Claimant: Farley Concreting Pty Ltd

Respondent: Tall Trees Rochedale Pty Ltd

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

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), who has reviewed the Claimant's payment claim of $267,076.83 (excluding GST) decide that (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated is **$185,801.23** excluding GST.
2. The date on which the amount became payable is **1 May 2007**
3. The applicable rate of interest payable on the adjudicated amount is **16.39%** simple interest.
4. The Claimant and Respondent are liable to equally pay the ANA's fees and the adjudicator's fees

Signed: …….. Date:…….

Chris Lenz Adjudicator

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Background

1. Farley Concreting Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by Tall Trees Aged Care Centre Rochedale Pty Ltd (referred to in this adjudication as the "Respondent") to undertake construction works in relation to the Tall Trees Aged Care Centre, Rochedale (the "project") for:

    1. Tilt panel construction and erection;
    2. Construction of concrete footings, slabs and external paving,

    called ("the works") at Rochedale in Queensland (the "site").

2. In August 2006 the Claimant and Respondent entered into a written contract for carrying out the works (the "contract"), collectively known as the "parties".

3. The works commenced on or about 26 August 2006 and the Respondent terminated the contract on 25 January 2007.

4. During this period the Claimant carried out works to the project and submitted progress claims.

5. Progress Claim No.9, which is the payment claim in this adjudication was submitted on 5 April 2007.

6. The Respondent's solicitor provided a payment schedule on 23 April 2007 in response to the payment claim.

7. The Claimant made a written application for adjudication on 8 May 2007 (the "application"), and the Respondent's solicitors provided an adjudication response on 16 May 2007 (the "response").

Appointment of Adjudicator

8. The Claimant applied in writing to the Institute of Arbitrators and Mediators Australia ("IAMA") on 8 May 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.

9. I find the application was to IAMA, as an authorised nominating authority, with registration number N1057859, thereby satisfying s21(3)(b) of the Act.

10. By letter dated 9 May 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. I accepted the nomination by facsimile dated 14 May 2007 sent to the Claimant and to the Respondent by facsimile, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.

11. I have no interest in the contract, nor I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have therefore been properly appointed under the Act as required by s23(2) of the Act.

12. On 28 May 2007 I wrote to the parties requesting an extension of time of 5 business days within which to complete the adjudication, and on 29 May 2007 the parties provided their consent for the extension of time, effectively until 6 June 2007.

13. Accordingly, I now adjudicate the matter, and refer to the material in the adjudication, and the threshold issue of jurisdiction before considering the application and response in detail.

Material provided in the adjudication

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

Claimant's Material

This material comprised the following in one lever arch folder:

The **Adjudication Application** dated 8 May 2007 (the "application") in support of its payment claim for $293,784.51 (including GST) comprising:

1. Annexure 1: The Claimant's submissions in support of the Adjudication Application (the "application submissions");
2. Annexure 2: Payment Claim with attachments "A" through to "R" (the "P/C attachments" from A to R);
    1. Attachment A: The breakdown and details of the claimed amount;
    2. Attachment B: Email from Joel Hewitson stating invoice terms;
    3. Attachment C: Farley Group: Tilt Panel Construction, Scope of Works dated 20.06.06
    4. Attachment D: TC2-2005 Building Australia Trade Contract signed by the Trade Contract Manager, the Claimant's Darren Neil (date unknown), and Living Concepts Pty Ltd as Principal (on 22.08.06);
    5. Attachment E: Letter dated 4 October 2006 from Farley expressing concern about changes to parts of Trade Contract;
    6. Attachment F: Order 15 dated 22 August 2006 from Joel Hewitson to Claimant under cover of fax dated 23 August 2006 to proceed with the works;
    7. Attachment G: The termination letter;
    8. Attachment H: Laurence Neil's Summary of Events;
    9. Attachment I: Letter to Claimant's solicitors Michael Drummond from HW Litigation Lawyers dated 9 February 2007;
    10. Attachment J: Copy of amended Progress Claim No. 6;
    11. Attachment K: Signed Copy of quotation dated 5 October 2006 for structural steel works to be carried out at "Tall Trees" under cover of facsimile from Joel Hewitson (F.W. Curley Pty Ltd);
    12. Attachment L: Printout of job card for $18,449.15 claimed by Farley from invoices received from AS Concrete Pumping Service:
    13. Attachment M: Quote to Joel Hewitson for Tilt Panel works variations to amend panel heights for fire ratings dated 18 October 2006;
    14. Attachment N: Claim for further three days of labour and crane costs:
        a) Kelly Green Invoices 086431; 087319; 087325
        b) Timesheets for 5/12/06 and 12/12/06
    15. Attachment O: Copies of lifting analysis from Claimant's Structural Engineer regarding additional steel required for lifting;
    16. Attachment P: Details of the charge for continuation of hire of props from KB Hire after initial 14 days;
    17. Attachment Q: Amended Program;
    18. Attachment R: Timesheets dated 30/01/07;
3. Annexure 3: Termination of contract letter to the Claimant from HW Litigation, solicitors for the Respondent dated 25 January 2007 (the "termination letter");
4. Annexure 4: Another termination of contract letter dated 29 January 2007;
5. Annexure 5: Letter from Respondent's solicitors to Claimant dated 23 April 2007, identified as the payment schedule (19 pages) (the "payment schedule"), without attachments;
6. Annexure 6: The payment schedule with email attachments to the payment schedule dated 23 April 2007, at 5.43pm (the "PS attachments" from "A" to "H")

7. Annexure 7: Statement of Laurence Neil dated 8 May 2007, with attachments LN1 to LN37 (the "LN attachments" from LN1 to LN37)
8. Annexure 8: Preliminary lifting location analysis by Michael Samuel, CPEng, for the project – undated
9. Annexure 9: Napier & Blakely account to Farley dated 11 December 2006;
10. Annexure 10: Provision of requested information to Napier & Blakely dated 22 January 2007
11. Annexure 11: None provided
12. Annexure 12: Original Curly Schedule presented to Farley prior to contract;
13. Annexure 13: Programme prepared by Farley for inclusion in the project programme (original amendment dated 07/05/07);
14. Annexure 14: Programme dated 29/04/07;
15. Annexure 15: Revised Working Schedule 08/11/06;
16. Annexure 16: Programme dated 30/04/07;
17. Annexure 17: Programme dated 07/05/07
18. Annexure 18: Programme dated 07/05/07
19. Annexure 19: Panel numbers with reference to epoxy and panel patching;
20. Annexure 20: Final pricing of panels;
21. Letter to Adjudicator dated 21 May 2007 and faxed on 23 May 2007 with comments on Tall Trees' Adjudication Response.
22. Letter dated 29 May 2007 agreeing to Adjudicator's extension of time

Respondent's Material

The Respondent's material consisted of the adjudication response (the "response") in one folder comprising the **Response submissions** with 5 Annexures;

i. **Annexure A**: Payment Schedule
   a. Attachment A - Construction Program
   b. Attachment B - Facsimile from HW Litigation Lawyers to Farley dated 30 January 2007
   c. Attachment C - Facsimile from Michael Drummond Lawyers dated 5 February 2007 detailing equipment/materials still on site, and response from HW Litigation Lawyers dated 9 February 2007;
   d. Attachment D - Facsimile from Michael Drummond Lawyers dated 16 February 2007, and response from HW Litigation Lawyers attaching "Lightwave" report dated 24 November 2006;
   e. Attachment E - Letter from FW Curley to Farley Concreting dated 23 January 2007 regarding no entitlement to further payments;
   f. Attachment F - Letter from HW Litigation Lawyers to Michael Drummond dated 14 March 2007 awaiting service of client's proceedings;
   g. Annexure G - Correspondence between the parties as follows:
      i. Letter from Farley to FW Curly dated 12 October 2006;
      ii. Letter from FW Curly to Farley dated 30 October 2006;
      iii. Letter from FW Curly in response to Farley letter dated 12/10/06;
      iv. Letter from FW Curly to Farley dated 19 October 2006;
      v. Letter from Farley to FW Curly dated 25 October 2006;
      vi. Email from Lawrence Neil to Alan Powell dated 15/01/07;
      vii. Email from Brad Allen of FW Curly to Lawrence Neil and Anthony Neil dated 18 January 2007;
      viii. Letter from Farley to FW Curly dated 23 January 2007.
   h. Annexure H - Report from Napier & Blakeley Quantity Surveyors dated 17/04/07;
   i. Annexure I - Report from Lightwave Architects dated 24/11/06;
   j. Annexure J – Draft report from Westera Engineers dated 25/01/07;
   k. Annexure K - Email from Andrew King of Napier & Blakeley to Martin Daniel containing his estimate of the work completed by Farley under the contract;
ii. **Annexure B –** Statement of Alan Powell dated 15 May 2007;

iii. **Annexure C –** Statement of Andrew King dated 15 May 2007;
iv. **Annexure D –** Statement of Rob Massey dated 15 May 2007;
v. **Annexure E –** Engineering Report from Westera Partners Pty Ltd dated 25 January 2007.
vi. **Annexure F –** BSA License search of the Claimant indicating currently unlicensed

Jurisdiction

Construction contract

15. In order for me to have jurisdiction to adjudicate this dispute, s3 of the Act requires that:
    (1) the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
    (2) that the *construction work* was carried out, or the related goods and services supplied for construction work, in Queensland.

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

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

17. It is incumbent upon me to make an objective finding as to whether there is a *construction contract* under s3 of the Act for an adjudication to proceed.

18. The P/C attachments C and D identify a scope of works and price for the works at the site, as well as the commercial terms of a contract, which was signed by the Claimant's Mr. Neil and by the Respondent, with the date of 22 August 2006.

19. There is a dispute about the terms of the contract and the date of entry into the contract, but neither party denies the existence of these documents. I find that these documents evidence a contract in which the Claimant undertook to carry out tilt panel construction and erection, as well as the construction of concrete footings, slabs and external paving at the site, which satisfies part of the definition of *construction contract*. 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*.

20. 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;…*
> *(e) Any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including –*
> *(i) site clearance….*
> *(ii) the laying of foundations; and…*
> *(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and*
> *(v) site restorations, landscaping and the provisions of roadways and other access works…."*

21. The construction of the tilt slabs on site, I find falls within the prefabrication of components to form part of any building, and the erection of those slabs I find falls within the definition of construction of buildings. Furthermore, I find the concrete

footings falls within the laying of foundations, and the slabs and external paving I find falls within landscaping, and the provision of roadways and other access works.

22. s11 of the Act deals with related goods and services, which provides:

> ***11 Meaning of related goods and services***
> *1.* ***Related goods and services****, in relation to construction work, means any of the following—*
> *(a) goods of the following kind—*
> *i) materials and components to form part of any building, structure or work arising from construction work;*
> *ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;*
> *(b) services of the following kind—*
> *i) the provision of labour to carry out construction work;"*

23. I find that the tilt slab construction could also fall within the definition of goods under s11(a)(i) and (ii) of the Act and the labour to carry out this works and the foundations, slabs and external paving could also fall within the meaning of *services* under s11(b)(i) of the Act.

24. Furthermore, the Claimant in paragraph 38 of its application submissions referred to the work in this application falling within *related goods and services* as defined in s11 of the Act, and the Respondent agrees with that in its response submission 16.

25. I therefore find that the contract date was after 1 October 2004, and it related to *construction work* and/or the supply of *related goods and services* at Rochedale, which I find is in Queensland, thereby satisfying threshold jurisdiction issues numbers 1 & 2.

26. I note the Claimant's submissions 42 through to 58 that identify that none of the exceptions contained within s3(2) and s3(3) of the Act applies to disqualify the *construction work* from the application of the Act; and the Respondent agrees with this in paragraph 16 of the response submissions, so I find that it is a matter which may be adjudicated.

<u>Claimant's license status</u>

27. The Respondent has provided a license search of the Claimant in Attachment F of the response, which identifies the Claimant's license having been cancelled by the QBSA, ostensibly for failing to comply with a QBSA audit.

28. This material was not provided in the payment schedule. However, the license status of the Claimant is a matter that goes to jurisdiction, because of the Court of Appeal decision in *Cant Contracting Pty Ltd v Con Casella and Michelle Lyndsay Casella* [2006] QCA 538 ("*Cant*") which dealt with an issue of unlicensed contracting in a summary judgement application. 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 on the Respondent's material.

29. McMurdo J in *Cant* 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)."*

30. 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."*

31. The Respondent has not made any submissions about the license status of the Claimant in denying payment. Accordingly, I do not find that there is a live issue as to whether the Claimant was carrying out unlicensed building work at the time prior to the contract being terminated. Nevertheless, it is a jurisdictional issue that requires a decision from me as to whether the adjudication can proceed.

32. The license search reveals the current status of the Claimant as unlicensed, but there is no date identified to indicate that it was unlicensed at the time of the contract. In fact, I find on page 3 of the license search that the Claimant had a concreting license until 23 April 2007, and it appears that it was then cancelled on that date.

33. Accordingly, I find that until 23 April 2007 it was licensed to carry out concreting and steel fixing, and this was well after the contract was terminated. This means that I find that at the time that the works were carried out by the Claimant, it had a license to do so. Therefore 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.

Service of the payment claim

34. I find from the material that the payment claim was served on the respondent on 5 April 2007 because that is the date of identified in the application and in paragraph 62 of the application submissions. The Respondent refers to the payment claim dated 5 April 2007 in the second paragraph of the payment schedule and did not take issue with the date of service.

35. Furthermore, the Respondent did not substantially take issue with the contents of the payment claim in the payment schedule or the response, so I am satisfied that the payment claim requirements in this adjudication are in accordance with s17 of the Act.

Scope of the adjudication

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

37. 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 <u>only</u>* (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."

38. I did not conduct any inspection of the project as the contract was terminated in January 2007 and I understand that others have continued with the work, which means that it would not be possible to ascertain the extent of work carried out by the Claimant at this time, some 4 months later.

39. I have the power to request submissions under s25(4) of the Act, but that is a discretion that I may or may not exercise. As Justice Wilson held in *Abel Point Marina (Whitsundays) Pty Ltd v Thomas Uher and Sea Slip Marinas (Aust) Pty Ltd* [2006] QSC at paragraph 20, I am not obliged to seek further submissions. I am required, as Wilson J said at paragraph 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.

40. I did receive an unsolicited submission from the Claimant on 23 May 2007 by facsimile, and decided to disregard it, rather than request submissions for the Respondent and Claimant respectively. This is a fiercely contested dispute, and I saw no utility in having the parties embroiled in a further dispute over a submission, that I did not request, and did not go to my jurisdiction.

41. 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.

Construction contract

42. Before dealing with findings on important preliminary issues, I have had to consider the contending assertions in relation to the entry into the contract, because they have a bearing on what is discussed below. The Claimant has argued that after Mr. Darren Neil signed the contract on 25 August 2006, it was subsequently altered to include provision for $400 per day liquidated damages in Schedule 4 of the contract, and that there was no margin allowable on variations in Schedule 8 of the contract (the "disputed terms").

43. The Claimant also disputes the date of entry into the contract because it says that Mr. Darren Neil signed it on 25 August 2006, but the date that it was allegedly signed by the Respondent was 22 August 2006, which could not be correct as Mr. Neil was the first to sign the document. I do not think that it is necessary to decide on the precise date of the contract, because nothing turns on the date in deciding the amount due in this adjudication. However, the anomaly regarding the dates is some evidence supporting the Claimant's version of events relating to the disputed terms

44. The Claimant said that it wrote to the Respondent on 4 October 2006 (Attachment E of the payment claim) after it had received the executed contract and challenged the insertion of the disputed terms. It argued that no response was received from the Respondent. Mr. Laurence Neil's statements signed on 8 May 2007 provide support for these assertions in paragraph 1.

45. Such allegations are extremely serious and it is not for an adjudicator to make findings on such matters if they do not bear significantly on the adjudication.

46. The Respondent denies that the contract was altered and asserted in paragraph 1.9 of the payment schedule that a discussion was held between Mr. Fred Curly and Mr. Lawrence Neil after the 4 October 2006 letter from the Claimant (Attachment E of the payment claim), and that it was inappropriate to now change the disputed terms, and this was further amplified in paragraph 1.10 in the payment schedule.

47. To my mind, there is a high evidentiary onus on the Claimant to prove that there is essentially some improper conduct associated with the execution of the contract. I do not believe that such onus has been discharged. Mr Laurence Neil provided a statement in the application about the disputed terms, as I have already stated, but he was not the signatory to the contract.

48. Despite what the Respondent says in paragraph 2 of the response submissions, that Mr. Laurence Neil signed the contract, all the other evidence points to Mr. Darren Neil being the signatory to the contract. For example, Mr Laurence Neil's statement in paragraph 1 confirms Mr. Darren Neil being the signatory.

49. Mr. Darren Neil could have provided a statement supporting the allegation that he signed the contract, without the disputed terms. No such statement was provided, and yet on 3 May 2007 he signed a statement saying that Arthur Powell had complimented the Claimant on the works already performed (see LN37 attached to Mr. Laurence Neil's statement). If he was in a position to sign a statement supporting the quality of the Claimant's work, he could have also provided a statement supporting the Claimant's version in relation to the disputed terms.

50. Mr Bob Massey's statement, in Attachment D of the response submissions referred in paragraph 4 to him seeing Mr Darren Neil sign the contract, but it does not go into whether the disputed terms were on the contract or not.

51. However, the Claimant admits that Mr Neil he did not review the contract at the time he signed it. On balance, I find that it is somewhat curious that, in the face of not having any response from the Respondent to its letter dated 4 October, the Claimant did very little further by way of follow-up on what was supposed to have been an important issue for the Claimant regarding the disputed terms.

52. The Respondent asserted in paragraph 1.9 of the payment schedule that Fred Curly and Mr. Lawrence Neil had a telephone conversation about the disputed terms. Mr. Laurence Neil's statement dated 8 May 2007 at paragraph 1.9 denies that this conversation took place, and that no response to the letter was ever received. He said that there was never a resolution to the issue raised in a conversation he had with Mr. Joel Hewitson. Mr. Hewitson did not provide a statement, on this point, or indeed any other point at all.

53. I find therefore that the conversation with Mr. Fred Curly did not take place, but this of itself does not discharge the Claimant's onus, because I felt that Mr. Dennis Neil should have provided a statement about the disputed terms, because he was in a unique position to do so.

54. I therefore agree with the Respondent's submissions that the contract contained the disputed terms, since the Claimant has not discharged its onus on this point. This means, that the liquidated damages and the zero profit margin provision regarding variations are in the contract.

55. I agree with the Claimant's paragraph 13 application submissions that the quotations provided prior to the entry into the contract form part of the contract between the parties. The Respondent did not dispute these submissions in the response. These quotes identified the scope of work in relation to the tilt slab construction in the sum of $430,984.00 and the footings, slabs and external paving in the sum of $604,374.00 which totals $1,035,358.00, which I find elsewhere is the contract sum.

56. I now turn to some important preliminary matters before dealing with the matters that fall within adjudication.

Preliminary issue findings

57. As I have said, the dispute between the Claimant and Respondent is fiercely contested and raises a number of construction law issues with which I need to deal at this early stage. It is evident from the material that the parties have been discussing the imminent commencement and defence of legal proceedings.

58. I have read all the material provided to me, including the submissions in support of the contending positions of the parties. The contest between the parties can be demonstrated by 196 submissions in the application of 33 pages, and 167 submissions in the response spreading over 34 pages.

59. Furthermore, the payment claim and payment schedules each had a number of attachments, supporting the relevant party's claims and counter-claims by way of set-off. Even though the volume of material in this adjudication was limited to the equivalent of 2 lever arch folders, the issues and sub-issues raised in these documents are wide-ranging, and the parties have engaged each other point by point. It has not been possible in this adjudication therefore to individually identify each issue and sub-issues raised because of the breadth of issues covered.

60. In my view, a lot of material that has been provided can only be dealt with in another jurisdiction. I have limited powers, and can only resolve the payment dispute on the material that is relevant to adjudication. I have therefore thought it prudent to identify the issues and the supporting material for those issues that will not be further considered by me, because they are outside the ambit of adjudication, so that the parties are aware of the limitations of adjudication.

Set off for damages

61. I am not prepared to consider a set-off for damages for delay claimed by the Respondent for the following reasons.

62. I have already found that the Respondent is correct in its assertion that $400 a day was agreed for liquidated damages in the contract. Liquidated damages are considered the genuine pre-estimate of the loss in the event of delays by the Claimant: DJ Cremean (2004): *Brooking on Building Contracts*, LexisNexis Butterworths, Australia ("*Brooking*"), paragraph 6.3 on page 78.

63. Having found a valid liquidated damages clause, the Respondent should not then be allowed to also launch a claim for damages for delay, as it is constrained by this sum. In ID Duncan Wallace (1970): Hudson's Building and Engineering Contracts, Sweet & Maxwell ("*Hudson*"), London at page 618, the learned author said:

> *"On the other hand, if it is held to be liquidated damages, the aggrieved party will be entitled to the stipulated sum, whether his real damage be greater, or less, or non existent."*

64. Although the Respondent has not claimed for liquidated damages, it has chosen pursue delay damages and I find that it is not entitled to do so based on the authority derived from *Hudson*.

65. Even if this conclusion is incorrect, and there is some residual basis upon which the Respondent may claim for delay damages, notwithstanding the existence of the liquidated damages clause, there is nothing in the contract that expressly allows for set-off of damages by the Respondent. Clause 8 of the contract that is headed "Damage" and it provides:

> *"The Trade Contractor must pay the Principal the cost of making good any damage to the work of the Construction Manager or of any other Trade Contractor, which is caused by the trade Contractor or its employees of subcontractors."*

66. Although neither party took me to this clause in their submissions, I must construe the contract, and this is the only express clause I find dealing with damage. In my view this clause connotes the payment for repair of physical damage to the work of the Construction Manager or another Trade Contractor. It is not in my view a clause that allows for set-off of the Respondent's damages under the contract.

67. To my mind the lack of an express term allowing set-off is fatal to the Respondent's claim, because it otherwise needs to imply a term into the contract allowing for damages for delay to be set-off. The Respondent has not asserted that any such term needs to be implied or ought to be implied into the contract, and it is not appropriate for me to analyse whether such a term should be implied.

68. In this instance I agree with the Claimant's application submission 16 that the contract provides for no right of set-off. The Respondent sought set-off for approximately $321,000 loss and damage in the payment schedule at paragraph 11.7, but provided no contractual basis for doing so.

69. I am confined by s26 (2) of the Act to consider essentially the contract, together with the payment claim and the payment schedule and the supporting submissions in the adjudication application and the response. I am not empowered to consider damages at large. In *Coordinated Construction Co. Pty Ltd v JM Hargreaves (NSW) Pty Ltd and others* [2005] NSWCA 228 ("*Coordinated Construction*") which was a case where a claimant was entitled to claim for damages under the provisions of the contract, the contractual mechanism provided for such an eventuality.

70. In *Coordinated Construction*, at paragraph 52 Hodgson JA said that, *"the Adjudicator's duty is to come to a view as to what is properly payable, on what the Adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim".*

71. Hodgson JA had earlier said, at paragraph 41:

> *"41 In my opinion, the circumstances that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out, or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.*

72. In this case, it is the Respondent claiming set-off for its damages in a number of submissions. For example in paragraphs 163 to 165 of the response submissions, the Respondent asserts that Clause 18 preserves the rights of the Respondent to recover damages for breach of contract. To my mind any such damages arise out of the breach of the contract, rather than within the contract. Hodgson JA's comments that, *any amount that is truly payable as damages for breach of contract is not an amount due for construction work* can apply in this instance to the Respondent's claim for set-off.

73. Using analogous reasoning, if as I have found there is no provision in the contract for set-off, then the Respondent's claim is for damages for breach of contract. In this event, it cannot be used as a set-off against a claim for an amount due for construction work, because it does not have that essential characteristic allowing for valuation under the contract. It is something that arises out of breach of the contract, for which adjudicators have no jurisdiction.

74. Therefore, if the contract makes no provision for a set-off for delay damages, I am not prepared to consider that such a claim can be made by the Respondent. In any event, I have already said that the contract provides expressly for liquidated damages, so the Respondent is limited to that claim, even though it has not advanced its claim for set-off on that basis.

75. Accordingly, I reject any claim by the Respondent for damages for delay by way of set-off. This means I will have no further regard to any material in support of, or disputing delays, for which the Claimant was allegedly responsible, that is associated with this issue.

Nominated subcontractor

76. The Respondent's payment schedule submissions 3.1 to 3.8 deal with the Claimant's subcontract with Curtis Steel Fabrication Pty Ltd ("Curtis"). In the application submissions 167 to 173 states that it has consistently referred to Curtis being the Respondent's nominated subcontractor, and that the delays to the project were limited to the delays caused by the Respondent and its nominated subcontractor Curtis.

77. I have already said that the right of set-off is not available to the Respondent in this adjudication, so I am not going to consider whether or not Curtis is a nominated subcontractor as it is not relevant to my valuing this payment claim. The Curtis issues go to the responsibility of the Claimant for delays, and the Claimant does not assert that the Curtis issues have any bearing on the variations for which it is seeking payment. Accordingly, I will not consider that material any further.

Breach of contract by the Claimant

78. There is a considerable amount of material on the Claimant's alleged breach of contract, and the Claimant's arguments that the Respondent unlawfully terminated the contract. Whether or not the termination was correct, is not relevant to adjudication. The grounds of termination identified in the termination letter relate to the Claimant's failure to execute the works:
    (a) in a proper and workmanlike manner using due diligence;
    (b) in accordance with the contract and the drawings;
    (c) in conformity with directions and requirements of the Construction manager.

79. In addition, the Respondent asserted that the Claimant had:
    (a) breached a warranty in not undertaking the works in a proper and workmanlike manner, and

(b) suspended the works without lawful cause, and
(c) failed to proceed with due diligence and in a competent manner, and
(d) caused delays, and
(e) created defects in the works.

80. In my view, this is of peripheral relevance to adjudication, apart from how these assertions impact on the valuation function under the contract for which I am responsible. In particular, the issue of defects is something for which I must have regard, as it is specifically referred to in s14(1)(b)(iv) of the Act.

81. In paragraph 7.9 of Mr. Laurence Neil's statement dated 8 May 2007, there is extensive denial that the general defects asserted by the Respondent were defects. He characterises them as matters that were not complete at the point of the unlawful termination, and that all the items identified are worked on in the normal course of tilt panel construction. He adds that the Claimant was ahead of program and uncompleted works cannot be claimed to be defective works. I will have to look further into these submissions in the adjudication because they have a bearing on the valuation function.

82. What is relevant is that the parties' accrued rights and obligations under the contract remain preserved until termination of the contract: *McDonald v Dennys Laschelles Ltd* (1933) 48 CLR 457 (*"McDonald"*). After termination the rights and obligations *in futuro* generally no longer remain: (*"McDonald"*). However, there are exceptions to this rule, which the parties have referred me to, and which will be discussed below.

83. However, suffice is it to say that the material and submissions dealing with the merits of the termination, except for the reasons stated above, are not considered further by me.

Retention monies

84. This is an issue that deals with whether a term of the contract survives termination, to which I have made reference to the law above. The Respondent has made submissions on retention monies in paragraph 7 of the payment schedule and paragraphs 43 to 47 of the response and asserts in paragraph 7.5 of the payment schedule that the retention clause 15 survives termination of the contract.

85. The Respondent in the payment schedule and in its submissions provided support for using the case of *Kennedy Taylor (VIC) Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2000] VIC 43 (*"Kennedy Taylor"*). Reference in that case was made to *Pearson Bridge (NSW) Pty Ltd v The State Rail Authority of NSW* 1 Australian Construction Law Report 81, p87 (*"Pearson Bridge"*).

86. The Claimant submits in paragraphs 122 to 126 that the clause does not survive termination of the contract and distinguishes *Kennedy Taylor*. It adds that if the clause does survive termination of the contract, in the circumstances the Claimant is prevented from ever reaching practical completion because the contract has been terminated, which means that the Respondent can withhold the retention money indefinitely. This, submits the Claimant, is contrary to s99 of the Act.

87. In paragraph 47.3 of the response submissions, the Respondent states that the Claimant's claim for release of retention monies is premature, given that Practical Completion of the Project is yet to be reached and the defects liability period is yet to expire.

88. The Respondent assertions in relation to the "*Practical Completion*" make reference to the definition and Clause 1 of the contract defines *"Practical Completion"* as:

> *"Means that stage in the execution of all the separate trade contracts under the related construction management contract when the Project can be said to be reasonably fit for use or occupation by the Principal"*

89. The Respondent refers to the definition of "*Project"* in Clause 1 of the contract, which is defined to mean:

> *"Means the Works to be completed by the Trade Contractor, taken together with the work to be completed by the other parties engaged by the Construction Manager, on behalf of the Principal or by the Principal, to complete the totality of all the related work under the Construction Management contract".*

90. The Respondent asserts that Practical Completion has not been reached as the totality of all work under the construction management trade contract has not been completed.

91. I turn first to Clause 15 of the contract that provides:

> *"(a) The Principal or the Construction Manager on its behalf may retain ten percent (10%) of monies becoming due under this Trade Contract until the sum retained is equal to five percent (5%) of the total amount payable to the Trade Contractors.*
>
> *"(b) One half of the retention monies will be released on Practical Completion of the Works by the Trade Contractor and the other half at the expiration of the defects liability period."*

92. I have had regard to the definition of *Works* which is defined in Clause 1 to mean:

> *"the whole of the work to be carried out and completed in accordance with this Trade Contract, as set out in Schedule 2".*

93. Schedule 2 of the contract identifies the *Works*, which are the works carried out under the contact, and not all of the works for the project, for which the Claimant has submitted a payment claim. However, Clause 15 refers to *Practical Completion of the Works by the Trade Contractor*, which narrows the definition of *practical completion* in this context. Accordingly, I find an inconsistency with the interpretation put forward by the Respondent that *practical completion* requires all work on the project to be complete so that the works are reasonably fit for occupation by the Respondent, and Clause 15 of the contract which requires that retention monies are held until practical completion of the particular work carried out by the Trade Contractor.

94. It would, to my mind, be somewhat curious that a Respondent would be entitled to withhold retention on Trade Contractors who had completed their Works, quite some time before the entire Project is complete, and be entitled to withhold those retention monies for what could be an extensive period, over which the relevant Trade Contractor would have no control.

95. The Respondent gave the Claimant the contract for signature [see submission 1.3 of the payment schedule], and I have identified an inconsistency in the interpretation of *practical completion*. This attracts the principle of "Contra Proferentum", which states that in the event of an ambiguity in a document, then the ambiguity is resolved against the Respondent: *Brooking* paragraph 2.14 page 20. I will return to this point after examining *Kennedy Taylor* and *Pearson Bridge.*

96. *Kennedy Taylor* is a case in which the clause 5.5 of that contract allowed recourse to retention monies and conversion of security. Clause 5.5 was, in that case, coupled with Clause 44.4 of that subcontract, which allowed a main contractor to claim a debt due from the subcontractor to the main contractor, in the even that it had taken work out of the hands of the subcontractor to complete the work.

97. In my view, *Kennedy Taylor* and *Pearson Bridge*, dealt with a Clause 5.5, which contained the specific words that a person was entitled to have recourse to retention monies and conversion of a security. Clause 5.5 or similar words are not applicable in this case since clause 15 does not provide for the Respondent to retain those monies or have recourse to them.

98. Furthermore, there is no other clause in the contract that provides such a mechanism. In addition, in case of a default under Clause 18 of the contract, the Respondent, by notice in writing, is entitled to determine the Trade Contract, which it has done. In the last sentence of Clause 18, it provides:

> "*The determination will not prejudice any right of the Principal to recover damages from the Trade Contractor for any breach".*

99. Nowhere in the contract does it provide that the Respondent has recourse to those retention monies. Accordingly, I do not feel constrained by *Kennedy Taylor*, nor the case of *Pearson Bridge*, in deciding that the Respondent is able to retain the retention monies until *practical completion* of the whole Project is achieved; nor in fact to wait until *practical completion* of the Trade Contract is complete, because the Trade Contract is now terminated.

100. In this instance, it is my view that the preferred interpretation in the circumstances is that the Claimant is entitled to have retention monies returned once its works are *practically complete*. If its works are terminated, and since there is no similar wording to the retention clause in *Kennedy Taylor* or *Pearson Bridge*, I am of the view that the retention clause no longer survives the termination because the Claimant no longer has an obligation to complete since this obligation has been taken away by the termination.

101. Accordingly, I find that the Clause 15 does not survive the termination of the contract in this particular circumstance and that the Respondent is unable to withhold those retention monies at this stage. Accordingly, the sum of $55,449.40 of retention monies is now claimable under the progress claim.

Estoppel relating to progress claim no. 7

102. The Claimant argued in the payment claim that the Respondent is liable to the Claimant for the amount of $79,473.49 because it did not respond with a payment schedule. The Respondent in paragraphs 6.3 and 6.4 of the payment schedule that the Claimant is estopped from seeking to rely on the provisions of the Act regarding the alleged service of payment claim no.7.

103. Adjudication is not the forum to seek summary judgement as contemplated by s18(5) of the Act, and I have not considered this issue any further as it is outside the scope of the adjudication.

Threshold adjudication points

Terms void under s99 of the Act

Disputed variations

104. The Claimant argues in the application submissions 17 to 27 that Clauses 5(a) and 12(d) of the contract are void under s99()(2)(b) of the Act in that they seek to:

> *"annul, exclude, modify or otherwise change the effect of s7 of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of s7 of this Act; or may reasonably be construed as an attempt to deter a person from taking action under this Act."*

105. In paragraph 27 of the application submissions, the Claimant concedes that Courts allow conditions precedent to payment, such as a delivery of a statutory declaration; but says that it is not appropriate for conditions to absolutely, or for an extended period deny payment or remove an entitlement to payment.

106. *Brooking* supports this proposition in paragraph 10.7, page 167, where the learned authors state:

> *"A clause which, on its proper construction, makes a written order a condition precedent to payment for variations generally will be effective to bar a claim for payment. To this rule there are several exceptions…..In particular, it is not clear whether references in some cases to it being a fraud on the part of the proprietor to set up the clause requiring written variation orders are to be regarded as recognising a distinct ground for enabling the contractor to recover notwithstanding the absence of such an order.*
>
> *Quite apart for the doubt, the true principle and scope of the exceptions is not entirely clear, and it may be said generally that it is often impossible to answer with confidence the question whether a contractor who has failed to obtain a written order will be able to recover the cost of variations: Melbourne Harbour Trust Commrs v Hancock (1927) 39 CLR 570."*

107. In paragraph 21 of the application submissions, the Claimant states that unless the Construction Manager authorises the entitlement and value in writing, payment is denied absolutely, and these clauses deny an adjudicator the right to value the work.

108. In paragraphs 8 through to 13, in the response submissions, the Respondent disputes that this is the effect of the clauses. It says that unless variations are approved in writing and valued under the contract, then any alleged variation is not the subject of an agreement, or construction contract. This means, the Respondent says, that claims for unapproved variations cannot be made under the contract, and therefore s7 which deals with the objects of the Act, does not relate to these claims.

109. Furthermore, the Respondent says that these clauses do not prevent the right of the Claimant to seek recovery under the principles of quantum meruit or unjust enrichment. The Respondent says they simply deny entitlement to payment under the contract but not at common law.

110. I thought it somewhat surprising that neither party was able to provide me with authority supporting their respective submissions in relation to adjudication of unwritten variations. After all, disputed variations play such an important part of construction disputes, and this matter is no exception. I was unable to find any case in Queensland or NSW that provided guidance as to whether unwritten variations, which are not recognised by the contract, can be considered by an adjudicator.

111. I will need, therefore, to consider the issue as a matter of principle, and then see if any cases support or prohibit the reasoning applied in this case.

112. I have referred to the principles in *Brooking* and note the prima facie position that payment is not allowed under a contract for unwritten variations, if the contract so provides.

113. Accordingly, I will consider the matter from the point of view that Clauses 5(a) and 12(d) of the contract specifically require variations in writing, and there are no written variations in this adjudication. This means that under the contract the Claimant is prevented from being paid for the variations.

114. In paragraphs 23 and 24 of the application submissions the Claimant refers to sections 7 and 8 of the Act, and claims that Clauses 5(a) and 12(d) of the contract absolutely deny entitlement unless the Construction Manager authorises entitlement and value in writing. I refer to these two sections and extract them below:

> ***"7 Object of Act***
> *The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—*
> *(a) undertakes to carry out construction work under a construction contract; or*
> *(b) undertakes to supply related goods and services under a construction contract.*
>
> ***8 How object is to be achieved***
> *The object is to be achieved by—*
> *(a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and*
> *(b) establishing a procedure that involves—*
> *(i) the making of a payment claim by the person claiming payment; and*
> *(ii) the provision of a payment schedule by the person by whom the payment is payable; and*
> *(iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and*
> *(iv) the payment of the progress payment decided by the adjudicator."*

115. Pearce and RS Geddes (2006): *Statutory Interpretation in Australia*, LexisNexis Butterworths, Chatswood, 6th ed ("Pearce & Geddes"), paragraph 2.3 on page 25 refers to the literal approach of statutory interpretation, which requires one to look at what the language means in its ordinary natural sense. s7 of the Act entitles the Claimant to a progress payment because it has undertaken to carry out construction work and to supply related goods and services under a construction contract.

116. The Respondent argues in paragraph 9 of the response submissions that, unapproved variations are not claims for payment under a construction contract because any alleged variation is not the subject of an agreement (or construction contract). It argues that an unapproved variation does not fall within the objects of the Act.

117. With great respect, I do not read s7 of the Act as narrowly as the Respondent. The effect of such an interpretation is that it would always be a jurisdictional point that an adjudicator would have to consider as to whether or not extra work under the contract was an approved or unapproved variation under the contract. If it was unapproved, then the Respondent's argument is that the adjudicator cannot consider the variation because it is not the subject of the object of the Act.

118. The literal meaning of s7 of the Act is that the Claimant is entitled to a progress payment if it carries on construction work under a construction contract (my underlining). It does not say (in s7 of the Act) that the progress payment is dependent on the terms of the construction contract (my underlining). In my view the Act applies to parties who enter into an agreement for construction work, and when work is carried

out (or undertaken to be carried out) under the agreement, then the worker is entitled to a progress payment under the Act.

119. I accept that the Act elsewhere provides that the contract is referred to for reference dates, interest, valuation etc, but in my view the Act is the source of the adjudicator's power to decide on the disputed claim. I will now turn to s8 of the Act because it determines how the objects of the Act are achieved.

120. s8 of the Act provides that the Claimant has an entitlement to a progress payment whether or not the relevant contract makes provision for progress payments, and provides a procedure for the referral of a disputed claim to an adjudicator. If the contract was silent about variations and did not constrain the adjudicator from looking at them, then the evaluation of variations is to be carried out by the adjudicator without regard to the contract, provided that the variations are for construction work or the supply of related goods and services.

121. However, in this case unapproved variations are not recognised by the contract and may not be paid under the contract, and the issue is whether I can consider variations that are not approved under the contractual mechanism. The Respondent argues that the Claimant is not prevented from claiming variations at common law as quantum meruit or unjust enrichment, and that the Claimant has agreed to Clauses 5(a) and 12(d), and cannot now complain about the effect of them after it has failed to follow those clauses.

122. In my view, the effect of Clause 5(a) and 12(d) of the contract is excluding my ability to consider variations for extra work under the construction contact, and such clauses are void under s99 of the Act because they have the effect of excluding my power to consider this extra work.

123. I refer to the case of *John Holland Pty. Limited v. Roads & Traffic Authority of New South Wales & Ors.* [2007] NSWCA 19. It is not a case directly on point, but there are some principles in the case that support the view that I have reached. Hodgson JA said:

> *"36 The jurisdiction of the adjudicator extended to determining the amount to which Holland was entitled pursuant to its payment claim, this amount being that specified in ss.9 and 10 of the Act, in particular in ss.9(a) and 10(1)(a).*
>
> *37 In substance, RTA's submission as to jurisdiction was to the effect that "calculated in accordance with the terms of the contract" in those statutory provisions meant determined according to mechanisms provided by the contract that is, the amount determined by the Superintendent or any amount substituted for that amount in accordance with the dispute resolution mechanism provided by the contract.*
>
> *38 I note that in Transgrid v. Siemens Limited [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35], I expressed the view (obiter) to the effect that "calculated in accordance with the terms of the contract" meant calculated on the criteria established by the contract, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word "calculated" and with the prohibition in s.34 of the Act on contracting out of the effect of the Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s.34. I do not think the legislature intended to make such usual provisions void. That obiter view is not directly relevant to the issue now under*

consideration; but the circumstance that the weight of authority was against RTA's submission has some indirect relevance, as indicated below.

39 Quite apart from the matter in the previous paragraph, I do not see that RTA's submissions in any event truly went to jurisdiction. The adjudicator's jurisdiction is to determine the amount of the progress payment in accordance with ss.9 and 10 of the Act; and RTA's submissions go to what is the correct result of doing this. That is, the submissions were to the effect that the correct exercise of jurisdiction would be to adopt the amount reached by the contractual mechanisms, rather than to apply the contractual criteria to reach a different result. It may be said that this view of mine, that RTA's submissions were not truly as to jurisdiction but merely as to how it could be exercised, is also irrelevant to the issue under consideration; but in my opinion it does have relevance in assessing whether RTA's jurisdiction submissions were "reasons for withholding payment" within s.20(2B)."

124. It is my opinion that this case supports my conclusion in the words of Hodgson JA at paragraph 38, *"On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s.34* (my underlining)*. I do not think the legislature intended to make such usual provisions void. That obiter view is not directly relevant to the issue now under consideration; but the circumstance that the weight of authority was against RTA's submission has some indirect relevance, as indicated below."*

125. I accept that Hodgson did say that he did not think that the legislature intended such clauses to be void and that it was obiter, but he had said in the previous sentence that such clauses could have the effect of restricting the operation of the Act. It is not an authority that constrains me to adopt either view, but I find it is useful in supporting the approach that I have taken, and I will apply it to this particular adjudication by looking at the disputed variations.

126. Turning to this adjudication, the Claimant has claimed extra money for the following activities, which are the disputed variations. These activities are:
    1. concrete pumping ($10,760.15),
    2. amendments to panel heights ($4,576.50),
    3. additional crane hire and labour ($26,080.50),
    4. supply of additional panel reinforcement for lifting ($10,847.34), and
    5. extension of supply of props ($27,207.00).

127. I find that all these activities fall within the definition of construction work or the supply of related goods and services in relation to construction work under ss10 and 11 of the Act. s7 allows a Claimant to claim progress payments for this work because the Claimant undertook to carry out construction work under a construction contract, or to supply related goods and services under a contract, and these activities fall under the Act.

128. If I was not to find Clauses 5(a) and 12(d) as being void under s99 of the Act, the effect of the Respondent's submissions are that, because the Respondent had not approved the variations and their value in writing, I would be unable to consider them because the contract does not recognise them as variations. I have already said that I cannot accept that this is the proper approach in dealing with these variations, and so I am prepared to consider the variations in the adjudication on the basis that Clauses 5(a) and 12(d) are not in the contract.

Retention monies

129. I have already considered this issue on the basis that Clause 15 does not survive termination of the contract, so there is no need to discuss it under this heading.

130. Although this comment does not belong under retention monies, it is important for me to stress that I have used the contract, despite it having been terminated, to decide on the amount of the progress payment, the due date for payment and the interest rate. The Act requires me to look at the contract in deciding these matters, and I felt it would be somewhat artificial to disregard these provisions on the basis that the contract has been terminated.

131. I do not feel that this is doing injustice to the parties under the Act, which does not distinguish between an enforceable contract and one that has been terminated. Furthermore, a contract in this context can be an *arrangement or understanding*, so it is unlikely that such an approach breaches the objects of the Act.

132. Naturally, my analysis of what rights and obligations the parties have under the contract before and after termination is made using the principles of contract law, and they relate to those parties rights in the adjudication; whereas I have otherwise used the contract to *plug into the Act* when required to facilitate my functions under s26(1) of the Act.

Payment schedule dispute

133. The Claimant concedes in paragraph 69 of the application submissions that it was served by facsimile with a payment schedule at 5.29pm on 23 April 2007 (the "first payment schedule"). Paragraphs 70 through to 74 of the application submissions then deal with the Claimant's objection to what it terms the provision of a second payment schedule by email at 5.43pm on 23 April 2007, to which was attached pdf files of the attachments.

134. The Claimant argued that the second payment schedule some 14 minutes later is prohibited because time had started running under the Act, and that the second payment schedule which provided the attachments could not now be submitted in the response. The Claimant's reasons are that the attachments were not in the first payment schedule and as such it had no opportunity to address them as properly made submissions prior to me handing down my decision. It referred to the case of *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd & Ors* [2005] NSWSC 439 at [48] – [5x] (*"Taylor Projects"*) as authority for this point.

135. The Respondent deals with the payment schedule in at paragraphs 20 through to 35 of the response. In particular at paragraphs 25 and 26, it challenges the authority of *Taylor Projects* and says that this case was not authority prohibiting the service of a payment schedule by more than one means of communication. In paragraph 28 it said that the Act does not prohibit the service of a payment schedule by more that one means of communication.

136. I agree with the Respondent that the Act does not prohibit more than one means of communication. I find that the second payment schedule attached the first payment schedule and the attachments, which had been foreshadowed in the first payment schedule. I find that the Claimant received these attachments on 23 April 2007, some 14 minutes after the first payment schedule sent by facsimile.

137. With the greatest respect I cannot understand how the Claimant has been denied natural justice in receiving the attachments 14 minutes later. The Claimant says that it had no opportunity to address these attachments prior to me handing down my decision. On 23 April 2007, I had not been appointed as an adjudicator and no

adjudication application had yet been made, so I do not accept the Claimant's submissions.

138. I find that the second payment schedule did not differ from the first payment schedule, except that it added the attachments in support of the first payment schedule, and that a gap of 14 minutes did not prevent submissions from being made from 24 April 2007. I find that the payment schedule was delivered in time by the 23 April 2007, and that the respondent had until midnight on that day to deliver a payment schedule.

139. If a completely different payment schedule had been provided after the first payment schedule there may have been some justification for the Claimant's complaint, but this is not the case here. I agree with the Respondent that s103 of the Act attracts the operation of s39 of the *Acts Interpretation Act 1954* and this allows service by a similar facility to facsimile, and as a matter of commonsense, I find email is a similar facility to facsimile since it used on a daily basis as the instant means of communication between people in business.

140. Accordingly, I find that the second payment schedule with the electronic attachments constitutes the payment schedule to which I will have regard.

141. I refer to the Claimant's argument that the some of the information in the attachments cannot be read or are illegible and that the photographs are illegible. I agree that the photographs provided are not the best quality. However, that is much a disadvantage for the Respondent, because I will only consider the material provided to me. If there is a contentious issue raised in a photograph which ostensibly supports that issue and it is illegible, such that I cannot decipher what the photograph depicts, I may be unable to make a finding on that issue.

142. I am not compelled to seek further submissions or better quality photographs. I am also not compelled to accept the Respondent's offer of a further copy of photographs provided by the Respondent in paragraph 30 of the response submissions. I feel content to deal with the quality of the photographs provided to me, since they are the same as those provided to the Claimant. If I asked for a further copy of the photographs and they were more legible, then I would have to ask for submissions on those photographs from the Claimant, as suggested in paragraph 76 of the application submissions. It would become an administrative nightmare keeping track of the photographs and submissions.

143. Accordingly, I reject the Claimant's submissions that it will not have an opportunity to refute the photographs from the copies given. If the Claimant had a problem with the quality of the photographs, it could have asked for better copies so that it could have dealt with the issues in the adjudication application. I do not accept that the fact that it had only been given a brief opportunity to see the photographs at a meeting on 24 January 2007 means that it never had the opportunity to get better photographs. I accept the Respondent's submissions in paragraph 30 of the response that another copy could have been requested, and that none was made. Given that the Claimant did not do so, it is in possession of the same quality photographs as me, and I will decide what I can see from them, as suggested by the Claimant in the application submission 77.

144. Apart from the matters referred to above, the Claimant accepts that the payment schedule is valid and I have already decided that I will have regard to the contents of the second payment schedule.

145. The Claimant has argued that the application is within time and complies with the Act, and the Respondent agrees in paragraph 36 of the response, so I find that the application is lawful.

Entitlement and the reference date

146. s12 of the Act gives rights to progress payments as follows:

> *"**12 Rights to progress payments***
>
> *From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."*

147. Therefore the right to progress payments is governed by the reference date, which is defined in Schedule 2 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…"*

148. The Claimant submitted in paragraph 61 of the application that the Respondent had admitted in paragraph 1.10.5 of the payment schedule that the payment terms were from the 15th day of each month. Furthermore, the Claimant asserted that the reference date for this adjudication was the 15th March 2007, and the Respondent did not take issue with this assertion in the response. Accordingly, without anything to controvert this assertion by the Claimant, I find that the reference date was the 15th March 2007.

149. The payment claim was made on 5 April 2007, which I find is from this reference date, so prima facie the Claimant is entitled to a progress payment for the construction work and the supply of related goods and service undertaken. The Respondent has challenged the Claimant's entitlement under the contract on the basis that:
    a) The Claimant has been overpaid;
    b) The Claimant has no contractual right to the disputed variations;
    c) There are defects in the construction work, which require rectification;
    d) The Respondent has a set-off for damages.

150. From the material I am satisfied that the Claimant has carried out construction work for which it has a prima facie entitlement to be paid. It is incumbent upon me, however, to decide whether this entitlement means that there is still money owing under a progress payment. I have dismissed the Respondent's claim for set-off for damages, but I will need to carefully consider the material in relation to:
    a) Whether the Claimant has been overpaid?
    b) What amount, if any, is due for the disputed variations?
    c) What amount, if any, should be deducted for defects?

Amount under the contract

151. In the payment claim, Claim No. 9, the Claimant identifies a number of variations to the contract consisting of $159,734.99 to which was then added the amount of work completed to date, less payments to date, resulting in a figure of $267,076.83 to which was added GST, resulting in a claim of $293,784.51. The Claimant provided justification in its payment claim for the variations associated with the claim and also claimed the return of the retention monies.

152. In the payment schedule, the Respondent essentially identified that there were a significant number of defects in the works, and delays had been caused to the

completion of the works such that ultimately on the 25 January 2007, the Respondent terminated the contract with the Claimant. It argued that the costs to complete the work, the costs to rectify the damages, and the delay costs exceeded the claim made by the Claimant.

153. The Respondent asserted that it was entitled to set-off the delay costs and it also asserted that the Claimant had been overpaid. In the payment schedule, the Respondent provided a valuation by Napier Blakely, Quantity Surveyors, as to the value of the works at the time of the termination of the contract.

154. I have already said that I am not prepared to consider any delay claims by the Respondent as a set off. However, the Respondent is entitled to challenge the valuation of the work done by the Claimant to date, and is also entitled to claim for the estimated costs of rectifying defects.

155. I have divided up the calculation of the amount due under the headings of the contract sum, disputed variations, and defects to which I now turn.

Contract sum

156. I find from Schedule 6 of the contract that the contract price is a lump sum of $1,035,358.00, exclusive of GST.

157. There is a contest about the value of the work carried out by the Claimant under the contract, and this requires me to look at all the available material to decide, if it possible, how much is owing to the Claimant under this payment claim for amounts due from the contract sum. There was no schedule of rates provided in the contract, and the quotes provided by the Claimant, which I have found formed part of the contract, do not break up the work such that it is possible to

158. It is pertinent to state that the Claimant has the legal and evidentiary onus to prove its case, and if and only if, it has discharged its evidentiary onus, then the evidentiary onus shifts to the Respondent.

159. The payment claim relating to work under the contract for which the contract sum applies, is based on previous progress claims made by the Claimant, and the Respondent specifically argues that progress claims 5 and 6 were overclaimed. It argues that the value of work carried out by the Claimant is less that what has been paid to date.

160. There is some complexity in the Claimant's earlier progress claims on which Claim No. 9 is based and it necessary to review these claims to ascertain the amounts due under each claim as claimed in this payment claim.

161. Prior to doing so, I would like to point out that I agree with the Respondent's assertions in paragraph 73 of the response that annexure 20 to the Claimant's submissions do not form part of the contract. This is the original panel quotation according to the Claimant's application submission 165, and I find that it was not agreed to form part of the contract by the parties and I have not had regard to it.

Claim No. 5

162. The Claimant advised in the payment claim that it was not pressing this claim, and that it was by way of background only, and that it had been requested by Joel Hewitson to claim for the pouring of the concrete floor to the first floor of level 1, prior to it completing this work. There was a concession that the works were not complete by 15 December 2006 and that only $120,000 of $208,363.70 was paid

163. The Respondent denies that this request was made by Mr. Hewitson, but there was no statement from Mr. Hewitson to refute this allegation and Mr Laurence Neil reaffirmed this assertion in paragraph 4.1 of his statement. I find that this request was made, but nothing turns on this finding because it does not assist in valuing this slab work, particularly since Mr. Neil agrees in paragraph 4.2 of his statement that some of the works claimed in Claim No. 5 were not completed before the Christmas break.

Claim No. 6

164. Mr. Neil in paragraph 5.5 of his statement refers to the Claimant's Carl Knight being requested by the Respondent's Bob Massey to delay the pouring of the first floor slab until the first week of February 2007. Mr Massey denies this in paragraph 11 of his statement dated 15 May 2007, and I prefer his version of events to the hearsay provided by Mr. Neil. However, all this achieves is a finding that the first floor slab had not been poured at the time of termination of the contract.

165. Mr Massey does not say in his statement what work had been done by the Claimant to prepare the slab for pouring. I would have expected that as the Respondent's site manager he would be in the best position to determine precisely how much of that work had been done, or to at least refute Mr. Neil's assertion in paragraph 5.6 of his statement that 8 units were formed and 5 had reinforcement in them. It is curious that in his statement he has not provided his own version of the extent of work done to this slab for progress claim 6, which amounts to a sum of $88,109.18 according to the Claimant.

166. Mr. Massey does not provide support for the assertion made by the Respondent in paragraph 5.6 of the payment schedule that only two of the ten units in building 1 were ready for concrete. This assertion of only two units being ready is repeated in paragraph 120 of the response submissions, but there is no evidence by way of a statement from the Respondent's people to verify this important point.

167. I therefore find that the Claimant has demonstrated that it had formed 8 units and had placed reinforcing in 5 units. I am satisfied that the amount of $88,109.18 for this work is appropriate because Mr. Massey could have refuted this and did not do so. Otherwise the Respondent merely argues in paragraph 5.8 of the payment schedule that the progress claim fails to properly value the work in accordance with the contract price, but it does not engage on the valuation of this item, but merely defers to the quantity surveyor's valuation of the whole project.

168. Mr. Andrew King has provided a brief statement dated 15 May 2007 in relation to his valuation and it is important to evaluate his statement at this stage because it has a bearing on the valuation of the payment claim. I accept that Mr. King is an expert as he is a quantity surveyor (QS), and that he is familiar with the project. As he said in paragraph 1 of his statement.

169. I am not so convinced that he was familiar with the contract insofar as the financial details were concerned, in that he requested that the Claimant provide the quotation figures for the contract, which I find were provided by facsimile to him on 22 January 2007. He may have been familiar with the contract by the time he provided a report dated 17 April 2007 (the "QS report") because he had been briefed by the Respondent to do so, and he had the figures provide by the Claimant.

170. He admits that he was the QS for the financier, and then he was commissioned by the Respondent to provide the report, so I am not convinced that his assertion in paragraph 5 of his statement that his report was an independent assessment of the Claimant's works. He said at paragraph 10 that he was aware that there were problems with the Claimant's works and that the Respondent and Curley were

concerned with the continuation of the Claimant's contract. He added that he wanted as much information from the Claimant as possible prior to termination of the contract.

171. He said at paragraph 11 that he wanted to keep the Claimant *on side* and suggested to them that may wish to issue a further progress payment so that he could get as much information from them as possible in relation to the works they had carried out to date. This desire to obtain information in the circumstances of an imminent termination of which he was aware, and his desire to keep on side with the Claimant to get as much information as he could, suggests to me that objectively his independence may have been compromised.

172. I am therefore not prepared to accept that the QS report was as objectively independent as Mr. King asserts, and it will be necessary to closely scrutinise its contents.

173. It appears that Mr. King's' words to the Claimant may have been taken out of context, since he denies at paragraph 7 that he said that it should issue a further progress claim as it had conducted further works. However, in his desire to keep *on side* with the Claimant he said that he told the Claimant that they could issue a further progress claim if they wished to do so and to send it for his review. His statement is somewhat confusing and may have confused the Claimant as well.

174. Mr. King also said at paragraph 9 that it was difficult to assess the amount of work undertaken by the Claimant, and that he made approximate calculations of the amount of work undertaken, knowing that at the end of the job any inaccuracies in his assessments would be resolved once all monies owing under the contract were paid to the Claimant.

175. At paragraph 10 he said that in mid January 2007 he asked for further details and copies of the Claimant's quotes so he could accurately assess the progress claims received to date, and I have found that he received this information on 22 January 2007, three days before the contract was terminated.

176. I cannot understand how he could have assessed the progress claims from August 2006 to January 2007 without knowing the breakdown of the contract sum and without having these quotes, so I find that any calculations he had made about the Claimant's progress claims up until 22 January 2007 were likely to be inaccurate.

177. As I have already said, I accept that Mr. King is an expert, but his assessment of the value of work at $120,000 in December 2006 in progress claim No. 5, without the quotations and contract sum is problematic. In this context, and on balance, I am prepared to accept Mr. Neil's statement at paragraph 5.8 that the Claimant was concerned that the QS was not in a position to accurately assess its progress claim and thus the reduction of its claims were invalid. I find that these concerns were well founded.

178. Mr. Neil also said at paragraph 5.10 that it was not a requirement that there be a trade breakdown, and that it relied on its own take off from its quotation to value the claims, which had been previously accepted by the Respondent. Surprisingly, the Respondent did not refute this assertion in the response, and this confirms to my satisfaction that <u>the amount of $88,109.18 is appropriate for the work under the contract in this payment claim</u>.

179. I therefore carry forward the amount of $88,109.18 to the summary.

180. I will consider the QS' report later, because it does not engage with each item of the claim, but rather deals with the costs on an overall project basis. However, I wish to

point out at this stage that I am not prepared to consider the QS report from the point of view of costs to complete the works, from which the QS then deducted the contract price to derive the Gross value of Works of $399,280.00. I am unable to find that the quantities calculated and the rates used by the QS relate to agreed amounts under the contract. I accept that it is one method of valuation of work and that QS's are expert in valuation, but I am not obliged to accept this approach just because it has been provided by an expert.

181. The quotations, which did form part of the contract, did not break down the items of construction into quantities and unit rates, and the contract price in Schedule 6 is a lump sum. I am unable therefore to use the QS' calculations of the costs to complete to derive the amount of work carried out under the contract to which the contract price relates, because I find that these quantities and rates were not agreed under the contract.

182. Furthermore, I am constrained in the valuation function by s13 of the Act to the amount calculated under the contract, and s14 of the Act to valuation under the contract, and if it does not provide for the matter, then by having regard to the contract price, and any other rates and prices stated in the contract. The QS' rates and quantities used, however expertly derived, were not agreed, so I am precluded from using them.

183. I find, because the Respondent did not dispute this assertion, that the Claimant's own quotation was used to value the claims to date, and I am satisfied that until Progress Claim 5, the QS had not rejected this approach. I am therefore satisfied that the payment claim has correctly identified the amount of works carried out under the contract for which it is entitled to be paid, and this amount of $88,109.18 is the correct value for this work under the contract.

184. Claim 6 also included a variation for structural steel of $51,541.70, which will be considered under disputed variations.

Claim 7

185. I have already rejected the Claimant's assertions about summary judgment. In essence this claim gathered together a number of the disputed variations, viz:

a)	Tilt slab concrete pumping	$10,760.15
b)	Amendments to panel heights	$4,576.50
c)	Additional crane hire & labour – poor survey	$26,080.50
d)	Additional panel reinforcement	$10,847.34
e)	Prop hire	$27,207.00

186. These items will be dealt with under disputed variations below.

Claim 8

187. This claim of $55,449.40 essentially relates to the payment to the Claimant of retention because the contract has been terminated. I have found that the retention clause does not survive the termination, and there is nothing in the contract that allows the Respondent to retain these monies, so I find that they must be returned.

188. I therefore carry the sum of $55,449.40 to the summary

Claim 9

189. This is the present payment claim and sums up the previous progress claims identified above.

190. The Respondent claims an overpayment of $158,423.74 in submission 11.5 of the payment schedule and approximately $80,000 in paragraph 11.8.2 in the payment

schedule. However, these figures do not appear to be derived from a consideration of the specific items being claimed, but rather take the overall project cost approach put forward by the QS in the QS report. I have rejected the basis of calculation for this QS report in relation to the value of the construction work carried out to date, so I do not agree that there has been any overpayment.

Disputed variations

191. I am obliged to decide the amount of the disputed variations, if any amount is due, and the lack of writing is no longer an impediment, since I have found those clauses in the contract to be void. This then begs the question as to how I can value construction work for variations. s14(1)(b)(iii) of the Act which refers specifically to valuing variations provides:

> *"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;"*

192. There is no variation explicitly agreed by the parties, and the Respondent has taken issue with the disputed variations, such that it is evident that there is no express agreement of any variation agreed to by the parties to the contract. To my mind this precludes the operation of s14(1)(b)(iii) of the Act as assisting in the valuation function that I am required to perform.

193. *Brooking* at paragraph 10.8, page 168 referred to the case of *Liebe v Molloy* (1906) 4 CLR 347 ("*Liebe")*, in which the High Court held there was an implied contract to pay for extra work, despite the contract requiring an order in writing for recognition of a variation and to allow payment.

194. At page 2 of the extract of *Liebe* from Austlii, Griffith CJ said that, *"When a man does work for another without any express contract relating to the matter, an implied contract arises to pay for it at its fair value. Such implication of course arises from an express request to do work made under such circumstances as to exclude the idea that the work was covered by a written contract. So it would arise from the owner standing by and seeing the work done by the other party, knowing that the other party, in this case the contractor, was doing the work in the belief that he should be paid for it as extra work."*

195. Given that I find that there is no longer an express term relating to written variations, I am prepared to find that there is an implied term that the Respondent would pay for their fair value. This then allows me to have recourse to the contract to value these disputed variations under the contract as provided by s14(1)(a) of the Act.

196. Clause 5(b)(i) provides that *the price of any variation must be added or deducted from the Trade Contract Price*. In this adjudication, the disputed variations are claimed to add to the contract price.

197. Clause 5(b)(ii) essentially provides that if the parties cannot agree on a price or a method of arriving at a price for a variation, the work can be ordered by the Respondent, and the price for the work is determined in accordance with Clause 5(d) of the contract.

198. Clause 5(d)(i) provides that, *"If additional work is required then the Trade Contractor is to be paid the reasonable cost of the extra work plus a margin for overheads and profits at the rate identified in Schedule 8. If no rate is stated then 12% must be applied."* I have already found that there is no margin for variations, since Schedule 8 has 0% for the margin. This means that the Claimant is entitled to a reasonable cost of the extra work, but no margin may be added.

199. I am therefore in a position to apply the contractual framework because in line with the High Court in *Liebe*, I may imply a term that the Respondent promises to pay for extra work, thereby enlivening the valuation provision of s14(1)(a) of the Act and the surviving subclauses in Clause 5 of the contract .

Structural steel $51,541.70

200. The Claimant asserted that it was owed this amount in the payment claim, which had been detailed in Progress Claim No.6. The Respondent then joined issue with this assertion in paragraphs 5.10 and 5.11 of the payment schedule, and asserted in paragraph 5.11.1 that the QS confirmed that all structural steel to building 1 had been provided, but in paragraph 5.11.2 that no structural steel to buildings 2 and 3 had been installed.

201. Surprisingly, the Claimant agreed with the paragraph 5.11 of the payment schedule in Mr. Neil's statement paragraph 5.11, despite having maintained a claim for variation in paragraphs 104 and 105 of the application. These paragraphs cross reference Mr. Neil's statement in paragraph 3, but this paragraph deals with the subcontract with Curtis Steel and not with the quantum of the structural steel claim.

202. I have not been given any further information from the Claimant to value this claim, but the Respondent has provided me with some material. Mr. King in the QS report at paragraph 9 on page 11 says that $15,893.74 has been paid to the Claimant for structural steel supplied and installed. Mr. Neil does not engage with Mr. King on this point in paragraph 9.6 of his statement, and I find therefore that there is no amount payable for a variation for structural steel.

Concrete pumping $10,760.15

203. The Claimant at paragraphs 106 to 109 in the application claims for this work on the basis that the amount was *provisional* in the quotation, and the Respondent engaged with this issue in paragraph 6.7 of the payment schedule and denied that this amount was payable.

204. I note that the Claimant's quotation for the tilt slab under Principal Contractor Responsibility provides:

> *"3) Any concrete pumps required due to inclement weather or on site conditions are to be the responsibility of the Principal"*

205. The Respondent did not deny that the quotation applied but denied in paragraph 6.7.4 of the payment schedule that the circumstances of inclement weather or on site conditions necessitated concrete pumps.

206. The Claimant argued in paragraph 108 of the application that the site conditions of limited access, in particular the excavations of tanks, meant that concrete pumps were needed, because the concrete could not be poured directly into the panel stacks from agitator trucks going directly to the stacks.

207. This was supplemented by Mr. Neil's statement in paragraph 6.7 who explained that this additional concrete pumping was to the tilt panel stacks because of the lack of site access and he attached photographs in exhibit LN26-1, 26-2, 26-3, 26-4, 26-5 and 26-6. In my view the last 4 photographs, although not perfectly clear, certainly show difficult access to the site.

208. Mr Massey's statement paragraph 8 concedes the fact of the excavation of tanks and an incorrectly cantilevered retaining wall, but argues that the Claimant should have been working on building 1. I find that the existence of these difficulties on a site that I

find from the photographs is congested, such that it was not possible for agitator trucks to drive alongside tilt panel stacks to discharge their load.

209. I am not prepared to accept the Respondent's argument that the program required the Claimant to be working on building 3, because it is evident that substantial delays to the project occurred, such that the first program used on the project, would have been likely to have been inapplicable early on. There were a number of programs provided in the material by the parties, and I am not prepared to consider the impact of these programs on the works, because they appear to be used by the parties to demonstrate issues supporting or denying delays.

210. Even if there was a contract program, which I am not intending to find, the effect of failing to adhere to that program would mean the Claimant could be liable for liquidated damages, if they had been claimed by the Respondent, and this would affect the valuation of the payment claim. However, no liquidated damages were claimed. Therefore, I accept that there were delays to the works, but neither the reasons for, nor the identification of the responsible party, is generally necessary in this adjudication, and I am not prepared to make any findings in that regard.

211. I do note that Mr. Neil asserted in paragraph 8.2.1 that the Claimant had planned to cast some panels for building 1 upon the floor slab for building 3 because it was in close proximity, such that building 3 needed to be available. Furthermore, in 8.2.2 Mr. Neil said that the Claimant had not unilaterally started on building 3, but that Mr. Massey had acknowledged that the Respondent had delayed the Claimant and that the Claimant was to go on to other works when they were delayed. Neither Mr. Massey in his statement nor the response denied that what Mr. Neil said was correct.

212. Therefore to my mind it is reasonable in the congested circumstances, where delays have occurred and where access has been restricted by the excavation of tanks (which the Respondent accepts took place), that concrete pumping was the only way to pour concrete to the tilt panels, possibly in locations different to what may have been originally planned, and I am prepared to accept that this was a variation.

213. In order to value the variation. I note that the Claimant has provided in Annexure L of the application, a summary of the invoices from A&S Concrete Pumping Service in the amount of $18,449.15, together with the invoices. This satisfies Clause 5(d)(i) of the contract, as I find that this was reasonable because it was a cost paid to a subcontractor and there is no evidence from the Respondent to suggest that this amount was unreasonable.

214. The Claimant has reduced its claim for this work by $7,689.00, because it says that this was its original allowance, and I am satisfied that the balance of $10,760.15 is payable. There is no margin added to this sum, which is correct, as no margin is payable.

215. I carry the sum of $10,760.15 for this item to the summary.

Amendments to panel heights $4,576.50

216. I note that the Respondent in paragraph 6.8.4 of the payment schedule admits that this amount is payable, so I find that it is payable and $4,576.50 is taken to the summary.

Additional labour and crane hire $26,080.50

217. The Claimant argued in the payment claim that there was an inadequate provision of survey points. The Respondent in paragraph 6.9 of the payment schedule denies the inadequacy of surveyor's set out and also denies that this was conveyed to the Respondent. In paragraph 6.9.3 the Respondent asserted that the Claimant did not

have the requisite expertise to install lift panels using the surveyor's set out of two points.

218. I have referred to the Claimant's exhibit LN-20 attached to Mr. Neil's statement in which a significant number of survey points are identified. I note also that the Claimant's quotation for the tilt slab under Principal Contractor Responsibility provides:

> *"1) Survey points to all external corners of the building and positions of internal walls, columns etc and to check construction plans submitted by us for construction of Panels"*

219. The Respondent denial of the inadequacy of the survey is not supported by any statements from the Respondent. This is an important issue, and it would not have taken much to have a surveyor provide a statement that the survey set out was adequate, if it was adequate.

220. Mr. Neil's statement at paragraph 9 goes into a lot of detail about the need for such survey points, and states that the Respondent had absolutely no idea of the requirements of survey points for locating tilt panels. The Respondent did not deny this in the response submissions, but only said that survey set-out points were provided and at the request of the Claimant, at the Respondent's own cost, they provided more set out points.

221. As to the Claimant's expertise, Mr. Neil in paragraph 8.1 engaged with the Respondent by asserting that the Claimant had expertise and had completed numerous tilt panel projects over the years, and that he had built one of the initial tilt panels 35 years ago. The Respondent merely said in response (in paragraph 133) that the Respondent provided, at its own cost, further surveyor set-out points.

222. Accordingly, I find that the Claimant had expertise in tilt slab construction and that extra surveyor set-out points were required because the original amounts were insufficient. Furthermore, Mr Neil asserted that he advised Mr Powell that these were needed, and Mr. Powell who provided a statement in this adjudication did not deny this.

223. Furthermore, Mr. Hewitson, who to my mind was a key player on the project, did not provide a statement to support the Respondent's denial that they were advised of the need for additional surveyor points. On balance, therefore, I am prepared to accept that the Claimant advised the Respondent of the need for these surveyor set-out points and that there was a delay in having these done.

224. The Claimant has consistently asserted that there was a three day delay which required additional crane hire of 28 hours and 322.5 hours additional labour. In paragraph 6.9.3 of the payment schedule, the Respondent merely reiterated its earlier admission that there was a 1.5 hour delay.

225. Mr. Neil repeated the delay of 3 days in his statement paragraph 6.9.4, and there was no realistic issue taken with this by the Respondent in paragraphs 127 of the response. I am satisfied that there was a need for additional survey points, and that there was a delay in having these done. I cannot agree that the amount of delay was only 1.5 hours for a significant number of survey points. Without any substantial controverting material, I accept that there was a 3 day delay for which the Claimant is entitled to be paid a reasonable sum as a variation.

226. The Claimant identifies $300 per hour for a crane, and this rate is substantiated by the invoices from Kelly Green and Co who hired the cranes to the Claimant, and I accept that this was a reasonable rate for a crane. The Respondent has not directly engaged

the Claimant on this, and it was incumbent of them to do so. I therefore accept the amount of $300/hr x 28hrs = $8,400.00 for crane hire.

227. The QS reports identifies two labour rates in the defect part of the report as $18.00/hour for James and $30.00/hour for fixing additional steel respectively. However, these rates were not put proffered by the Respondent to this variation claim rate of the Claimant. The Respondent did not otherwise challenge the Claimant's rate of $55.00 per hour for labour and I therefore find, without controverting evidence, that $55.00/hour is a reasonable rate for the Claimant's labour.

228. The Claimant has identified the labour amount as 321.5 hours, but I am only able to find 311 hours on the time sheets, so I find that 311 labour hours for 5, 6 and 7 December 2006 for this additional work. This calculates to 311hrs x $55.00/hr = $17,105 for additional labour.

229. I therefore find $25,505.00 for this additional labour and crane hire and this is taken to the summary.

Additional panel reinforcement $10,847.34

230. The Claimant asserts in the payment claim that the additional reinforcement it provided to maintain panel integrity is a variation to the contract, and it refers to the lifting analysis of Michael Samuel Structural Engineer for the Claimant regarding additional steel required for lifting. In paragraph 6.10 of Mr. Neil's statement he says that the quotation makes this clear that additional lifting reinforcing may result in additional costs because it is not possible at quotation stage to know the extent of this reinforcing.

231. The Respondent in paragraph 6.10 engages with the Claimant on this point and says that it was not aware that additional reinforcement was required. In paragraph 6.10.2 the Respondent says that the quote should have included the cost of the additional reinforcement, and in paragraph 6.10.1 that the exclusion in the quotation relating to delays was not applicable in this claim. The exclusion clause in the quotation provides:

> *"If lifting dates are accelerated, through delays to the program, concrete strength will be increased to compensate, in an effort to make lifting dates to meet your revise program. Relative extra over costs will be charged accordingly."*

232. I do not find any evidence that this claim is for increased concrete strength, as it is expressly for additional reinforcement to ensure panel integrity after the concrete has cured sufficiently. Therefore, I find that this exclusion does not apply.

233. The Respondent refers to the quotation wording and I note that the words identifying the items that are included in the price as:
    - *"Supply and install mesh and trimmer bars as per Engineers drawings*
    - *Supply and install required concrete for Tilt Panels*
    - *Supply of concrete will be of strengths to meet normal curing times prior to lifting"*

234. I do not find a qualification that additional lifting reinforcement is within the exclusions, and the reference by the Claimant to the Engineers drawings does not assist the Claimant in substantiating a variation, as I do not find that they are contract documents. To my mind this additional reinforcing, although not explicitly included in mesh and trimmer bars or in the concrete, would be necessarily implied.

235. The Claimant should have allowed for this additional reinforcing in its price, or provided a qualification by way of exclusion so that the Respondent was aware that

the price may vary. I find that the Claimant did not provide any such qualification, so I find that the contract price includes additional reinforcement, and I reject the claim for $10,847.34.

Extra over prop hire $27, 207.00

236. This is a rather difficult claim because it does attract the issue of responsibility for delays raised by the Respondent in 6.11.1 and 6.11.3 in the payment schedule, and there is a significant amount of material from the parties about who is responsible for delays.

237. I accept that the quotation specifies prop hire of $3.00 a day, and that the props price would only be for a 2 week period. The project was delayed for a variety of reasons and the vertical tilt panels needed to be propped because they had not been fully installed.

238. There is no utility to my mind in spending hours of analysis relating to the complicated delays and program evaluation to analyse this prop hire claim. In my view it is more appropriate to deal with claim on the strict basis of evidentiary onus. I will first consider that the Claimant must prove its case, which then shifts the evidentiary onus to the Respondent to refute it.

239. I am prepared to accept that Claimant's hire period from its hire summary in Appendix P of the application was from 4 December 2006 to 18 December 2006 and this was included in the contract price. Thereafter, I am only prepared to consider a claim for props until 25 January 2007, because at that time the obligation of the Claimant to prop the panels was terminated.

240. Between 18 December 2006 and 1 January 2007 the Claimant incurred $9,072.00 hire charges, which I have confirmed are at $3.00 per prop per day. 34 standard panel props were for a shorter period of 16 days from 1 January 2007 to 17 January 2007 and they will also be considered. From 1 January 2007 to 25 January 2007 is 25 days hire, and this is the limit of the hire period obligation under the contract. I accept that the Claimant says that the props were needed to support the panels, but under the contract it no longer had an obligation to do so. Applying this constraint to the hire list yields the following calculation:

Type	**Number**	**Days**	**Amount**
Standard	34	16	$1,632.00
Standard	18	25	$1,350.00
Jumbo	18	25	$1,350.00
Standard	1	21	$63.00
Mini panel	17	25	$1,275.00
Standard	71	25	$5,325.00
Mini panel	23	25	$1,725.00
Standard	35	25	$2,625.00
No.2 Acrow	1	2	$6.00
		TOTAL	**$15,351.00**

241. The Respondent merely denies that it is liable on the basis that the delays requiring the props to remain on site were caused by the Claimant, and it does not provide me with any other amount for the hire of these items. Furthermore, there is no specific reference to the delays for which the Claimant is responsible in relation to these props, and I have already said that I am not prepared to do a full delay analysis to determine the merits of this item, as it simply would not be justified. I find therefore that the Claimant has satisfied the onus, and that the Respondent has not discharged

its onus, so I am prepared to allow $15,351.00 to go to collection for the hire of these props.

The QS report

242. Napier Blakely identified that the costs to complete the work were $578,327 and that the costs to rectify defective works were $78,960. Napier Blakely also identified that the gross value of work as at the 29 January 2007 was $399,280. In Napier Blakely's estimation, the concreting invoices of the Claimant of $961,798.48 (ex. GST) submitted by the Claimant equated to approximately 91 per cent of the adjusted contract price, which it said was a gross over claim.

243. I do not have those invoices, so it is not possible for me to verify these figures, and Mr. King did not refer to these in his statement. Accordingly, I am not prepared to find that the Claimant has claimed $961,798.48. No such figure is evident in Progress Claim No. 9 so I reject it.

244. I have also rejected the basis of calculation of the value of works completed done by the QS because I have not found that the quantities and rates used were agreed by the parties under the contract.

245. However, there is evidence of defects from the Architect's report and that of the consulting engineer, so the amounts calculated by the QS will be scrutinised along with other material and submissions, to ascertain the estimated costs of rectifying any defects to which I must have regard under s14(i)(b)(iv) and s14(2)(b)(iv) of the Act.

Defects

246. The Respondent has provided the QS' report which quantifies the alleged defects identified by the Architect and the Engineer, and it is useful to use this as a template so as to ensure that all the defects alleged by the Respondent are dealt with. I will use the template and then refer to the Architect's and Engineer's reports, if necessary, because it is really quantification that is of most importance in this context. Naturally, I must also refer to the various submissions to make a decision on each defect.

247. At the outset it is important for me to decide whether the Claimant admits to the defects as asserted by the Respondent in paragraph 60 of the response submissions.

248. In paragraph 150 of the application, the Claimant accepts that there will be patching, rebates to be cut, fixtures to be added and alignment to be adjusted after the panels are in position. Furthermore, it accepts that panels may be bowed, but they straighten when all fixtures are in place and the props removed.

249. Surprisingly, the Claimant did not take issue with the defects list and quantum in the QS' report, but it did say at paragraph 10.3 of Mr. Neil's report that the majority of the defects do not exist in any event and any defects which do exist (which the Claimant terms uncompleted works) would cost no more than $4,640.28 to rectify, and refers to attachment LN18. I cannot find anything in this attachment that helps me find comfort in the figure of $,640.28.

250. Furthermore, Mr. Neil in paragraph 10.4 says that the need to rectify panels is a normal occurrence.

251. The termination of the contract has made it impossible for the Claimant to carry out this work which it says is part of panel construction and should not be characterised as a defect. However, from the point of view of the Respondent these are defects because the Claimant is unable to carry out any further panel construction, and I am prepared to consider them in that light.

252. I am satisfied that I must have regard to this list because it is the Respondent's case that there are defects. The onus is on the Respondent in this arena, which if discharged, then shifts to the Claimant.

253. Before compiling the template, I find that I am not prepared to accept certain items identified in the QS's defects table. I am confined by the Act under s14(1)(b)(iv) and s14(2)(b)(iv) to the *estimated cost of rectifying the defect.* To my mind I am therefore confined to that *cost of rectification* and I do not think that it includes the cost of identifying the defect. Therefore I reject the estimates for the following items:

Consultant (Lindsay)	*$4,000.00*
Westera Report	*$4,500.00*
Lightwave report	*$5,500.00*
Napier & Blakely report	*$4,500.00*

254. Furthermore, I am not prepared to accept that a site estimator is necessary to rectify defects, nor is it appropriate to allocate $8,800 for site supervision and $4,000 for a construction manager for these defects. I have found that these defects are not particularly extensive, such that supervision by these personnel of rectification is unnecessary. Furthermore, I am not minded to allow the contingency as an item, because it is only tangentially a cost of rectification, based on inherent uncertainties in the estimated rates. I accept that a prudent QS would include this item, but it is not a rectification cost per se, and I do not include it.

255. I have therefore narrowed the items down to the following list:

• Additional panel patching (quote)	$15,000
• Trim and epoxy panels (item)	$5,500
• Additional connections (item)	$4,500
• Repair connections (item)	$4,000
• Additional scaffolding (12 weeks)	$6,000
• Labourer (James) (90 hrs)	$1,620
• Additional Survey points (item)	$800
• Additional steel to ferrules (610 no.)	$1,830
• Labour to fix additional steel (50 hr)	$1,500

256. There is no quote attached for the panel patching to substantiate this claim, which means it is a bare assertion made by a QS, who is admittedly an expert. However, I have had concerns about the objectivity of the report for the reasons previous outlined, and I need to find support elsewhere about the extent of this item.
257. Attachment LN17 to Mr. Neil's report was the letter from Satch Constructions dated 4 April 2007, in which it said that the panels were structurally sound, but that a large amount of patching was required.

258. In paragraph 61 of the response submissions, the Respondent says that two patchers have worked continuously for a period of 5 weeks attending to the patching, and that another patcher is still on site dong this work for approximately 4 weeks. This amounts in total to 560 labour hours. The Respondent did not identify a rate for the labour in these submissions, but I am at liberty to use one of the rates from the QS' report for comparison purposes. If the rate of $18.00/hr is used, this yields a sum of $10,080, and for $30.00/hr yields an amount of $16,800.

259. I accept that the Claimant cannot respond to the response submissions, so that if I used these labour hours of 560 hours, I would have to ask for its submissions. However, I have used the hours, and the QS' numbers provided in the payment schedule merely to verify the number suggested by the QS for this work. It appears that his quote falls within these two sums calculated and I accept the figure of $15,000

for the defect rectification cost of patching, and find that this comprises a large amount of patching as foreshadowed by Satch Constructions.

260. The trimming and epoxy panels item does not have any support by way of how much time is required to carry out this work, and I am not prepared to accept the QS report without additional substantiation for the reasons outlined earlier.

261. Having regard to the Lightwave report incorrectly date 24 November 2006 in attachment I to the payment schedule, I must comment that the photographs are not easy to evaluate. However, I am focussing currently on the trimming and epoxying of panels allegedly required. There is nothing in this report that identifies the extent of work necessary under this item. The report does refer to a general unsatisfactory quality of concrete face alongside the first photograph, but the extent is not provided.

262. The Westera report, which was attachment J in the payment schedule again did not refer specifically to trimming and epoxy work. Items that may have required this treatment, but it is not clear, may be Units 60/77 where panel type10 contains seriously bony concrete and requires a special repair procedure. However, it is not clear to what extent this is prevalent. There are other references to hairline cracks in some panels, but as a matter of commonsense it is unlikely that these would require this treatment.

263. On this basis, I am not satisfied that this repair is either necessary or substantiated by the expert reports and it is dismissed

264. Additional connections are merely an item in the QS' report. Lightwave's report does not detail these matters at all. However, there is extensive reference in Westera's report to missing connections, and I am on balance satisfied, without anything directly on point from the Claimant controverting this, that the sum of $4,500 may well be reasonable.

265. In relation to repair of connections, there is nothing in the Lightwave report on this point, and precious little from Westera. All I can glean from Westera is that site welded connections had not been treated and should be cold gal painted. Furthermore, there is a reference to balcony panel type 41, nut to top connection bolt being seriously damaged by an angle grinder. I am not prepared to accept that a figure of $4,000 is a reasonable figure for this work, and without any other figure in the material, I consider that the Respondent has not discharged its onus, and I reject this amount.

266. It appears that the basis of the hire of the scaffolding is to allow access to the panels for repair, and the QS has allowed 12 weeks for this work to be carried out. I am not satisfied that this is a reasonable length of time given that panel patching appears to be the longest duration repair activity, and two of the other items have dropped off the list. In the circumstances I would allow 6 weeks for hire of the scaffolding for the patching and additional connection work, which is slightly longer than the 2 men working on the patching. This translates to $3,000.00

267. I accept that a labourer would be needed to assist in the repair functions and will accept the figure of $1,620.00, but I am not prepared to consider the additional survey points because I have already found that this was the Respondent's responsibility.

268. As to the additional steel to ferrules, again the Lightwave report provides no assistance, but Westera refers to bolts instead of cast in ferrules, wrong size ferrules in the panel type 20 slab, and I am satisfied that $1,830 is a reasonable figure for this work.

269. In addition, given the extent of the repairs and the need to fix this steel, I am satisfied that the labour cost of $1,500 is a reasonable sum for this work.

Defect	**Amount**
Additional panel patching	$15,000
Trimming and epoxy panels	$0.00
Additional connections	$4,500
Repair connections	$0.00
Additional scaffold	$3,000
Labourer	$1,620
Additional survey points	$0.00
Additional steel to ferrules	$1,830
Labour to fix additional steel	$1,500
Total defect cost	**$13,950**

Summary of the adjudicated amount

270. I have gathered the above amounts into this table for ease of reference and calculation and this is provided below.

Item	**Amount decided**
Contract work	$88,109.18
Concrete pumping	$10,760.15
Amendments to panel heights	$4,576.50
Additional labour and crane hire	$25,505.00
Additional panel reinforcement	$0.00
Extra over prop hire	$15,351.00
Payment of retention	$55,449.40
Subtotal	**$199,751.23**
Less estimated cost of defects	$13,950
TOTAL	**$185,801.23**

271. **The adjudicated amount is therefore $185,801.23 excluding GST**

Due date for payment

272. s15(1)(a) provides the due date for payment under the contract, if the contract provides about the matter. Schedule 7 of the contract identifies payment to be made 15 business days after receipt of the payment claim. The payment claim was served on 5 April 2007, which means the due date for payment, subject to s15(1)(a), is therefore 1 May 2007.

273. There is nothing to suggest that the provision is void under s16 of the Act. ss67U or 67W of the *Queensland Building Services Authority Act 1991* deal with particular building contracts that must not allow payment of a progress payment later than 25 business days and 15 business days respectively, and the contract doe not exceed either of those two periods of time. I am satisfied that the 15 business day period from submission of the payment claim, governs the **due date for payment, which is therefore 1 May 2007**.

Entitlement to interest

274. s15(2)(a) applies because there is no rate of interest stipulated under the contract. The Supreme Court rate of 10% prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*, so I find interest at 10% in accordance with s15(2)(a) of the Act.

275. Neither party identifies the interest that is payable, but I must consider whether the contract is a *building contract* to which s67P of the QBSA Act applies as provided by s15(3) of the Act. This provision is in Part 4A of the QBSA Act to which I need to have regard according to s26(2)(a) of the Act. S67P of the QBSA Act 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.*

276. 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 a single detached dwelling or a duplex, and I find that the Tall Trees Aged Care Centre Project is neither. This means that it is not a *domestic building contract* and s67P of the BSAA may apply.

277. 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 QBSA 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 the Tall Trees Aged Care Centre Project is a *building* and I have already found that the contract is other than a *domestic building contract*.

278. 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 6.39% on 30 April 2007 (which is the last published date) for 90 day bank bills.

279. Accordingly, the interest rate that applies is 10% + 6.39% = $16.39%

280. **I find the rate of interest is 16.39% simple interest payable on the adjudication amount.**

Authorised Nominating Authority and Adjudicator's fees

281. s34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has succeeded in its claim to the extent of approximately 70%. A large part of the Respondent's defence was based on delays, set- off and lack of written variations, all of which I have rejected. However, time was devoted to evaluating the merits of the payment claim. It is likely that this dispute will continue in another arena, and this adjudication has at least distilled the issues.

282. On balance, I am inclined to preserve the status quo provided in ss34(3) and 35(3) that each party bear the ANA's fees and my fees equally, because the matter has been brought to a head, and both parties had parts of their case upheld in this adjudication.

283. Accordingly, I decide that both the ANA's fees and my fees should be shared equally.

Chris Lenz
Adjudicator

6 June 2007