Claimant: Civil Mining & Construction Pty Ltd

Respondent: Australian National Homes Pty Ltd

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

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:

1. The adjudicated amount in respect of the adjudication application dated 24 August 2006 is **$285,999.96 including GST**
2. The date on which the amount became payable is **15 August 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
4. The Respondent is liable to pay all the ANA's fees of $165 and all the adjudicator's fees

Signed: ……. Date:……

Chris Lenz Adjudicator

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Background

1. Civil, Mining and Construction Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by Australian National Homes (referred to in this adjudication as the "Respondent") to undertake construction works by providing labour, and machinery for earthworks, roadworks and drainage ("the works") at Old Coach Way, Yandina (the "project").
2. The Claimant and Respondent entered into a contract (partly oral and partly in writing) on or about 28 January 2006 (the "contract") for the works to be provided by dayworks, with payment on a cost-plus basis.
3. The works commenced on 2 February 2006 and stopped on 7 June 2006.
4. Qantec McWilliam carried out the function of Superintendent on the project (the "Superintendent") and issued 3 Payment Certificates nominating the Respondent as the Principal. The Superintendent is in the process of reviewing Progress Claim No.4.
5. The Claimant lodged a Progress Claim, dated 3 March 2006 for $136,571.47, with the Superintendent. In Payment Certificate No.1 dated 7 June 2006, he certified a sum of $132,498.64 (including GST) as payable to the Claimant. This certificate deducted the sum of $13,383.70 for retention moneys.
6. The Claimant lodged a Progress Claim, dated 3 May 2006 for $126,252.91, with the Superintendent. In Payment Certificate No.2 dated 7 June 2006, he certified a sum of $124,990.38 (including GST) as payable to the Claimant. This certificate deducted the sum of $26,008.99 for cumulated retention moneys.
7. The Claimant lodged a Progress Claim, dated 1 June 2006 for $156,217.54, with the Superintendent. In Payment Certificate No.3 dated 7 June 2006, he certified a sum of $177,468.68 (including GST) as payable to the Claimant. This certificate deducted the sum of $20,811.37 for cumulated retention moneys.
8. A Progress Claim dated 21 June 2006 for $239,188.59 was lodged with the Superintendent, but this was not certified.
9. On 1 August 2006, the Claimant lodged a payment claim, the subject of this adjudication, claiming completion of the total value of the work of $732,510.54(including GST), and claiming the outstanding balance of $297,552.84 (including GST) for work carried out in May and June 2006.
10. On 14 August 2006, Crowley Greenhalgh Solicitors, on behalf of the Respondent, provided a Payment Schedule stating that the Respondent proposed to pay no amount, and it is also the subject of this adjudication.
11. The Claimant made a written application for adjudication on 24 August 2006 (the "application"), and the Respondent's solicitors provided an adjudication response on 1 September 2006 by facsimile (the "response").

Service of the application

12. This was an issue before the adjudication commenced. On 30 August 2006, I received a telephone message from the Respondent's solicitors stating that the Respondent and its solicitors had not been served with the application.

13. On 31 August 2006 1 wrote to both parties advising of the message and reminded the parties that service of the application was a requirement before adjudication could proceed. On 31 August 2006, I received a facsimile (copied to the Respondent) that the application had been hand delivered on 24 August 2006 and signed for by Gregory George Armstrong on behalf of the Respondent, and a copy of this signed acknowledgement was attached to the facsimile.

14. I was satisfied that the application had been served and on 1 September 2006 I received the response from the Respondent's solicitors.

Appointment of Adjudicator

15. The Claimant applied in writing to the Institute of Arbitrators and Mediators Australia ("IAMA") on 24 August 2006 for adjudication. Subject to my finding jurisdiction, which is dealt with below, I find that the application in writing satisfies s21(3)(a) of the Act.
16. I find the application was to IAMA, which I find is an authorised nominating authority, because it has registration number N1057859, thereby satisfying s21(3)(b) of the Act.
17. By letter dated 28 August 2006 IAMA referred the adjudication application to me to determine, pursuant to s23(1) of the Act. I am registered as an adjudicator under the Act with registration number J622914. I accepted the nomination by facsimile dated 30 August 2006 sent to the Claimant and to the Respondent, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.
18. Accordingly, I now adjudicate the matter, and firstly refer to the material in the adjudication, and then consider the threshold issue of jurisdiction before considering the application in detail.

Material provided in the adjudication

19. I list the Claimant's material and the Respondent's material separately.

Claimant's Material

This material comprised the following:

(i) The application dated 24 August 2006 in support of its payment claim for $732,510.54(including GST) comprised the following documents:
   (a) Cheque No. 502848 in the amount of $165.00 for the adjudication application fee;
   (b) Tab 1 - Claimant's submissions numbers 1 to 138 (the "submissions");
   (c) Tab 2 – The Adjudication Application dated 23 February 2006;
   (d) Tab 3 –Document indicating payments by the Respondent;
   (e) Tab 4 – Documents indicating the street name for the road for the subdivision;
   (f) Tab 5 – Payment Claim;
   (g) Tab 6 – Documents supporting the breakdown and details of the amounts comprising the claimed amount in the Payment Claim;
   (h) Tab 7 – Statutory Declaration of David Ahern, Director of the Applicant, together with the Claimant's Document, dated 24 January 2006 attaching a list of external hire rates for labour and equipment;
   (i) Tab 8 – Bundle of day works/variation sheets from 2 February 2006 to 14 June 2006;
   (j) Tab 9 – Summary of Payment Claims together with interest and claimed preparation costs plus an interest calculation sheet;
   (k) Tab 10 – Tax Invoice from Alternative Dispute Resolution Services;
   (l) Tab 11 - Progress Claims dated 3 March 2006, 3 May 2006 and 1 June 2006, together with Progress Payment Certificate Numbers 1, 2 and 3, all dated 7 June 2006;
   (m) Tab 12 – Claimant's facsimile to Superintendent dated 21 June 2006 attaching breakdown of costs for May up until June 14 2006, together with facsimile from Superintendent to Claimant and Respondent attaching Progress Claim No. 4 review

Respondent's Material

The Respondent's material consisted of:

(a) the Respondent's solicitors' facsimile dated 1 September 2006, (the "response") comprising 22 paragraphs, to which was attached the Payment Schedule dated 14 August 2006;

(b) a facsimile sent on 11 September 2006 requesting that a review of the amounts contained in the Claimant's invoices be undertaken as part of the adjudication. I did not have regard to this document, for reasons set out under the heading of Valuation below.

Threshold jurisdictional issues

20. s3 of the Act requires that (1) the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and (2) that the *construction work* was carried out, or the related goods and services supplied for construction work, in Queensland for me to have jurisdiction to adjudicate the dispute. This section also excludes certain types of construction contracts from the application of the Act, to which I will turn later.

21. Paragraph 2 of the application refers to the Statutory Declaration of Mr Ahern, together with the Rate Confirmation Correspondence dated 24 January 2006 and the attached external hire rates (the "rates"), which are contained within Tab 7. Mr. Ahern, a director of the Claimant, asserted that an arrangement with the Respondent was made on or about 28 January 2006, on certain terms, for work on the Ninderry project.

22. In submissions 2 through to 5, the Claimant sets out its assertions in relation to the contract which includes reference to Mr. Ahern's statutory declaration. In paragraph 5 of the response, the Respondent specifically takes no issue with the matters raised in paragraphs 1-78 of the submissions, which could suggest that it did not disagree with submissions 2 to 5. However, the Respondent had earlier asserted in paragraph 1 of the Payment Schedule and paragraph 3 of the response, that there is no contract with it, but that there was a contract with Sunshine State Developments Pty Ltd ("SSD").

23. Nevertheless, the Respondent does not take issue with the date of the "contract" in its material, so it is open to find on the material, that on or about 28 January 2006 there were discussions relating to work on a project at Ninderry. It will be necessary for me later to determine whether these discussions resulted in a *construction contract* for work in Queensland, and I must also determine the identity of the correct parties to that contract. Presently, I am focussing on the date of the discussions, and having found that they were on or about 28 January 2006, I find that this is after 1 October 2004. This satisfies the first jurisdictional point.

24. I must now determine whether the agreement constituted a *construction contract* as defined under the Act.

25. 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."*

Having regard to submissions 2 to 5 with support from the Statutory Declaration of Mr Ahern, and with no material from the Respondent to controvert on this point, because it did not take issue with submissions 1 to 78, I am satisfied that there was at least an *arrangement* under which the Claimant, through Mr. Ahern, undertook to carry out work for, or to supply related goods and services to an organisation which Mr Vandermeer represented. The identity of that organisation has yet to be determined because it has been put in issue by the Respondent, as identified above. This *arrangement* satisfies the definition of *construction contract* providing it was for *construction work or supply of related goods and services* within the meaning of the Act.

26. In submissions 10 through to 32, the Claimant dealt with the application of the Act and the Respondent, as stated previously, did not take issue with submissions 1-78. However, I must find jurisdiction, whether or not the parties agree that there is jurisdiction. I first turn to *construction work*, as defined in s10 of the Act, and *related goods and services* in s11 of the Act. In submissions 11 and 12, the Claimant highlighted extracts from s10 and 11 of the Act in bold letters some words in which it did not explain the significance of the highlighting. I could speculate as to what the Claimant was trying to achieve by this highlighting, but it is unsafe and unnecessary to do so.

27. My focus is on the "*arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."* Therefore, at this stage, I do not focus on the activities that may subsequently have been carried out by the Claimant for the Respondent during the course of the project, but rather on the *arrangement* on 28 January 2006, because it is at that time that I need to decide whether there was an undertaking to *carry out or supply*…

28. Paragraph 3 of Mr Ahern's Statutory Declaration referred to a request from Mr Vandameer for the Claimant to complete the work on a project, but it is not clear what constituted that work from this document. Certainly there is reference in Paragraph 5 to valuation of work by means of day works with a cost plus 12% on materials and plant labour rates, as provided, but the particulars of the work are not identified. Accordingly, I will have to look elsewhere to determine whether there was a *construction contract.* The Claimant, in submission 12 extracted s11 of the Act, which deals with *related goods and services*. I consider this section of the Act more apposite to which the facts may apply and I now discuss this further.

29. I find from paragraph 5 of Mr. Ahern's statutory declaration that there were rates provided to and agreed by Mr Vandermeer. The rates were not attached to his affidavit, but they were provided behind it in Tab 7. The rates contained the hire costs of plant and machinery, which as a matter of commonsense, are used for earthworks, roadworks and drainage projects. The Respondent does not take issue with the rates letter, its contents or its delivery, in the Payment Schedule or the response. I now extract the relevant provision dealing with related goods and services.

11 Meaning of related goods and services

1. ***Related goods and services****, in relation to construction work, means any of the following—*

(a) goods of the following kind—

i) materials and components to form part of any building, structure or work arising from construction work;

ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind—

i) the provision of labour to carry out construction work;

ii) architectural, design, surveying or quantity surveying services relating to construction work;

iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;

iv) soil testing services relating to construction work;

(c) goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.

2. In this Act, a reference to related goods and services includes a reference to related goods or services."

30. I find that these plant and machinery hire costs fall within the meaning of s11(a)(ii) "*plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work".* In addition, the rates also included the hourly rates for human resources. I find that these fall within the definition of s11(1)(b)(i) "*provision of labour to carry out construction work"* so that the rates fall within the definition of *related goods and services.* I must, however, be satisfied that both categories relate to the *carrying out of construction work*

31. I have already concluded as a matter of commonsense that the rates are for plant and machinery that are to be used for earthworks, roadworks and drainage projects, which I find fall within the definition of *construction work* as defined by s10(1)(b) of the Act, which refers to *"…any works forming, or to form, part of land, including walls, roadworks…and installations for land drainage…"*. In addition, s10(1)(e) of the Act provides for any operations integral to or preparatory to s10(1)(b) above and includes in ss(i) *"site clearance, earth-moving, excavation, tunnelling and boring"*, and in s10(g) *"carrying out the testing of soils and road making materials during the construction and maintenance of roads;"*. Accordingly, I am therefore satisfied that the plant or material supplied by hire for use in connection with, and the provision of labour as identified above, were both to *carry out construction work* as defined in the Act.

32. In making this finding, I found that the Claimant satisfied its evidentiary onus in respect of the rates having been agreed by Mr. Vandermeer. The evidentiary onus then shifted to the Respondent to controvert the existence and quantum of the rates, and as I have said, it has not done so in its material. I therefore find that the Claimant has satisfied it evidentiary onus on this point.

33. However, it has not yet been determined what the status of Mr Vandermeer was in relation to the Respondent, nor for that matter whether Mr. Ahern, as a matter of law could bind the Claimant. Accordingly, the Claimant's legal onus to prove a *construction contract* between the parties has not yet been discharged and this is canvassed in the first basic and essential requirement below.

34. Mr. Ahern's statutory declaration refers to the address of the project as Ninderry, but it is not clear where Ninderry is. However, the documents in Tab 8, included day works/variation documents, with the site described as Old Coach Road Ninderry/Yandina, or Old Coach Way Yandina. I am therefore satisfied, without contrary material from the Respondent that an agreement was entered into on or about

28 January 2006, which is after 1 October 2004, and was for work in Yandina, which I find is in Queensland.

35. I find that the contract date was after 1 October 2004, and it related to the supply of related goods and services for *construction work* in Queensland, thereby satisfying threshold issues numbers 1 & 2, providing that the exclusions in ss3(2) and 3(3) of the Act do not apply.

36. I find that none of the exceptions contained within s3(2) and s3(3) of the Act applies to disqualify the *construction work* from the application of the Act.

37. Consequently, I have jurisdiction to adjudicate this matter.

Scope of the determination

38. 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.

39. 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 (my emphasis added)*:*

> *(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."*

40. I did not conduct any inspection of the project, so I am confined to s26(2)(a) to (d) only in carrying out the adjudication. 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

41. 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)).

Detailed consideration of each Basic and Essential Requirement

The first basic and essential requirement – the construction contract

42. I have already found that there is a *construction contract* to which the Act applies. I also need to be satisfied that there was a contract between the Claimant and Respondent for this adjudication to proceed further. The identity of the parties is fundamental in this adjudication because the Respondent argues that it did not enter into a contract with the Claimant.

43. I have considered the respective submissions and assertions of the parties in the application and response, and the material on which these are based (viz. the Payment Claim and the Payment Schedule), and discern that there are sub-issues raised by these contending submissions regarding the existence of a *construction contract* between the Claimant and Respondent, which are as follows:
    i. The capacity of a director to enter into a contract on behalf of a corporation;
    ii. The assumptions that the Claimant may properly make in relation to the entry into a contract with another corporation
    iii. The apparent or ostensible authority of Mr. Vandermeer to act on behalf of the Respondent.

44. I have sometimes used the following identifiers to abbreviate those documents:

Payment Claim	= PC
Application	= APP
Payment Schedule	= PS
Response	= RES

Director's capacity to contract on behalf of company

45. Although the Respondent did not directly raise the Claimant's ability, though its agent, to contract as an issue, it did challenge the foundation of the alleged contract with the Respondent, because it alleged that the Claimant was mistaken as to the identity of the contracting party: RES para 7. I have already found from Mr. Ahern's affidavit that the Claimant acted through Mr. Ahern. It is, however, important to determine whether these actions bound the Claimant, thereby entitling the Claimant to make a payment claim. If the Claimant was not bound under a *construction contract* then it is unable to make a payment claim.

46. I am obliged to determine the merits of the case, and therefore must ensure that the foundations of the *construction contract* have been properly laid. Accordingly, I have considered Mr. Ahern's capacity to contract on behalf of the Claimant as part of that foundation that needs investigation.

47. In Mr. Ahern's statutory declaration, he asserted that he was a director of the Claimant. I find the Claimant is a corporation, because its name ended with Pty Ltd, and it identified its ACN of 102 557 175 in the Payment Claim. I also find from Tab 3 of the application that the Respondent is a corporation with ABN 97 010 903 189. The law provides that *a corporation cannot act on its own account as they need human beings as their hands and minds:* Willmott, Lindy; Sharon Christensen and Des Butler (2005): *Contract Law*, Oxford University Press, South Melbourne, Victoria, 2nd ed, paragraph [10.220], page 372 ("*Willmott*").

48. A contract may be executed by a corporate agent and s126 of the *Corporations Act 2001 (Cwth)* provides that the company's power to make a contract may be exercised by an individual acting with the company's express or implied authority: Vermeesch RB and KE Lindgren (2005): *Business Law of Australia*, LexisNexis Butterworths Australia, 11th ed, paragraph 21.34, page 561 ("*Vermeesch*").

49. Accordingly, I find that, without any material to the contrary from the Respondent that Mr. Ahern was a director of the Claimant from paragraph 1 of Mr. Ahern's statutory declaration, and s126 of the *Corporations Act 2001* permitted him to enter into a contract on behalf of the Claimant. I find therefore that the Claimant did enter into a *construction contract* with someone under the Act, albeit that it was oral. The Claimant does not assert that there was a written contract, so s127 of the *Corporations Act 2001* dealing with the directors' requirements for execution of documents does not apply.

50. I have not asked either party for submissions on this point because I found that it was sufficiently, albeit tangentially, raised in their respective cases, thereby providing me with sufficient information on which to make this finding. I must now decide who that "someone" is, with whom the Claimant contracted.

Assumptions that the Claimant may make regarding a contract with the Respondent

51. As a matter of law the Claimant is entitled to make some assumptions in relation to its dealings with the Respondent as provided by ss128 and 129 of the *Corporations Act 2001* (the "CA") because I have found that the Respondent is a *company*. *Company* is defined in s9 of the CA as a company administered under that Act and the ABN and ACN numbers are administered under the CA. Relevant extracts of the CA are extracted below.

"128 Entitlement to make assumptions

> *(1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect…*
>
> *(3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.*

> *(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.*
>
> ***129 Assumptions that can be made under section 128***
>
> *Constitution and replaceable rules complied with*
>
> *(1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with….*
>
> *…Officer or agent*
>
> *(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:*
>
> *(a) has been duly appointed; and*
>
> *(b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.*
>
> *Proper performance of duties*
>
> *(4) A person may assume that the officers and agents of the company properly perform their duties to the company.*

52. Given that the law allows the Claimant to make assumptions, and it has referred to its assumption about the status of Mr. Vandermeer in paragraph 2 of Mr. Ahern's statutory declaration; it is my view that the evidentiary onus shifts to the Respondent to controvert any such **entitlement to assume**. In paragraph 3 of Mr. Ahern's statutory declaration, it is also stated that Mr. Vandermeer had said that the Respondent had a project in progress on the Ninderry project, for which another contractor had been terminated. There is nothing in the material from the Respondent asserting that Mr. Ahern knew or suspected that its assumption about the status of Mr. Vandermeer was incorrect, nor that the Respondent was not the party carrying out the project.

53. There is no statutory declaration from Mr. Vandermeer or anyone else on the Respondent's side to provide cogent material to satisfy this evidentiary onus that it should discharge. There is material in the Payment Schedule denying the existence of a contract between the parties, which put this matter in issue. However, I would have expected that the Respondent would have, in its response, provided a statutory declaration in response to Mr. Ahern's, in which it could have controverted the facts claimed therein. This is perhaps the most significant issue in this adjudication because if the Respondent could show that SSD was the contracting party, then this adjudication could not presently continue. However, all that the Respondent did was to make submissions in its response, RES 7, that:

    i. the Claimant was mistaken as to the identity of the contracting party;
    ii. Mr. Vandermeer was not a director of the Respondent;
    iii. SSD was the owner and developer of the land;
    iv. Mr. Vandermeer contracted on behalf of SSD;
    v. the use of the Respondent's letterhead was an administrative issue and not conclusive of the identity of the contracting party

vi. The Claimant's misunderstanding was due to its own failure to identify the appropriate party for the claim.

54. Points (ii), (iv), (v) and (vi) above are assertions that the Claimant is unable to meet (unless I ask for submissions) because the response is the last document in an adjudication. If I was prepared to consider these submissions as sufficiently cogent, I would have asked for such submissions from the Claimant. However, as I have said there was no material to support these submissions, and I have difficulty being persuaded that these points are supported by the facts.

55. The Claimant retains the legal and evidentiary onus to prove that it entered a contract with the Respondent, which will need to be considered below, so I have not reversed this onus in this analysis. However, the Respondent has raised these points, and it has the "last shot" in the adjudication, so I am analysing these points at this time. The evidentiary onus on the Respondent regarding these points is in response to the assumptions the Claimant may make under the *Corporations Act 2001*.

56. Although this analysis appears to "put the cart before the horse" in that the Claimant bears both the legal and evidentiary onus in relation to its claim, it is considered logical to canvass the Respondent's evidentiary onus at this point, because the law allows the Claimant to make certain assumptions about the points that the Respondent has raised, and the Claimant has asserted its facts and assumptions in the statutory declaration of Mr. Ahern.

57. In point (i) the Respondent essentially asserts that the Claimant made a mistake of identity, in that it mistakenly entered into a contract with the wrong party. According to Willmot at para [14.25] an operative mistake is one of fact, not law, and the authors refer to the case of *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226 at 245 in support of that proposition. Therefore, it is important for the Respondent to satisfy me <u>on the facts</u> that the Claimant was mistaken, rather than relying on a legal point that I would be bound to consider. It does not provide any facts in support of this point, so I am unable to consider this point further.

58. As to point (ii), even if the Respondent had provided a company search to prove that Mr. Vandermeer was not a director of the Respondent, it does not squarely deal with the Claimant's submission that it understood Mr. Vandermeer was a director. It does not appear the Claimant is suggesting it is a case of actual authority of Mr Vandermeer on which it relied, but rather on apparent, or ostensible authority, to which I will turn later. For the moment, the case in my view does not turn on whether or not Mr. Vandermeer was actually a director, so this point raised by the Respondent does not take the matter very far.

59. As to point (iii), which was originally identified in paragraph 1 of the Payment Schedule, the Claimant (correctly in my view) suggests in submission 82 that the owner of the development is not relevant to the determination of the contracting parties. I am not required, as a matter of law, to find that because SSD is the developer of the land, it <u>has to be the person with whom the Claimant contracted</u>. In my view it is a question of fact as to the identity of the contracting parties, and this will be determined on the facts. There are no facts from the Respondent positively asserting that SSD as developer, was the person with whom the Claimant contracted. I find that there are no facts supporting this point.

60. In relation to point (iv) the assertion is that Mr. Vandermeer contracted on behalf of SSD, but there is no material supporting this beyond the Respondent's submission. Again this is matter of fact, not law. If there were facts supporting this point, in my view they should have been provided, because they could have assisted in resolving this important issue. If these facts were before me, it may have been persuasive that in light of them, it would have not been possible for the Claimant to make assumptions under s128 of the *Corporations Act 2001*. In that event, the apparent or ostensible authority would not have been a live issue to be considered below. However, I find that there were no facts to point toward Mr. Vandermeer contracting on behalf of SSD, so I will need to consider the apparent or ostensible authority of Mr. Vandermeer.

61. Regarding point (v), I agree with the Respondent that stationery is not conclusive evidence of a contracting party. However, it is not denied that the Respondent's letterhead was used for correspondence with the Claimant. The Claimant in submission 83, referred to correspondence and remittance advices (attached in Tab 3) pointing to the Respondent being the contracting party. It is incumbent upon me to therefore evaluate all the material to decide whether, in all of the circumstances, the letterhead points toward or away from the likelihood of it being probative of a contract between the parties. This will be further considered below.

62. In relation to point (vi), it is a question of fact in all of the circumstances, as to whether the Claimant has failed to identify the correct party to the contract. The Respondent has not provided any facts to support this submission.

63. Accordingly, I find from this analysis above that s128(4) of the *Corporations Act 2001* cannot be invoked by the Respondent to preclude the Claimant from making assumptions. However, it is necessary to consider the material further to decide what assumptions were made or could reasonably have been made by the Claimant about Mr. Vandermeer and his connection with the Respondent

The apparent or ostensible authority of Mr. Vandermeer

64. In Paragraph 1 of the Payment Schedule, the Respondent asserted that it had no contract with the Claimant and no liability whatsoever with the Claimant and that the Payment Claim should have been directed to SSD. In submission 82, the Claimant said that it had no prior dealings, nor had heard of SSD, and that it always understood the Respondent to be the other party to the construction contract, and in submissions 84 and 85 said that the Respondent was estopped from denying that it had a contract with the Claimant for the project.

65. The Claimant is unable to establish by means of actual authority of Mr Vandermeer that negotiations with him bound the Respondent to a contract with the Claimant. It did not attach a company search that may have identified Mr. Vandermeer as a director. Accordingly, it is necessary to consider whether Mr. Vandermeer was clothed with an apparent or ostensible authority to contract on behalf of the Respondent, because in his statutory declaration Mr. Ahern said that he believed Mr. Vandermeer to be a director.

66. The law in relation to apparent or ostensible authority is neatly encapsulated in Paragraph 19.10 of *Vermeesch.* The learned Authors state that the general principle is that where a Principal, by his conduct, held out to a third party, that another person is his agent or has allowed that other person to hold themselves out as the Principal's agent, and the third party has dealt with the agent on the basis of the "holding out", then the

Principal is prevented ("estopped") in favour of the third party from denying that A is the Principal's agent. The rule is that the third party must be able to prove that they were aware of the holding out and contracted in reliance on it.

67. The learned authors, in this same paragraph, also called this principle the doctrine of estoppels or holding out, and illustrated the principle by reference to the case of *Tooth v Laws* (1889) 9LR (NSW) 154 where Laws, a licensee of a hotel, allowed his name to kept over the hotel door in which he no longer had an interest. The hotel bought liquor from Tooth, a supplier, who later sued Laws for the cost of the liquor supplied. Laws had not advised Tooth that he was not carrying the business, and he was estopped from denying that the persons, who were actually carrying on the business, were doing so as his agents.

68. I have already said that in submission 82, the Claimant said that it had not heard of SSD, and that it had always understood that the Respondent was the other party to the contract. In support of this assertion it referred to its invoices and the Respondent's remittance advices in Tab 3, which identified the Respondent as liable for the project at Ninderry. All the invoices were dated 7 June 2006 and addressed to the Respondent at PO Box 233 Kallangur QLD 4503. Furthermore, there were 2 Remittance advices from the Respondent at PO Box 233 Kallangur QLD 4503. Further details of these documents are as follows:
    i. Invoice #666 for $147,131.93(including GST) for progress claim 1, which was then effectively withdrawn by Invoice #682 deducting this sum;
    ii. Invoice #683 for $132,498.64 (including GST) for progress claim was then issued in its place;
    iii. Invoice #10027 for $124,990.38 (including GST) for progress claim 2;
    iv. Remittance advice #006360 dated 14 June 2006 from the Respondent in favour of the Claimant for $257,489.02 was attached , which referred to invoice #683 and #10027;
    v. Invoice #10028 for $177,468.68 (including GST) for progress claim 3;
    vi. Remittance advice #006361 dated 15 June 2006 from the Respondent in favour of the Claimant for $177,468.68 was attached, which referred to invoice #10028

69. I find that Invoice numbers 683 and 10027 totalled $257,489.02, which was the precise amount provided in Remittance advice #006360, and the amounts in Invoice #10028 and Remittance advice #006361, also match exactly.

70. In submission 83, the Claimant also referred to correspondence from the Maroochy Shire Council to the Respondent dated 5 September 2005 about the new name for a road on a project, as well as a facsimile from Mr. Vandermeer on the Respondent's letterhead to the Claimant dated 21 April 2006 attaching Maroochy's letter. This correspondence was attached in Tab 4.

71. In the same submission, the Claimant referred to documents in Tab 11 and Tab 12. These documents consisted of the Claimant's progress claims 1, 2 & 3 dated 3 March 2006, 3 May 2006 and 1 June 2006 comprising the monthly breakdowns of costs, together with 3 certificates from Qantec McWilliam.

72. Each of these certificates dated 7 June 2006 identified the Principal as the Respondent and the Contractor as the Claimant. The certificates also nominated distribution to the Claimant and Respondent. Curiously each certificate had a reference to AS2124-1992,

which I can say as a matter of universal construction industry knowledge, is a reference to an Australian Standard Construction Contract. I will return to this AS2124-1992 point later in discussion about the valuation of the retention.

73. In submissions 84 and 85 the Claimant said that the Respondent was estopped from denying that it had a contract with the Claimant because of the irrefutable documentary evidence. To counter these important submissions 82 to 85, the Respondent in its paragraph 7 raised the issues, which I have called points (i) through to (vi) in paragraph 50 above.

74. In the analysis that followed paragraph 50, I have already found that the lack of facts provided by the Respondent to support its assertions meant that I could not find in its favour on points (i) through to (iii). I said with reference to point (iv) that the issue of Mr. Vandermeer's apparent or ostensible authority needed consideration and in point (v) that the issue of stationery not been conclusive evidence of a contracting party, needed further consideration. On both points there was no material from the Respondent to support its assertions, but the Claimant bears the onus of proving the identity of the person with whom it contracted, so this analysis is required.

75. In considering whether Mr. Vandermeer was clothed with apparent or ostensible authority, it appears clear from the Claimant's material, and without any controverting material from the Respondent, that:

    i. Mr. Vandermeer received the rates by facsimile on 24 January 2006 (paragraph 5 of Mr. Ahern's statutory declaration), and the facsimile to the Respondent for Mr. Vandermeer's attention dated 24 January, to which were attached the external hire rates – Tab 7;
    ii. Mr. Vandermeer had a conversation with Mr. Ahern, on or about 28 January 2006, in which he said that the Respondent had a project at Ninderry, with a contractor that they had terminated, and were seeking the Claimant's availability to complete the project for the Respondent;
    iii. The terms of the prospective arrangement between the parties were outlined in paragraph 5 of Mr. Ahern's statutory declaration, and have been discussed elsewhere;
    iv. Mr. Vandermeer and Mr. Ahern agreed to these terms and the Claimant was in a position to complete the project for the Respondent – paragraph 6 of Mr. Ahern's statutory declaration.

76. I find that the Claimant's facts in the paragraph above satisfies the legal and evidentiary onus that Mr. Vandermeer acted as the Respondent's agent and had the apparent authority to do so. This is further supported in the chronology below, that the conduct of the parties after the agreement points to the existence of a contract with one another for the project:
    i. The Respondent through Mr. Vandermeer sent a facsimile to the Claimant on 21 April 2006 attaching correspondence addressed to the Respondent from Maroochy Shire council dated 5 September 2005;
    ii. The Superintendent's certificate No.1, dated 7 June 2006, addressed to both the Claimant and Respondent was for $132,498.64, and this amount matched Invoice #683 – Tab 11 of the submissions;
    iii. The Superintendent's certificate No.2, dated 7 June 2006, addressed to both the Claimant and Respondent was for $124,990.38 and this amount matched Invoice #10027 – Tab 11 of the submissions;

iv. The Superintendent's certificate No.3, dated 7 June 2006, addressed to both the Claimant and Respondent was for $177,468.68, and this amount matched Invoice #10028 – Tab 11 of the submissions;
v. Invoice numbers 683 and 10027 to the Respondent totalling $257,489.02, was paid under the Respondent's Remittance advice #006360 – Tab 4 of the submissions;
vi. Invoice #10028 to the Respondent for $177,468.68 (including GST) was paid by the Respondent's Remittance advice #006361 – Tab 4 of the submissions;

77. I find it illogical that the Respondent would pay the precise sums of money, in response to the Superintendent' certificates and the Claimant's invoices, unless it had a contract with the Claimant made through Mr. Vandermeer as its agent. In addition, the chronology of facts provided by the Claimant and not controverted by the Respondent, raises an estoppel under the principle of apparent or ostensible authority, to prevent the Respondent from denying the existence of the contract, even if it had some controverting facts. Furthermore, as a matter of law, the Claimant was entitled to make the assumptions under s128 of the CA.

78. I am satisfied therefore 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 – service of the Payment Claim

79. The *second basic and essential requirement* requires the service of the Payment Claim on the Respondent in accordance with s17 of the Act. I find that this contract did not provide a term relating to service, as the terms identified in paragraph 5 of Mr. Ahern's statutory declaration, and paragraph 2 of the Payment Schedule, makes no reference to service. Therefore, s103(2) of the Act applies, which refers to the provisions of s39 of the *Acts Interpretation Act 1954* ("the AIA") as governing service.

80. s39(1)(b) of the AIA deals with service on a body corporate as follows "*—by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate."*

81. The Payment Claim identified that it was to be delivered by hand to the Respondent at 23 Thirteenth Ave, Brighton, for attention Mr. Tosh Murphy, and submission 43 identified that this was the address of the respondent from the White Pages. I searched the AIA and the *Corporations Act 2001* to find a definition of *principal office* and was unable to find one. I therefore apply commonsense for the ordinary meaning to the expression and am satisfied that a business address in the telephone directory would fall within the meaning of *principal office.*

82. In submission 80, the Claimant referred to paragraph 1 of the Payment Schedule in which the Respondent identified the Payment Claim, so in submission 81 it asserted that the Respondent had confirmed it was served with the Payment Claim.

83. The Respondent, through its solicitors, in the Payment Schedule identified the Payment Claim having been passed by the Respondent to them, and that their letter constituted a Payment Schedule. They took no issue with the service of the Payment Claim on the Respondent, so I am prepared to find that service took place at the Brighton address by hand, as there is no material to controvert this finding. This constituted service under the

Act because s39(1)(b) of the AIA allows service by *leaving it at* a principal office of the body corporate, so that the *second basic and essential requirement* is satisfied.

The third basic and essential requirement – valid application to an ANA

84. I have already found the Claimant has validly made the application to an ANA, accordingly, *the third basic and essential requirement* is satisfied.

The fourth basic and essential requirement – eligible adjudicator

85. *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 already found that I am an eligible adjudicator because I am registered, 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. I have been properly appointed under the Act as required by s23(2) of the Act.

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

The fifth basic and essential requirement – s26(1) requirements

87. *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. My decision on page 1 adheres to this requirement.

88. 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 decision, which is in writing and contains reasons, adheres to the requirements of s26(3)(a). The decision was made after consideration of the merits of the case, to which I now turn.

89. The major issue in this adjudication was whether the Claimant and Respondent entered into a *construction contract* to which the Act applies. After detailed analysis, I have already answered that question in the affirmative, which means the other issues arising out of the material have to be identified and discussed because they bear on the ultimate outcome in this adjudication.

90. I have already referred above to sub-issues arising regarding the vitally important question of the construction contract that arose out of the Payment Claim, supported by the application, and the Payment Schedule supported by the response, as they are the documents for determination of the true merits of the dispute. By reference to this material I have also found that there are a number of other issues that require resolution in this adjudication before carrying out the function of valuation.

Other issues in this adjudication

(a) Whether there are moneys currently payable because the Superintendent has not certified any amounts payable for this construction work.

(b) Whether the power of the Principal to retain retention moneys is implied into the construction contract.

(c) Whether the consultant's work in providing assistance in lodging the adjudication application is "construction work".

(d) The merits and valuation of the claim

Consideration of these issues

a. Whether there are moneys currently payable because the Superintendent has not certified any amounts payable for this construction work.

91. This is also an important issue because it turns on whether there is any money payable to the Claimant at present in this adjudication.

92. In Paragraph 4 of the Payment Schedule, the Respondent asserted that no payment is to be made until certified by the Superintendent, and that the due date for payment was then 10 days after certification. Furthermore, in paragraph 6(a) of the Payment Schedule, the Respondent stated that the Superintendent had not yet certified the claim pursuant to an agreement between the Claimant and SSD, and until certification took place, there was no liability for the claim.

93. The Claimant in submission 95 responded to paragraph 4 of the Payment Schedule and said that that the Act made no provision for certification by the Superintendent, and it was the Respondent's responsibility to determine the amount of payment to be made. In addition, the Claimant asserted that the parties could not contract out of the Act, and that a dual system of a statutory and a contractual payment regime was contemplated by the Act, which was identified in *Beckhaus v Brewarrina Council* [2002] NSWSC 960, at para 60.

94. In Submission 96, the Claimant further stated that the failure of the Superintendent to certify the June Progress Claim was of no consequence, because the Respondent was still required to determine the amount it was proposed to make under the Act. In addition, Submission 98 dealt with the Respondent's assertion that the due date for payment was 10 days after the date of certification. The Claimant said that this construction fell foul of s15 and 99 of the Act, because the Superintendent may never make a certification and that the Superintendent had taken 105 days to certify the February Payment Claim. In Paragraph 11 of the response, the Respondent reiterated that the claims were subject to certification by the Superintendent and not payable until certified, and therefore there was a contractual term as to when the payment was due.

95. Submission 105 responded to Paragraph 6(a) of the Payment Schedule and repeated its earlier submissions and said the certification or otherwise of the Superintendent was irrelevant to any claim under the Act. In the response in Paragraph 16, the Respondent reiterated that the claim was not payable until the certification process was complete. Furthermore, in Paragraph 17 of the response, the Respondent identified that the reason for non-payment was the non-certification by the Superintendent and would only be payable when certification was complete.

96. In submission 112, the Claimant referred back to Submission 95 and reiterated that the Respondent was misguided in its interpretation of the Act because it made no provision for Superintendent certification and that the parties could not contract out of the Act which contemplated a dual system of statutory and contractual liability.

97. There are two aspects to this part of the dispute. The first is the broad issue of whether a Claimant must wait until certification by a Superintendent before the due date for payment can trigger. This is essentially a question as to how far do the contractual and statutory progress payment regimes properly mesh to facilitate the objects of the Act. This is a broad question, and in this case it can be narrowed down to specifically ask whether the contractual agreement to rely upon certification by a Superintendent governs the timing for the due date for payment under the Act.

98. The second aspect to this part of the dispute is the actual basis on which the Respondent asserts the due date for payment is triggered. This latter issue is somewhat difficult to properly pin down, but it stems from paragraph 4 of the Payment Schedule. I find that the parties agreed to certification by Qantec McWilliam acting as Superintendent. However, the Respondent goes further and uses this agreement regarding certification to launch its claim that the contract had a provision for the due date for payment, as being a reasonable time of 10 business days after certification by the Superintendent.

99. Whilst it did not specifically say so, the Respondent must be claiming that this term was implied into the contract, because it had earlier agreed with the Claimant in paragraph 2 of the Payment Schedule, that the time for payment had not been discussed. In submission 98, the Claimant came closest to dealing with this issue by merely saying that there was nothing in the contract regarding the time for payment of a progress claim, so that one then had to invoke s15(1)(b) of the Act to provide the time frame.

100. Adjudication does not require pleadings and it is then sometimes difficult to tease out the real issues between the parties. It seems clear to me that if the parties had not discussed the time for payment, then the only basis for the Respondent to argue that the time for payment was 10 days after certification, is if it claims that the terms was implied. It did make reference to 10 business days being a reasonable time, but that is not the only criteria that need to be satisfied for a term to be implied, since elsewhere in this adjudication the five tests reiterated in the case of *Codelfa* have been discussed.

101. I will firstly deal with the broad question contained in the first part of the dispute, before deciding whether it is necessary to embark upon a close analysis of implying terms in these circumstances.

102. I could not find any case in Queensland dealing with this important broad issue. I thought it necessary to seek guidance from the cases in New South Wales that deal with essentially the same legislation. In this way it may be possible to discern what the Court has said about the contractual regime requiring certification by a Superintendent and what effect it has on the operation of the Act. It is important to identify that it appears to be settled that and adjudicator is not bound to follow a certificate of a Superintendent: *Abacus Funds Management v Davenport* [2003] NSWSC 1027, McDougall J [38] – [39], which was affirmed in obiter by Hodgson J in *Transgrid v Siemens Limited* **(** 2004) 61 NSWLR 521, at para [35]. However, the valuation aspect of certification is not in issue here, it is the timing for payment that needs exploration.

103. In *Okaroo Pty Limited v Vos Construction and Joinery Pty Limited & Anor* [2005] NSWSC 45, Nicholas J, at para 46, referred to a comprehensive analysis provided by Macready AJ in *Beckhaus v Brewarrina Council* [2002] NSWSC 960, (the Authority referred to by the Claimant in submission 95), where His Honour had said:

> *"60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives*

remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime….

62 Section 11 then deals with the due date for payment in respect of "a progress payment under a construction contract". It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.
63 Thus s 13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant".

104. At para 48, Nicholas J continued and referred Austin, J who had observed in *Jemzone Pty Limited v Tritan Pty Limited* [2002] NSWSC 395 (para 41) that the Act offers special statutory rights which override general contractual rights and place a claimant in a privileged position. At para 51 His Honour continued and said:
"The statutory scheme therefore operates, as intended by s 3(2), regardless of the existence or absence in contracts or arrangements for construction work of provisions which govern entitlement to, and liability for, payments. Where, for example, the arrangement is one which does not give rise to liability for payment enforceable at common law against the party for whom the work is done the statute provides for liability for a progress payment."

105. His Honour continued at para 53 and said:
"So understood, it is clear that issues of entitlement and liability stem from the statute and not from the provisions of the contract or arrangement which is the construction contract.

106. In *Beckhaus v Brewarrina Council [2002] NSWSC 960* Macready AJ, which was not extracted in *Okaroo* had further added in para [63] – [64]:
"63 … If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:-
" ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services."
64 In my view the submissions of the defendant are simply not arguable."

107. These cases provide a thread of authority that the contract cannot preclude the statutory right to progress claim. The Respondent asserts that the **due date for payment** does not arise until 10 business days after certification by the Superintendent. It is common ground that progress claim no. 4, which forms the bulk of this Payment Claim, has not been certified by the Superintendent. The Claimant, in its submissions referred to above, and submission 98 in particular, said that the effect of this approach fell foul of the Act because the Superintendent may never certify. It added that time was at large, as

demonstrated by the 105 days for certification of progress claim no.1, and that progress claim no.4 had not yet been certified.

108. In my view the effect of the Respondent's assertion regarding the due date for payment when certification takes over 100 days, and possibly may never occur in reality, is precluding a statutory right for the Claimant to be paid, which contravenes what Macready AJ was saying in *Beckhaus* at paras [63] – [64] referred to above. It is at the whim of the Superintendent and in my opinion is purporting to *annul, modify or restrict* the due date for payment in s15 of the Act. In *Okaroo* at para 48 Nicholas J approved Austin J's comments in *Jemzone* at para 41 which were:

> *"The statutory scheme therefore operates, as intended by s 3(2), regardless of the existence or absence in contracts or arrangements for construction work of provisions which govern entitlement to, and liability for, payments. Where, for example, the arrangement is one which does not give rise to liability for payment enforceable at common law against the party for whom the work is done the statute provides for liability for a progress payment."*

109. The Respondent does not argue that there is never a right to statutory payment, and in paragraph 11 of the response concedes that the Claimant is entitled to make progress payments referable to the reference period. However, liability for payment, which in my view is equally important to ensure that claimants receive their progress payments seems to be at the discretion of the Superintendent. Under the Respondent's regime, a significant hurdle is introduced in requiring certification, which has drastically slowed down cash flow in this project.

110. There is further support for my approach if one has regard to *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823, where McDougall J held:

> *"42. The effect of the contractual regime in the present case is that Contrax has no entitlement to be paid, on a progress payment basis or otherwise, for certain kinds of construction work done under or by reference to the contract until a particular contractual regime is worked through. It is apparent that the working through of that contractual regime may mean that any progress payment in respect of that work is payable not from the reference date occurring next after the work is done, but from the reference date occurring next after the contractual process is worked through. If Contrax' submission is correct (see para [10] above), the latter reference date may be 200 days, or in excess of 6 months, after the former.*
>
> *43. In my judgment, it is plain that the relevant contractual provisions exclude, modify or restrict the operation of the Act. They do so because, if relied upon, they defer the entitlement given by s 8(1) of the Act to be paid from a reference date for construction work carried out prior to that reference date.*

111. To my mind the Respondent's *due date for payment interpretation* is inconsistent with the Act, and I prefer the submission of the Claimant that the silence of the contract regarding due date for payment means that s15(1)(b) operates to provide a date of 10 business days after a payment claim for the progress claim has been made under part 3 of the Act.

112. I have found that the Respondent's *due date for payment interpretation* is untenable, so I don't need to consider the implication of this term into the contract. In any event

there is a paucity of material to imply a term. In my view, the Respondent has the onus to imply the term, and it has provided very little material from which to launch such a difficult argument, because it needs to satisfy the five Codelfa elements before such a term is implied and it has not discharged this onus. There is nothing for me consider in analysing the facts to satisfy those terms. The Claimant's view therefore remains preferable that the contract was silent on the due date for payment, so the Act kicks in to provide a certain date to which I will turn later.

b. Whether the power of the Principal to retain retention moneys is implied into the construction contract.

113. On page 3 of the Payment Claim asserted that there was no agreement for retention moneys, and that it had not had time to take issue with the deduction for retention because all 3 previous progress claims had all been simultaneously certified.

114. In paragraph 5 of the Payment Schedule, the Respondent asserted that:
"It was an implied term in the contract that the standard industry practice in respect of payments that retentions and the like would form part of the contract. It added that the standard was 5% of the contract price to be retained for 12 months from the date the work was completed, as security for defective work and to ensure completion of the works. The term is implied into the contract to give effect to the intended bargain and to give business efficacy to the contract."

115. In paragraph 6(b) of the Payment Schedule the Respondent summarised its response to the Payment Claim and reiterated that it was an implied term that retention of 5% be retained for 12 months from the date of completion of the work to secure rectification of defects and secure completion of the work. It argued that the milestone had not been reached, so it was entitled to retain the retention money.

116. In submission 99, the Claimant reiterated its rights to full payment with reference to the bald assertions in Paragraph 5 of the Payment Schedule, and denied that a term could be implied because it was not standard industry practice that cost-plus contracts have a retention applied to them. It referred to the case of *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA24; (1982) 149 CLR 337, which held that for a term to be implied, it must be;

(a) reasonable and equitable;
(b) necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
(c) so obvious that it goes without saying;
(d) capable of clear expression;
(e) not contradict any expressed term of the contract.

117. In submission 100, the Claimant said that the Respondent had not satisfied the onus to imply the term in the Payment Schedule. It added that, as the Claimant would be given no opportunity to reply to any further submissions made by the Respondent, it would be a denial of natural justice if an adjudicator was to consider any further submissions made on this point in any adjudication response.

118. On this natural justice point, I am not prepared to find that any assertion made by the Respondent in the response automatically requires a request for submissions from the Claimant, which if not requested, means that there has been a denial of natural justice.

The Respondent identified in paragraphs 5 and 6(b) of the Payment Schedule that such a term could be implied, and in my view this entitles it in the response to make submissions that relate to implying the term: s26(2)(d). If fresh issues are raised, either they are not related to the Payment Schedule and would therefore be inadmissible, or if they are "line ball" submissions, in my discretion I may choose to ask for submissions from the Claimant in s25(4).

119. As to submission 101, the Claimant asserted that as it was a cost-plus contract, the cost of rectifying any defective work and cost of completion of the work were both costs recoverable under the contract and therefore there was no necessity for retention. In addition, and in the alternative, if there was any damage suffered by the Respondent, which was not asserted by the Respondent (and which is denied by the Claimant), it would always be open for the Respondent to properly claim damages in litigation.

120. In submission 102, the Claimant asserted that it was misleading for the Respondent to assert that it was standard industry practice for such a term to be implied as there was no industry "standard" and that there were a significant number of contracts in the construction industry that had no such terms. The Claimant added that those contracts that did have provision varied dramatically in both amount to be held and the "trigger for release", such that any suggestion of such a term as standard was clearly misleading. The Claimant said that the Respondent's assertions that such a term was part of the intended bargain was completely unfounded and that it was instructive to note that on the one hand the Respondent was asserting that they were not a party to the contract, and yet on the other they were making assertions as to what the intended bargain between the parties was.

121. In submission 103, the Claimant reasserted that the contract did not provide for retention monies to be deducted and that the Superintendent in Progress Claim 4 "Review" had identified, without consideration of the entitlement for retention that the Claimant should be paid the amount withheld for retention, if the works were found to be satisfactory. The Claimant added that the Respondent had made no assertions in its Payment Schedule that the Claimant's work was unsatisfactory, such that it would be unable under s24(4) of the Act to do so now.

122. In submission 104, the Claimant said that it was not necessary for a retention term to exist to give business efficacy to the contract, nor was it so obvious that it went without saying, nor was it reasonable or equitable.

123. In response to these submissions 99-104, the Respondent asserted in paragraph 12 of the response that the tests of Codelfa were met as:

i. They were standard practice in the industry;
ii. They were common and implied to give business efficacy in circumstances where the Principal was subject to risk of defective or incomplete work;
iii. They were reasonable and equitable;
iv. Obvious within the industry;
v. Simple, concise and capable of clear expression; and
vi. Did not contradict any express terms.

124. Furthermore, the Respondent asserted that it was necessary to give effect to the contract and it was evidenced by the parties' conduct in that the Claimant had not raised objections to progress payments 1, 2 & 3. This latter point had not been specifically referred to in the Payment Schedule, but in my view it relates to the Payment Claim, and

is admissible, because the Respondent must be afforded the opportunity to counter the submissions in the application and support its Payment Schedule. The Claimant had raised the point that it had not earlier taken issue with retention because all certificates were issued simultaneously by the Superintendent, and this is confirmed by the dates of all certificates. Accordingly, the Respondent was entitled to deal with the Claimant's conduct in its response. It is not automatic that the Claimant then has a further right of reply on this point, as it is not contemplated by the Act.

125. In considering this important point, I need to start by evaluating whether the Claimant has satisfied its legal and evidentiary onus that retention is not part of the contract. I am satisfied that the parties agree that there was no express term relating to retention, and this assists the Claimant in discharging its legal onus. Having put in Mr. Ahern's statutory declaration identifying the terms, it had satisfied the evidentiary onus, which then passed to the Respondent. The Respondent could not provide evidence of an express term, and agreed that there was not one. However, it then argued that a term was to be implied into the contract. This attracts the proposition that *"He who asserts, must prove"* and I find that the Respondent then had the legal and evidentiary onus to prove the implied term.

126. It made submissions to this effect, but provided no evidence in support. Taking each of Codelfa's requirements in turn in paragraph 12 of the response:

i. That it was standard practice in the industry. I accept that the industry has retention clauses. In my view I am entitled to have regard to AS2124-1992 contract because it was referred to in the Superintendent's certificates. It has a clause 5 dealing with retention money. Clause 5.2 of that contract provides that if it is provided in the Annexure that a party requires security then it is to be provided. The Annexure Part A refers to Clause 5.2 and allows the parties to fill in the amount. However, there is no default provision, that if the item is left blank then 5% retention is required. These default provisions are found elsewhere in the Annexure, and this demonstrates that it is not standard practice in the industry, and there is no material from the Respondent to prove this standard practice. Therefore it fails on this point alone;

ii. They were common and give business efficacy to the contract. This assertion also fails because there is no evidence to support this unsubstantiated submission. If one had regard again to AS2124-1992, the absence of a default provision as identified above, precludes accepting even this bare assertion

iii. They were reasonable and equitable. Again there are no facts to support this submission;

iv. It was obvious in the industry. This point fails on the ground that no facts were put into support the submission, and Clause 5.2 of AS2124-1992 specifically points to it not being so obvious that it goes without saying, because if this was the case there would be a default provision;

v. Whilst the other two Codelfa points may be satisfied by bare assertion, although I make no finding on these points, the other three have failed, and it is necessary that all five points be satisfied for a term to be implied.

127. I therefore find that the Respondent has failed to discharge its legal and evidentiary onus to imply a term. This means to my mind that the evidentiary onus does not shift to the Claimant to controvert anything about the implied term, such that it is not required to explain its conduct in not disputing the retention monies that had been deducted. In any event, I am satisfied that it had not had the time to do so until the simultaneous certificates had been issued, so its conduct is explained anyway.

128. I have found that the certificates by the Superintendent referred to AS2124-1992, and this may be why retention was deducted by the Superintendent, on the basis of an assumption by it that this contract governed the parties' project. It has not been explained why the Superintendent did deduct the retention money, but having regard to its Progress Claim Review of 28 June 2006, it did state that if the works were found to be satisfactory, then the retention should be released. It may have understood that retention should not have been deducted, but it is undesirable to speculate further.

129. Suffice is it to say that retention should not have been deducted as there was no agreement to do so, which means the amount of $20,811.37 should be paid to the Claimant.

c. Whether the consultant's work in providing assistance in lodging the adjudication application is "construction work".

130. On page 2 of the Payment Claim the Claimant attached a $4,125.00 invoice from its consultant in which it claimed that this was an additional cost incurred in carrying out (the) construction work.

131. In paragraph 6(d) of the Payment Schedule, the Respondent denies that preparation of a Payment Claim is *construction work* and this is repeated in paragraph 3(e) of the response. In submissions 121-125, the Claimant reasserted its claim for the consultant's work as construction work because:

i. it fell within the meaning of *carry out construction work* in Schedule 2 of the Act as (c) *provide advisory, administrative, management or supervisory services for carrying out construction work*;
ii. they had undertaken to carry out construction work as provided in ss7 and 12 of the Act;
iii. the Payment Claim is inextricably linked to construction work such that preparation of a payment claim may be advisory, administrative or management services;
iv. it was a cost plus contract so that it was entitled to recover its costs, and preparation of a payment claim is such a cost to carry out construction work.

132. The Respondent in paragraph 21 of the response stated generally that the amount paid for preparation of the Payment Claim was unreasonable, unnecessary and premature and it did not arise out of administration of construction work.

133. I was unable to find any authority on this point, so I need to consider the matter from first principles. I am unable to conclude that advisory services for preparation of a payment claim are *advisory, administrative, management services for carrying out construction work* as identified in Schedule 2. I accept that they could be any one of the three services identified, as the definition is broad. However, the qualification is that they are for the *carrying out construction work*.

134. I am unable to accept that having entered the *carrying out construction work* definition in Schedule 2, and after having established that the work falls within any of the three services mentioned, that you are entitled to remain within the definition to decide what is meant by the term *carrying out construction work.* This becomes circuitous and unworkable. In my opinion, one needs to refer to s10 to decide what is meant by *construction work*, because Schedule 2 refers to construction work in all three

subsections. Schedule 2 defines *construction work* by reference to s10. When one looks at *construction work* in s10, the theme of all the subsections is the practical work associated with construction. There is no reference to advisory, administrative or management services in s10. Those aspects are dealt with as *related goods and services* in s11, but Schedule 2 makes no reference to *related goods and services*, so one is not entitled to have regard to s11, even though they are in relation to construction work

135. Accordingly, as a matter of strict statutory interpretation, and without authority from the Claimant, I am unable to find that these sums form part of construction work, so this sum is not payable.

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

The merits and value of the Claim

137. The Court of Appeal in Brodyn in para 55 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.."*

138. 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."*

139. Information has been provided in this Payment Claim. I find that the construction work, being earthworks, road-works and drainage, was identified sufficiently. In Attachment F of the Payment Claim, the Claimant attached three previous Progress Claims that were certified by the Superintendent. Although I was not provided with the previous Progress Claims and Certificates in "Attachment F", I am satisfied that they were attached to the Payment Claim because submission 38 stated that a copy of the Payment Claim was attached in Tabs 5 through to 12. The Respondent did not take issue with not having received the attachments to the Payment Claim; and it provided a Payment Schedule. Accordingly, I am satisfied that s17(2)(a) was complied with.

140. The Payment Claim on Page 1 claimed $732,510.54 including GST as payable. However, it qualified this amount by deducting what it had already been paid and identified an outstanding balance of $297,552.84 on Pages 1 and 3 of the Payment Claim. Accordingly, I am satisfied that this is the **claimed amount** under s17(2)(b) of the Act.

141. The heading of the Payment Claim carried the endorsement that it was made under the Act, thereby satisfying s17(2)(c) of the Act.

Due date for payment

142. This issue has already been canvassed to some degree in the reasons above. It is important to remember that the Claimant bears the legal onus of proving the due date for payment. In addition, it has the evidentiary onus to support that proposition, which if discharged, then shifts the evidentiary onus to the Respondent, which must provide material to support its assertions. The Claimant's evidence in relation to the **due date for payment** is the absence of any term in the contract that governed the due date for making a Progress Payment. In Paragraph 5 of Mr Ahern's Statutory Declaration, he identified that the time for payment had not been discussed.

143. The Respondent agreed in Paragraph 2(b) of the Payment Schedule that there was no agreement for the time for payment. Therefore, I am satisfied by the Statutory Declaration, that the term of the contract made no provision for the time for payment, such that the evidentiary onus of the Claimant has been discharged.

144. Suffice is to say that I have found that the contract is silent on the due date for payment, which means that s15(1)(b) provides this date as 10 business days from the date of the payment claim. The Payment Claim was made on 1 August 2006, and 10 business days later has been calculated to be 15 August 2006, and this is the date that I find. I have already found that the Respondent's alternative view of the due date for payment is untenable, so I find that 15 August 2006 is the appropriate date.

Entitlement to progress payment

145. It is 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.

146. 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."*

147. I need to determine the *reference date* for the progress claim, which is defined in part in Schedule 2 of the Act as:

> *"(b) if the contract does not provide for the matter-*
> (i) *the last day of the named month in which the construction was first carried out, or related goods and services were first supplied, under the contract; and*
> (ii) *the last day of each later named month"*

148. The parties agree that the contract provided no reference date, so that they agreed that the reference date was the last day of the month, in accordance with (b)(ii) above. This was identified in the Payment Claim and agreed in paragraph 3 of the Payment Schedule and was again canvassed in submission 93 of the APP and the Respondent did not take issue with this submission. By reference to the Schedule 2 definition, I am

satisfied that the *reference date* is the last day of the month. This particular Payment Claim, which included progress claim 4, with the last day of work being claimed as 14 June 2006, could then have been submitted no earlier than 30 June 2006.

149. The Payment Claim was made on 1 August 2006 and I am satisfied that this is *from* the *reference date* of 30 June 2006. The Claimant's submission 94 in which it referred to *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, paras 52-60 did not really provide support for this point. I am prepared as a matter of simple construction of the statute, by referring to the ordinary meaning of the word *from*, in the New Penguin English Dictionary as meaning *" a starting point in measuring or reckoning e.g. come a week from today."* I therefore find that 1 August 2006 was from, the starting point of 30 June 2006.

150. 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. The Payment Claim relates to work that had already been carried out and claimed in the previous progress claims numbers 1,2 & 3 that had been certified and paid. In submission 93 the Claimant said there had been no payment claim served on the Respondent in the month prior to the Payment Claim. Accordingly, I find that there was only one Payment Claim for this reference date.

151. I need to consider whether Part 4A of the *Queensland Building Services Authority Act 1991* (the "BSAA") applies in making my decision. Neither party asserts that this construction work falls within the definition of *building contract* under the BSAA.

152. 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, *"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…."*

153. 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 New Penguin English Dictionary definition of *building* is *a permanent structure usually having walls and a roof*, and I conclude that road works and drainage are not *buildings*. I therefore conclude that none of the *construction work* on this project was *building work*.

154. However, the operative provision as to whether the BSAA applies is whether or not there is a *building contract*. I turn firstly to s67A of the BSAA with reference to *building contract*, and it in turn refers to S67AAA which excludes a *contract that includes construction work that is not building work*. I have found that the work on this project is not *building work*, so I find that the 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.

Valuation of the payment claim

155. I received some additional material from the respondent's solicitors on 11 September 2006 requesting that I look at discrepancies in invoicing that they had discovered. I did not request this submission from the Respondent, as I am entitled under s25(4)(a), and I find that I am unable to consider this document, as it does not fall within the limited category of documents in s26(2)(d) described as:

> *"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."*

156. This belated document I find was *not properly made* because it was delivered after the time that the adjudication response had to be provided. Furthermore, if it was somehow considered *properly made* (which I do not find), if it was trying to advance reasons for non payment based on errors in the invoices, then it contravenes s24(4) of the Act, which disallows including reasons for withholding payment in the response, if those reasons have not been included in the Payment Schedule. Accordingly, I did not refer to the document, nor was I influenced by it in these reasons.

157. 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.

158. The starting point for valuation is provided in s13 of the Act, which deals with the *amount of the progress payment*. In my view s13(a) applies so that the *amount is calculated under the contract*. Valuation of this amount is provided under s14 of the Act, and s14(1)(a) applies to value the *construction work under the contract.* In relation to related goods and services they are *valued under the contract*: s14(2)(a). If the contract does not provide for the valuation then s14(b)(i) values these by *having regard to the contract price for the goods and services*

159. I must now consider what is properly payable. Hodgson J A in Court of Appeal in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA ("Hargreaves") said at [52] 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."*

160. The Respondent did not put in any material to controvert the amounts claimed in this Payment Claim, apart from the document dated 11 September 2006 to which I had not reagard. The Claimant in submission 79 stated that the Respondent had not taken issue with the invoices and diaries in the Payment Claim, so that it could not do so in the response. In paragraph 6 of the response, the Respondent confirmed that no issue was taken with the documentation, but that since certification had not yet taken place, the

provision of documentation could become an issue if the Superintendent requested further documentation.

161. Furthermore, in submission 91 the Claimant reiterated its entitlement to reimbursement on a cost-plus basis, or dayworks; and in submission 92 stated that the Respondent had confirmed the method of adoption for valuation of the works. In paragraph 10 of the response, the Respondent said that it had not disputed the basis of calculation, but the Superintendent was to decide if the claim was correctly calculated.

162. The Respondent has put in no admissible material to controvert the valuation made by the Claimant. It agrees with the basis of calculation, but seems to want to defer to the Superintendent's future valuation. Essentially, its two reasons for non payment of the payment claim are:

i. there is no contract between the Claimant and Respondent;
ii. that the Superintendent has not valued the claim.

163. I have found that there is a contract between the Claimant and Respondent, and that the Act does not require valuation of the Payment Claim by the Superintendent for an amount to become payable. Valuation of the Payment Claim is my responsibility under the Act, and even if the Superintendent had valued the claim, I am not bound to adopt this valuation: *Abacus Funds Management v Davenport* [2003] NSWSC 1027, [35]-[36] and *Transgrid v Walter Construction Group* [2004] NSWSC 21, [53] referred to above

May and part of June Spreadsheet, invoices and supporting documents - $239,188.59

164. It is not possible for me to consider this claim to anywhere near the degree that the Superintendent may be able to, because the Superintendent is likely to be on site to see the progress of the works, and be able to verify times and work progress. I am not bound by the Superintendent's valuation, but I would find it instructive to see the previous progress claims to glean how the work breakdown schedules were evaluated, particularly as regards the rates claimed by the Claimant.

165. In paragraph 10 of the response, the Respondent has not taken issue with the method of calculation, nor has it challenged the amounts claimed, but deferred to a future valuation by the Superintendent. This valuation, even if was done, would not bind me in any event, and I will scrutinise the spreadsheet to some degree to determine its merits, but in my view I am not required to scrutinise it in detail.

166. This aspect of the claim essentially consists of:

i. Monthly rentals of some equipment that is used throughout a project
ii. Labour, Project Manager and Foreman;
iii. 12G Grader;
iv. Excavators 6ton and 20ton;
v. Bobcat and Backhoe;
vi. Water truck;
vii. Padfoot roller, CC10 Roller, Multi tyre roller;
viii. Tandem truck;
ix. Materials for the works;
x. Kerb and channel subcontractor

167. I have looked at the rates charged for the items in this Payment Claim, and compared them with the previous claims, and all bar the Theodolite and Legs, agree with previous

rates in the earlier progress claims. The Theodolite rate claimed in this claim is $508.48 instead of the previous rate of $609.28.

168. The bobcat, backhoe and grader docket days tallied with the claim. The only sporadic pattern that I found was that with the bobcat, backhoe and grader hour entries there was sometimes an additional half an hour, or sometimes more added on to a hire period for a day. Furthermore, sometimes amounts that had been invoiced by others were not put in the payment claim. For example, I found that Burrell grader hire had charged 16.5 hours for 7 and 14 June 2006, but the Claimant had not charged the Respondent for this work. I did not see that the parties would find any benefit in the adjudicator scrutinising each docket and recalculating small amounts to determine a new figure. Accordingly, I did not find such discrepancies were material to the adjudicated amount, and if done, may be incorrect to accurately reflect the costs, because an adjudicator could not be privy to the finer details of the claim. The Respondent had not bothered to challenge these amounts, and it was in a better position to do so. I also referred to the dayworks dockets for labour – Tab 8, and sometime found similar anomalies, but I do not think that they were material. Accordingly, I found sufficient correlation to not interfere with the claim in this regard either.

169. The Advance rental amounts for the CC10 roller, padfoot roller and the multi tyre roller were for a period, and not every day in this period was charged by the Claimant, presumably because they were not operated every day. Again I see no utility in recalculation of these small amounts, which may well increase parts of the claim, which I may not do.

170. Accordingly, I am satisfied that the amount of the payment claim of **$239,188.59** reflects the value of the contract work

Retention - $20,811.37

171. I have already found that this retention amount of **$20,811.37** should not have been deducted, and it is now payable.

Interest on past progress payments $6,337.62

172. On pages 2 and 3 of the Payment Claim the Claimant made assertions about interest on overdue payments monies. The Respondent in paragraph 6(c) of the Payment Schedule denied any interest was payable because there had been no previous payment claims, and that no interest could accrue.

173. In submission 114 the Claimant went further to substantiate its argument by saying that entitlements to recover progress payments were not contingent on the recovery process under part 3 of the Act, so that s15 allowed interest on overdue payments. The Respondent countered this in para 20 of the response by saying that interest in s15(2) of the Act refers to interest on unpaid amounts of a progress claim that has *become payable* and that amounts had not yet become payable.

174. In submission 119 the Claimant continued with its approach that there was nothing in s15(2) that it was reliant on s15(1), and that it was only subject to s15(3). It reiterated that s15(2) allowed interest and it was not subject to part 3 of the Act.

175. I do not agree with the Claimant on this point because s15(1) identifies when a progress payment *becomes payable* either under ss(a) or (b). In this case, the contract makes no provision about when it becomes payable, so one needs to invoke s15(1)(b), which provides that a progress claim becomes payable 10 business days <u>after a payment claim for the progress claim for the payment is made under part 3</u> (my underlining).

176. s15(2) provides that *interest for a construction contract is payable on the unpaid amount of a <u>progress payment that has become payable</u>* (my underlining) under either (a) or (b). The critical issue appears to me to be that interest is payable on a progress payment that *has become payable*, and a progress payment *becomes payable* 10 business days after a *payment claim* is made.

177. A *payment claim* is defined under Schedule 2 as a claim under s17 of the Act. The three earlier progress claims made by the Claimant did not bear the endorsement required by s17(2)(c) and the facts indicate that the progress claims were directed to the Superintendent, and not to the Respondent, as required by s17(1) as the person who is liable to make the payment. They were therefore not *payment claims*.

178. Accordingly those earlier progress payments had not become payable under the Act, so the Claimant was not entitled to invoke the interest provisions under s15(2) of the Act.

The consultant's fees - $4,125.00

179. I have already found that this amount is not payable.

The adjudicated amount

180. The **adjudicated amount** comprises:

(i)	Work carried out – spreadsheet breakdown	**$239,188.59** excl GST
(ii)	Retention money	**$20,811.37** excl GST
	TOTAL	**$259,999.96 excl GST**
	GST	**$ 26,000.00**
	TOTAL	**$285,999.96 inc GST**

Due date for payment

181. I have already found that the due date for payment is 15 August 2006.

Rate of interest

182. 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 contract did not identify the payment of interest, so there was no rate under the contract.

183. Accordingly, I refer to s15(2)(a) which calls up s48(1) of the *Supreme Court Act 1995*. This provision 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, as the contractual rate was nil. Therefore the rate of 10% applies, and I find this is the applicable interest to apply to the adjudication

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

Authorised Nominating Authority and Adjudicator's fees

185. s34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has substantially succeeded in the quantum of its claim. The Respondent's defence was based largely on its claim that it had no contract with the Claimant and that no money was payable until it certification by the Superintendent.

186. There was a substantial body of material demonstrating the Respondent was the contracting party, and its defence had no realistic prospect of success and the requirement that a Superintendent certify a claim is inconsistent with the thread of

authority on this point. The Claimant then had to go to the unnecessary trouble and expense of an adjudication. Accordingly, I exercise my discretion to alter the default provision in s34(3) and 35(3) and decide that the Claimant pay all of the ANA's fees of $165 and all of my fees.

Chris Lenz
Adjudicator

15 September 2006