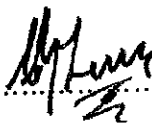


Claimant: COMPLEX PTY LTD
Respondent: FORTIA FUNDS MANAGEMENT LTD

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 payment claim for \$714,322.88 in the adjudication application dated 23 March 2007 is **\$82,969.90 excluding GST**;
2. The date on which the amount became payable is **16 March 2007**;
3. The applicable rate of interest payable on the adjudicated amount is **16.34%** simple interest;
4. The Claimant is liable to pay 25% of the ANA's fees and 25% of the adjudicator's fees and the Respondent is liable to pay 75% of the ANA's fees and 75% the adjudicator's fees.

Signed:



Chris Lenz Adjudicator

Date:.....

19 April 2007

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Background

1. Complex Pty Ltd, ABN 50 111 433 277 (referred to in this adjudication as the "Claimant"), entered into a written contract with Fortia Funds Management Ltd, ACN 104 111 631 (referred to in this adjudication as the "Respondent"), on 15 September 2006 for Early Works (Stage 1) and Construction (Stage 2) of Dalgety Apartments in Townsville in Queensland (the "contract").
2. The Claimant carried out work under the contract under part of Stage 1, but the contract was terminated on 18 January 2007, ostensibly on the grounds that the Claimant was unlicensed and because the lender did not approve of the Claimant.
3. On 26 February 2007 the Claimant served a payment claim for \$714,322.88 (including GST) for the work.
4. The Respondent served a payment schedule on 9 March 2007.
5. The Claimant made a written application for adjudication on 23 March 2007 (the "application") in which the claim was reduced to \$358,024.24 (including GST) and the Respondent provided an adjudication response on 3 April 2007 (the "response") in which it stated that nil was payable.

Appointment of Adjudicator

6. The Claimant applied in writing to the Institute of Arbitrators and Mediators in Sydney ("IAMA") on 23 March 2007 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.
7. I find the application was to IAMA, as an authorised nominating authority, with registration number N1057859, thereby satisfying s21(3)(b) of the Act.
8. By letter dated 27 March 2007, 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.
9. I accepted the nomination by facsimile dated 28 March 2007 sent to the Claimant and to the Respondent, which was within 4 business days after the application was made, which complies with s32(1)(a) of the Act. Accordingly, I became the appointed Adjudicator by virtue of s23(2) of the Act.

Material provided in the adjudication

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

Claimant's Material

This material contained the following documents:

- i. The application dated 23 March 2007;
- ii. Claimant's submissions in support of the application, to which were annexed
 - a. Annexure A attaching progress certificate no. 5 from Cadence with correspondence and calculations;
 - b. Annexure B – Payment Reconciliation document in a spreadsheet;
 - c. Annexure C – Direction from Integrated Project Services to Claimant dated 5 October 2006 requiring cessation of engineering design on piling, but continuation of design for underpinning of neighbour's property;

- d. Annexure D – Respondent's letter to Claimant dated 10 October 2006 requesting a price for underpinning and propping work and inspection by engineer;
- e. Annexure E – Design Certificate dated 15 August 2006 from Cardno (Qld) Pty Ltd for design of steel frame and precast concrete deck access and façade support structure;
- f. Annexure F – Early works cashflow spreadsheet;
- iii. Payment Claim dated 26 February 2007 with fax transmittal sheet;
- iv. Payment Schedule dated 9 March 2007 with fax transmittal sheet;
- v. Instrument of Agreement dated 15 September 2006, together with AS4902-2000 amended General Conditions of Contract for design and construct work ("GCC"), together with a one page early works programme and an overall construction works programme (the "contract documents").

Respondent's Material

The Respondent's material consisted of:

- (i) The adjudication response dated 2 April 2007 (3 pages);
- (ii) Tab 1 – Respondent's submissions;
- (iii) Tab 2 – Respondent's submissions in reply to Claimant's submissions;
- (iv) Tab 3 – Statement of Craig Pearsall;
- (v) Tab 4 – Payment Claim;
- (vi) Tab 5 – Payment Schedule;
- (vii) Tab 6 – Instrument of Agreement and the GCC;
- (viii) Tab 7(i) – Letter from BSA dated 18 January 2007 regarding licence status of Claimant;
- (ix) Tab 7(ii) – Letter from Respondent to Claimant dated 18 January 2007 terminating the contract;
- (x) Tab 7(iii) – IPS site instruction No. 2 regarding ceasing piling design but continuing with design for underpinning;
- (xi) Tab 7(iv) – Respondent's variation Notice no.2 dated 10 October 2006 together with early works programme;
- (xii) Tab 7(v) – Cadence's Progress Certificate No. 5 dated 9 March 2007
- (xiii) Tab 8 containing case authorities, viz:
 - a. (i) – Isis Projects v Clarence Street [2004] NSWSC 714 ("*Isis*")
 - b. (ii) – Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor [2004]NSWCA 394 ("*Brodyn*")
 - c. (iii) – Multiplex Constructions Pty Ltd v Luikens & Ors [2003] NSWSC 1140 ("*Multiplex*")
 - d. (iv) – John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd [2004] NSWSC 258 ("*John Holland*")
 - e. (v) – Veolia Water Solutions v Kruger Engineering [2007] NSWSC 46 ("*Veolia*")
 - f. (vi) – Musico v Davenport [2003] NSWSC 977 ("*Musico*")

Jurisdiction

11. 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 [s3(1) of the Act]; and
- (2) that the *construction work* was carried out, or the related goods and services supplied for construction work, in Queensland, see s3(4) of the Act.

12. Turning firstly to schedule 2 of the Act. It 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."

13. The Claimant's material attached the contract documents and the Respondent in Tab 6 also included the Instrument of Agreement ("IOA") and the GCC. The Instrument of Agreement in the contract documents was signed by two directors for the Respondent and Claimant and each had signatures of two witnesses. I find, without anything to the contrary, that the IOA was executed on 15 September 2006 as this was the date on the document, and in clause 8 it identified the contract documents, so I am satisfied that this was the date of the contract between the Claimant and Respondent.
14. I find that Clause 1 of the IOA required the Claimant to undertake Stages 1 and 2 of the works, and that Clause 3 identified Stage 1(a) – Early works as demolition and any works incidental to demolition, and identified Stage 1(b) – Piling as piling and any works incidental to piling.
15. I also find that Clause 2 of the IOA provided that the Respondent agreed to pay the Claimant, in accordance with the provisions of the contract, for the contract sum for Stage 1 – Early works.
16. I am satisfied therefore that there was a *contract* as provided by Schedule 2 of the Act, on 15 September 2006, in which the Claimant undertook to carry out work for or to supply related goods and services to the Respondent. However, it is necessary for me to determine whether the undertaking related to *construction work* or to supply related goods and services in relation to *construction work*.
17. Construction work is defined in s10 of the Act as:

 “(1) **Construction work** means any of the following work –
 (a) The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;...
 (d)(ii) the laying of foundations”
18. I am satisfied that Stage 1(a) – Early Works falls within the definition of *demolition of buildings* in s10(1)(a) of the Act as *construction work* as part of the construction of the apartments, which I am satisfied is a building, and that piling or associated work falls within s10(1)(d)(ii) under *laying of foundations*.
19. 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—
 (b) services of the following kind—
 (iii) building, engineering...services relating to construction work;”
20. I find that the Instrument of Agreement at Clause 4(b) identified that the Claimant was to provide for the piling design and structural design as detailed in the Early Works Cashflow Schedule Weeks 7-16, which as a matter of commonsense are engineering services, thereby falling within the meaning of *services* under s11(1)(b)(iii), as the provision of engineering services relating to *construction work* of building the apartments.
21. I am therefore satisfied that the contract date was after 1 October 2004, and it related to *construction work* and the supply of related services for *construction work* as defined in ss10 and 11 of the Act.
22. I find therefore that s3(1) of the Act has been satisfied for the reasons outlined above.

23. I find that Townsville is in Queensland, thereby satisfying that the construction work regarding demolition was in carried out in Queensland. Annexure E of the Claimant's application attached a design certificate from Cardno Qld Pty Ltd in Townsville, so I am satisfied, without anything from the Respondent to the contrary that the related goods and services of engineering services were carried out in Queensland. Accordingly, the exclusionary provisions of s3(4) of the Act do not apply.
24. I find that Recital D of the Instrument of Agreement and Clause 48(a)(iii) of the GCC states that it is a condition of the contract that the Financier approve of the Claimant and that the Respondent and the Claimant may be required to enter into a *Builder's Side Deed*. I do not have any material on the Builder's Side Deed, or whether such a document was executed.
25. On the material provided in the adjudication, it is not apparent that the contract is part of a loan agreement, contract of guarantee or contract of insurance. Furthermore, although the Respondent's financier is defined in Clause 1 of the GCC as the "financial institution which is providing the Principal with project finance", it is not apparent that the Respondent's financier is a *recognised financial institution* as defined in Schedule 2 of the Act. Accordingly, it is not possible to find that the contract falls within the excluding provisions of s3(2) of the Act.
26. Furthermore, there is no evidence that the contract includes the financier as a party, or that the financier undertook to lend, guarantee payment, or provide an indemnity relating to construction work. Accordingly, it is also not possible to find that the contract falls within the excluding provisions of s3(3) of the Act.
27. Consequently, I have jurisdiction to adjudicate this matter and now proceed to do so, being mindful of the constraints imposed by the Act in carrying out this function.
28. However, there is one very difficult matter that I need to deal with under this heading of jurisdiction relating to a claim of unlicensed contracting, to which I will return, once I have canvassed the scope of the adjudication as provided by s26 of the Act, and two Court of Appeal authorities in NSW.

Scope of the adjudication

29. s26(1) of the Act 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.
30. 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."*
31. Part 4A of the *Queensland Building Services Authority Act 1991* (The "QBSA Act") may apply to this adjudication to which I will return later and I did not conduct any inspection of the project.
32. 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.
33. Returning to s26(2) of the Act, it clearly restricts what an adjudicator may consider. However, Hodgson JA in *The Minister for Commerce (formerly Public Works & Services) v. Contrax Plumbing (NSW) Pty. Ltd. & Ors. ("Contrax")* [2005] NSWCA 142, considered the restrictive scope in the NSW equivalent of s26(2) and said at paras 34 and 35 relating to s22(2) of the NSW Act as follows:

"34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.

35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d)."

34. Hodgson JA continued with his theme in the Court of Appeal case of *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19 ("*John Holland*"), at paras 47-49, and in particular to para 48, where His Honour referring to his decision in *Contrax* said:

"However, it is to be noted that I said that the adjudicator was required by pars.(a) and (b) of s22(2) to consider matters "if he or she thinks [they are] relevant to the construction of the Act, the construction of the contract, and the validity of the terms of the contract having regard to the provisions of the Act. To put this another way, I was saying that the adjudicator should not ignore something which he or she is aware of and also believes is of real relevance to issues under pars.(a) and (b), simply because the matter was not raised in submissions duly made by the respondent. Of course, if the matter has not been so raised, there may be questions of natural justice to the claimant that needs to be addressed, perhaps by calling for further submissions or by arranging a conference; but that is another issue. However, the requirement for natural justice to the claimant is a further

reason why the adjudicator would not be required to consider such matters under pars.(a) of (b) unless he or she thought they were really material to issues arising under those paragraphs"

35. Accordingly, if I am of the view that there is something of relevance, I must deal with it; and in order to comply with the requirements of natural justice, I may have to call for submissions or arrange a conference.
36. In my view, the allegation that the Claimant was unlicensed is a jurisdictional issue that must be considered by me, and I now turn to this important issue.

Further jurisdictional issue

37. The Respondent claims in para 2.7 of its response that the Claimant was not licensed to carry out the work under the contract and had breached s42(9) of the *Queensland Building Services Authority Act 1991* (the "BSAA") (the "unlicensed contracting claim"). In para 2.8 of the response the Respondent asserted this lack of a licence was one ground for terminating the contract with the Claimant.
38. The Respondent did not refer to the unlicensed contracting claim in its response submissions in Tab 1. However, in Tab 2, in its detailed submissions in reply to the Claimant's Adjudication submissions paragraph 3, it repeated the unlicensed contracting claim. It referred to Tab 7(ii)(sic) to a letter dated 18 January 2007 from the Building Services Authority's ("BSA") Compliance Manager which concluded that in the BSA's opinion the Claimant was not licensed to carry out the works under the contract.
39. The Respondent again referred to the unlicensed contracting claim in response to the Claimant's submission paragraphs 18 and 20. The unlicensed contracting claim was again raised in response to the Claimant's submission 135, but after quoting s42(3) and s42(4) of the BSAA, the Respondent expanded on its unlicensed contracting claim by asserting that the Claimant was not entitled to monetary or other consideration (the "monetary or other consideration submissions") in stating that:

"In the circumstances, the Claimant is not entitled to monetary or other consideration for carrying out building work in contravention of this section if the reasonable remuneration:

- (a) is not more than the amount paid by the Claimant in supplying materials and labour for carrying out the building work; and*
- (b) does not include an allowance for any of the following:*
 - (i) the supply of the Claimant's own labour*
 - (ii) the making of a profit by the Claimant for carrying out the building work;*
 - (iii) costs incurred by the Claimant in supplying materials and labour if, in the circumstances, the costs are not reasonably incurred; and*
- (c) is not more than any amount agreed to, or purportedly agreed to, as the price for carrying out the building work; and*
- (d) does not include any amount paid by the Claimant that may fairly be characterised as being, in substance, an amount claimed for the Claimant's own direct or indirect benefit."*

40. However, the monetary or other consideration submissions stopped at that point, and the Respondent made no assertions as to whether the reasonable remuneration qualifications contained in (a) through to (d) had been made out to disqualify the Claimant from any monetary or other consideration. Nevertheless, the issue was raised.

41. At this point it is important for me to make the finding that the payment schedule made no direct reference to the unlicensed contracting claim as a reason for non payment of the payment claim. The only reference may be by inference in that paragraph 8(b) of the Payment Schedule, where in response to a claim for \$85,000, the Respondent stated that *"the agreement was terminated under Clause 39.4(b) for your substantial breach of contract and further and in the alternative under clause 48.1."*
42. I find that clause 39.4(b) of the GCC of the contract only provides the mechanism for termination, and does not refer to unlicensed contracting. One would then have to draw an inference from this submission that the Claimant knew that the substantial breach of contract was unlicensed contracting, and then another further inference that this disentitled the Claimant from \$85,000.
43. There is no submission from the Respondent in the payment schedule that the substantial breach (not identified, but by inference relating to unlicensed contracting) disentitled the Claimant from the \$85,000 claimed under paragraph 8 or any monies claimed elsewhere.
44. This failure to raise the unlicensed contracting claim as an issue in the schedule has lead in my view to this not being addressed by the Claimant in its adjudication application at all. In my view, the Respondent by raising this issue in the adjudication response for the first time, in circumstances where the Claimant has no right to deal with this issue in submissions, puts the Claimant at a significant disadvantage which may require its submissions on the point.
45. I have the power to request submissions in s25(4) of the Act, but that is a discretion that I may or may not exercise. As Mr Justice Wilson held in *Abel Point Marina (Whitsundays) Pty Ltd v Thomas Uher and Sea Slip Marinas (Aust) Pty Ltd* [2006] QSC at para 20, I am not obliged to seek further submissions. I am required, as Wilson J said at para 20, to afford the parties procedural fairness, but the primary obligation is to make a decision on the material before me (my underlining). In my view, given the speed with which the adjudication process is required to be completed, I am inclined to exercise the discretion sparingly. However, if I were to make an adverse finding on the unlicensed contracting claim, without giving the Claimant an opportunity to make submissions on the point, this would in my mind be a breach of natural justice, and I would not allow that to occur.
46. The unlicensed contracting issue has caused me considerable disquiet. I have found that this must be dealt with as a matter of jurisdiction, because of the Court of Appeal decision in *Cant Contracting Pty Ltd v Con Casella and Michelle Lyndsay Casella* [2006] QCA 538 ("*Cant*") to which I will now turn. I may be required to exercise my discretion and ask for submissions from the Claimant, if I find that unlicensed contracting has been made out, but I will firstly closely evaluate the Respondent's material.
47. In my view, having regard to sections 7 and 8 of the Act, the legislation simply facilitates the recovery of progress payments to persons entitled to progress payments. It is not in my opinion designed to require adjudicators to become inquisitors through the powers contained in s25, or for the parties to conduct interlocutory jousting, and surprising one another during the very tight time frames within which the parties are to provide their documentation, and the time within which the adjudicator is to value the progress claim.
48. Nevertheless I must consider the issue raised by the unlicensed contracting claim since *Cant* is authority that an unlicensed contractor was not entitled to summary judgement for a progress payment under the Act, because the issue of whether or not a contractor was licensed, was a triable issue.

49. It is vitally important that I carefully consider what the Court decided in *Cant*, and apply it in the light and context of the material before me, so that I can decide whether or not *Cant* is a precedent for this adjudication, or in any event, highly persuasive for me to follow in this adjudication.
50. *Cant* was a summary judgement application before the Chief Justice of the Supreme Court at first instance. The original claim by the Respondent was for moneys due and owing pursuant to an agreement or alternatively on a quantum meruit. In the defence and counterclaim, the Appellant raised an issue of unlicensed contracting, and the Respondent put this in issue in its reply, and then subsequently amended its statement of claim to include a payment claim under the Act. The Appellant pleaded defences to the Act on the basis that nothing in the Act derogated from the Respondent complying with s42 of the BSAA.
51. His Honour, the chamber judge, held that the failure by the Appellants to raise the requirement for a license in the payment schedule, precluded them from raising it as a defence in a summary judgement application. In separate judgements, but all agreeing with the orders that were made, the Court of Appeal ordered that the summary judgement be dismissed with costs.
52. Williams JA, at para 29, held that the Chief Justice was wrong in relying upon *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another* [2004] NSWCA 394 ("*Brodyn*") as authority in support of his granting summary judgement. Whilst it was obiter, at para 33, His Honour held that "*Parliament could not have intended that pursuant to the Payment Act an unlicensed contractor could immediately recover the whole of the contract price for doing the work, in the face of a statutory prohibitions in the Building Act on such contractor recovering any monetary consideration, other than as specified in s42(4) for doing work under the contract.*"
53. Jerrard JA at para 44 noted that it was not denied by the Respondent that it was an unlicensed builder. His Honour held that the Respondent was not entitled under ss 12 or 13 of the Act to a progress payment because it was prohibited from doing so by s42(3) of the BSAA, and, at para 48, held that was the basis why the summary judgement should be set aside.
54. McMurdo J at para 50 noted that the Respondent builder, for the purposes of the appeal, had to be treated as unlicensed. At para 55, His Honour held that there was a difficulty with the Act because an unlicensed builder is not entitled to enforce its contract by virtue of s42 of the BSAA. In para 57, His Honour held that s42 of the BSAA is not within Part 4A of the BSAA, such that an adjudicator could not consider s42 of the BSAA because of the limitations contained within s26(2) of the Act.
55. His Honour held further at para 59 that:

"...there could be a genuine question as to whether the builder is relevantly unlicensed. In particular there could be questions of fact going to the classification of work for the purposes of the licensing requirement, which cast doubt on whether the builder held the licence appropriate for the agreed work. But that is not a matter which could be investigated by the adjudicator, who would be confined to a consideration of the matters listed in s26(2)."
56. His Honour held further at para 61 that:

"It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the Payments

Act was intended to override the disentitlement according to s42; the contrary appears. In my view the Payment Act operates only where there is a construction contract of which the terms as to payment are enforceable by the builder."

57. His Honour then held that there was a triable issue on the licensing question and held that summary judgement should not have been given. McMurdo J's findings that the Act only operates where there is a construction contract that is enforceable by the builder is the reason why I find that unlicensed contracting is a jurisdictional issue. If unlicensed contracting is made out, then His Honour states that the Act does not apply. I must therefore decide on the material before me, if unlicensed contracting is established. Unfortunately, this raises some complex evidentiary and procedural issues with which I must grapple.
58. The Respondent has raised the issue of licensing and in my view, if it is to be considered, the Respondent bears the onus of providing sufficient evidence of this fact, before the evidentiary onus shifts to the Claimant to provide controverting evidence. However, McMurdo J at para 47 said that licensing is not a matter dealt with under Part 4A of the BSAA, so on the strict reading of s26(2) of the Act, I should not have regard to this issue. This is one of the dilemmas with unlicensed contracting.
59. All Judges in *Cant* referred to the fact that an unlicensed builder would not have an entitlement to progress payments, viz. Williams JA at paras 30 and 31, Jerrard JA at paras 44, 47 and 48 and McMurdo J at para 53. These are provisions of the Act, and relying upon the Court of Appeal cases in NSW; that if the matter relates to the provisions of the Act [s26(2)(a) of the Act] and the construction contract [s26(2)(b) of the Act], and I am of the opinion that it has real relevance to the entitlement of the Claimant under the construction contract, then I should consider it. In my view unlicensed contracting has direct relevance to entitlement and I intend to consider it.
60. However, in considering the licensing issue, I am only doing so because it effects entitlement and the construction contract, and I do not believe I have the power under the Act to evaluate submissions about the complexities of licensing, as I am confined by s26(2) of the Act. McMurdo J in *Cant* at para 59, specifically prohibits an adjudicator from investigating whether a builder held the licence for the agreed work. I am of the opinion therefore that I must have compelling evidence from the Respondent of the Claimant being unlicensed before the evidentiary onus shifts to the Claimant.
61. As noted in *Cross on Evidence (2004)*, Lexis Nexis Butterworths, 7th Australian Edition, para 1485 on page 101, "all evidence which is sufficiently relevant to the issue before the court is admissible, and all that is irrelevant, or insufficiently relevant should be excluded". Accordingly, as a matter of law I am obliged to consider relevant evidence, however, the weight given to such evidence is a matter for me as the adjudicator. In this context I am mindful that the Act essentially facilitates regular progress payments and that adjudication is not arbitration where the parties' contractual rights are finally determined. I am prohibited from embarking on an inquiry, as my powers are confined by s26(2) of the Act, and I must accord both the Claimant and the Respondent natural justice.
62. Referring generally to the provisions of Section 5 in Cross from para 1485 to 1615, page 101 to 118, I need therefore to consider the material provided by the Respondent to see if it firstly satisfies the test of relevance. If it does so, then I must consider whether, in adjudication, the exclusionary rules provided in the common law relating to hearsay and opinion evidence apply to exclude any evidence. If I decide that the evidence is admissible, I must then consider what weight should be given to it.

63. The only material directly bearing on the issue of the Claimant's license is contained in the Respondent's Tab 7(i), which I find is a letter to the Respondent dated 18 January 2007 from Mr. Shane Wilson, Compliance Manager from the BSA. Mr. Wilson refers to Mutual Recognition legislation in Queensland that compels the BSA to grant the Claimant the same license that it has in NSW.
64. He then refers to NSW licensing legislation and concludes in his opinion that the Claimant's licence in Queensland is not appropriate to carry out the works, and by entering into the Instrument of Agreement, the Claimant has breached s42(9) of the BSAA, and that the BSA intends to take action against the Claimant for this breach.
65. He also states that if the Claimant commenced any commercial work at the site, the BSA may seek a stop work order under s108 of the Commercial and Consumer Tribunal Act 2003.
66. For the sake of completeness, I extract the relevant extracts from Mr. Wilson's letter sent to Mr. Ian Taylor of Gilbert & Tobin, solicitors acting for the Respondent (the "BSA letter"):

"I refer to your facsimile dated 12 January 2007 regarding the 20 storey "Dalgety Apartments" project ("the work"), to be constructed at the corner of Denham and Sturt Streets, Townsville.

I confirm that you have requested BSA advise you whether Complex Pty Ltd is appropriately licensed to carry out the work. To assist me in making a determination in this matter you have provided me with a copy of the ground floor plan for the works, and contractual documentation...[An analysis of the licensing provisions then follow]

In the circumstances BSA is of the opinion that due to the restriction place (sic) on its BSA licence, Complex Pty Ltd is not appropriately licensed to carry out the works. By entering into the instrument of agreement with Fortia Funds Management Limited, Complex Pty Ltd has breached s42(9) of the Queensland Building Services Authority Act 1991. BSA intends to take action against Complex Pty Ltd in respect of this breach.

Further BSA will not allow unlawful building work to take place at the site. Should Complex Pty Ltd commence undertaking any of the commercial work contained in the ground floor plan BSA may seek a stop work order under s108 of the Commercial and Consumer Tribunal Act 2003.

If I can be of further assistance please don not hesitate to contact me..."

67. The Respondent's letter of termination dated 18 January 2007 in Tab 7(ii) does not provide any additional evidence of unlicensed contracting, as I find that it merely relies upon the letter from the BSA.
68. The submissions made by the Respondent are not evidence. Most of the Respondent's submissions, apart from one reference in response to paragraph 135 of the Claimant's submissions, do not positively assert that the Claimant was not entitled to any monies because it was unlicensed. The Respondent seems to concentrate on the effect of unlicensed contracting being a breach of the offence provision in s42(9) of the Act, which is not relevant to this adjudication.
69. Nevertheless, the unlicensed contracting issue is raised by the Respondent, and the monetary or other consideration submissions were made. The fact of unlicensed

contracting I have said goes to jurisdiction, and must be considered because it has been raised.

70. I find that the Statement of Mr. Pearsall in Tab 3 merely refers to the BSA letter [in paragraph 12] and the Respondent terminating the contract [in paragraph 13]. There is no explanation by him why the licensing issue was not raised in the payment schedule, and I do not find that anything in his statement that is sufficiently relevant to consider it as admissible of the fact of unlicensed contracting.
71. I have already found that the Respondent did not raise the unlicensed contracting in the payment schedule. In my view it was clear to the Respondent that it believed that the Claimant was unlicensed because it terminated the contract on 18 January 2007, on one basis that the Claimant was unlicensed. Nevertheless, nearly 2 months later it chose to not raise this important issue in the payment schedule, which goes to the heart of entitlement to progress payments. The consequence of this, as I said earlier, is that the Claimant did not canvass its licensing status in the adjudication application.
72. Whilst s24(4) of the Act prohibits the Respondent from raising reasons for withholding payment unless those reasons were raised in the payment schedule, I accept that unlicensed contracting goes to jurisdiction, so I do not believe it is prohibited under the exclusionary provisions of s24(4) of the Act.
73. Having considered the Respondent's material, I am left with the BSA letter which provides an opinion by the Compliance Manager that the Claimant was unlicensed. His opinion is based on a ground floor drawing and "contractual documentation" ostensibly provided by the Respondent. Although there is an exception to the common law rule of the admissibility of relevant evidence in the case of opinion evidence [see *Cross* at para 1505 on page 104], in my view the Compliance Manager of the licensing authority has the expertise to provide an opinion on licensing, such that it would be unsafe to exclude it on this basis.
74. Although I have said that the Act's focus is the facilitation of regular progress payments, there are similarities to arbitration in that the parties themselves have the responsibility for the conduct of their cases, and to that extent at least it is an adversarial process. I have already said that the Respondent bears the evidentiary onus of proving the unlicensed contracting because it has raised it, before the onus shifts to the Claimant, and I have not yet asked the Claimant for any evidence about its license status.
75. It can be argued that the purpose for which the Respondent provided this letter in the response is to prove that the Claimant is unlicensed. It was provided not by Mr. Pearsall but by the BSA's Compliance Manager, who is not party to the adjudication. I conclude on this basis that the letter is hearsay. There is no guidance provided in the Act regarding adjudications as to whether the common law exception that hearsay is to be excluded from admissibility of relevant evidence, [see *Cross* para 1500 on page 104].
76. In my experience adjudication often involves consideration of material that is strictly hearsay and it is the weight of the evidence with which adjudicators continually juggle. In such a rapid decision-making process, it is my view that Parliament has entrusted adjudicators to carry out their functions without constraining them to require reception of material strictly in accordance with the rules of evidence. However, adjudicators should at least be mindful of the rules of evidence in carrying out their functions, so it is arguable that the letter could be excluded on this ground.
77. However, I have said that I am constrained by *Cant* to consider unlicensed contracting. Furthermore, *Contrax* and *John Holland* require me to not ignore

something that is of relevance, whether or not it is clearly raised in submissions. On this basis, and on the basis that I find that the strict rules of evidence should not be applied in adjudication for the reasons outlined above, I am prepared to allow the letter to be considered by me as some evidence of unlicensed contracting. I must now make an evaluation of its weight in exercising my discretion about its probative value.

78. I find that Mr. Wilson's letter is in response to the Respondent's enquiry about unlicensed contracting, and he provides his opinion based on some documents that were not provided in this adjudication [in the case of the ground floor plans] or sufficiently identified in the case of the contractual documentation, apart from the IOA. It is not clear as to what *contractual documentation* was provided to Mr. Wilson and what else may have been told to him, so the basis founding his opinion is not clear.
79. In my view it is unsafe based on this evidence to find that the Claimant was not licensed for the work under the contract, or breached s42(9) of the BSAA, which is an offence provision that provides for penalties. There is no evidence that the BSA even commenced prosecution or that a conviction was recorded, from which I could draw the obvious inference that the Claimant was unlicensed. The letter is not an official or public document under s44(b) of the Evidence Act 1977, as it was written in response to the Respondent's request.
80. Furthermore, I am not prepared to find that a possible action by the BSA for a stop work order has been made out on the material, as there is no evidence that this was ever commenced by the BSA, or that it succeeded in stopping work by the Claimant. There is no Court or Commercial and Consumer Tribunal record of a prosecution in the material. I find Mr. Wilson invited the Respondent to contact him further, and I draw the inference that if the Respondent had done so, Mr. Wilson would have provided evidence of prosecution or stop work, and any decision by a Court or Consumer Tribunal. There is no such material provided, so I draw the inference that there is no such evidence.
81. I am therefore left only with an opinion of the Compliance Manager of the BSA, that the Claimant was unlicensed, in circumstances where I am prohibited by s26(2) of the Act, as identified by McMurdo J in *Cant*, to investigate the suitability of the Claimant's licence for the work carried out. I have found nothing in s42 of the BSAA, or elsewhere in that Act for that matter, that an opinion of the BSA's Compliance Manager is conclusive proof that a person was unlicensed.
82. In reviewing the BSAA, which I find I am required to do for the purposes of considering unlicensed contracting, which relates to s26(2)(a) *the provisions of the Act*, I find that the Commercial and Consumer Tribunal has jurisdiction to consider disciplinary action against a person who is not a licensee under s90 of the BSAA. Furthermore, s42(9) of the BSAA creates offences, which may be tried in a Court. In both instances, a Tribunal or Court is the body that makes the decision as to whether or not someone should be disciplined or convicted for unlicensed contracting, from which I can draw the inference that the opinion of the Compliance Manager is not proof of unlicensed contracting.
83. Accordingly, I am not satisfied on the material provided by the Respondent that the Claimant was involved in unlicensed contracting, so the evidentiary onus does not shift to the Claimant for it to provide submissions.
84. Having found that the Respondent had not discharged its onus, *Cant* does not have a bearing in the adjudication, because I have not found on the material that the Claimant was unlicensed.

Requirements of an adjudication decision

85. The NSW Court of Appeal in *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)).*

86. I will now check that each basic and essential requirement has been complied with.

Detailed consideration of each Basic and Essential Requirement*The first basic and essential requirement – the construction contract*

87. I have already found that there is a *construction contract* to which the Act applies, which gave me jurisdiction to proceed with the adjudication.
88. I have also not found on the material provided that the Claimant was unlicensed, which would have disentitled it from making a progress claim under the construction contract.
89. I have therefore established the *first basic and essential requirement*.

The second basic and essential requirement – service of the payment claim

90. The *second basic and essential requirement* requires the service of the payment claim on the Respondent in accordance with s17 of the Act.
91. s103(1) of the Act allows the contract to provide for the way of service, and Clause 7 of the contract provides:
- "A notice (and other documents) shall be deemed to have been given and received:*
- (a) if addressed or delivered to the relevant address in the Contract or last communicated in writing to the person giving the notice; and*
 - (b) on the earliest date of:*
 - (i) actual receipt;*
 - (ii) confirmation of correct transmission of fax; or*
 - (iii) 3 days after posting."*
92. The Claimant has demonstrated that it faxed the payment claim to the Respondent on 26 February 2007 as it attached a fax transmission report which confirmed that 6 pages had been sent, and the covering letter was printed out in the fax transmission. The address on the letter was suite 701, 15 Bent Street, SYDNEY NSW 2000, and I find that this is the address of the Principal in Item 2 of Part A of the Annexure to the

GCC. Furthermore, I find that the payment schedule delivered by the Respondent by facsimile on 9 March 2007 identified that it had been served with the payment claim dated 26 February 2007. I am therefore satisfied that the Respondent received the payment claim by facsimile.

93. Accordingly I find that proper service of the payment claim took place as required by s17 of the Act so that the *second basic and essential requirement* is satisfied.

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

94. I have already found the Claimant has validly made the application to IAMA which is an ANA. I have found that IAMA in Sydney received the application on 23 March 2007, and it was then forwarded to IAMA in Brisbane where I find it was received on 27 March 2007.
95. The Respondent has not taken issue with the lodgement of the adjudication application in Sydney, and s21(3)(b) merely requires it to be made to an authorised nominating authority, which is defined in Schedule 2 to be a person registered under part 4, division 2 as an authorised nominating authority. I have already found that IAMA is such an ANA.
96. s21(3)(c(i) of the Act provides that the Claimant had 10 business days from 9 March 2007 (the service of the payment schedule) to lodge its adjudication application. By my calculation this meant that the application had to be made by 23 March 2007, so that was within time.
97. Accordingly, *the third basic and essential requirement* is satisfied.

The fourth basic and essential requirement – eligible adjudicator

98. *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.
99. I am not a party to the period subcontract 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.
100. Accordingly, *the fourth basic and essential requirement* has been satisfied.

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

101. *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.
102. The decision is in writing in accordance with s26(3)(a), and I have provided reasons in accordance with s26(3)(a) because the parties have not agreed to waive the requirement of reasons: s26(3)(b). The decision was made after further consideration of the merits in the dispute, to which I now turn.

Further discussion on the merits in the dispute

Payment claim deficiency

103. The Respondent asserts in 1.2 of the Executive Summary of the response and in paragraph 1 of its submissions, that the Claimant is not entitled to payment because

in contravention of s17(2)(a) of the Act, that it did not identify the construction work or related goods and services to which the progress payment relates (the "payment claim deficiency").

104. In support of its submissions, it referred to *Isis*, where McDougall J in dealing with the NSW equivalent of s17(2)(a) of the Act provided a list of 4 matters that should satisfy the requirement of sufficient identification of construction work or related goods and services (the "*Isis* requirements"). His Honour's finding at para 37 is as follows:

"In principle, I think, the requirement of s13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

- 1. The payment claim gives an item reference which, in the absence of evidence to the contrary, is taken to be referring to the contractual or other identification of the work;*
- 2. That reference is supplemented by a single line item description of the work;*
- 3. Particulars are given of the amount previously completed and claimed and the amount now said to be complete;*
- 4. There is a summary that pulls all the details together and details the amount claimed."*

105. s17(2) of the Act, provides the statutory requirements for the payment claim, viz.:

"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."*

106. In paragraph 7 of the respondent's detailed submissions relating to the payment claim, the Respondent relied on paragraph 1 of its response submissions of insufficient identification of the construction work, or failure to satisfy the *Isis* requirements. In particular, the Respondent referred to the following parts of the payment claim, which allegedly did not satisfy s17(2)(a) of the Act, viz.:

- (a) Consultants – Structural \$34,000.00
- (b) Complex Management - \$20,025.00
- (c) General preliminaries \$2,025.00
- (d) Erect site accommodation - \$1,800.00
- (e) Delay costs - \$249,600.00

107. The Respondent did not confine itself to a challenge on these particular items, because in paragraph 1.7 of its submissions it alleged that the payment claim had no effect under the Act, that the adjudication application had no effect, and that I am unable to determine a void application.

108. I find the payment claim consisted of a covering letter that contained the endorsement that it was made under the Act, identified an amount of \$714,322.88 (excluding GST) and identified that it was for work carried out under the contract. It had a spreadsheet attachment, which listed various work activities in the first column, then a column for the budget amount for each activity, a column for approved variations, a revised budget amount column, a column identifying what had previously been claimed or certified, followed by a percentage complete column, a column identifying the amount of the claim, and finally a column of balance owing (the "spreadsheet"). Furthermore, it annexed documents A through to D, which further explained delay costs ("Annexure A"), return of retention moneys (Annexure B), amount previously certified but and not paid ("Annexure C"), and an amount claimed under Clause 48.1 ("Annexure D").

109. I am satisfied that the spreadsheet identified the work under the contract, because it followed the format used for the Early Works Cashflow ("EWC"), which Clause 8 of the IOA identified as a contract document. By scrutinising the Costs to Complete column (Column C) in the EWC, it is apparent that this agreed with the Budget amount identified in the spreadsheet. Accordingly, I am satisfied that this format, by inference from a reference in Annexure A to previous certification by the Project Manager, that the spreadsheet was understood by the Respondent as reflecting the work that was agreed to be carried out by the Claimant.

110. To that end, therefore, I am satisfied that this payment claim was given by the Claimant to the Respondent experienced in the industry and familiar with the particular contract, because at the very least it had a Project Manager to manage the contract. McDougall J in para 36 of *Isis* referred to Palmer J's judgement in *Multiplex* at para 76 where Palmer J had said:

"A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of the construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precisions and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issue in the dispute."

111. I cannot accept that as a general proposition, as strongly urged by the Respondent in paragraph 1.7 of the submissions, that the payment claim did not sufficiently identify the construction work. I find that it follows the EWC contract format, and the contract or budget amounts identified in the contract. There may be particular items that needed further clarification to which I will turn in the deciding the amount of each item, but generally I am satisfied that the information provided complies with s17(2)(a) of the Act.

112. This means that I reject the Respondent's submissions that there was insufficient identification of the construction work and related goods and services, and therefore impliedly also reject the Respondent's assertions that the adjudication application is void. This also means that I reject the Respondent's submission that I cannot decide a void application, because I do not find it to be void.

New items

113. In paragraph 1.3 of the Executive Summary and in paragraphs 2 and 4 of its submissions, the Respondent argues that the Claimant has advanced new items of claim in the adjudication application, which were not previously claimed in the payment claim (the "new items"). It asserted that the new items totalled \$317,923 and that if I considered the new items in the adjudication, this would constitute a breach of natural justice because the Respondent had not had the opportunity to respond to these new items in the payment schedule.

114. I have difficulty understanding the Respondent's submissions, as it is not clear to me that the Claimant was advancing a claim for the new items at all. It seemed to me that the payment schedule, paragraph 9(a) referred specifically to the DCWC report dated 1 February 2007 (sic) and the Project Manager's certificate no.5 (the "Certificate"), and in it the Respondent's said that it relied on the reasons set out in those 2 documents in the payment schedule to support a nil payment.

115. I find that there is only one document from DCWC in the Respondent's material, and that is dated 8 March 2007. This 8 March 2007 document refers to the Contractor's progress certificate No 5, and values the work to date on a 1 page table. I do not understand this to be a report, because it is only a 1 page valuation, and does not provide a detailed explanation on how the column "Recommended Certified Value to Date" is arrived at. I will call this the *DCWC valuation*. There are 2 notes A and B in the document, which state:

- i. A *The value of the work included against this trade has been based on our assessment of progress on site;*
- ii. B *This price for this variation has not yet been agreed pursuant to the relevant contractual conditions and an interim value has been included based on my assessment of the value of work completed, and/or the ascertained value as stated in the relevant correspondence has been included.*

116. I will turn in further detail to the DCWC valuation later in the decision.

117. Nevertheless, the Claimant chose to put submissions in to answer the DCWC valuation and the certificate, as they formed part of the schedule, and this is what it did in paragraphs 29 and 30 of the adjudication submissions, by referring to the numbered issues in the Certificate as "Certificate #1" etc. The effect of the Certificate was to challenge in the payment schedule what had already been paid for the "Gantry Steel erection and Prelims", "Demolition", "Site grading and Utilities", "Overheads and Profit" and Variation No.6. I find that none of these items formed part of the amount being claimed in the payment claim, as I draw the inference that the amounts for these items had been previously certified and paid.

118. Accordingly, I find that the Claimant was joining issue with the Respondent over amounts that the payment schedule had re-valued for work that had already been previously paid. I do not find that the consequence of this joining issue meant that the Claimant was raising new claims. Furthermore, I cannot accept that the Respondent can argue that there would be a breach of natural justice if I considered these matters, because I find that these matters were first raised by the Respondent itself, and s26(2)(d) requires me to consider the payment schedule and its submissions in support thereof. I will consider these matters when considering the amount of the payment claim below.

Reimbursement for overpayment

119. In paragraph 5 of the submissions, the Respondent asserts that the total value of contract work completed is \$545,153.00 (excluding GST), and that the Claimant has already been paid \$687,998.03, so that it has been overpaid \$157,130.52 (inclusive of GST). Accordingly, the Respondent argues that nil amount is now payable to the Claimant.

120. To some extent the valuation of the work in the DCWC valuation and the Certificate overlap with the re-valuing of the "Gantry Steel erection and Prelims", "Demolition", "Site grading and Utilities", "Overheads and Profit" and Variation No.6 items referred to above. There is a discrepancy between the payment schedule, which identified an overpayment of \$224,846.45 (including GST) and that in the submissions of \$157,130.52 (inclusive of GST). Given that I am required to value the payment claim, this discrepancy may not be of significance in any event. Essentially, however, I am required to determine the amount of the progress payment associated with this payment claim.

121. There is some difficulty in this adjudication in that the Claimant has reduced the amount of its claim to \$358,024.24 in its adjudication submissions by abandoning certain items claimed in the payment claim, but increasing other items too.

122. What complicates the matter further is that in paragraph 27 of its adjudication submissions, the Claimant stated that, "...no regard will be had to reconciling prior claims, and prior certifications against the current claims or the total payments to date." However, in paragraph 31 the Claimant states, "Notwithstanding the various differences between the DCWC assessment dated 8 March 2007 and the Payment Claim dated 26 February 2007 this adjudication submission relies generally on prior certification dated 12 December 2006 issued by the previous Project Manager, Integrated Project Services."

123. The Claimant did not provide the 12 December 2006 certificate of the previous Project Manager, and as I have already stated, I will adjudicate on the material provided to me. I do not consider it appropriate to ask the Claimant for submissions or a copy of this certificate, as for whatever reason, it has chosen not to provide it.

124. The payment schedule opens up valuation issues that were not in the payment claim by revaluing items that have apparently already been paid. In *Procorp Civil Pty Limited v Napoli Excavations and Contracting Pty Limited & Ors* [2006] NSWSC 205 Einstein J at para 24 referred to *Coordinated Constructions Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229, where Hodgson JA at para 24 held that the task of the adjudicator was in substance to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. His Honour said:

"24 However, I accept that what is referred to an adjudicator for determination is a claimant's payment claim, and what an adjudicator is to determine is the amount of the progress payment to be paid on the basis of that claim and on the basis of other considerations in s 22(2) of the Act. Accordingly, the task of the adjudicator is to make a determination within the parameters of the payment claim, although that is not to say that, if an adjudicator were to make an error which can later be seen as taking the determination outside those parameters, it necessarily invalidates the determination."

125. My duty is therefore to decide the amount of the progress payment, if any, as required by s26(1)(a), and I am obliged to consider the issues raised by the payment schedule because this directly relates to the amount of the progress payment. I am not simply valuing the payment claim, i.e. focussing only on the items advanced in this payment claim. In deciding the amounts below, I need therefore to consider the Certificate because it has been put in issue in the payment schedule, and the Claimant has joined issue with these valuations. However, the earlier 12 December 2006 certificate by the previous Project Manager is not in the material and therefore cannot be referred to.

126. The adjudication decision cannot require the Claimant to pay the Respondent any money, so in valuing the progress payment and any valid deductions that may arise out of the revaluation, the effect can only be to reduce the progress payment to nil. I now proceed to decide the amount of the progress payment, and will do so by first considering the payment claim items, as amended by the adjudication application, where appropriate.

127. In so doing, I remain mindful of the Claimant's legal and evidentiary onus to prove its case. If and only if the material is cogent enough to discharge the evidentiary onus, will it be necessary to refer to material from the Respondent to then see if it discharges the shifted evidentiary onus. The same approach will be adopted with

material dealing with the payment schedule, but of course the evidentiary onus is in reverse, and the legal onus always remains with the Claimant.

Adjudicated amount

Entitlement

128. I must be satisfied that the Claimant has the right to the progress payment before consideration of the adjudicated amount, and I refer to s12 of the Act that provides:

"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."

129. I will need to determine the reference date for this claim, so as to be satisfied that the Claimant was entitled to make the claim. *Reference date* is defined in Schedule 2 of the Act as:

"(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or..."

130. I find that Item 34 in Part A of the GCC, which qualifies Clause 37.1 of the contract identified progress payments to be made on the 14th and 28th of each month, or the preceeding business day, if that day be a weekend or public holiday. The payment claim was made on the 26 February 2007, which I find was a Monday and that is before the 28th of the month.

131. Clause 37.1 identifies that "an early progress claim shall be deemed to have been made on the date for making that claim". One interpretation of these words is that means that the early progress claim is the date of the progress claim, which I find somewhat absurd. I prefer to accept that the word *early*, and the words *the date for making that claim* are qualified by Item 34 to mean, in this case the 28th of February 2007. I therefore find that the reference date is therefore *worked out under the contract* as 28 February 2007. The Respondent's submission on this point was "No comment" in reply to para 11 of the adjudication submissions, which did not identify the reference date in this part. In the summary to its adjudication submissions, the Claimant stated that the reference date was 28th February 2007, which is what I have found.

Calculation of the amount

132. The adjudicated amount must be decided and the Act makes provision for deciding the amount [s13 of the Act] or valuing the construction work [s14 of the Act]. Turning to each in turn:

"13 Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is--

(a) the amount calculated under the contract; or

(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.

14 Valuation of construction work and related goods and services

(1) *Construction work carried out or undertaken to be carried out under a construction contract is to be valued--*

(a) *under the contract; or*

(b) *if the contract does not provide for the matter, having regard to--*

(i) the contract price for the work; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

133. I will consider each item that is in dispute under the contract separately, taking into account the payment claim, the adjudication application amendments (where I am permitted to do so), the payment schedule and the adjudication response. I will carry the calculated amount, if any, to a summary table called "Collection".

134. The payment schedule challenges the line items in the payment claim, and then goes on to essentially revalue all the work to date with the result that there is allegedly an overpayment to the Claimant to date, for which the Respondent seeks recovery. Adjudication does not allow recovery by the Respondent. I need to decide how far I am required to value all the work to date as identified in the payment schedule, and to which the Claimant made submissions in the adjudication application. The basis of the revaluation by the Respondent was to demonstrate that no money was owing to the Claimant, such that this was a reason for not making payment.

135. As identified by Giles JA in *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* [2007] NSWCA 49 at para 63 in the first sentence, I am obliged to decide the amount of the progress payment, if any, in relation to the construction work identified in the payment claim. In the second and third sentences of that paragraph, His Honour said, "*The adjudicator addresses the work and the entitlement to be paid for the work. In making the determinations the adjudicator will consider any submissions duly made in support of the payment claim and the payment schedule.*"

136. This authority tends to suggest that my focus must be on the payment claim, but it is silent as to the extent I should have regard to the Respondent's overpayment submissions. Given that an adjudicator is to consider the construction contract in reaching a decision, and the fact that the case law allows for offsets under the contract for example for liquidated damages; it appears to me that I cannot ignore the payment schedule and the response submissions (which deal with points other than those raised in the payment claim), and must consider them.

137. However, the requirement of an adjudicator to evaluate whether or not a particular provision under the contract entitles the offset to be made, and then evaluate how much of an offset is allowable, is somewhat different to having to consider the revaluation of the work done under the contract, when only certain work is claimed to after this reference date. Accordingly, I will have to carefully consider how to properly deal with these items in this adjudication to which I now turn.

138. Furthermore, I find that I am not required to consider a payment claim item, if it has been abandoned by the Claimant in the adjudication application and therefore I have not considered them. I have also not considered that any increase to the payment claim is allowable by submissions in the application, because that puts the Respondent at a disadvantage, which would fall foul of Einstein J's reasoning in para 34 in *John Holland* that the Respondent would be denied the opportunity to advance a defence to any increase.

139. I have used the Respondent's Item numbering system in the Attachment 1(b) Spreadsheet for the heads of claim or response as a matter of convenience. However, I have added a C or an R in front of the item numbers to differentiate between a Claimant item and a Respondent item. In brackets, I have referred to the Claimant's submissions numbering system, so it might find it easier to follow.

Item 1.3 Consultants – Structural - \$34,000.00 [Letter #1]

140. There are two disputes in relation to this line item. Firstly, the Respondent (in the payment schedule) values the percentage completion of this item at 87% instead of the Claimant's 85%, but secondly the Respondent denies that the Claimant is entitled to a \$10,000 variation.

141. I will firstly focus on the variation claim of \$10,000 because it comprises the substantial difference between the parties. The payment claim merely identified the \$10,000 as an approved variation without any supporting documentation. However, I find from Annexures C and D below that the parties had correspondence regarding this issue, so that it was not something that had just arisen in this payment claim. The Claimant has provided material in the application in support of its payment claim that the \$10,000 was additional design work ordered as a variation by the Respondent. This material was provided in Annexures C, D and E.

- i. Annexure C I find was a response to the Claimant's request for clarification about a notice to omit design & approvals work, together with a site instruction from the Project Manager to the Claimant to continue to develop a design for underpinning a neighbour's boundary wall up to an amount of \$10,000 for design fees only. Both documents were dated 5 October 2006;
- ii. Annexure D I find is a direction from The Respondent's Managing Director under Clause 36.1 of the GCC of the contract dated 10 October 2006 to price the design for underpinning of a boundary wall, and a propping system for the boundary wall, together with site inspections by the engineer and the carrying out of the work;
- iii. Annexure E I find is a design certificate dated 15 August 2006 from Cardno relating to the preparation of design and documentation for steel frame and precast concrete deck plank access and façade support structure.

142. The Respondent refers in submissions to the contractual provisions and says that the Claimant has not demonstrated entitlement and denies that any variation was approved and says that Clauses 36.1, 36.4 and 36.5 were relied upon. In addition, the Respondent stated that the variation work was not carried out and no design documents have been provided.

143. The GCC are quite clear in identifying that the Project Manager did not have authority to *authorise any variation that may entitle the Claimant to an extension of time and to an adjustment of the contract sum* [see Clause 36.5]. Clause 36.1 permitted a director of the Respondent to direct a variation in writing, and Clause 36.2 provided that a director of the Respondent could direct the Claimant to give a detailed quotation for a proposed variation.

144. Accordingly, I find that Annexure C, which was a site instruction from the Project Manager about design for underpinning up to \$10,000 could not be characterised as a variation direction under Clause 36.1 because it had no power to order variations. However, in my view it did constitute a direction to continue with this work. I draw the inference that the work had already been started, for the Claimant *"to continue to develop a design...up to \$10,000 for design fees only."* On balance by further inference, I am prepared to accept that a figure of \$10,000 had been discussed by the Claimant and Project Manager.

145. Annexure D is the document that is somewhat incongruous in that it is a direction under Clause 36.1 from the Respondent regarding a request that works for design for underpinning be priced, but also identifies 3 other items in the scope of work to be priced. Clause 36.2 is actually the correct clause for directing the request for price, so it is necessary to look at the words of the direction to see if it is clear what characterised the direction.
146. In construing the document, it appears clear that it is a request for price, with words *...we request the following works be priced as a variation....Can you please provide a detailed price breakdown...".* The Claimant has not explained the meaning of the handwritten notes on this document, and I am unable to make any sense of these notes to establish that the document went further in proving that the parties agreed on this price of \$10,000, or going further that an actual direction for this design work had been made. I am therefore only left with an inference that a figure up to \$10,000 had been discussed between the Claimant and Project Manager, which is not enough to sheet home agreement by the Respondent.
147. I therefore find that the 10 October 2006 direction from the Respondent to the Claimant was a request for price only, and that it erroneously referred to Clause 36.1 rather than the correct 36.2 of the GCC.
148. Even if I am wrong in this finding, I accept the Respondent's submissions that the Claimant has not demonstrated that it carried out the variation work. Annexure E is a letter from Cardno dated 15 August 2006, that is nearly 2 months prior to the 10 October 2006 letter. I find that it would be extremely unlikely that Cardno could have been referring to work that I infer from the correspondence and submissions had not been contemplated until two months later.
149. Furthermore, the Certificate of Cardno related to steel frame, precast concrete deck plank access and façade support structure. As a matter of commonsense from the description of the work, and the heading on the certificate, I infer that this design work relates to the gantry structure and not to underpinning of a neighbour's boundary wall, which I find as a matter of logic and commonsense could not fall within the work described in the certificate. The reference to support in the certificate related to support for the façade of the apartments, not to a boundary wall.
150. I conclude therefore that no variation for this works was issued, and even if it had, the Claimant has not discharged its onus in proving that the work was done. I therefore reject the claim for \$10,000 as a variation under this item.
151. This means that the dispute is narrowed to the correct estimate for the work actually carried out, without the variation. However, the Claimant is prepared to accept the higher valuation of the original work at 87%, so there is no longer a dispute about this work and I find that the figure of \$73,746 correctly quantifies the total value of this work for this payment claim.
152. I am prepared to find that the previous amount paid for this work was \$46,750 as asserted by the Claimant because it was not directly controverted by the Respondent. I accept that the Respondent merely copied this column in its Spreadsheet in Item b) of its payment schedule, but it did not deny that this was the previous amount paid for this item.
153. Accordingly, I calculate that the amount of work for this progress claim is \$73,746 - \$46,750 = **\$26,996**. The difference between this amount and the payment claim for this item is \$7,004, which is what the Respondent identifies in its column i) as the variance, so I am satisfied that this is the correct amount.

154. It is useful to pause at this point, and identify that unless there is something specific in the Respondent's material directly on point, I am prepared to find that the column in the payment claim labelled "Less previously claimed/certified" and the column f) in the payment schedule labelled Complex Claim 4 identifies amounts previously agreed between the parties. I draw the further inference that the amounts in this column have been previously paid by the Respondent.
155. The reasons for coming to this finding are that the Respondent in paragraph 9 of its payment schedule identifies that overpayment had been made, which it then proceeded to correct in the payment schedule. Although I do not have the payment certificate No 4 dated 12 December 2006 from the previous Project Manager (referred to in paragraph 24 of the application submissions) to verify this column, this would only have confirmed amounts certified, not the amounts paid. The Respondent's response submission 24 identified that the correct certificate number for the 12 December 2007 certificate was 5 and not 4 nominated by the Claimant. Although the Respondent stated that this submission was irrelevant, it did not deny that the certificate existed.
156. Although I was not provided with the letter from the Respondent in support of the Claimant's allegations, I am prepared to find that on 13 December 2006 Integrated Project Services were terminated by the Respondent as Project Manager. I find that this was the day after the purported Certificate 4 from Integrated Project Services. The Claimant asserted this in paragraph 25 of the application submissions, and the Respondent did not deny this fact in the response, but merely stated that it was irrelevant.
157. The termination of a previous project manager and then a downwards revaluation of the work (of \$224,846.45) by a new project manager, whom I find was Cadence, with support from the DCWC valuation, points by logical inference to the fact that moneys had already been paid. I am further prepared to find by inference that the amount that had been certified by Integrated Project Services would have been the amount paid by the Respondent. It is logical that they would do so, given that Clause 37.2 of the GCC required the Respondent to pay within 7 days of receipt of the certificate. However, there may be instances where the material demonstrates that a specific item amount was not paid, and in that event regard to that material must be made.
158. Furthermore, in paragraph 20 of Mr. Pearsall's statement he refers to a spreadsheet marked "A" that he had prepared to identify the amounts paid to the Claimant, and generally this agrees with the "Less Previously Claimed/Certified Column" in the payment claim, and "Column f)" in the payment schedule to identify the amount already paid to the Claimant. This may simplify the calculations required to determine the progress payment, if any, and the data in these columns will now be considered as "previously paid" apart from where there is a discrepancy borne out by the material.
159. Although, I could simply have referred to Mr. Pearsall's spreadsheet as an admission of the amounts previously paid, it was considered important to put the factual matrix of the certificates, changes of project manager and the DCWC valuation in context because I will refer again to this context when considering the overpayment issue below.
160. Mr. Pearsall also refers in paragraph 23 to a payment reconciliation marked "B" attached to his statement, but states that it does not take into account amounts for items already paid, in part or in full. It essentially lists the difference between the Claimant's claim for total work value and that of the Respondent, to which I have had regard in calculating the amount of the progress payment.

161. I will further poise at this point to make it clear that I am not bound to follow a certificate of a Superintendent, which I find relates to the Project Managers' certificates in this case. In *Abacus Funds Management v Davenport* [2003] NSWSC 1027, McDougall J [38] – [39] made this finding, which was affirmed in obiter by Hodgson J in *Transgrid v Siemens Limited* (2004) 61 NSWLR 521, at para [35]. Therefore, I will not simply follow the alleged certification by the previous project manager in relation to delay damages, nor will I simply follow the current certification by the present project manager. In both cases, the issues supported or refuted by these certificates will be evaluated on their merits. I now turn to the next item.

C Item 1.5 Complex Management - \$20,250.00 [Letter #2]

162. The payment claim merely claims that this work (budget \$135,000) was 70% complete. Although the payment claim did not extend 70% of \$135,000 into a column, it did claim \$20,250 for the work. I calculate that the work claimed to date is \$94,500, so that if you take away \$74,250 previously paid results in a claim of \$20,250.
163. The payment schedule identifies that certification can only support a pro rata assessment of 1A works, and that this stage 1A contract sum allowance is \$60,000. The further notes on the assessment in Certificate 5 are that \$60,000 *is the only value we are allowed to make an assessment against. The valuation is based on a pro-rata component of this budget. Assessment against Stage 1(b) is zero.* There is no further explanation provided as to how this budget figure is arrived at.
164. The Claimant asserts in paragraph 45 of its submissions that the Early Works Cashflow contract document ("EWC") was not a Bill of Quantities or a Schedule of Rates, but that it does identify certain provisional sums. In submission 47, the Claimant surmised the basis upon which the budget figure was derived by the Respondent was to differentiate between the stage 1A and 1B allocation in the EWC.
165. In my view it is not incumbent upon a Claimant to surmise the basis on which a Respondent has identified a budget amount, or that the EWC was not a Bill of Quantities. This should be explained in the payment schedule, and it was not. Some further explanation may be provided in the response submissions to amplify something already identified in the payment schedule, but I do not find that there was sufficient in the payment schedule. There is, however, a reference in the response submission to clause 4 of the contract.
166. Clause 4 of the contract refers to the early works contract sum and the agreement that the Respondent would pay the amount of \$800,776.00 (excluding GST) for Stage 1A, which would include amounts paid to the date of the Contract and the cashflow indicated in EWC for week 1 to 6. On one view one may draw the inference that the EWC was therefore a document to facilitate payment for Stage 1A, but I am not prepared to consider the clause 4 submission, because in my mind it is essentially an attempt to create another *reason for non payment*, which it is prohibited from doing by s24(4) of the Act.
167. Had the Claimant been aware of the basis of derivation of the "budget" amount at the time it received the payment schedule, it may have adopted a different approach to this item. However, all it was told that it was a budget item, and I do not find that a budget is so clearly identified in the contract such that the Claimant ought to have been aware of this categorisation of how the contract sum for Stage 1A is split up.
168. In paragraph 48 of its submissions, the Claimant asserts cost of management involves significant start up costs for additional staff resources and that a lower weekly cost could then be applied later. I am prepared to accept this explanation, and

as I am unable to consider the Respondent's explanation because they are excluded by s24(4) of the Act, so that I accept this item claimed.

169. I therefore carry the figure of **\$20,250** to Collection.

C Item 1.6 General Preliminaries - \$2,025.00 [Letter #3]

170. The payment claim merely claims that this work (budget \$13,500) was 70% complete. Although the payment claim did not extend 70% of \$13,500 into a column, it did claim \$2025 for the work. I calculate that the work claimed to date is \$9,450, so that if you take away \$74,250 previously paid results in a claim of \$2,025.

171. The payment schedule identifies "ditto", which is the same explanation as for Item 1.5 above. The further notes on the assessment in Certificate 5 are that \$5,400 *is the contract sum allowance. The valuation is based on a pro-rata component of this budget. Assessment against Stage 1(b) is zero.* There is no further explanation provided as to how this budget figure is arrived at.

172. For the reasons identified under C Item 1.5 above, I accept the claimant's figure for this item.

173. I therefore carry the figure of **\$2,025** to Collection.

C Item 2.2 Erect site accommodation – Denham Street - \$1,800.00 [Letter #4]

174. The payment claim merely claims that this work (budget \$3,000) was 100% complete. Although the payment claim did not extend 100% of \$3,000 into a column, it did claim \$1,800 for the work. I calculate that the work claimed to date is \$3,000, so that if you take away \$1,200 previously paid results in a claim of \$1,800.

175. The payment schedule spreadsheet does not address this item, and neither do the further notes on assessment. The DCWC valuation values the work at \$3,000, which agrees with the payment claim, and I accept that there is no dispute about this item, despite the later submissions of the Respondent.

176. For the reasons identified above, I accept the claimant's figure for this item.

177. I therefore carry the figure of **\$1,800** to Collection.

C Item UV 2 Delay Costs – Now \$144,000 [Letter #5]

178. The payment claim originally identified \$249,600 for delay costs, but the application reduced the claim to \$144,000, and I have already said that I will only consider the lower figure.

179. The payment claim provided a supporting document, Annexure A – Delay Costs that referred to the 12 December 2006 Certificate 4, which in paragraph 4 stated that delay damages had been previously certified by the Project Manager. I have not been provided with the Variation Notice 0004, nor the delay claim documents dated 29 November 2006, 11 December 2006 and 12 December 2006. I have also not been provided with a Variation Claim for Variation Notice 0004 and the documents dated 8 December 2006 and 12 December 2006. I have already said that I have not been given the 12 December 2006 Certificate 4.

180. I will only consider the material before me, and the Claimant bears the evidentiary onus to provide material to support the delay claim, and I find that it failed to do so. I accept that it has made submissions on the point in paragraphs 57 through to 65, but submissions are not evidence. As Giles JA said in *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* [2007] NSWCA 49 at para 63, "*But the submissions do not set the parameters of the application or its determination.*" It is not possible for

me to make any findings of fact that there were delays for which the contract may provide a mechanism for compensation based on the Claimant's submissions.

181. Even if there had been the Certificate 4 from the previous Project Manager, I am not bound to follow it, and have to make my own assessment, and there is no material which I can consider, and therefore I find that the evidentiary onus has not shifted to the Respondent, and therefore I do not need to have regard to its submissions and material on this point.

182. Accordingly, I find that this claim is not made out and \$0 is carried to Collection.

C Item UV 4 Return of Retention monies - \$32,898.90 [Letter #6]

183. The payment claim identified \$32,898.90 for retention money and provided a supporting document, Annexure B – Return of Retention Moneys in which it submitted that retention was being held under Clause 5 of the contract, which was terminated on 19 January 2007, such that the clause no longer operated, which meant that the monies are due to be returned to the Claimant.

184. In the payment schedule, the Respondent stated that retention would be adjusted on the payment certificate, and in the further notes on assessment it stated that it was not a variation and that the retentions were calculated at the rates in part A of the agreement and are calculated in the payment certificate.

185. It is not clear from the payment schedule why retention monies should not be returned and the only reference to retention in Payment Certificate 5 is an amount of \$53,934.58 based on the total value of work to date of \$539,345.83, which the certificate stated had been derived from DCWC.

186. I find that I need to consider the response submissions to discern the basis of the Respondent's argument for non payment, because, with respect, however obtusely the Respondent has dealt with this claim, it did say that it was not a variation. At this point, I note that there has been no challenge by the Respondent to the quantum of the retention sought to be returned.

187. There is no clear guide from the material how much money is being held in retention, but I can infer from Certificate 5 that \$53,934.58 is being held. Without controverting material from the Respondent on the amount being claimed by the Claimant therefore, I am prepared to find on the basis of the payment claim and the submission in support that at least \$32,898.90 of retention being held, for which the Claimant seeks payment.

188. I must, however, decide whether there is a legal right for the retention to be returned. I find that the contract was terminated on 18 January 2007 as it was faxed to the Claimant. I have not been satisfied on the material that the Claimant was unlicensed, so I do not find that the contract termination was justified on this ground.

189. It may seem curious that an adjudicator needs to look at issues of contract termination, but in my view it relates to the construction contract, and I may need to look at what clauses, if any survive the termination of the contract in order to determine the amount of the progress payment. The conduct of the parties leading to termination may qualify the amount, if any, that is payable to the Claimant under the contract (or that part of the contract that survives termination), and the Respondent has put the Claimant's conduct in issue in the response submission in reply to application submission 68.

190. Given that I am unable to find that the ground of unlicensed contracting is made out justifying termination, I need to consider whether the alternative ground under Clause

- 48.1 of the contract has any bearing on the return of retention monies. There is a list of payment amounts in Clause 48.1 to which the Claimant is entitled in the event of termination under that clause, and retention is not one of the amounts identified. I must therefore consider the matter on the basis of principle, and by having regard to other terms of the contract.
191. The Respondent refers in response submission 67 to Clause 5.4 of the contract in which it essentially argues that the mechanism for retention release is constrained by Clause 5.4 into a reduction when a certificate of practical completion is issued, and then the balance of retention monies are then released 14 days after the final certificate.
192. I take the Respondent's submissions to mean therefore that the retention money will never be released because a final certificate will never be given to the Claimant because it no longer has a contract with the Respondent. In essence therefore, the Respondent claims that the retention money is forfeited, in the circumstance where I have found that termination was made under Clause 48.1 on the basis that the Respondent's financier did not approve of the Claimant.
193. Accordingly, the proposition being advanced by the Respondent is that if a Financier does not approve of the Claimant, notwithstanding a whole list of amounts that the Claimant is entitled to upon termination under Clause 48.1, retention monies are forfeited. I need to look closely at the contract to see if such a proposition is supported by the contract.
194. I turn firstly to Clause 5.1, which requires security to be provided in accordance with Item 14 and 15 in Annexure Part A. In Item 14 there is reference to retention and performance guarantee, but I have no material in the adjudication to glean what is meant by performance guarantee. Accordingly, I find that there was no performance guarantee in the contract.
195. Clause 5.2 deals with recourse to security to a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party has notified the other of the intention to have recourse. The Respondent, incorrectly in my view, in its submissions refers to Clause 5.3 for its rights of recourse to the security, and this clause deals with Change of Security. Nevertheless, it asserts that it has this right, and I need to consider it.
196. I have found that the contract was terminated on 18 January 2007. I am unable to find anywhere in the contract that Clause 5.2 survives termination of the contract. The only Clause that expressly states that it survives termination of the contract is Clause 40A, which deals with termination for convenience. Accordingly, I find that Clause 5.2 does not survive termination of the contract. This means that the Respondent is left with the proposition that it is entitled to the retention money as it has been forfeited.
197. I had some difficulty finding authority on this particular point, and none were provided by the parties. The consequence to my mind of forfeiting a retention sum draws out the principle of *penalties* so often referred to in cases of liquidated damages. I found a reference in Duncan Wallace I.N. (1970) *Hudson's Building and Engineering Contracts*, 10th ed, page 633 ("Hudson"), where the learned author said, "*With one exception in an American case, the above illustrations show that provisions in building contracts for the forfeiture of retention-moneys, however described, offend against the basic principle and are penalties, since the amount retained, which is principally designed as a security of possible defective work, and consequently increases, quite logically from this point of view, as a greater quantity of work is completed, can bear*

no reasonable relation to the potential loss to the employer arising on delay in completion or on termination of the contract."

198. Accordingly, without the contract providing a specific right of forfeit, and without the right any more to have recourse to retention monies, and based on the principle of penalties as identified in Hudson above, I find that the retention moneys should be paid to the Claimant.

199. I find therefore that **\$32,898.90** of retention is carried to Collection.

200. The following 9 Items were not claimed in the payment claim, but they were identified in the payment schedule and deal with a revaluation of particular items, which the Claimant has contested in the application, to which I now turn. I have already found that they are not new items as asserted by the Respondent.

R Item 2.1 Erect steel to Denham Street [Certificate #1]

201. Essentially the Respondent has chosen to revalue this item on the basis that balustrading, access and complete bolting off of the façade were still outstanding, and valued this outstanding work at \$6,654 based on the DCWC valuation.

202. It is not clear what yardstick was applied by DCWC in deciding that there was 9% of the work that was outstanding, apart from a subjective view by an unknown author, whose qualifications were unknown, the date of the site visit being unknown, which could have been 1 February 2007 when some report which was not provided was ostensibly done, or 8 March 2007 which is the date of the DCWC valuation. Furthermore, it is not clear what correspondence this author had in their possession when making his or her assessment of the progress of work on site, as alluded to in Note B to the DCWC valuation. The weight of this DCWC valuation will arise again in the adjudication, and it is as well to point out at this point that I am not minded to give it much weight, unless other circumstances provide further explanation of the genesis of the report in a particular case.

203. The Claimant in its submission 78 on this point identified that the work had been previously certified as 100% complete by the previous Project Manager, and that subsequently balustrading, access and complete bolting off had been removed by the Claimant to prevent unauthorised access. I am prepared to accept this explanation, which explains how the DCWC author could find outstanding works.

204. The Respondent's submissions, essentially contained in submission 75 merely relies on its earlier submission in paragraphs 2 and 4 of its Tab 2 submissions that these were new items. That does not assist me at all because I have found that it was the Respondent that raised these revaluation matters.

205. I am of the view that after the date of termination, I am not in a position to consider valuation of further work that may have been, or have to be carried out. I draw the inference that the Claimant removed these items after termination. Although there may be other legal avenues open to the Respondent to deal with the removal of some of the work for which it had already paid the Claimant, I do not believe I have the jurisdiction to consider any such amount in the adjudication, as it would not be in my mind a proper valuation under s14 of the Act. It has not been characterised as a defect [s14(1)(b)(iv)] for which the costs of rectification have been identified, and I am loathe to embark on a journey after the construction contract has been terminated.

206. Accordingly, I am not satisfied that any amount can be reduced under the contract for this allegedly outstanding work because I am satisfied that as at the date of termination this work had been completed.

R Item 2.3 Erect steel to Sunskill house [Certificate #2]

207. Essentially the same issue is raised under this item, and the Claimant has also removed some work after termination.

208. The Respondent's submissions, essentially contained in submission 80 merely relies on its earlier submission in paragraphs 2 and 4 of its Tab 2 submissions that these were new items. That does not assist me at all because I have found that it was the Respondent that raised these revaluation matters.

209. For the reasons outlined in Item 2.2 above, which I find are essentially the same issues in this item, I am also not minded to disturb the amount under the progress payment.

R Item 2.4 Install temporary power Gantry [Certificate #3]

210. There is a bare reference in the payment schedule spreadsheet to "Agree temporary relocations have occurred", and in the further notes on assessment there is reference to, "this represents a general assessment (see note above). It is not clear at all what the basis of this deduction is, and the DCWC valuation merely reduces the figure from \$3,000 to \$2,000 on the basis that the work is 66.67% complete.

211. In the circumstances, I am not prepared to accept that sufficient material has been given by the Respondent on which I may make a valuation judgement, particularly in light of my concerns about the weight which I should give the DCWC valuations that I have referred to above.

212. Accordingly, I am not satisfied that any amount can be reduced under the contract for this revaluation.

R Item 2.5 Install temporary water [Certificate #4]

213. Essentially the payment schedule spreadsheet and the further notes stated that no temporary services were apparent and the DCWC valued this work at nil.

214. In addition the Respondent's submissions, essentially contained in submission 91 merely relies on its earlier submission in paragraphs 2 and 4 of its Tab 2 submissions that these were new items. That does not assist me at all because I have found that it was the Respondent that raised these revaluation matters.

215. I am therefore left with contending assertions regarding whether this work was done, with the Claimant in para 95 stating that it was, and the payment schedule essentially relying upon the DCWC valuation stating that no work was done.

216. I find that the work had already been paid for, as Annexure A to Mr. Pearsall's statement bears this out. In the circumstances, I find that there is insufficient material provided by the Respondent, i.e. the DCWC report alone, that asserts that work was not done, and I am not prepared to find that it was not.

217. Accordingly, I am not satisfied that any amount can be reduced under the contract for this revaluation.

R Item 3.1 Demolish building [Certificate #5]

218. The payment schedule spreadsheet values the work at 44% from a previous amount of \$90,860 that I find paid. The further notes identify that some components of work were incomplete, viz.:

- i. Footings to car park site;
- ii. Roof on tower site;
- iii. Toilet block on tower site;
- iv. Original slab on tower site;

- v. Wall to tower site;
- vi. Footings to tower site.

219. The DCWC simply valued the work at 44.35%, which is a strange number, and the basis of the valuation is not explained. I have already stated that I give this valuation very little weight. In the circumstances of a significant downward valuation of work that was previously paid in full, I would need substantially more additional material to be satisfied that the revised valuation was correct.

220. Instead I have been given a list of allegedly incomplete work, without any explanation as to how this outstanding work was valued, and how it came to amount to 56%. There are no details of precisely what aspect of each item on the list is incomplete; in what way it was incomplete; and as I have already said how the percentages were arrived at. I have merely been given this subjective DCWC valuation, and it is unsafe to me to make any finding on this basis.

221. I find support for this rigorous approach from the case of *Veolia Water Solutions v Kruger Engineering* [2007] NSWSC 46, where McDougall J at para 17 referring to the learned adjudicator's decision, where the adjudicator found material provided was unsatisfactory and His Honour quoted from her decision as follows:

"I accept that by this means the payment schedule identified three areas, or categories, of work that were said to be defective or incomplete. But in substances it did not:

- (1) Specify what work, if any, "was not carried out under the contract" (determination, paragraph 23);*
- (2) "Provide any further details" of the incomplete work (determination, paragraph 35..."*

222. McDougall J went on to say at para 22 that, *"...submissions in support of the payment schedule. If they were to be so regarded, they could not be used to supplement any deficiencies, either as to particularity or as proof, to the extent that these were observed..."* The Respondent's submissions, essentially contained in submission 97 merely relies on its earlier submission in paragraphs 2 and 4 of its Tab 2 submissions that these were new items. They do not take the matter any further anyway, so I am left with a subjective valuation of DCWC, to which I attribute little weight.

223. Accordingly, I am not prepared to reduce the progress payment by any amount under this item. There is some confusion as to what was the amount previously paid for this work. Annexure A to Mr. Pearsall's statement says that it is \$146,796.49; whereas the payment claim stated it was \$90,860, and in one submission no 99 the Claimant said that it had valued this work at \$74,450. It does not matter to my mind what amount had been paid for this item because all I have found is that no deduction is allowable under the contract based on the material

R Item 3.3 Disconnection of services [Certificate #6]

224. The payment schedule stated that the toilet block and some electrical connections remained and the further notes state that the sewer was not disconnected and a general assessment of 67% was made.

225. The Claimant in submissions claims a reduced amount of \$7,000 for this work but asserted that it was 100% complete, subject to acknowledging that the existing toilet block had not been disconnected at the request of the Respondent.

226. The DCWC valuation merely identifies a global 66.67% completion for this work with not clear basis on which to found that assessment.

227. Furthermore, the Respondent's submissions essentially contained in no 103 merely relies on its earlier submission in paragraphs 2 and 4 of its Tab 2 submissions that these were new items. That does not assist me at all because I have found that it was the Respondent that raised these revaluation matters.

228. I find that the work had already been paid for, as Annexure A to Mr. Pearsall's statement bears this out. In the circumstances, I find that there is insufficient material provided by the Respondent, i.e. the DCWC report alone, that asserts that work was only 66.67% complete, and I am not prepared to find that it was not.

229. Accordingly, I am not satisfied that any amount can be reduced under the contract for this revaluation. However, the Claimant has reduced its claim to \$7,000 for this item, which is a reduction of \$1,000 which I carry to Collection.

R Item 4.1 Install fence [Certificate #7]

230. The payment schedule stated that only stage 1(a) could be certified, and there is nothing further in the further notes to provide any more material. The DCWC identified the value of work at \$2,000 based on 100%, when I find that previously \$4,000 had been paid.

231. The Claimant alleged that all of the Walker Street alignment had been fenced such that it was not appropriate to allocate 50% to Stage 1(b) when all the work had been done.

232. The Respondent's submissions mainly in 108 again focus on the new item issue and do not assist in valuation.

233. I am not prepared to accept that a 50% revaluation is justified in the circumstances, as I cannot see how the contract divides up this work between Stage 1(a) and 1(b) and I do not allow any reduction under this item.

R Item called Contingency and called Overheads and profit in the payment claim [Certificate #8]

234. At the outset I cannot understand the Respondent's submissions in item 4 of the Introduction to the payment schedule where it stated that the *contingency sum was incorrectly labelled as overhead and profit in the claim*. The EWC identifies an item of OH&PROFIT which I take to mean *Overheads and profit*. However, whatever term is used, there is a figure of \$158,000 against this item to which I have regard.

235. Annexure A to Mr. Pearsall's statement identifies in the last column that \$63,552 had been paid, and yet its other columns for claims 1 to 4 added up to \$117,007, and I find that this amount has been paid for this item. I further find that this amounts to 73.64% of \$158,000, which is the EWC amount for this item, and this amount is identified in the payment claim. I cannot understand the Claimant's submission 118 that it had been paid 100% for this item because that is inconsistent with the payment schedule.

236. I accept the Respondent's submission in paragraph 4 of the payment schedule that there is no mechanism in the contract to assign costs to this contingency figure, nor are its contents defined. I do not accept the assumption that it is necessarily a balancing figure to allow the sum of the individual allowances to equate to the contract sum stage 1(a) because the contract is silent about it.

237. For the purposes of valuation, I accept that the contract sum for stage 1(a) cannot exceed \$800,776 as identified in Clause 4 of the Contract. However, allocation of this overhead and profit amount does not have a specific contractual mechanism. Accordingly, I find that there is no basis for the payment schedule to cap this item at

\$37,800, and there is nothing in DCWC or anywhere else to explain how this figure is arrived at. The Respondent has the evidentiary onus to discharge, and I find that it has failed to do so in this case.

238. Once again its submissions in 116 do not assist with the valuation aspect, but merely refer to the new items claim. Accordingly, I am not satisfied that any amount can be reduced under the contract for this revaluation.

R Item AV1 Sawcutting to redundant slabs [Certificate #9]

239. The Respondent's payment schedule identified that 0% of this work was done in circumstance where I find that it had previously paid \$16,202 for this work. There is no further material from the Respondent apart from this statement, and as stated previously I would need additional material from the Respondent before I was in a position to make a finding that this work was not carried out, particularly when it has already paid for the work.

240. I find that the Respondent has failed to discharge its onus. Accordingly, I am not satisfied that any amount can be reduced under the contract for this revaluation.

Reimbursement for overpayment

241. The Respondent in paragraph 9 of the payment schedule then identified a revaluation of the completed works on the project based on the 1 February 2007 DCWC report, which was not provided, and the Project Manager's Certificate No 5. I have already stated that the only DCWC document in the material is the DCWC valuation and I have attached very little weight for the reasons already outlined.

242. The Respondent in paragraph 5 of its submissions merely reiterated its previous assertions in the payment schedule.

243. I am not satisfied that the material supporting revaluation, which is essentially founded on DCWC's assessment, for which I have had little regard, discharges the Respondent's evidentiary onus. It fails to identify what yardstick was applied by DCWC in deciding that the percentages of work that could be certified. As I have also said there is only a subjective view by an unknown author, whose qualifications were unknown, with the date of the site visit being unknown.

244. Furthermore, I said that it was not clear what correspondence this DCWC author had in their possession when making his or her assessment of the progress of work on site, as alluded to in Note B to the DCWC valuation. In the circumstance of a major downward valuation of work done to date which had already been approved by the previous Project Manager shortly before a new Project Manager was appointed, I am of the view that compelling evidence is necessary to be provided for me to embark on a revaluation exercise. In my view the existing material does not discharge the Respondent's evidentiary onus for me to be satisfied that this DCWC valuation was the correct valuation that should be given to the completed work to date.

245. I do not require evidence of the entire value of work to date in valuing the progress claim, as I traversed each line item of work claimed in the payment claim, as well as traversing those particular items put in issue by the Respondent in the payment schedule. Accordingly, I am satisfied that the amount of **\$82,969.90** contained within my assessment of the payment claim and payment schedule is the adjudicated amount.

COLLECTION

Item No	Claimant's amount	Respondent amount for this claim	Adjudicator's amount (excluding GST)
Payment Claim			
1.3 [Letter #1]	\$34,000	\$73,746 for work to date	\$26,996
1.5 [Letter #2]	\$20,250	\$40,000 for work to date	\$20,250
1.6 [Letter #3]	\$2,025	\$3,600 for work to date	\$2,025
2.2 [Letter #4]	\$1,800	\$3,000 for work to date	\$1,800
UV2 [Letter 5]	\$249,600 reduced to \$144,000	\$0	\$0
UV4 [Letter 6]	\$32,898.90	\$0	\$32,898.90
UV5 [Letter #7]	\$223,810.54 Withdrawn	\$0	\$0
UV6 [Letter #8]	\$85,000 Withdrawn	\$0	\$0
TOTAL			\$83,969.90
Payment Schedule			
	In application as a response to schedule		Possible reduction
2.1 [Certificate #1]	\$73,854	\$67,199.75	\$0
2.3 [Certificate #2]	\$3,000	\$2,000	\$0
2.4 [Certificate #3]	\$3,000	\$2,000	\$0
2.5 [Certificate #4]	\$3,000	\$0	\$0
3.1 [Certificate #5]	\$75,460	\$43,463	\$0
3.3 [Certificate #6]	\$8,000	\$5,333.33	\$1,000
4.1 [Certificate #7]	\$4,000	\$2,000	\$0
Contingency [Certificate #8]	\$117,007	\$25,199.97	\$0
AV1 [Certificate #9]	\$16,202	\$0	\$0
Reimbursement for overpayment	Not dealt with in the application	-\$224,846.45 (including GST)	\$0
		Reduction under contract	\$1,000
		Adjudicated amount	\$82,969.90

246. I am therefore satisfied that the Claimant is entitled to the progress payment of **\$82,969.90** excluding GST as the adjudicated amount.

Due date for payment

247. s15 of the Act deals with the due date for payment, and provides in s15(a) of the Act that it is the date under a provision of the contract, providing it is not void under s16 of the Act, or void under s67U or 67W of the BSAA. Clause 37.2 of the GCC of the contract provides that assessment and a progress certificate identifying the progress claim and the amount due, with reasons for any difference, had to be provided within 10 business days of the progress claim.

248. Thereafter, Clause 37.2 requires payment within 7 days after a certificate is received, and I take the effect of this to be 5 business days with the consequence that payment is to be 15 business days after the payment claim. This circumvents the necessity to carefully analyse whether the contract is a *commercial building contract*, as provided for in s67W of the BSAA, because that provision prohibits the contract from having payment later than 15 business days, which is not the case under the contract.

249. I find that the Certificate was faxed on 9 March 2007 to the Respondent, so that payment was required by 16 March 2007 (7 days later), which was submitted by the Claimant and not obviously controverted by the Respondent, which merely referred to clause 37 and surprisingly, clause 38.

250. I am satisfied therefore that the **due date for payment is 16 March 2007.**

Interest

251. I note that the Claimant claims 10% interest on the basis that the Supreme Court rate applies. However, I must consider whether the contract is a *building contract* to which s67P of the QBSA Act applies. This provision is in Part 4A of the QBSA Act which deals with building contracts other than *domestic building contracts*. A *domestic building contract* is defined in Schedule 2 of the QBSA Act as having the meaning in the *Domestic Building Contracts Act 2000*.

252. s7(1)(a) of the *Domestic Building Contracts Act 2000* ("DBCA") provides that a *domestic building contract* is a contract to carry out *domestic building work*. *Domestic building work* is defined in s8 of the DBCA as *the erection or construction of a detached dwelling*. A *detached dwelling* is defined in Schedule 2 of the DBCA as a single detached dwelling or a duplex, and I find that Dalgety Apartments are neither. This means that it is not a *domestic building contract* and s67P of the BSAA applies.

253. s67P of the QBSA Act provides for interest of late progress payments in relation to a *building contract*. *Building contract* is defined in s67A of the QBS Act as a contract or other arrangement, other than a *domestic building contract*, for carrying out building work in Queensland. *Building work* is defined in Schedule 2 of the QBSA Act as *the erection or construction of a building*, and I find that Dalgety Apartments is a *building* and I have already found that the contract is other than a *domestic building contract*.

254. s67P(2) provides that interest at a *penalty rate* is payable for unpaid progress payments, and the penalty rate is defined in s67P(3) as 10% per year plus the annual rate of 90 day bank bills published by the Reserve Bank of Australia. I referred to the Reserve Bank online at <http://www.rba.gov.au/Statistics/Bulletin/index.html>, and the link to Interest Rates and Yields – Money Market Daily – F1, which provided 6.34% on 28 February 2007 as the last entry for 90 day bank bills.

255. I therefore find interest at the **penalty rate of 16.34% on the unpaid payment claim.**

Authorised Nominating Authority and Adjudicator's fees

256. s34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise.

257. This adjudication has contained some complexities arising from the unlicensed contracting claim and the submissions raised by the Respondent in relation to new items ostensibly advanced by the Claimant, as well as its attempts to reduce the amount of the progress payment by revaluing the work done under the contract in which it did not succeed. However, the Claimant tried to advance what was essentially its largest claim of delay damages, after it reduced its payment claim amount, and it did not succeed. It also did not succeed in its variation claim about the additional engineering design.

258. On balance, the bulk of the adjudication time was spent dealing with jurisdictional issues and valuation issues raised by the Respondent and in

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exercising my discretion, I decide that the Respondent should pay 75% of the ANA's fees and my fees and the Claimant is responsible for the residual 25% of both fees.

Chris Lenz

19 April 2007

A handwritten signature in black ink, appearing to read 'Chris Lenz', with a stylized flourish at the end.