass this issue in any detail, because it is not something within the material to which I may have regard under s26(2) of the Act. However, suffice is it to say that I do not consider that estoppels can arise in adjudications to constrain a party from legitimately challenging whether a document falls within the Act. The adjudicator is the one who has to make decisions on these documents and the operation of the Act, and any assertion by one party that the other party cannot deny the legitimacy of a document under the Act, is to my mind untenable.

121. I realise that estoppel does not fall within the meaning of *contract, agreement or arrangement* as provided in s99 of the Act. However, the principles arising out of this provision render any such *contract, agreement or arrangement* void to the extent which it is contrary to the Act [s99(2)(a)], purports to annul, exclude etc a provision of this Act [s99(2)(b)], or may reasonably be construed as an attempt to deter a person from taking action under this Act. By analogy, I would consider that it would not be possible under the Act to raise an estoppel to prevent a person from challenging whether a document fell within the Act or not. In any event it is for the adjudicator to decide what effect can be given to a document. Even if I was asked to decide such an estoppel point, which I am not required to do in this adjudication because it is raised in a document to which I may not have regard, I would say that an adjudicator should not be constrained in dealing with the material on its merits within the confines of s26(2), even if there was a claim of estoppel.

122. I have now found that:

i. a Division 2 payment schedule can only deal with jurisdictional matters, and that this Payment Schedule did not raise such matters;
ii. furthermore, the Payment Schedule was not a payment schedule under the Act;
iii. I was therefore unable to have regard to the response;
iv. I am unable to consider any estoppel point that KBR wished to raise because it was contained within a response to which I may not have regard.

Material not considered

123. The result of these findings above means that I am unable to have regard to the:
   i. Payment Schedule; and
   ii. The response.

124. I now turn to determine the merits of the claim.

The merits and value of the Claim

125. I have already stated that 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" which I have followed, 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.."*

Analysis of the more detailed requirements

126. 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."*

I have already provided a summary of what was contained within the Payment Claim in the reasons above. It was dated 11 January 2006 and referred to Kooroomba Estate Mt. Alford, Civil Works Contract No BEV420/1. It attached a BoQ which identified the quantities that were scheduled and completed on the project to 30 December 2005 relating to Earthworks, Roads and Drainage together with Variations and Testing Fees. In addition, the FIA was attached in Attachment 1 and the tender form in Attachment 2, which both refer to Contract BEV420/1.

127. Einstein J in 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 earthworks, road-works and drainage, is identified sufficiently, as it uses the Bill of Quantities to specify the amount of and type of work done up to 30 December 2005. I find that the Respondent could respond with a payment schedule. Furthermore, by reference to *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 at [76], Palmer J held that *"payment claims and payment schedules are given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim.."*. In the circumstances of this adjudication, where I find that practical completion had been reached on 16 December 2005 because it was certified by KBR in a letter dated 12 January 2006 and annexed in the Claimant's material – Tab 8, I find that the Claimant and Respondent were sufficiently familiar with the contract to know that the Payment Claim adequately identified the work; which satisfies s17 (2)(a) of the Act.

128. The Bill of Quantities (pages 2 to 7) and the Summary (page 1 of 7) of the Payment Claim provided the calculation of the amount payable of $170,383.51, which I find to be the **claimed amount,** and satisfies s17 (2) (b) of the Act.

129. There is an endorsement in paragraph 1 of the letter introducing the Payment Claim, as well as at the foot of the Payment Claim Summary on page 1 of 7, which I find satisfies s17(2)(c) of the Act.

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

131. 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.

132. I have already found that the Payment Schedule (even though I have found it was not a payment schedule under the Act) was served on 15 February 2006, and I must have recourse to the Act to determine the time within which the application is required to be made. At the time the Claimant was not to know whether an adjudicator would find this document to be a payment schedule, so it had time limits within which to apply for adjudication, to which I now refer.

133. s21 of the Act provides:

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

i. *the respondent serves a payment schedule under division 1…*
ii. *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 subjection (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."

134. I have found that 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 to commence adjudication: s19(1)(b) of the Act.

135. Clause 42 of the GCC in the Claimant's material (Tab 1 – Attachment 5) and (Tab 6) deals with timing for payment claims and progress payments. Clause 42.1, at the first paragraph states, *"At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor…"* Part A of the GCC (Tab 7) states that the *Time for Payment Claims* is the last Friday of each month.

136. Clause 42.1, at paragraph 4 states that, *"Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor…an amount not less than the amount shown in the Certificate.."* Neither party has provided me with any other term of the contract, which amends this provision, so I will apply it in this adjudication.

137. 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* ("QBSAA") which relates to construction management contracts and subcontracts. There is no material to suggest it falls foul of s16 of the Act, which deals with pay when paid provisions, because the Claimant was working directly for the Respondent. The contract was not a construction management contract or subcontract, so I find that ss67U and W of the QBSA do not apply. I will now refer to the definition of due date for payment.

138. ***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."

139. The Claimant submits at paragraphs 84 and 85 that the *due date for payment* is 25 January 2006 because s15(1)(b) applies on the basis that the contract makes no provision to determine a due date for payment for a payment claim served on the Principal. The Respondent cannot take issue with this because there is no material to which I may have regard. However, I am obliged to establish the true merits of the claim and to consider, inter alia, the provisions of the Act. I do not agree with the Claimant's submissions because the cases suggest that one must have recourse to the contract to determine the *due date for payment*, and only if the contract definitely makes no provision for the due date for payment, then s15(1)(b) can fill in the gaps. In *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391 (21 September 2005) ("*Isis*") the NSW Court of Appeal dealt with payment claims (rights to progress payments) and the meaning of *due date for payment*. The latter issue was concerned with s11 of the NSW Act, with broadly similar but by no means identical wording.

140. In *Isis* the NSW Court of Appeal firstly dealt with the statutory entitlement to progress payments, and held at [49] that the right to a progress payment cannot be bargained away entirely, and at [50] that a contract may confer and regulate a contractual entitlement to receive a progress payment. It then added that Clause 42.1 of the AS2124-1992 [confirmed in para15 of the case], has this role. The Court went on to refer to the case of *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116, where Barrett J had held that just because a contract's express terms do not adopt a statutory definition of "progress payments" does not mean that the parties are forced on to the default timing and quantification regime prescribed in ss8(2)(b), 9(b) and 10(1)(b) and 2(b) [of the NSW Act]. This default timing approach was taken by the Claimant, and with respect, it does not accord with the law. The Full Court did not have to decide whether Barrett J was correct, but I find that it is highly persuasive, and I must look closely at Clause 42.1 to see whether it governs "progress payments' to which I will turn later.

141. I must firstly deal with the meaning of *due date for payment* and I have already said that *Isis* dealt with this with broadly similar but by no means identical wording in the definition of s11 of the NSW Act . At para [63] the Court took the view with reference to Clause 42.1 of the that AS2124-1992 contract which *"did not express a date other than 28 days from the end of the month after receipt by the Superintendent of the claim"*, even if there were other conditions attached to the clause. It was only if the clause did not operate that the statute would move to then fill in the gaps. I apply this approach to this adjudication. I will calculate the *due date for payment* in accordance with s15(1)(a) of the Act. This provision requires reference to the contract, and Clause 42.1 of the GCC provides that payment is due either 28 days after receipt by KBR (the Superintendent) of the payment claim, or 14 days after the issue of a payment certificate, whichever is the earlier.

142. Accordingly, providing the Claimant was entitled to make a progress claim under the Act on 11 January 2006, the progress claim is payable 28 days later because there is no material to suggest that a payment certificate had been given by KBR in response to this

claim. I calculate the *due date for payment* **as 8 February 2006** and not 25 January 2006 asserted by the Claimant.

143. I have earlier referred to the service of notices under the Act and that the Payment Claim was validly served on the Respondent. The Claimant had 20 business days immediately following 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 9 February 2006, which is the first day immediately following the due date for payment and is within the 20 day period.

144. The Respondent had 5 business days after the 9 February 2006 to deliver a Division 2 payment schedule, and the last day of this 5 day period was 15 February 2006, which was the date that I found a Payment Schedule was provided.

145. The Claimant's application was then required within 10 business days after the end of 15 February 2006, and so its delivery on 23 February 2006 was on the 7th day and also within time.

146. 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 on page 2 of the application and on page 3 of the application the Claimant asserted that no payment schedule had been served on it. I have found that no payment schedule had been served and that the application sufficiently identifies the payment claim to comply with s21(3)(d).

147. s21(3)(e) also needs to be satisfied. I note from the covering letter to the application dated 23 February 2006 that a fee of $385 was paid by cheque, and this is also identified in the application at page 3. I am therefore satisfied that an adjudication application fee was paid to satisfy s21(3)(e).

148. I now refer to s21(3)(f) and have noted above the list of the Claimant's material attached to its submissions. 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.

149. 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 2 March 2006 by delivery. 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 28 February 2006 by facsimile, and I had confirmation that the facsimiles were received by the parties. Accordingly, I am satisfied that the acceptance was received by the Claimant and Respondent on 28 February 2006. This means that the adjudication response had to be delivered within 2 days thereafter, and this was achieved by delivery on 2 March 2006. This satisfies s24(1)(b) under the Act. The same time frame is achieved by calculating the time under s24(1)(a), viz 2 March 2006. I commenced to decide the adjudication on 3 March 2006, the day after receipt of the adjudication response. Accordingly, *the third more detailed requirement* is satisfied.

150. 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.

Entitlement to progress payment

151. 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."

152. I need to determine the *reference date* for the progress claim, which 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…"

I have already found the *due date for payment* as defined in s15 by reference to the terms of the contract. Part A of the GCC provides that the times for progress claims under Clause 42.1 were the last Friday of each month. 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 find that the *reference date* for this Payment Claim as Friday 30 December 2005 and the Payment Claim heading referred to Progress Claim No 5 – December 05.

153. The Payment Claim was dated 11 January 2006. 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 from 30 November 2005; in this case 11 days from the *reference date*.

154. 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.

155. 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…."

156. 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 Earthworks, Roadworks and Drainage, 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 *erection or construction of a building*, but does not include work that is excluded by regulation (my emphasis).

157. The *Queensland Building Services Authority Regulation 2003* ("the Regulations") provides in Regulation 5 as follows:

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

Accordingly, I find that the Earthworks is not *building work* under the BSAA because it is specifically excluded by Regulation 5(1)(zb) of the Regulations. However, road works and drainage are not specifically excluded so I must discern whether they fall within the ordinary meaning of *building work* under the BSAA. The Collins Concise Dictionary definition of *building* is *something built with a roof and walls*, and I conclude that road works and drainage are not *buildings*.

158. 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.

159. I have already found that the Claimant was entitled to a progress payment under s12 of the Act. s17(5) of the Act prohibits the making of more that one payment claim in relation to each reference date. There is no material to suggest that there is another payment claim for 30 December 2005. However, the Payment Claim relates to work that had already been carried out and claimed in the previous progress claims, because Progress Certificate No. 4 – Attachment 4 to the Payment Claim contained items in the BoQ that had been previously paid. In addition, it is evident from the Payment Claim in paragraphs (l) and (m) that the variation claims 3, 4 and 7 had already been rejected by the Superintendent. 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.* According to Einstein J, in Leighton, I am not bound by a Superintendent's certificate, so that even though these claims appear to have been rejected by the Superintendent, they can still be the subject of adjudication.

Valuation of the claim

160. Adjudication is the objective valuation of debt arising from work done under a construction contract. s26(1)(a) requires a decision on the amount of the progress payment valuation is made and the starting point is entitlement provided in s13 of the Act, and then valuation under s14 of the Act, either by means of a specific provision dealing with valuation of the particular work under the contract: s14(1)(a) and s14(2)(a); 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). These provisions of the Act are listed so as to determine the adjudication amount:

"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.

161. In order for the Claimant to be entitled to payment for this work, it bears the both the legal and evidentiary burden of proof, and it must do so, before the evidentiary 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.

162. I am satisfied that because the Respondent failed to provide a Division 1 payment schedule as required by s18(4) of the Act, the Respondent was liable to pay the claimed amount on 8 February 2006 because s18(5) applies. The Claimant elected to have the matter adjudicated under the provisions of s19(2)(b), which required the Claimant to provide a notice under s21(2) of the Act. I have found that a Division 2 payment schedule could only deal with jurisdictional issues, and that the Payment Schedule delivered by KBR did not deal with these issues. Furthermore, I found that the Payment Schedule was not a payment schedule under the Act, because I characterised it more as a progress certificate. Accordingly, I may not have regard for the Payment Schedule, and must now determine this adjudication on the merits with those constraints in mind.

163. The amounts claimed in the Payment Claim are summarised as follows:

Description of works	**Value of work**
Earthworks, Roads & drainage	$865,764.50
Variations	$253,011.13
Testing fees	$15,411.00
Total value of works (excl GST)	**$1,134,186.63**
GST	**$ 113,418.66**
Total value of works incl GST	**$1,247605.29**
Less previous payments	$1,077,221.78
Payment claim amount	**$170,383.51**

164. The Claimant chose to limit its claim to the balance of the original contract sum, variations 3, 4 & 7 only and the delay costs associated with extensions of time. I have already summarised the components of the Payment Claim incl GST from the Payment Claim covering letter as follows:

i.	**Contract balance claim**	**$ 24,036.38**
ii.	**Disputed Variations Claim**	**$111,499.13**
iii.	**Delay costs Claim**	**$ 34,848.00**
	TOTAL	**$170,383.51**

165. I have already found that adjudication is different if a Division 1 payment schedule is not delivered, as has occurred in this case. I also found that s18(5) of the Act rendered the Respondent liable to pay the claimed amount unless those obligations are extinguished. I have also stated that a summary judgement application to court on the facts that are the subject of this adjudication, would probably preclude the merits of the case being considered apart from jurisdictional matters allowable under s19(4) of the Act. Although I decided that a Division 2 payment schedule could only raise jurisdictional issues to overcome the liability to pay obligation under s18(5), I have to accept that adjudication in these circumstances is not a summary judgement application to a court.

166. There is sufficient case authority in NSW to confirm that an adjudicator must turn their mind to reach a decision on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable: see *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13 (31 January 2006) ("Soliman") where Brereton J cited with approval the judgement of Hodgson J A in Court of Appeal in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA ("Hargreaves"). Hodgson JA said at [52] in Hargreaves that, "*The*

adjudicator may find very readily in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without addressing any of its merits." Brereton J in Soliman further at para [78] referred to the case of *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 in which Hodgson JA, with whom the Full Court agreed on this point said that, *However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks is relevant to the construction of the Act, the construction of the contract, and the validity of the terms of the contract having regard to the provisions of the Act."*

167. Accordingly despite my analysis of the extent of the operation of the payment schedules, which was required because there was no authority on point, I am now constrained by Full Court authority in NSW to consider the merits of the claim even though I have found that I cannot have regard to the Payment Schedule and the response.

Contract balance claim

168. I am obliged to value the claim in accordance with the Act, and I turn firstly to the **Contract balance claim** of $24,036.38 incl GST. I have already found that practical completion was reached on 16 December 2005. After reviewing the material, I found an express term in the General Job Specification A2.1 (Attachment E – Tab 1) *that it was a lump sum contract, with the BoQ not forming part of the contract except for use in valuing variations ordered by the Superintendent. Furthermore, quantities were provided for information only, and no responsibility was taken for their accuracy*.

169. Attachment 2 provided the contract price of $922,598.49, and the BoQ in Attachment 3 derived this sum by extending the costs for the 17 items and then totalling the columns into the contract sum. However, the BoQ contained provisional quantities (identified in my table below) and a contingency sum of $50,000. In the words to the left of the agreed sum in Attachment 2, there was a specific requirement that, "*The amount must include payments specified for any provisional items"*. Provisional items have not been defined in the material provided to me relating to the contract. I must try to make sense of the contract based on the material before me. Without a definition of provisional items and provisional quantities, I have had recourse to DJ Cremean (2004): *Brooking on Building Contracts*, 4th ed, LexisNexis Butterworths, at page 271 ("Brooking"), where "provisional items" and other items of similar descriptions in a BoQ require the contract price to be adjusted by substituting the actual cost for the sum provided in the BoQ.

170. Furthermore, Hudson's (1970): *Building and Engineering Contracts*, Sweet & Maxwell, 10th ed ("Hudson") refers to "Provisional sum" as a term that has so far defied legal definition, but that in practice it relates to the fact that the work may be provisional in character at the time of the contract, either because the work may not be carried out at all (page 204), or if there is reference to the latest standards(note this is a 1970 publication) then the term means sums provided for work or costs that cannot be entirely foreseen (page 759). Hudson also links provisional to the word contingent work on page 204, such that one could accept that a contingency sum may also not be expended at all. This is supported by the Collins Concise Dictionary definition of *contingency* which is, *"a possible but not very likely future event or condition."*

171. I therefore find, without material to the contrary, that the (lump sum) contract price was subject to adjustment, at least insofar as it dealt with provisional items and contingencies, howsoever described in the BoQ. If these items were not required they should be deducted from the contract price. Brooking at page 109 canvasses the doctrine of entire contracts and states that, "*An entire contract is one which the builder's promise to complete the work is an essential term…*" I refer to the tender form where the Claimant "*tenders to perform the works for the sum of..*" and also the FIA, Clause 3 where the *"..Contractor will construct complete and maintain the Works in conformity in all respects with the provisions of the Contract"*, and I am prepared to find that it was an entire contract. Clause 4 of the FIA provides that the Principal will make payments to the contractor in accordance with the provisions of the contract, and Part A of the GCC – Tab 7, and Clause 42 of the GCC provide for progress payments, and I find accordingly.

172. Since the Claimant has reached practical completion, whatever that terms means under this contract, as I was not given that part of the GCC, I am prepared to find that it was entitled to be paid the contract price, because it was an entire contract less any progress payments already made. This is apart from any variations and other costs properly payable under the contract. However, I am not prepared to accept that one merely subtracts from the contract price, the amounts already paid for those Schedule A items to reach the figure for the **contract balance claim**, because the contract price includes provisional items and contingencies. I was unable to determine how the Claimant arrived at its figure of $24,036.38 including GST, and I have reviewed the contract and performed my own calculations, which is my obligation to derive the proper sum payable for the **contract balance claim.**

173. I find that contract price was subject to adjustment because of the provisional sums and contingencies, and with reference to my table below, it is evident that a number of monetary adjustments have taken place. In relation to items 11, 13, 17 (project sign) and 17 (contingencies) both the Claimant and the Superintendent had excluded these items from their calculations for the Payment Claim and Progress Certificate No. 4. This strengthens my finding that the contract price was subject to adjustment. The Claimant maintained a claim for miscellaneous roadworks, which the Superintendent had excluded. However, this item was not described as a provisional sum or a contingency item, and I am prepared to accept that it formed part of the contract price. The most important monetary deviation from the original BoQ arose under item 4 dealing with subgrade replacement, in which the original provisional quantity was $33,500, but this increased to $144,452.00, both in the Superintendent's Certificate 4 and the Payment Claim. Furthermore, both the Superintendent and Claimant did not allocate any of the $50,000 contingency to their assessments of the final contract amount.

174. I accept that the Superintendent certified the value of works complete at 30 November 2005 at $1,077,221.78 as provided in Progress Certificate No. 4 – Attachment 4 of Tab 1 ("PCert#4"), and find this progress certificate reflected the Superintendent's assessment as at 14 December 2005, shortly before the date of practical completion. I find that I should consider PCert#4 in order to assist in determining the balance of the contract price because there is reference in the BoQ to provisional quantities, including rock that were not certified. Furthermore, Notice to Tenderers No.1 in Attachment B of Tab1 stated that there was no additional payment for rock. I have summarised those items into a table with the final figures for each schedule at the top of the table, and then only entered items where there was a difference between the original BoQ, PCert#4 and/or the Payment Claim ("Progress Claim # 5"). I then subtracted the Provisional quantities and contingency sums

from each schedule to arrive at a figure for the items that had not changed during the contract.

Item #	Description	Schedule Quantity	Complete Quantity	Unit	Rate $	BoQ	Amount $ PC#4	Amount $ PC#5
	Final figures					**838,725.9**	**861,580**	**865,764.5**
						Contract sum		
4	Pavement matl							
	Subgrade rep	500	2156	m^3	67.00	33,500	144,452	144,452
8	Misc roadworks							
	Street sign x 1	1			250	250		250
	R1-2 Give Way	1			250	250		250
	G9-18 No thru	1			250	250		250
	D4-4	1			450	450		450
	Line mark on	1			500	500		500
	Line mark off	1			500	500		
11	Misc drainage all prov qty (PQ)							
	E/O trench exc	200		m^3	65.00	13,000		
	Rock @ out	150		m^2	38.00	5,700		
	Rock to out	20		m^2	38.00	760		
13	Allot imp PQ							
	Dozer	40		Hrs	110	4,400		
	Grader	40		Hrs	90	3600		
	Water truck	20		Hrs	65	1300		
	Excavator	20		Hrs	120	2400		
14	Seeding (PQ)	7200	7200	m^2	2.30	16560	14076	16560
17	Project sign	1		item	750	750		
17	Contingency	1		prov	50000	50000		
	∑ exc PQ & cont					704,555.9	703,052	703,052.5

The Final figure by deducting PQ and contingency items for the Payment Claim of $703,052.50 differs from the PC#4 figure by only $0.50, which is insignificant, but I have subtracted different figures for Item 14 seeding. In this analysis I am using the bill rates, which is permissible under s 14(1)(b)(ii) of the Act.

I find that by subtracting the Payment Claim figure from that of the contract price less the provisional quantities and contingencies result in a difference of $1,503.90, which I find is payable. To this must be added any discrepancy between PC#4 and the Payment Claim for

these bill/schedule items, provided the Payment Claim difference is justified. I turn to each item for analysis, and will add the testing fees that form part of the PC items.

Item No.	PC#4	Progress	Difference	Preferred	Why?
4	$144,452	$144,452	0	$0	
8	$0	$1,700	$1,700	+$1,700	not PQ
14	$14076	$16560	$2484	$0	PQ
Testing	$14,671.80	$15,411.00	$739.20	+$739.20	PC item
		Add diff under contract price		$1,503.9	
		Contract balance claim		**$3,943.10 excl GST**	

175. I am unable to find any other amounts payable under this heading, which was advanced by the Claimant in the Payment Claim.

Disputed Variations Claim

176. I now have turn to the **Disputed Variations Claim** amounting to $111,499.13. This is the significant claim and is based on the premise that the Claimant familiarised itself with the Local Authority Standards, specifications and drawings, and based on the assumption that the use of alternative shoulder material was anticipated, it priced for the work on the basis that alternative shoulder material could be used.

177. On 1 September 2005, KBR then directed the Claimant to use pavement materials to construct the shoulder, which resulted in extra costs associated with providing additional pavement material and changing its method of working. KBR on 22 September 2005 denied that variations 3, 4 & 7 were justified because the BoQ did not form part of the Contract, such that discrepancies in the BoQ was at the Contractor's risk

178. I need to examine the document and drawings in light of the Claimant's submissions and list the following documents before analysing them, and I will develop a chronology at the same time:

i. 9 June 2005 - Notice to Tenderers No.1 (Attachment B – Tab 1), paragraph 4 specifically allows for variations to changes in Boonah Shire Council's requirements at the unit rates in the BoQ, and in paragraph 2 recognises that Engineering drawings not yet approved by Boonah Shire Council;
ii. 9 June 2005 – General Job Specification A6.3 (Attachment C – Tab 1) – ref to Local Authority standards – contractor to familiarise themselves that standards, drawings etc are current at time of construction;
iii. 9 June 2005 – General Job Specification A6.4 (Attachment D – Tab 1) – Engineering Works Manual to be adhered to as part of the works;
iv. 9 June 2005 – General Job Specification A1.3 (Attachment E – Tab 1) – Order of precedence of contract documents, and in A2.1 it is a lump sum contract, BoQ not part of contract, except for variation purposes and no responsibility for quantities;
v. Boonah Shire standard drawings STD.R – 001 and 002 (A) and Institute of Public Works Engineering Australia (IPWEA) R-0033, identifying vertical line separating pavement material from shoulder material on all standard cross sections;
vi. 9 June 2005 – General Job Specification B13.2 (Attachment G – Tab 1) stating that pavement thickness and BoQ assumed minimum thickness used for calculating BoQ. Actual thickness to be determined after testing subgrade;

vii. Allegedly corroborative calculations by Claimant establishing that surface area of road requiring pavement x min pavement thickness of 125mm yields 2075 m^3 = quantity at item 4(a). Claimant asserts that this corroborates BoQ and drawings;
viii. Claimant asserts that it provided for use of alternative material at time of tender;
ix. 25 August 2005, after award of contract, Boonah Shire drawings STD.R – 001 and 002 (A) (Attachment J – Tab 1) issued by KBR – same as previous;
x. 1 September 2005, KBR directs shoulders and batters to be constructed out of pavement material requiring Claimant to change work, carry out extra work and import extra material;
xi. 12 & 13 September 2005 (Attachments L1 & L2 – Tab 1), Claimant asserts that such direction constitutes a variation under cl.40.1 of GCC, and requests a valuation pursuant to Cl40.5. It sets out calculations in correspondence, and then fully detailed calculations in Attachment L3;
xii. 22 September 2005 (Attachment M – Tab 1) correspondence from KBR rejecting claim on basis BoQ did not form part of contract and that quantity discrepancies at Claimant's risk;
xiii. Claimant's assertions that KBR's arguments flawed
xiv. Further Claimant's assertions that arguments flawed and if documents ambiguous then contra proferentum rule applies
xv. Further Claimant's assertion that tender documents misleading and deceptive under *Trade Practices Act 1974*;
xvi. Attachment Q – Tab 1 - Boonah amends its drawings in November 2005 STD.R – 0012 Amendment C
xvii. Claimant then asserts that claim for payment for additional materials and costs associated with change of work methodology and additional materials is a variation to the contract.

179. At the outset I advise that I have no jurisdiction to deal with claims under the *Trade Practices Act 1974* as s26(2) of the Act constrains the matters to which I may have regard. In this analysis, the critical documents relating to the issue of liability, are the Notice to Tenderers No. 1 (Attachment B), the General job specifications (Attachments B, C, D, E) and the Boonah Shire Standard Drawings (Attachments F1 and F2). Thereafter, if liability to pay is established, I will need to look at other documents.

180. I will only have recourse to Clause A1.3 Order of Precedence of documents, if it absolutely necessary because interpretation of contracts requires one to give words their ordinary meaning, and that "courts" should be upholders of bargains and not their destroyers: *Geebung Investments Pty Ltd v Varga Group Investments No. 8 Pty Ltd* (1995) 7BPOR 14551 at 14570 [cited in Brooking page 13]. I interpret that word courts should extend to adjudicators.

181. I find from Attachment B that at the time of tender that Boonah Shire had not approved drawings and there was uncertainty as to what amendments may be required by the Shire. In the event of changes ordered by the Superintendent, the document expressly provided that variations would be calculated in accordance with the BoQ rates. Furthermore, in Attachment G, I find that there was a recognition that pavement material thicknesses were identified as the minimum for the drawings and for calculation of earthworks and paving material quantities in the BoQ and pavement thicknesses would be varied in accordance the results of subsequent subgrade testing.

182. A reasonable contractor confronted with such uncertainty must still take risks and lodge a tender based on the material available. However, it is my view that it is not possible to sheet home to a contractor all the risks associated with imprecise documentation, which are subject to the change by a third party. Hudson, at page 210, deals with tenders where the extent of work is uncertain. He stated earlier on the page that a lump sum basis contract is only practicable when the works have been designed in sufficient detail to enable them to be defined and priced by the builder. If the work is uncertain, the author suggests that work can be carried out at unit prices or rates, or at cost plus a percentage profit. The Author continues that there has to be an admission that no precise design exists at the time of contracting. So far so good, because the Notice to Tenderers in this adjudication is quite clear in that regard.

183. Hudson then continued at page 210, that the best approach in engineering contracts is to use the traditional type of contract and a set of drawings with varying degrees of precision, and rely on the power to vary the work contained in the contract. The author added that such a contract is likely to be a fertile source of dispute, and substantial claims by the contractor. Again, the Notice to Tenderers deals with the real possibility of variations and advises how that will be carried out. KBR however, adds a rider that the Claimant must familiarise itself with the Boonah Shire Standard drawings in General Specification 6.3. I find that this is a sensible approach so that the Claimant is aware of these standards and that of the Engineering Works manual. I find, without material to the contrary that the Claimant did seek out and obtain the Boonah Shire Council's standard drawings and associated standards (attachment s F1, F2 and F3), so it fulfilled its obligations in that regard.

184. I must now look to the standard drawings to establish what is depicted on them. In all the cross sections I note a small vertical line at the point where the shoulder meets the sealed surface of the road pavement. It is clear that there is a nearly horizontal line (3% crossfall) which extends across the whole pavement and shoulder, but in all cases the arrow referring to pavement thickness is directed at the pavement directly under the seal, apart from one reference to a rural road single lane on R-0033. There is no reference to pavement material in the small trapezium comprising the shoulder material which I interpret abuts the pavement, and is depicted by the small vertical line already described on both sides of the cross section, apart from the rural road single lane example. I have not been able to establish from the material whether a single lane road is being constructed, and with no material to verify that this road has been constructed, I find that it is not applicable to this adjudication.

185. I must now discern what a reasonable contractor would consider is necessary to construct the shoulder and road pavement, and what materials were required to be used. I find that there is no description of the shoulder material, so that it is reasonably open as a matter of commonsense in the construction industry for the Claimant to have considered that it could use a lower grade and possibly cheaper material for the shoulders as compared to the road carriageway, unless the contract provided otherwise. I have no material on which to decide otherwise, and I am unable in the circumstances of such uncertainty to find support for KBR's argument that the Claimant ought to have checked the quantities for which the Respondent was not responsible. I cannot accept that any reasonable contractor, in a case of acknowledged uncertainty is to be expected to second-guess that pavement material should go under the shoulder (when the drawings do not require this material), and therefore be expected to check the quantities in the BoQ to determine how much gravel it should allow for? Nothing in the drawings suggests that pavement gravel extends underneath the shoulder, because if this were the case, then there would be no need for the vertical line on both sides of the sealed surface, where the shoulder abuts. I consider that it was reasonably

open for the Claimant to believe that if the Superintendent wished to vary from the requirements of the standard cross section drawings, then a variation would issue, and it would be paid according the rates in the BoQ.

186. I find that a variation was directed by KBR on or about 1 September 2005, in which the Claimant was ordered to provide pavement gravel the whole way across the road profile and by necessity extending into the shoulder material. Having regard to Hudson' s reference to these contracts being a fertile source of disputes, it appeared inevitable that a dispute would arise when the Superintendent then relied upon a BoQ quantity "no responsibility clause" in General Job Specification A2.1 to refuse to allow a variation. I find that the direction, which I find was in writing (Attachment K- "granular material to extend to the batter") by KBR on 1 September 2005 constituted a variation to the work because it changed the *character or quality of any material or work*: s40.1(b) of the GCC and caused the Claimant *to execute additional work*: s 40.1(d) of the GCC, because gravel was not required to be introduced into the shoulder in the Boonah Shire Council' standard drawings. Accordingly, it should have been priced in accordance with the approach foreshadowed in the Notice to Tenderers No. 1 as following the unit rates in the BoQ. Accordingly, I find that there was a liability for the Respondent to pay for this variation under Clause 40.5 of the GCC.

187. Turning now to quantification of this part of the claim, which have found is justified, I am satisfied that the approach taken by the Claimant in Attachment L3 to calculate upper and lower subgrade and upper and lower sub-base areas, together with the base area, which appear to have been averaged (where applicable) and then multiplied by the depth yielded the gravel required to carry out all the gravel work, together with the calculated quantities of subgrade replacement. From these figures the Claimant then subtracted the BoQ figure for the various gravels to yield the extra quantity of gravel used on the project. The dollar value was then obtained by multiplying the resulting volume by the rate per cubic metre and I find that the correct BoQ rates were used for subgrade replacement, sub-base and base of $\$67/m^3$, $\$61.20/m^3$ and $\$65.80/m^3$ respectively. This calculation yielded $49,403 extra sub-base and $44,752.23 base course gravel respectively, and I am satisfied that this is a reasonable means to calculate these quantities. I am also satisfied that with rounding off to the nearest m^3 that these amounts were extended to the letter dated 12 September 2005 claiming 44,744.00 and 49,388.40 respectively and that these amounts were then extended to Variation Claims No. 2 and 3 in the Payment Claim. I find these amounts payable under Clause 40.5 of the GCC.

188. I noted that the Claimant also submitted a claim for extra final trimming of roads prior to spray seal. Although this did not appear to be explicitly directed by the Superintendent, I find that it is a necessary operation to ensure for this additional area of gravel to be sealed, it needed to be trimmed prior to the seal being applied. However, I was unable to follow the calculation provided in Attachment L2 because it yielded an additional cost of $13,443.50 for additional trimming and compaction of subgrade, which was then to be added to the cost of pavement. This figure of $13,443.50 did not appear to be extended across to Variation Claim No 7, which referred to extra final trimming of roads prior to spray seal and had a figure of $7,230.45 in the amount column? The Claimant bears the onus, and I am unable in this instance to check the calculations, because there is insufficient information for me to do so. I have no drawings apart from the cross sections on which to even attempt such a review of costs. Accordingly, I am unable on the material presented to me, and being mindful of my adjudication obligations to accept Variation No. 7.

189. The **Disputed Variations Claim amounts to $94,132.40 excl GST**.

Delay Costs Claim

190. In relation to the **Delay Costs Claim** of $ 34,848.00, I must be satisfied that this is not a damages claim, which cannot be considered by me in adjudication if it does not fall within the umbrella of claims for construction work. The recent case of *Hargreaves*, Hodgson JA at para 42 said that, "*Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.*"

191. The claim for delay damages in this adjudication is based on costs associated with extensions of time that had been granted and the Claimant asserts that Cl.36 of the GCC allows damages to be claimed. Accordingly, these "damages fall within Hargreaves, where Hodgson continued at para 42, in dealing with the NSW equivalent of the legislation, *"Under the contract in this case, delay damages are payable only if an EOT is for a compensable cause, that is, in general some act or omission of the head contractor or the superintendent or the sub-contract superintendent; but nevertheless, they are not of their nature damages for breach but rather are additional amounts which may become due and payable under the contract (cl.34.9) and which are then to be included in progress payments (cl.37.1). They are therefore prima facie within s.9(a) of the Act."*

192. In order for the parties to understand the basis of the delay damages claims arising out of the extensions of time I tabulate the extensions of time and delay cost claims below.

EOT#	Description	EOT days granted	EOT needed	Amount claimed excl GST	Amount allowed excl GST
1.	Increased sub-based courses and increased sub-grade trim area.	5			
	Lime stabilisation of subgrade	3			
	CBR 15 subgrade replacement	4	4 days	$11,040.00	$4,960.00
2.	October 20 wet weather effects	½			
	October 21, 25, 26 wet weather and its effects on site	3			
3.	November 7, 11 wet weather and effects	2			
	November 14-15, 21-23 Telstra trenching and backfilling	5		$6,640.00	$2,640 $1,760
	November 16-19 Transfield not placing Telstra cable	3	2	$3,600.00	$1,760
4.	Excavation of Telstra pits	½			
	Supply and install guide posts	2			

5.	December 2, 5 wet weather and effects on site	2	4	$4,640.00	$3,520
	Waiting for approval for Telstra trench concrete encasement	4			
6.	December 12-15 delays caused by Transfield in laying Telstra cable and time required to complete Telstra pit excavation	4	4	$5,760.00	$3,520
TOTAL		**38 days**	**14 days**	**$31,680.00**	**$18,160**

193. Clause 36 of the GCC provides that delay or disruption costs should be paid by the Principal for the costs necessarily incurred by reason of the delay. The claims made by the Claimant related to extension of time ("EOT's") granted due to delays caused by others on the site. Having regard to Tab 6, which was attached to the application, I refer to Clause 35.5(b)(i) to confirm that the delay for which the Claimant made a claim related to delays caused by "other contractors or agents", which puts it within Clause 35.5(b)(i). This is the specific entitling mechanism in Clause 36 to allow for extra costs to be paid for delays caused by those circumstances.

194. The Claimant has lodged a claim idle plant and labour. The plant ranged from graders, rollers, water trucks and backhoes with labour including supervision and labour hire. I am obliged to value the claim under s 14(1)(a) of the Act under the contract, or if the contract makes no provision for quantification then under s14(1)(b) of the Act, I must consider (i) the contract price for the work, (ii) any other rates or prices stated in the contract and (iii) any variation agreed to by the parties, or any other rate or price stated in the contract.

195. I refer to the BoQ which provided at item 10 for plant hire rates for graders at $90/hr and water trucks at $65/hr. No other plant nominated in the delay claim was identified in the BoQ, nor was there any reference to labour and supervision costs. I found another rate in the Progress Certificate No.4 on page 8 at Item 6 for excavation of Telstra pits at an agreed rate of $110/hr, and the Payment Claim detail for this item, which I find is Item 9 Excavation of Telstra pits…referred to backhoe hire at $110/hr.

196. There is no material to suggest that there were other variations agreed by the parties to the costs of any other plant or any labour or supervision. The valuation provision under the Act is directed at there having been an agreement between the parties in relation to specific rates. Accordingly, apart from the grader, water truck and backhoe I am unable to find rates or prices agreed by the parties, or any variations subsequently agreed by them, and cannot value those components of the claim under the Act.

197. Whilst I find that the Respondent is liable to pay delay costs for the EOT's referred to above, I am unable to value them because the rates identified in these claims have not been agreed by the parties. Accordingly, in relation to the delay costs associated with the EOT's I find the agreed rates (excl GST) as follows:

Grader Hire	$90.00/hr
Water truck	$65.00/hr
Backhoe	$110/hr

198. I then calculate the delay costs for the EOT's as follows and have inserted these amounts in the table above.

EOT #	Description	Amount	Hours	Total
1	Grader	$90/hr	8 x 4	$2,880
	Water truck	$65/hr	8 x 4	$2,080
			TOTAL	$4,960
3	Backhoe	$110/hr	8 x 3	$2,640
	Backhoe	$110/hr	8 x 2	$1,760
	Backhoe	$110/hr	8 x 2	$1,760
			TOTAL	$6,160
5	Backhoe	$110/hr	8 x 4	$3,520
	Backhoe	$110/hr	8 x 4	$3,520
			TOTAL	$7,040

The adjudicated amount

199. The **adjudicated amount** comprises:

i.	Contract balance Claim	$ 3,943.10 excl GST
ii.	Disputed Variations 3, 4 & 7	$ 94,132.40 excl GST
iii.	Delay damages	$ 18,160.00 excl GST
	TOTAL	**$127,859.05 inc GST**

Due date for payment

200. I have already found that the due date for payment is 8 February 2006.

Rate of interest

201. 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 the rate of interest identified in the contract was *nil*.

202. 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, and this is the greater of the 2 rates, and therefore applies. I find this is the applicable interest to apply to the adjudication

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

Authorised Nominating Authority and Adjudicator's fees

204. The Claimant has obtained approximately 75% of what it has 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), again unless I decide otherwise. Valuation of the Payment Claim was difficult in some areas because the calculations were unable to be followed, and insufficient material was available to investigate the matter fully.

The onus is on the Claimant to prove its case, and it has substantially succeeded. However, the Respondent failed to deliver a Division 1 payment schedule or a Division 2 payment schedule and a lot of time was spent having to deal with these issues.

205. I am obliged to value the claim on its merits and the Claimant received 70% of its claim. Accordingly, I exercise my discretion to alter the default provision in s34(3) and 35(3) and decide that the Claimant pay 25% of the ANA's fees of $385.00 and 25% of my fees, and the Respondent pay 75% of the ANA's fees of $385.00 and 75% of my fees..

Chris Lenz
Adjudicator

16 March 2006