Claimant: Service Stream Limited

Respondent: Ericsson Australia 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 $3,053,246.61 (excluding GST) decide that (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated is **$2,674,054.04** excluding GST.
2. The date on which the amount became payable is **30 June 2007.**
3. The applicable rate of interest payable on the adjudicated amount is **10%** 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

Table of Contents

Background

1. Service Stream Limited, previously known as Total Communications Infrastructure Ltd (referred to in this adjudication as the "Claimant") was subcontracted by Ericsson Australia Pty Ltd (referred to in this adjudication as the "Respondent") under contract no. READ-2005:114276 (the "contract") to undertake construction works in relation to the Installation Services ("the works") for the Telstra 3GSM 850 Queensland project (the "project") in various places in Queensland (the "sites").

2. The Claimant and Respondent, collectively known as the "parties, entered into the contract in writing on 9 December 2005".

3. Since that time the Claimant carried out works on the project and submitted progress claims.

4. The payment claim, the subject of this adjudication, (which comprised 13 claims) was submitted on 31 May 2007.

5. The Respondent provided a payment schedule on 12 June 2007 in response to the payment claim.

6. The Claimant made a written application for adjudication on 26 June 2007 (the "application"), and served the Respondent with the application on 28 June 2007. The Respondent provided an adjudication response on 5 July 2007 (the "response").

Appointment of Adjudicator

7. The Claimant applied in writing to the Institute of Arbitrators and Mediators Australia ("IAMA") on 26 June 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.

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

9. By letter dated 28 June 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 2 July 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.

10. I have no interest in the contract, nor am I 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.

11. 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

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

Claimant's Material

This **Adjudication Application** comprised the following in two lever arch folders:

File 1

1. Tab 1: The Claimant's submissions in support of the Adjudication Application (the "application submissions");
2. Tab 2: Application detailed submissions for sub-claim no.5 – Site Rectification Works;
3. Tab 3: Application detailed submissions for sub-claim no.6 – Site works completed as a result of PIM testing;
4. Tab 4: Application detailed submissions for sub-claim no.8 – Site integration and acceptance (25%) stage completed;
5. Tab 5: Application detailed submissions for sub-claim no.10 – Additional External works (primary sub-contractor Silcar);

File 2

6. Tab 6: Application detailed submissions for sub-claim no.11 – External; works and miscellaneous site related variations;
7. Tab 7: Application detailed submissions for sub-claim no.13 – Qld antenna Tilt adjustment works;
8. Tab 8: Application detailed submissions for sub-claim no.16 – HPA (high power amplifier) installation works;
9. Tab 9: Application detailed submissions for sub-claim no.17 – Site Fault Rectification work;
10. Tab 10: Application detailed submissions for sub-claim no.18 – Faults Claim No.3 (Site fault rectification work);
11. Tab 11: Payment Claim
12. Tab 12: Payment Schedule
13. Tab 13: Contract
14. Tab 14: Authorities
    1. *Alan Connolly & Co v Commercial Indemnity* [2005] NSWSC 339 ("Connolly")
    2. *GW Enterprises Pty Ltd v Xentex Industries Pty Ltd and Ors* [2006] QSC 399 ("Xentex")
    3. *JJ McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC ("Gall")
    4. *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd & Ors* [2004] NSWSC 258 ("Cardno")
    5. *Molloy v Liebe* (1910) LT 616 ("Molloy")
    6. *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 ("Multiplex")
    7. *Pavey & Mathews Pty Ltd v Paul* (1987) 162 CLR 221 ("Pavey")
    8. *Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd & Ors* [2006] NSWSC 205 ("Procorp")
    9. *State Rail Authority of NSW v Baulderstone Hornibrook Pty Ltd* (1989) BCL 17 ("Baulderstone")
    10. *Update Constructions Pty Ltd v Rozelle Childcare Centre* (1990) 20 NSWLR 251 ("Update")

Respondent's Material

The Respondent's **Adjudication Response** (the "response") in two folders comprising:

File 1

1. Tab 1: Background
2. Tab 2: Legal submissions
3. Tab 3: Alternative submissions – Claim No. 5 – Site Rectification works
4. Tab 4: Alternative submissions – Claim No. 6 – PIM claim
5. Tab 5: Alternative submissions – Claim No. 7 – PIM testing
6. Tab 6: Alternative submissions – Claim No. 8 – 25% acceptance payment
7. Tab 7: Alternative submissions – Claim No. 10 – Additional extra works
8. Tab 8: Alternative submissions – Claim No. 11 – External works and miscellaneous site variations
9. Tab 9: Alternative submissions – Claim No. 13 – Antenna tilts
10. Tab 10: Alternative submissions – Claim No. 16 – HPA works
11. Tab 11: Alternative submissions – Claim No. 17 – Site fault rectification
12. Tab 12: Alternative submissions – Claim No. 18 – Site fault rectification (Faults Claim No.3)
13. Tab 13: Advance payments
14. Tab 14: Payment schedule dated 12 June 2007

File 2

15. Tab 15: TCI Agreement
16. Tab 16: Authorities
    a. *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 ("Multiplex")
    b. *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd & Ors* [2004] NSWSC 258 ("Cardno")
    c. *Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing* [2004] NSWSC 823 ("Contrax")
    d. *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd* [2004] NSWSC 905 ("Holdmark")
    e. *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Another* (2004) 61 NSWLR 421 ("Brodyn")
    f. *Minister for Commerce (formerly Public Works and Services) v Contrax Plumbing* [2005] NSWCA 142 ("Contrax CA")
    g. *Alan Connolly & Co v Commercial Indemnity* [2005] NSWSC 339 ("Connolly")
    h. *Brookhollow Pty Ltd & R&R Consultants Pty Ltd* [2006] NSWSC 1 ("Brookhollow")
    i. *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 ("John Holland")

Jurisdiction

Construction contract

13. 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.

14. In Tab 13 of the application, the Claimant provided a copy of the contract, which was dated 9 December 2005, and this was the same date of the contract provided by the Respondent in Tab 15 of the response. Accordingly, I am satisfied that the date of the contract was 9 December 2005, which is after 1 October 2004.

15. I now turn to the issue of whether it was a *construction contract* for *construction work*.

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. I am satisfied that the contract is a *contract* within the definition of *construction contract*, as I have found the existence of a contract in which the Claimant agreed to provide services (identified in Schedule 1 of the contract) for the Respondent. However, it is necessary for me to determine whether the contract related to *construction work* or to supply related goods and services in relation to *construction work*.

18. 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;…*
> *(b) The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunications apparatus, aircraft runways....."*

19. The Project Scope of the contract in Schedule 1 provides for a swapping of the existing 5112 Telstra CDMA/GSM sites for 5112 850Mhz Ericsson Node B sites, I find that these works falls within the meaning of *"construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including telecommunications apparatus"*.

20. 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;*
> *ii) architectural, design, surveying or quantity surveying services relating to construction work;*
> *iii) building, engineering...services relating to construction work..."*

21. I find that the reference in Schedule 1 Scope of Works of the contract to design activity in paragraph 2.3 of the Scope of Works, which as a matter of commonsense I find in this context must be a reference to engineering design, falls within the meaning of *services* under s11(b)(iii) of the Act.

22. Furthermore, the reference in Schedule 1 Scope of Works of the contract to project management in paragraph 3, I find falls within the definition of *carry out construction work* in Schedule 2 of the Act as it encapsulates *administrative, management or supervisory services*, as defined in section (c) of the definition.

23. 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* and the *carrying out of construction work*. This means that it is a *construction contract* under the Act.

24. I also find from each claim document (apart from Claim No.7, which was the site of Terranora in NSW, and has not been considered further) that the sites identified in the material are throughout Queensland, which satisfies the jurisdiction issues.

25. There is nothing in the material to indicate that any of the exceptions contained within s3(2) and s3(3) of the Act apply to disqualify the *construction work* from the application of the Act; so I find that it is a matter which may be adjudicated, subject to the further essential requirements and one further jurisdictional point below.

Service of the payment claim

26. I find from the material that the payment claim was served on the respondent on 31 May 2007 because that is the date identified in both the application and in the response, and no issue has been taken with service of the payment claim and its date. Attached to the application submissions was an Allied Express Courier delivery docket dated 31 May 2007 which I find (without controverting material) was proof of service by courier delivery.

27. However, the Respondent has taken issue with the payment claim in arguing that there have been multiple payment claims, with the result that the Respondent says that the 13 invoices are not payment claims within s17 of the Act, and that I have no power to adjudicate these 13 claims. I will deal with these submissions under threshold adjudication issue below, but as far as service of the payment claim is concerned, I am satisfied that the service was effected in accordance with s17 of the Act.

28. I will deal with the threshold adjudication issue as a further jurisdictional point, because if I find that s17(5) of the Act has been breached, then I have nothing to adjudicate about.

Threshold adjudication issue – multiple payment claims contravening s17(5) of the Act

29. This matter was put in issue on page 2 of the payment schedule, and has been dealt with in submissions 11 through to 19 of the application, and submission 2.1 of the response.

30. The Claimant refers to the case of *Connolly* in support of its submission that multiple invoices served at the same time constituted one payment claim. Furthermore, the Claimant argued that there was only one payment schedule, demonstrating that the Respondent accepted the claim was one payment claim.

31. I am not prepared to find that the provision of one payment schedule demonstrated that the Respondent had accepted that the 13 claims were one payment claim. On page two of the payment schedule, the Respondent specifically disputed this and said that there was no payment claim upon which the Respondent could provide a payment schedule. The Respondent said that the Act was not enlivened because s17(5) prohibited the serving of more than one payment claim in relation to each reference date.

32. The Respondent argued that *Connolly* was wrongly decided and that *Holdmark* was authority that in the case of the serving of 4 payment claims, the Claimant was found to have contravened the equivalent of s17(5) of the Act in the service of the fourth payment claim because it was in respect of the same reference date as the third payment claim.

33. Given that the Respondent has raised the threshold issue of the contravention of s17(5) of the Act by serving multiple claims, I will deal with the *Holdmark* case, because the Respondent has used this case, and paragraph 40 in particular, as authority precluding me from adjudication.

34. Before considering *Holdmark* it is important to refer to the response submissions which state that the reference date for all the 13 invoices was 25 May 2007. The Claimant has made no submissions on the reference date point. I have not yet commenced adjudication of the matter, so for present purposes I will accept that the reference date for all invoices is 25 May 2007 so as to evaluate the Respondent's argument.

35. McDougall J in *Holdmark* was dealing with four claims that were lodged after the contract was terminated: see paragraphs 9 and 10 of *Holdmark*. The payment claims were served on 13 March 2004, 3 April 2004, 28 May 2004 and 27 July 2004 and all payment claims related to the same work because no further work was done under the contract after it was terminated: see paragraph 11 of Holdmark. These facts are distinguishable from this adjudication in which each claim is for separate work under the contract, all of which having been served on the 31 May 2007, not on successive dates as had occurred in *Holdmark*.

36. In *Holdmark*, McDougall J, at paragraph 40 disallowed the fourth payment claim, because (although he did not expressly refer to the third payment claim) he said it would have been in respect of the same reference date of 30 April 2004, which applied to the third payment claim of 28 May 2004. His Honour had found that there was only one reference date after a contract was terminated, which meant that the fourth payment claim was prohibited by the equivalent of s17(5) of the Act.

37. In paragraph 65 of *Brodyn* Hodgson J, with whom Mason P and Giles JA agreed, held that *Holdmark* was wrongly decided. The basis that it was wrongly decided appears to be that there can be more than one reference date after contract termination, and that is not in issue here. However, I do not consider that *Holdmark* is authority that constrains me from adjudicating this matter because it can be distinguished on the basis that:

    1. *Holdmark's* payment claims were between 3 weeks and 8 weeks apart, whereas the claims in this adjudication were all served on the same date;
    2. *Holdmark's* payment claims related to the same work, whereas in this adjudication, each claim is in relation to different work under the same contract.

38. In contrast, *Connolly*, a case that was decided after *Holdmark*, is directly on point as the facts are similar insofar as:
    1. The timing of each payment claim in *Connolly* was practically at the same time, having been sent by facsimile, whereas in this case they arrived at the Respondent by courier at the same time;
    2. Each payment claim in *Connolly* had the same reference date of 31 January 2005, and for present purposes (prior to adjudicating) I have accepted the Respondent's submissions that the invoices in this adjudication have the same reference date;
    3. Each payment claim in *Connolly* related to separate items of building work, which is precisely the same as in this adjudication.

39. The reason for the decision in *Connolly* was that the Court held that the mischief that the equivalent of s17(5) of the Act was seeking to avoid was the burden of time

imposed on a respondent by having to provide an adjudication response: see paragraph 21.

40. The ratio of *Connolly* is that a person receiving the payment claim, on receipt of all the documents, would be immediately aware of the total amount of the claim in the documents, and given that they related to different types of work, the three documents could be considered one payment claim, since it was clear to the recipient what was being claimed: see paragraph 23.

41. I agree with the reasoning of the learned Master as to the mischief that s17(5) of the Act is trying to avoid, and that in this case the Respondent would have been apprised of the full amount of the claims made by the Claimant on 31 May 2007, in order to provide the payment schedule. The payment schedule provided by the Respondent stated, on page 2 that it was a valuation of its contractual liability, but in the alternative (if it was found that all the Claimant's claims constituted a valid payment claim) then it was to be considered a payment schedule.

42. Whilst an adjudicator is not bound by a decision of a Supreme Court in another State, there would have to be good reason for me to not follow such a decision, if it is dealing with essentially the same legislation and the same issue as that confronting me. I have no reason to depart from the decision of *Connolly*, when its facts so closely mirror that of this adjudication. I therefore find that all 13 invoices (apart from invoice claim no.7 for a site in NSW) constitute one payment claim, and I have jurisdiction to adjudicate.

Scope of the adjudication

43. 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.

44. s26(2) of the Act restricts the matters that I may consider in determining an adjudication application. s26(2) of the Act provides:

    "In deciding an adjudication application, the adjudicator is to consider the following matters only:

    (a) the provisions of this Act, and to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;
    (b) the provisions of the construction contract from which the application arose;
    (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
    (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
    (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

45. I did not conduct any inspection of the project.

46. 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

47. The construction contract was a fairly comprehensive document with embedded documents contained within it, and I asked each of the parties to provide me with a soft copy of the contract by 4pm on Wednesday 11 July 2007 because it appeared that the hard copies provided did not provide all the documents that could be relevant to the adjudication. For example, it did not appear that I was given a document "3GSM 850 Deliverables", and it was my view that this document may have a bearing on the adjudication decision.

48. I also asked both parties to provide me with submissions, by 4pm on Wednesday 11 July 2007, if they were of the view that the document was not relevant to the adjudication. I received a soft copy from the Respondent before 4pm, but not from the Claimant, and neither party provided any submissions by 4pm on that day. Accordingly, I have had regard to the soft copy as well as the hard copies provided by the parties.

Entitlement and the reference date

49. 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."*

50. 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…"*

51. Clause 9.4 of the contract states that:
> *"On the 25th of each month the Contractor is to submit a Tax invoice by state in respect of all completed works for the month..."*

52. Accordingly, I find that the reference date for work carried out in a month is the 25th of that month. The response essentially argued that the Claimant's claims in this adjudication were not for work completed in May 2007, but for work carried out at various earlier times, and some claims did not identify when the work was carried out.

53. The Respondent submitted that the reference date for the invoices was 25 May 2007 because the claims were all dated 30 May 2007. Having regard to the material in which it appears that site acceptance was managed by "Site Handler" on a cumulative basis, I find that the reference date for this payment claim was 25 May 2007.

Amount under the contract

54. The payment claim is divided into 13 separate claims with separate submissions relating to each claim, so it is logical to consider each claim separately in this adjudication.

55. There is a contest between the parties as to what matters I may consider in the adjudication because the Claimant argues in paragraphs 20 to 25 of the application submissions that the Respondent is limited to the reasons provided in the payment schedule. The Respondent argues in paragraph 2.2 of the response that it was not required to fully particularise all of the reasons provided in the payment schedule, and that it is entitled to expand upon those reasons in the response. Both parties provided authorities to support their argument.

56. I will carefully consider the contending arguments on this issue as I review each claim to ensure that the Claimant is not *ambushed* [e.g. see Claim 10 paragraph (gg) application submissions] by fresh reasons, whilst being mindful of the Respondent's argument that the response may be able to further particularise reasons that have already been identified in the payment schedule.

57. In carrying out the review, as required by s26(2)(c) and (d), I have focussed primarily on the payment claim and payment schedule, with further regard to the respective submissions in the application and response insofar only as they are properly made in support of the payment claim and payment schedule respectively.

Claim No. 5 - Site rectification works for $286,273.88

58. This claim relates to site rectification works according to Variation No. 6 for 146 sites listed in a spreadsheet. The Claimant stated that the Respondent's site controller has accepted these sites. In the application submissions (e) & (f) the Claimant referred to the Respondent's requirement to use the Internet based project tracking tool "Site Handler", which demonstrated at any point in time the relevant stages relating to the progress and acceptance of the works.

59. I accept that in the circumstances of a national "rollout" of a new telecommunications network that as a matter of commonsense a project tracking tool would be required to keep abreast of the progress of the work. Accordingly, I am prepared to find that Site Handler provides data in relation to stage completion, and that it is a tool that was provided by the Respondent. The response identified Site Handler as a management tool, so this point is conceded by the Respondent.

60. The Claimant says that Site Handler's description of the various stages are as follows:

    a) Stage 12.1 is acceptance by Ericsson Site Controller;
    b) Stage 12.3 is input to Dbors by Ericsson;
    c) Stage 12.7 is acceptance by Telstra,

    and the Respondent, in paragraph 3.2 of the response, agreed that the reference to these steps was a convenient method to decide whether or not a site has reached a stage at which payment was due to the Claimant.

61. Accordingly I find that Site Handler correctly identified the stages for all the sites in this claim. The claim for 146 sites listed in the spreadsheet was supported by Site Handler for sites to stage 12.1, if one accepts the Claimant's calculation that 210 sites in Queensland were at stage 12.1, and that 64 sites in Queensland were the

subject of separate legal proceedings, and not part of this adjudication. The difference between 210 and 64 is 146, which is the amount of sites claimed in this claim.

62. I am satisfied that the correct number of sites have been claimed in this adjudication for sites up to stage 12.1, and that it is the Respondent's own software that provides this number. The Respondent did not take issue with this number of sites in the fifth paragraph on page 2 of the response. It merely argued that the Claimant had not demonstrated that the rectification work was complete for those 146 sites by reference to Site Handler.

63. I understand from the system description of Site Handler provided in the application that, *"Site Handler will give the project participants access to a common tool for site information exchange, independently of what company they work for."*

64. To my mind, as a matter of logic, it is a management system that is required to identify construction progress for a comprehensive roll-out of a system of this nature, and that Site Handler did precisely that. I cannot accept the Respondent's response submission that the Claimant needed to assert that these sites were complete, as that is what Site Handler demonstrates. I also cannot accept the response submission that because Site Handler was not referred to in the contract documents in relation to payment, that somehow a further assertion was required from the Claimant.

65. Accordingly, I am satisfied that the Claimant has discharged its onus about the number of sites completed to the various stages. The actual number for which the Claimant is entitled to be paid will be dependent on the contractual entitlement to which I must first have regard.

66. The price claimed for each site is $1960.78 (excluding GST), and the payment schedule accepts this rate payable for each site, so I find that this is the appropriate rate.

67. The claimed basis of entitlement is in accordance with an unexecuted variation number 6. Although the payment schedule argued that the variation was not binding, the Respondent accepted that Claim 5 is a variation to the contract, so I find that the Claimant has an entitlement to make this variation claim.

68. The payment schedule, as I have said, accepts entitlement and the claimed rates, but disagreed with the quantities. The schedule lists the Respondent's own assessment of quantities in Attachment 1. This attachment lists 80 sites that the Respondent conceded had been accepted, but apart from 23 sites that were listed in the claim, the other sites have no relevance to this adjudication because they identified sites that were not claimed in Claim No.5.

69. The words used in the payment schedule to dispute the quantities were:

> *"**Quantities issues***
> *Ericsson has assessed and disagrees with the quantities claimed by TCI – Ericsson's assessment of the quantities (and valuation based on the rate referred to above) is attached to this document as Attachment 1.*
> ***Valuation by Ericsson $156,862.40**"*

70. There is nothing further provided in the schedule giving reasons for not paying this claim. I refer to the Respondent's response submission that it does not have to fully particularise all of the reasons in the payment schedule, and that it can

expand upon those reasons in the response. However, I draw a distinction between more fully particularising the reasons that have been provided in the payment schedule, and providing essentially fresh reasons that were not in the payment schedule.

71. In this claim I find that all the Respondent has done is listed what it says are the sites that it is prepared to pay for, but it does not say why it will not pay for the other sites. With respect, it adds some confusion by listing sites that were not claimed, which it has attempted to cure in the adjudication response, by stating that these sites are not relevant to the adjudication.

72. The Respondent did not state in the payment schedule that the sites were not considered completed because documentation had not been provided, or that Telstra had to approve the sites before payment could be made. I find that it is not possible for the Respondent to provide further particulars in the response, ostensibly to expand upon the payment schedule reasons, because I find that no such reasons were provided in the schedule.

73. As Palmer J said in paragraph 70 of *Multiplex*:

> *"For a respondent to merely state in its payment schedule that a claim is rejected is no more informative than to say merely that payment of a claim is "withheld": the result is stated but not the reasons arriving at the result. Section 14(3) requires that reasons for withholding payment of a claim be indicated in the payment schedule with sufficient particularity to enable the claimant to understand, at least in broad outline, what is the issue between it and the respondent. This understanding is necessary so that the claimant may decide whether to pursue the claim and may know what is the nature of the respondent's case which it will have to meet if it decides to pursue the claim by referring it to adjudication."*

74. For the Respondent to merely provide a list of sites that it was prepared to pay for, most of which had not been claimed, without any further reasons, to my mind falls within the concept of the unsatisfactory broad "*withheld*" concept in *Multiplex*. I find that it could not have been clear to the Claimant what case it had to meet in the adjudication. The Claimant provided Site Handler to further demonstrate that the claimed sites had reached Stage 12.1 since the payment claim had said that the sites had been accepted by Ericsson site controller.

75. The Respondent then challenged these submissions in the response by saying that the payment schedule had applied Stage 12.7 as the necessary trigger for payment to the Claimant. I find that there were no words in the payment schedule to explain that reason at all. The response then reviewed the Stage 12.7 approach, and stated that the Respondent was prepared to accept Stage 12.3 as the trigger for payment and that the correct amount to be paid under this claim was $123,529.14.

76. With respect, I cannot accept that such an approach taken by the Respondent for this claim is anything other than an *ambush*, which Palmer J in *Multiplex* at paragraph 67 said was unacceptable. His Honour with reference to the equivalent provisions of s17(1) and (2), s18(1), (2) and (3) and s24(4) of the Act said:

> *"The evident purpose of s13(1) and (2), s14(1), (2) and (3) and s20(2B) is to require the parties to define clearly, expressly, and as early as possible what are the issues in dispute between them; the issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s22. It*

would be entirely inimical to the quick and efficient adjudication of disputes which the schedule of the Act envisages if a respondent were able to reject a payment claim, serve a payment schedule, which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in the adjudication response that the reasons for the rejection were founded upon a certain construction of the contractual terms or upon a variety of calculations, valuations and assessments said to be made in accordance with the contractual terms but which the claimant had no prior opportunity of checking or disputing. In my opinion, the express words of s14(3) and s20(2B) are designed to prevent this from happening."

77. S24(4) of the Act prohibits fresh reasons from being advanced in the response, and in my opinion the Respondent's arguments about the specific stages that needed to be reached to trigger payment to the Claimant are fresh reasons because they were not advanced in any way in the payment schedule. I cannot accept that these are submissions that are properly made in support of the payment schedule, as required by s26(2)(d) of the Act.

78. Further support for this approach can be found in the judgement of Lyons J in the Queensland case of Xentex at paragraph 37 who said:

"Accordingly, it is imperative that any reasons for withholding payment must be raised in the payment schedule or they cannot be raised at all."

I am therefore unable under the Act, as confirmed by the above authorities, to consider these fresh reasons.

79. Accordingly, I find that the Claimant has discharged its onus for its claim of $286,273.88 because it:

- has demonstrated its entitlement under the contract for this work (conceded by the Respondent on page 8 of the payment schedule);
- has satisfied me that the rate of $1,960.78 per site was agreed by the parties (conceded by the Respondent on page 8 of the payment schedule);
- has demonstrated the number of sites for payment as 146, being 210 sites less 64 sites, the subject of other legal proceedings (not disputed by the Respondent in the payment schedule, or in the response);
- has substantiated its claim by providing the data from Site Handler (the Respondent's project tracking system) to demonstrate the number of sites completed to the satisfaction of the Respondent's site controller;
- correctly calculated the amount of $1960.78 x 146 sites to be $286,273.88.

80. I take $286,273.88 to the summary table under adjudicated amount below.

Claim No. 6 – Site works after PIM testing – revised claim of $405,000.00

81. The Claimant withdrew its claim for sites in Mackay and Rainbow Beach, which reduced the claim to $405,000.00.

82. The payment schedule on pages 8 and 9 identified that there was no dispute about the Claimant's entitlement and the rates applied but under the heading of quantities said:

"***Quantities issues***

> *Ericsson has assessed and disagrees with the quantities claimed by TCI – Ericsson's assessment of the quantities (and valuation based on the rate referred to above) is attached to this document as Attachment 2.*
> ***Valuation by Ericsson $381,420***"

83. The Claimant is correct in asserting that the Respondent only challenged payment for 12 sites. Before considering these sites, I confirm that the admission by the Respondent about site 427 is disregarded because it was the site in NSW that I have said is not part of the adjudication because it is not in Queensland. The Claimant did not pursue this site in the adjudication, although it was Claim No.7 in the payment claim.

84. In the "Clarify??" Column of Attachment 2 in the payment schedule, sites 8440, 607, 16513, 658, 256, 561, 685, 651, and 9812 merely had the words "Clarify??" in that column without any further detail as to the basis of non payment. Sites 241, 799 and 19203 had "Who made tails?" in the Clarify?? Column, but again there were no further details as to the basis of non payment.

85. I find that insufficient reasons were provided in the payment schedule for the Claimant to know why it was not being paid. In any event, despite the payment schedule challenging the claim, the Respondent in the response agreed with the revised claim, so I take $405,000.00 to the summary table under adjudicated amount below.

Claim 7 – Not advanced in the application and ignored by me as work in NSW

Claim 8 – Site integration and acceptance for $904,509.77

86. This claim relates to the same sites as were claimed in Claim No.5 and simply claimed for site integration and acceptance (25%) stage completed for sites in the attached spreadsheet.

87. In (a) through to (f) of the application submissions, the Claimant set out its entitlement by reference to Schedule 1 Scope of Work, clause 9.4 of the contract that called up Schedule 2 for the milestone payments and said that variations 1 to 4 facilitated a pricing mechanism that related to each site. Essentially the claim relates to the final 25% of milestone payment no.3 identified in Schedule 2 of the contract for payment.

88. The Respondent did not dispute the Claimant's submissions (a) to (f) in the response, so I am satisfied that the Claimant has demonstrated its entitlement to its claim.

89. The Claimant's submissions (g) through to (j) regarding how the quantum was derived was accepted by the Respondent in the response, save for the fact that the Respondent said it had the original quotations which sometimes had different amounts than those put forward by the Claimant. The Respondent provided copies of the original quotations and a schedule identifying all amounts it said were then due to the Claimant. This amount was $353,792.54, which is less than the schedule amount of $472,259.01

90. Before turning to the response in more detail, it is important to note that in the payment schedule the Respondent, as it had done in Claim No.5, allowed claims for sites that were not in the payment claim in deriving its scheduled amount.

91. Those sites totalling 57, as I have said before, are irrelevant to this adjudication and reference to them and the amounts ostensibly payable for these sites, are not considered further in this adjudication.

92. This leaves 23 sites which the Respondent conceded were properly claimed, and where the Respondent was clearly able to understand the claim. The other 123 sites in the payment claim, were not responded to at all in the payment schedule. It is not clear why these sites were not referred to, nor why incorrect sites were identified, but what is clear is that there are no reasons given for not paying for these 123 sites, or explaining what should be paid for those sites and why.

93. The fact of their absence, demonstrated that the Respondent was not going to pay for these sites; but *at best* all that points to is that the amount is *withheld* with no other reason. I have already found that I am unable to consider any reasons subsequently put forward in the response because there were no reasons in the payment schedule, which is in contravention of s24(4) of the Act. Therefore, however plausible the arguments that the Respondent may launch in the response about which I make no finding, I am simply unable to consider them and any material provided in support of them.

94. I am left with a dilemma about whether to consider the copies of the original quotations provided in Attachment B in the response to Claim No.8 because the Respondent argues these identify the correct amounts that are payable. I have decided to ignore these documents, because to do so, would in my view be considering a submission that is not properly made in support of the payment schedule, which it outside what I may consider under s26(2) of the Act.

95. I am therefore satisfied that the Claimant has satisfied its onus in relation to entitlement and quantum and that it has substantiated its claim by reference to Site Handler. Accordingly, I am satisfied that $904,509.77 is to be taken to the summary under adjudicated amount below

Claim 9 – Purchase of SPC bars for $44,993.75

96. The Claimant's claim for this work was accepted by the Respondent in paragraph 4.4 of the payment schedule so the amount of $44,993.75 is taken to the summary table under adjudicated amount below.

Claim 10 – Additional extra works for $314,637.48

97. The payment claim relating to 48 sites was very brief in attaching a spreadsheet to a document that stated:

> *"Additional external works carried out on sites where external primary contractor was Silcar as per attached spreadsheet."*

98. The attached spreadsheet had 8 columns, viz.:
    - site number;
    - site name;
    - Ext works Not Silcar;
    - Cherry Picker/Cranage;
    - Steelwork;
    - Total External Works cost excluding Silcar;
    - 15% mark-up;
    - Amount to charge.

99. There were amounts in the *Ext Works not Silcar* column, nothing in the *Cherry Picker/Cranage* column, and for 10 sites there was an amount in the *Steelwork* column.

100. The payment schedule challenged entitlement, rates and quantities in some detail. As to entitlement, the payment schedule stated that:

> *"**Entitlement issues***
> *TCI was responsible for the management of the work performed by Silcar and in those circumstances Ericsson has no liability for the costs of repairing any defective work resulting from TCI's failure to manage the Services performed by Silcar*
>
> ***Rates issues***
> *Ericsson understands from the presentation of TCI's claim that there are no specific rates applied by TCI for the purposes of calculating the amount that it claims in its Claim No.10. Moreover, even if Ericsson is found to be liable for defective work carried out by Silcar (which Ericsson denies); there is nothing in the information provided by TCI that would allow Ericsson to assess whether the amount claimed:*
> - *is correctly calculated;*
> - *reasonable; and/or*
> - *resulting solely from acts, defaults or omissions of Silcar in performing the Services on TCI's sites.*
>
> ***Quantities issues***
> *Ericsson refers to and repeats the comments it made above on the rates issues.*
>
> ***Valuation by Ericsson $nil**"*

101. In the application, the Claimant argued essentially that:
- the parties had agreed Silcar could be engaged to provide rigging services, with the additional costs for engaging Silcar to be paid by the Respondent;
- Silcar managed the sites inefficiently and the Claimant had to engage other contractors to complete the works;
- the Respondent agreed to pay Silcar directly and to pay the Claimant the cost of having other contractors to complete the external works to Silcar sites;
- the costs of these additional works were on an open book basis for which a 15% mark-up for overheads and management was allowed;
- if it was found that no agreement was reached, then the Claimant was entitled to recover the costs of extra work on the basis that the Respondent would otherwise be unjustly enriched in accordance with the principle of *Pavey & Mathews v Paul* (1987) 162 CLR 221 and could claim as a quantum meruit for the work;
- *Update Constructions Pty Ltd v Rozelle Childcare Centre* was authority to allow a claim for variation work done outside the contract on a restitutionary basis based on an implied contract.

102. In the response, the Respondent essentially argued that:
- The Claimant was unable to perform the required external works to the Silcar sites in the time required under the contract;
- It was therefore agreed that Silcar would assist the Claimant in performing works on these sites at the Claimant's direction;

- The Claimant had agreed to manage Silcar and charge the Respondent directly for an agreed project management fee in relation to the Silcar sites;
- Subsequently the parties agreed that the Respondent would pay Silcar direct;
- The works at these sites had not been completed and the Claimant had failed to offer any of these sites for approval by the Respondent;
- The Respondent had paid the Claimant for the management of these sites;
- The Claimant was responsible to complete these sites as they formed part of the contract, and they were currently incomplete and had not been offered for acceptance;
- The Claimant had made unsubstantiated assertions regarding:
  - the state of varied contractual relations between the parties;
  - payment for substantial claims;
  - the Respondent had been advised that prior to the works commencing, that the Claimant was incurring additional costs;
- The only document provided by the Claimant was an email from Dan Birmingham, which did not support the wide contractual relations asserted, and confined any agreement to a 2 week period, whereas the invoices supplied by the Claimant were over a much longer period of time, and largely predated the Birmingham email.

103. The substantiating documents provided by the Claimant included the email from Dan Birmingham, Provisional Sum administration document from the Respondent dated 4 August 2006, Variation No.3, and various invoices and other documents relating to particular sites. It is of interest to note that the first few invoices provided (not in the separate tabs) related to sites 713, 791, 273, 310, Normanby Fiveways, 382, 413 and 1011. Only site 713 was a site relevant to this claim, so the other documents were irrelevant.

104. I find that the email from Mr. Birmingham related to 2 teams of Silcar riggers for 2 weeks and that reasonable costs associated with mobilising Silcar would be paid. I do not find that this document is evidence that the Respondent agreed to any period longer than the 2 weeks identified, nor is it evidence that the Respondent agreed to pay for other contractors to complete the Silcar sites. However, I find that it is some evidence of the Silcar variation, particularly given the Respondent's concession about this variation.

105. It is important to the parties to be reminded that the Claimant bears both the legal and evidentiary onus in relation to its claim, and it is only if the evidentiary onus is discharged, then is the Respondent called upon to discharge its evidentiary onus in relation to its disputing assertions.

106. In relation to the Claimant's claim, it is not clear at all why Variation No.3 in its entirety is provided to me. It comprised 39 pages of detailed requirements, including 5 pages of spreadsheets, but did not appear to relate to this specific alleged variation regarding the Silcar sites. I have not been directed to any part of that variation for substantiation of the Claimant's claim. I therefore reject Variation No. 3 as evidence of substantiation.

107. The provisional sum administration document appeared to be provided to demonstrate that 15% mark-up had been agreed for this Silcar variation. I cannot find such substantiation as relating to the Silcar variation, as it appears to me that the Respondent wanted a consistent approach to the calculation of provisional sums, but there is nothing to suggest that the Claimant had provided a provisional sum for the Silcar variation. In addition, this document contemplated that further

discussions between the parties were required for there to be a resolution of the calculation of provisional sum items. I therefore reject the provisional sum administration document as substantiating this claim.

108. Apart from the invoices and the TCI invoice Support Form and other documents relating to the sites, there is nothing else provided to demonstrate that the mobilisation costs of Silcar would be beyond the 2 week period, and more importantly that the Respondent agreed to pay for other contractors to do the external works to the Silcar sites.

109. With respect, this is fatal to the Claimant's claim, since it must demonstrate that this work was carried out under the contract, as varied by the parties. The only material before me to satisfy this Silcar variation, is for the 2 week period. More importantly, if the sites had been completed, which the Respondent denies, I would have expected that Site Handler would have been provided to demonstrate that the site had been accepted by the Respondent. However, no such documents were provided.

110. The Claimant argues in the alternative that it is possible for it to be compensated on a restitutionary basis under quantum meruit. With respect, I cannot agree. Deane J in *Pavey* at paragraph 19 on page 32 of the extract provided by the Claimant, said:

> *"The common indebitatus count for compensation does not involve enforcing an agreement which is unenforceable by the builder under s.45 of the Act any more than it involves bringing an action upon an agreement upon which the bringing of an action is precluded by the Statute of Frauds. As has been seen, the basis of such an action lies not in agreement but in restitution and the claim in restitution involves not enforcing the agreement but recovering compensation on the basis that the agreement is unenforceable."*

111. Given this High Court authority it is not possible from me to allow the claim in quantum meruit, as I am only entitled <u>to allow payment under the contract</u> and quantum meruit is a restitutionary remedy that the Claimant must seek elsewhere.

112. However, the Claimant also submitted that there was an implied contract to pay for extra works based on *Update* and *Liebe.* However, as identified in those cases, it is necessary for the Claimant to demonstrate that I can draw proper inferences from the facts in relation to the Respondent:

1. having actual knowledge of the extra works as they were being done;
2. knowing the works were outside the contract;
3. knowing the Claimant expected to be paid for the work as extras.

113. From the material provided to me I am unable to find that the Respondent had actual knowledge of the works as they were being done, and that they were outside the contract. Whilst it is open to infer that the Respondent knew extra works were being done, it has not been demonstrated that the Respondent knew that the extra works <u>were outside the contract</u>. In fact it appears to be that the opposite is true, as the evidence (and the concessions in the Response) points to the Silcar variation (however unclear its terms on the material before me) being applicable, and this puts the work inside the contract.

114. Whilst it is open for me to conclude that the Respondent knew that the Claimant expected to be paid for the work, it is equivocal because the expectation to be paid could equally arise under the variation to the contract. I am therefore unable

to imply a term that the Claimant be paid a reasonable sum for the work that it has carried out.

115. Accordingly, I reject this claim as I am not satisfied on the material before me that there is entitlement, so I take the figure of $0.00 to the summary table under adjudicated amount below.

Claim 11 – Ext works and miscellaneous for revised amount $147,193

116. This is a claim in which there is a significant contest, and each contested site will need to be looked for entitlement, quantum and substantiation. However, the Respondent has revised its payment schedule amount of $72,560.08 upwards to $94,780.77 in the response. In addition a number of the claim items were withdrawn by the Claimant after it had received the payment schedule, so it is a document that will need careful scrutiny.

117. For the purposes of this claim I have taken the reference in the payment schedule to the abbreviation SOR to mean *Schedule of Rates* which I find were in the Claimant's quote in Schedule 2, part 3 which listed all the prices for various numbered deliverables.

118. The payment claim had a 6 page spreadsheet attached to it in which it detailed extra works and variations to 46 various sites in which there were often more than one variation claimed per site. The Respondent took issue with each claimed item by providing handwritten comments on the claim. I am satisfied that the handwritten comments, albeit cryptic, were in general sufficiently cogent to be considered reasons for non payment. Overall, I am therefore prepared to consider the response submissions providing they support the reasons identified in the payment schedule.

119. However, I do not consider "copy of invoice required" or "more information required" or similar words as reasons. Nevertheless, generally the Claimant responded to the request and stated that it provided some documents. Unfortunately, those documents were not provided in the application so I have a more difficult job in gleaning the merits of each claim. Accordingly, I will consider the information properly available in relation to each site on its merits, being continually mindful of the fact that the Respondent is unable to provide new reasons in the response. This has been a slow process where there has often been only a few hundred dollars in issue. However, the parties have required me to adjudicate, and the merits of each claim need to be scrutinised, whatever the quantum involved.

120. As I have said, the consequence of the handwritten notes in the payment schedule was that the Claimant stated that it had provided further information to deal with those sites rejected or which needed further information, and some of this information must have satisfied the Respondent because the amount in dispute reduced when the response was delivered.

121. Discussion on each of those disputed sites now follows because each site has its own details that need evaluation, and I have created a table for ease of reference for all sites, including those that are accepted, but not those that have been withdrawn; so that the correct amount can be taken to the summary table in adjudicated amount below. This table is Annexure A below.

122. In relation to site 1 and 42, the claim was for $3,105.00. The payment schedule requested more information, which I do not find to be a reason.

However, in the application the Claimant stated that it attached an invoice, and the response identified an amount of $2,000 with Attachment B as a document demonstrating that the amount for Structel was only $2,000 and not $3,105.00. This raises a difficult question as to what amount should be allowed after the invoice from Sructel was provided. I find that the invoices had not previously been provided otherwise the request would have not been made by the Respondent.

123. On balance, I am prepared to find that the invoices were needed to further substantiate the claim, as the Respondent did not argue that the claim did not satisfy s17(2) of the Act. I was not provided with the invoices, but it appears that the Claimant had agreed to a rate of $2,000 for Structel as identified in its quote dated 14 September 2006 (Attachment B of the response). Given that the Claimant has the onus of proving its claim, I am prepared to find that Structel should have been for $2,000 and not $3,105.00 as it had claimed. I am not relying upon Attachment B to allow a new reason from the Respondent, but I am relying upon it to discharge the Claimant's onus, which it would not otherwise have done, since I did not have the Structel invoices to review.

124. As to site 8, it appears that some changes occurred to the feeder numbers, but the Respondent argued that this work was in the quote. The quote and a Change request form was allegedly provided, but not in the application in support of the payment claim. The response argued that only a TCI invoice Support Form had been provided because there was no further information supplied. Given that I do not have a copy of the quote and the change order, I do not find that the Claimant has discharged its evidentiary onus and I find $0 payable.

125. As to site 9, the Claimant claimed that a cherry picker had to revisit after birds had eaten the first set of cables. The payment schedule stated that this work was in the quote and this was the reason for non payment. I must consider the contract, and having regard to the Scope of Works section **2.2 Prices** in the fourth paragraph it states:

> *"Return Visit shall be provided for instances where approval is given due to faulty equipment. Such approval will be sought from and given by the Ericsson Regional Program Manager. This is to be priced on a per event basis."*

126. Furthermore, Attachment E of the response to which I may have regard as supporting the reason for non payment, identified a flat rate for cherry picker of $3075 for all external sites, so I am not satisfied the Claimant has discharged its evidentiary onus to demonstrate that approval for the return visit had been sought, and that it was entitled to payment for another visit because of the contents of Attachment E, and I find that $0 is payable.

127. With reference to site 19, two of the four claims were rejected on the basis that they were in the original rates and were duplicate claims. These claims related to overtime on 5th and 6th August 2006 amounting to $202.50 and delay on 5 August 2006 relating to installation of feeders amounting to $2160.00. The Claimant apparently attached a quotation stating that only business hours were in the quote and there were no overtime allowances. They were not in the application.

128. As to the first disputed site 19 claim; the Respondent's response stated that no further information apart from the TCI Invoice Support Form was provided by the Claimant, and that there was no change request from the Respondent. I have no supporting documentation from the Claimant to demonstrate these additional hours were worked. Given the history of this claim, the withdrawal of certain

claims and the increase in the amount that the Respondent was prepared to pay, it must be clearly demonstrated that the Claimant is entitled to claim, and I am not satisfied that this $202.50 claim is justified and it is rejected.

129. Furthermore, as to the second disputed site 19 claim, the alleged delay due to labels being wrong has also not been substantiated so I reject this claim for the same reason.

130. With reference to the Sproule Castle claims for site 50, the first two claims for $157.50 and $1822.50 were challenged by the Respondent asking for more information, which I have already said is not a reason for non payment. The Claimant supplied the subcontractor's summary, but these were not in the application, and I have nothing further to satisfy me that the claims were substantiated, and I reject them both. In doing so I have not had regard to the response submissions for these two claims.

131. With reference to the second Sproule Castle claims for site 50, the Respondent argued that the reason for non payment is that the costs were already in the quote, and I do not have any substantiating documentation from the Claimant to scrutinise that point, so I am again not satisfied that the Claimant has made out its claim, and I also reject these two claims.

132. As to the Mount Oscar site 52, the Claimant claimed for external plant installation as part of RET program of $675 and mobilisation for external works as part of RET program of $90. The Respondent argued that it rejected the claims as they were on a separate claim, and in the application the Claimant then said they were not claimed as part of the RET program and attached the invoices which were not provided in the application. I am not satisfied with these claims, which originally were claimed as part of the RET program, and then surprisingly were then not claimed as part of the RET program in the application. I do not have the invoices to scrutinise, and there is some confusion about these claims, so they are rejected as I am not satisfied that the Claimant discharged its onus.

133. As to the Mt. Glorious site 90 claim regarding the delay of $112.50 for a wrong key, it is not clear why this is the Respondent's responsibility if, as I find, the Respondent had supplied all keys up front to the Claimant. As a matter of common sense, the administration of allocation of keys would then be the Claimant's responsibility, and the Claimant would need to provide cogent evidence that this wrong key was abnormally the responsibility of the Respondent, and I cannot find any such evidence. Accordingly, the claim is rejected.

134. In relation to Belmont site 98 which was a claim for mobilisation for external works under provisional sum 8b, and the Respondent's rejection was that it was part of a separate claim. In this case I have had to carefully consider what the Respondent is saying as it is my view that this challenge means the Claimant is to demonstrate that the claim was not part of a separate claim. It does not appear that the Respondent has challenged that the work was done or that the amount claimed is wrong.

135. The Claimant then attached copies of invoices to demonstrate that these works were not part of a separate claim. I do not have these invoices, but the response argues that it cannot find any evidence that these works were completed on this date or at all. This is a separate reason to my mind and must be rejected. However, on balance I am satisfied that whatever documents were provided by the Claimant, they must have demonstrated to the Respondent that this claim was not part of a separate claim, thus satisfying its evidentiary onus in this context. Accordingly, although I have not seen these documents, I am

satisfied that the Claimant met the Respondent's payment schedule challenge, which did not include a challenge to the fact that the work was carried out and the value thereof. Accordingly, I am satisfied that this claim is made out.

136. In relation to Mount Boulder site 107 I am again prepared to find that the Claimant has made out its claims for essentially the same reasons as for the Belmont site. The basis of the Respondent's rejection was that the claim was part of the equivalence program. This was the challenge that the Claimant had to meet, and although I do not have a copy of the Claim 14 that the Claimant attached, it stated that these claims were not part of the equivalence program costs. The onus then shifted to the Respondent, which in the response then argued that these works should be invoiced separately under another purchase order. I find that this is another new reason for denying these claims, and I cannot have regard to this reason. I am therefore satisfied as a matter of logic that the Claimant had demonstrated to the Respondent that its claims were not part of the equivalence program claim; otherwise the Respondent would not have changed tack and argued a fresh reason for rejection. The Respondent did not reject the quantum and the fact that the work was carried out, so if I am satisfied that the Claimant has demonstrated that the work was not part of the claims for the equivalence program, then these claims are made out. I therefore accept these claims.

137. In relation to the Toowong Line depot site 155 claims, the payment schedule identified that the agreed rates were already in the quote so that they were rejected. The first claim related to a provisional sum PS08a and related to supply of steel and headframe for $2070.90 and the second related to transport costs for the deliverable M224 for $243.00. The Claimant attached the quote showing that the steel was not included, but this quote was not in the application. I am entitled to consider the response submissions as they support the reason for non payment, and Attachment H provides the quote for Toowong site 155.

138. In reviewing the quote I note that item 8a refers to, *"D&C a/w with extensive structural upgrades to existing site structures/infrastructure such as towers, masts poles and buildings."* I am satisfied that this is the correct item for upgrades to the structure. There is no item identified in deliverable 224 for transport. I find that this is a design and construct contract, and the Claimant's quote identified what was required to commission this site into the network, and it had included an additional antenna head frame as pointed out by the Respondent.

139. These are variation claims and the Respondent's challenge is that the works were already in the quote. In paragraph 2.2 of the Scope of Works in the contract there is reference to the prices applicable and in the seventh paragraph it states:

> *"The Price Schedule will form a key component of the basis for allocating work to the Contractor and the price for the works will remain fixed for the defined scope of works. Variations to the agreed price will not be allowed unless there is a significant change of scope or delays or errors caused by Ericsson or its Customer. The Contractor must advise the Ericsson Regional Program Manager of variations verbally followed by written application for approval to the Ericsson Regional Program Manager for turnaround (verbal and written advice) within 24Hrs."*

140. It appears that this structural steel was additional to the quote as a variation, but I am not satisfied that the Claimant followed the agreed protocol identified above. The Claimant has not put forward any submissions that it is entitled to a variation as a matter of law notwithstanding it did not follow this protocol, so I must reject this claim, because variations to the agreed price will not be allowed unless

there is a significant change of scope or delays or errors caused by the Respondent AND the Respondent's Regional Program Manager is advised.

141. I am obliged in this adjudication to decide the amount payable to the Claimant under s13 of the Act, and this may mean that I have to value the construction work under s14 of the Act. In so doing, I may have regard to variations agreed to by the parties [s14(1)(b)(iii) of the Act]. I have no evidence that any of the changes were caused by the Respondent and that its Regional Manager was advised, which is the agreed variation protocol. Accordingly, I am unable to value this work as a variation under s14(1)(b)(iii), so both claims for this site are rejected.

142. As to the Wurtulla Exchange site 157 claims of $780.00 and $1,050.00 respectively, the Respondent rejects them on the basis that they are in a separate claim, but does not reject the fact that the work was done or its quantum. The Claimant was therefore required to demonstrate that these claims were not in another claim, and it asserted as much in the application for these two claims. In the response the Respondent then argued that 8 sweeps had already been covered in the original quote and there was no explanation as to why more were required. I find that the response has identified new reasons and I cannot consider them, so I am left to consider whether the Claimant has satisfactorily demonstrated that they were not part of another claim.

143. Given that it is not practically possible for the Claimant to provide documents to show that these claims are not part of an unspecified claim, I am left with the Claimant's assertions in the application. Again as a matter of logic the Respondent must have been satisfied with these assertions because it then launched fresh basis for rejection of the claim. Accordingly, I am satisfied that the Claimant has made out these two claims.

144. As to Caloundra State Forest site 161 for $251.25 and $75.00 respectively the payment schedule rejects them on the basis that they are in a separate claim (RET), but does not reject the fact that the work was done or its quantum. In the response the Respondent then accepted the claim, and I am satisfied that the Claimant is entitled to these claims.

145. In the Maroochydore site 185 claim relating to a delay to remove a snake the Respondent argued that it was in a separate claim, but did not deny that the works was done or its quantum. The Respondent then agreed with the claim in the response, and I am satisfied that the Claimant has made out this claim.

146. As to Veresdale site 547 for a cherry picker for $1537.50 under PS07b the Respondent rejected the claim saying it was in the quote, but did not challenge the fact that the work was done or its quantum. The Claimant then provided copies of the quote and the cherry picker costs (not provided in the application) and said that the works were not in the RET claims.

147. In the response the Respondent then said it was not advised of this install and could not confirm that the works were carried out. I find that this is a fresh reason for the rejection and it cannot be considered. I am satisfied that the works were not in the quote, and this was the only challenge that it had to meet from the Respondent, as I find there was no challenge to the fact of the work or its quantum. Accordingly, I find that the Claimant has made out its claim.

148. In relation to Samford East site 713's claim for overtime of $135 the Respondent wanted more information, which I find is not a reason and there was no challenge to the fact or quantum of the work. The Claimant asserted that the

claim related to extra over costs for travel out of hours to which the response then argued there was no substantiation or explanation, which I find is a fresh reason and cannot be considered. Based on the Claimant's assertions in answer to the further information request, I am satisfied that this claim is made out.

149. In relation to the Rockhampton North site 791 for overtime amounting to $2430.00 and $1642.00 respectively and LNA fix of $562.50, the Respondent required more information, which I do not find is a reason, but added that it was a Silcar site, which I am prepared to glean is a reason because I have found that there was a Silcar variation.

150. The Claimant then asserted that the claims were for overtime for LNA install and extra-over for business hours as well as the LNA fix, but no documents appeared to have been provided. The response then argued that the Silcar site meant that the Claimant was not required to undertake these works, and I accept that this submission is in support of its reason. No substantiation was provided by the Claimant to the Respondent in circumstances where the Silcar variation was controversial in any event and where substantiation would be expected, and I find that the Claimant has not made out its claims.

151. As to Milmerran site 273 to swap LNA's for $1614.00 based on a change of RF design, the Respondent wanted more information as to whether it was a build or HPA. The Claimant responded and said that it was part of RF design and not part of the HPA program. In the response the Respondent provided a copy of the quotation for this site in Attachment F which identifies two deliverables for detailed design of D8704 for $2,900.00 and D8706 for $2,680.00.

152. It is not clear from the Claimant's material of the basis for a claim for the change for the RF design, which in my view should follow the variation protocol identified earlier in order for me to value the work as a variation under s14(1)(b)(iii) of the Act. I have no material on which to be satisfied that this protocol was followed, so I cannot accept the claim.

153. In relation to Normanby 5 Ways site 310 overtime claims for $1080.00 and $1440.00 respectively, the Respondent rejected the claim by reference to them having been agreed to in the quote. No issue was taken as to the fact that the work was done and the quantum of the claims. The Claimant argued that the claims were not in the quote which were enclosed (but were not provided in the application), did not allow for overtime and said the work for these two claims related to Sunday works due to a road closure.

154. In the response the Respondent then challenged that the work could not have been done in the dark and also queried the entitlement, and I am not able to consider these new reasons. The Respondent did not dismiss the veracity of the quotes supplied to it, so as a matter of logic I infer that the quote/s demonstrated that the work was not included in that work that was originally agreed. Given that the payment schedule did not challenge the fact that the work was done and the quantum thereof, I am satisfied that the Claimant had demonstrated to the Respondent that the work was not part of the quoted work. This is all that was asked of it in the payment schedule, and on balance I am satisfied that the claims are made out.

155. As to Raglan RT site 377 claim for $270.00 it appears that the Claimant incorrectly maintained this claimed amount when it had agreed that the cost should be rejected. Accordingly, this claim is not made out.

156. In relation to Biloela RT site 381 claims for $5047.80 for Mobilisation for Silcar clean up and $5423.53 for the Silcar clean-up, the payment schedule stated that Ericsson had not advised works to proceed. The Claimant responded by stating that the work was for mobilisation to Biloela and costs of rectifying site due to faulty work. It was not evident that the Claimant had provided any substantiating evidence for these claims, and given the arguments over the Silcar variation, it was necessary in my view to provide such evidence. Accordingly, I reject these claims.

157. As to Westwood Range site 400 claim for $750.00 for removal of old cables, the Respondent's schedule stated it was rejected because it was RET program to which the Claimant replied that the standard RET installation did not allow for removal of old cables. I reviewed the contract documents and found the RET stands for Remote Electrical Tilt, which is a kit in the Free Issue Materials supplied by the Respondent in the embedded document under Schedule 1 Scope of Works, called the FIM list Round 2 file.

158. The Claimant argued that this work was not part of the standard RET installation, and the response stated that no substantiation had been provided to demonstrate that removal of the cables was required. In my view the Claimant has the onus to demonstrate that the work was required and it has failed to do so, as I have no material on which to be satisfied that this work was required, so I reject the claim.

159. In relation to the Tieri Exchange site 413 claims of $4,109.48 and $4,097.40 for the installation of steelwork and mobilisation due to a design change, the payment schedule required more information, which I do not find is a reason for rejection. The Claimant identified it as a variation due to an RF design change with consequential labour and mobilisation costs.

160. I cannot refer to the response's reasons as I find that they are new. However, the onus remains on the Claimant to prove its claims, and I am unable to value this work under s14(1)(b)(iii) as a variation because it does not appear that the variation protocol referred to earlier has been followed. The Claimant did not argue any other legal basis for a variation to be considered by me, so I am confined to the variation process under the contract. Accordingly, I reject these claims.

161. As to Manly West site 1011 claim for a cherry picker for $3,075 the Respondent rejected the claim on the basis that the works were in the quote. The Claimant argued that it had to return to site because the existing feeders could not be used in accordance with the design. It provided a copy of the quote and noted that only 1 day for the cherry picker had been approved by the Respondent in the quote. Presumably this was the reason for only charging 1 extra day for the cherry picker.

162. The response provided the quote in Attachment D in which a cherry picker for $3,075 was included, and stated that there was no further substantiation for this claim as it was part of the original quotation. There is no evidence of further documentation to substantiate the Claimant's claim, and in my view it bears the onus of demonstrating that the existing feeders were unacceptable.

163. Under Clause 2.2 in the Project scope of works there is reference to Return visits being permitted where approval is given for faulty equipment from the Regional Program Manager, and I have no material to demonstrate that this occurred, so I must reject the claim.

164. In relation to Mount Cenn Cruaich TV site 5950 claims for access and site induction amounting to $126.50, $920.00, $345.00 and $126.5 respectively, the Respondent rejected the claims on the basis that they were internal costs for the Claimant. The fact of the induction and the quantum were not disputed.

165. The Claimant provided copies of the invoices (not in the application) and argued there was no part of the agreement that required it to pay for 3rd party costs for access to the site. The response argued that the Claimant was responsible for site access and induction as part of the scope of works.

166. On page 9 of the Scope of Works document there is reference to:

> *"Complete/Attend any site induction procedures relevant to the 3rd party land.*
>
> *The Contractor's employees and subcontractors must undertake and demonstrate that they have undertaken the relevant site induction training from a certified external trainer; i.e. Southbank Institute of TAFE (QLD), prior to requesting a Telstra Contractor Identification badge or Telstra Keys from Ericsson."*

167. In the Schedule of Rates in the Pricing in Schedule 3 of the contract, there is no specific reference to induction, however, there is reference to mobilisation. I am not in a position to infer that induction costs are inside or outside the pricing regime, as I have no guidance from the Claimant to assist me, apart from the submissions that it is not liable for 3rd party access and induction. The Claimant bears the onus and I cannot be certain that this claim is justified, so on balance it must be rejected.

168. As to Beachmere site 6568 claims for $303.75 and $600.00 and the Wild Horse North site 8272 claims for $225.00 and $90.00 for overtime, the Respondent rejected the claims stating that they were "RET program – on separate claim reject". There was no dispute about the work having been done or the quantum. The Claimant acknowledged that it had claimed under the RET program for the work but stated that these were the additional costs for doing the work out of hours.

169. The response stated that the Claimant had set the schedule for the program and that there had been no request for overtime prior to the work being done. I will allow this as amplifying its reason for non payment in these circumstances as the issue was that the work was part of what had been quoted. The Claimant did not state that it provided any documentary support for its claim, and none was in the application. It also acknowledged that this site was part of the RET program, so there is some confusion about what is in and what is outside the original quote. Accordingly, I am not satisfied that it has discharged its onus for these claims and they are rejected.

170. In relation to Lang Park site 8358 for $1,230.00 for cherry picker hire, the Respondent rejected the claims stating that they were "RET program – on separate claim reject". There was no dispute about the work having been done or the quantum. The Claimant asserted that the costs had not been submitted as part of any other claim. In the response, the Respondent argued that no date had been supplied and the need for the equipment had not been demonstrated. I am not prepared to consider these, as I find they are fresh reasons.

171. The issue in this claim was whether the claim was part of the RET program and the Claimant asserted that it was not. I find that it was not possible to provide

documents to demonstrate that the claim was not part of another claim, so on balance I am satisfied that the Claimant has discharged its onus in this circumstance, since there was no issue raised by the Respondent about the work not having been done, or its quantum and I allow this claim.

172. I have calculated the total amount owing for this claim in Annexure A and take the amount of $104,029.46 to the summary under adjudicated amount below.

Claim 12 – RET install works for $33,635.51

173. The Claimant's claim for this work was accepted by the Respondent in paragraph 4.7 of the payment schedule so the amount of $33,635.51 is taken to the summary table under adjudicated amount below.

Claim 13 – Qld antenna tilt adjustment for $23,961.60

174. The Respondent accepted the amount claimed in the response, so there is no longer a dispute about this amount, so $23,961.60 has been taken to the summary table under adjudicated amount below.

Claim 14 – CDMA equivalence for $75,743.23

175. The Claimant's claim for this work was accepted by the Respondent in paragraph 4.9 of the payment schedule so the amount of $75,743.23 is taken to the summary table under adjudicated amount below.

Claim 15 – Site strengthening for $34,528.00

176. The Claimant's claim for this work was accepted by the Respondent in paragraph 4.10 of the payment schedule so the amount of $34,528.00 is taken to the summary table under adjudicated amount below.

Claim 16 – HPA installation for $366,130.84

177. This claim relates to High Power Amplification work that was separately agreed as a variation by the parties on or about 30 November 2006. In the response the Respondent accepted the fact of the variation, the pricing process and the fact that mobilisation costs, Living Away From Home Allowance (LAFHA) and travel costs were payable.

178. The claim sets out in a spreadsheet the basis of the amount for each of 55 sites where this work was carried out. Whilst it is essentially a summary of work, the information in the columns included:

- the names of personnel who carried out the work;
- the work that was done and equipment provided was particularised in various columns;
- the kilometres travelled and the total travel costs;
- the LAFHA claimed; and
- a column that provided an explanation of additional information

179. The payment schedule accepted only 4 of the sites, and provided a column for Ericsson's comments. There were 37 challenges to the LAFHA and 19 challenges to the distance travelled, with a particular distance provided in the schedule. The LAFHA challenge also included an assertion as to what the Respondent claimed was the acceptable duration, which varied from 2 max to 6 max nights. In 10 cases the challenge was to both LAFHA and the distance

travelled. In 26 cases where the LAFHA was challenged, there would also be a question as to where the workers had mobilised from.

180. However, there was no quantification of the claims that were challenged and no denial that the work was done and materials supplied in these cases. It appears that the Respondent was merely questioning the veracity of the kilometres claimed and the duration of the LAFHA. I therefore accept the claims, except in relation to LAFHA and kilometres travelled, which are further discussed.

181. The dispute between the parties is whether the challenges to LAFHA and kilometres travelled are sufficient reasons under the Act. The Claimant's application submission (j) states:

> *"...either Ericsson believes the claims are fraudulent, or they are simply not sure about significant elements of the amounts claimed. If fraud was the issue, presumably Ericsson would not have said that it had no problem with "entitlement". If Ericsson is not sure about the elements, then this is insufficient to qualify as a reason for withholding payment under the Security of Payment Act."*

182. The response, in the seventh paragraph of 10 on page 1, stated:

> *"In its adjudication (sic) schedule Ericsson took that spreadsheet and added a column headed "Ericsson's comments". In this additional column Ericsson lists queries (albeit in abbreviated form but understandable to Ericsson and TCI) such as queries as to the number of nights which would reasonably be expected to carry out the work and the start and finish locations relating to claims for kilometres travelled.*
>
> *In its payment schedule, Ericsson rejected much of TCI's claim 16 on the basis that TCI did not include sufficient information for Ericsson to properly assess the living away from home allowance and distances travelled. Ericsson required more information as to:*
>
> - *The place from which the team mobilised; and*
> - *Reasons for more than one site visit (i.e. nights spent) to carry out the work on each site.*
>
> *Without the further information requested Ericsson considered that the claims (in particular, the living away from home allowance claims) were excessive."*

183. For the moment I will put to one side whether the "queries" identified by the Respondent constitute reasons. Apart from reference in 10.3 of the response, I cannot find any reasons for the Respondent in the payment schedule challenging the rest of the claim for each site insofar as the work done and materials supplied is concerned. Paragraph 10.3 merely queried a deduction that was made to the whole claim in the spreadsheet for which it said no explanation was provided. Nothing was made of this in the payment schedule.

184. The Claimant argues in paragraph (k) of the submissions that the Respondent *"had not provided any information on why installation works ($2934/site) and preliminaries costs ($976.80) have been rejected on those site nor have they made any assessment of what they allege is payable for mobilisation and LAFHA where they have made queries on the distance travelled and LAFHA quantities."*

185. Having regard to the payment claim and payment schedule I am therefore satisfied that the payment claim, apart from LAFHA and kilometres travelled is accepted.

186. Turning now to the queries, with respect, it requires too much elastic reasoning to glean that a query about LAFHA and the kilometres travelled was a reason for non payment. I find that the query was more akin to a Superintendent in a construction contract requiring further detail about a claim before processing it. A payment schedule performs more than that function as s18(3) of the Act requires the Respondent to state why the scheduled amount is less and the reasons for withholding payment.

187. I do not find that the Respondent has satisfied s18(3) of the Act as is did not state why the scheduled amount was less. It merely challenged the LAFHA and identified a *maximum* without quantifying that amount, as well as providing a kilometre distance without anything further as to quantum it was prepared to allow for travel. Nothing further was provided in the payment schedule that could be considered to be reasons.

188. Accordingly, I am satisfied that the Claimant has demonstrated entitlement, quantum and has substantiated its claim, and the Respondent has not discharged its onus in defeating the claim, in whole or in part, and I take $366,130.84 to the summary under adjudicated amount below.

Claim 17 – Site fault rectification for $67,082.00

189. The Respondent has increased the payment schedule amount of $18,838.00 to $43,707.00 in the response, but maintains that there is no further substantiation in the application and identifies 4 areas of dispute for consideration.

190. The payment claim identified 42 sites that required site rectification and it attached a spreadsheet including details of the site, the date visited and the costs of mobilisation and labour. It also included a spreadsheet that identified the particular fault details and the action taken for the sites in question. In paragraph 4.12 of the payment schedule the Respondent did not take issue with entitlement, but referred to the attached spreadsheet for challenges to the rates and the quantities in the claim.

191. In the payment schedule spreadsheet there were no reasons for non payment or challenges to the rates or quantities, apart from a column headed "Ericsson position" and amounts are filled in this column. As noted in my reasons previously, I cannot find that this is a reason for non payment, as it falls within the category of "withheld" in *Multiplex*, which I find is unsatisfactory. Accordingly, I am unable to consider the other reasons in the response, and the 4 areas of dispute, because I find that these are new reasons to which I may not have regard.

192. I am satisfied that the details provided by the Claimant sufficiently detailed the particulars of the claim, supported by the application submissions, and the Respondent did not in practical terms challenge entitlement and quantum, or for that matter the substantiation, so I allow the claim.

193. I take the amount of $67,082.00 to the summary table in adjudicated amount below.

Claim 18 – Site fault rectification for $328,166.00

194. The Respondent has increased the payment schedule amount of $324,386.00 to $325,646.00 in the response. This means that there is a discrepancy of $2,520.00.

195. The Claimant's claim was called "Faults Claim No.3" for site fault rectification with details agreed with "Graham Bow" for site visits amounting to $322,496.00 and non site visits amounting to $5,670.00.

196. The payment schedule in paragraph 4.13 identified no issues with entitlement, but issues with rates and quantum as found in Attachment 7's spreadsheet. The Respondent agreed with the site visits claim of $322,496.00, but reduced the labour claim of each non site visit claim from $270.00 to $90.00 each in a column headed "Ericsson position". I cannot understand from the Respondent why $90.00 was applied instead of $270.00. No reason for this reduced rate was provided by the Respondent, so I am unable to consider that this is a reason for non payment, as I find that it falls within the unsatisfactory "withheld" category.

197. The Claimant suggested that the reason for the $90.00 may have been the 1 hour work in the office, however, I must look to the Respondent's reasons, not that supposed by the Claimant. The consequence of making the finding that there were no reasons in the payment schedule is that I cannot have regard to the additional reasons provided in the response because they are new reasons for withholding payment. I am satisfied that the Claimant has made out its claim for these sites, as it further explained the basis of the $270.00 for each site in the submissions, and the contest was only in relation to the non site visits. I therefore take $328,166.00 to the summary in adjudicated amount below.

Advance payments

198. The Respondent identified this as an issue in paragraph 2 of the payment schedule in which it said that it has paid the Claimant $24,820,052.92 on account for the Services, and that it reserved its rights to put submissions to me as to the proper allocation of the advance payments.

199. The Claimant did not take issue with the matter of advance payments in the application, and in section 13 of the response the Respondent merely repeated what it had said in the payment schedule, and made no submissions on this point.

200. I therefore find that there is nothing that I am required to adjudicate in relation to the issue of advance payments, and I now finalise the adjudicated amount.

The adjudicated amount

201. There is a residual issue relating to the amount that the Claimant is entitled to be paid under the contract. On page 15 of the payment schedule, the Respondent argued, that apart from Claims 5 and 8, that 25% retention applied to the other claims on the basis that some sites had not achieved full acceptance.

202. The Respondent did not expand upon this approach in the response, despite the Claimant identifying it as an issue in issue 6(c) of the application and stating that it was an ongoing theme of the Respondent as to whether milestone 3 in Schedule 2 of the contract had been achieved. In the circumstances of the Claimant particularising each claim, both in the payment claim, and further in the

application, I would have expected the Respondent to make further reference to its assertion that full acceptance of particular sites had not been achieved in order to justify its rather sweeping assertion that 25% retention needed to be deducted from the claim for those claims apart from 5 and 8.

203. Furthermore, the fact that the Respondent fully allowed 5 claims and very nearly all of one claim, suggests that its 25% retention claim was abandoned in the adjudication. I do not see any provision for retention to be withheld by the Respondent under the contract, and neither party referred to me to any legal principle that would allow or disallow such an approach to be taken in this adjudication.

204. Accordingly, if this 25% retention is still a live issue then I find that there is no entitlement for the Respondent to withhold 25% retention on all claims, and I now turn to the calculation of the adjudicated amount.

205. I have gathered the above amounts into this table for ease of reference and calculation and this is provided below. I have included all the claims to be considered, even if the Respondent does not dispute the claim in order to establish the full adjudicated amount.

Claim Item No & description	**Claimed $ (revised)**	**Scheduled $ or response $**	**Adjudicated amount**
5 Site rectification works	$286,273.88	$156,862.40	$286,273.88
6 PIM claim	$405,000.00	$381,420.00	$405,000.00
8 Site integration & acc	$904,509.77	$472,259.01	$904,509.77
9 Purchase SPC bars	$44,993.75	$44,993.75	$44,993.75
10 Add ext works	$314,637.48	$0.00	$0.00
11 Ext works & misc	$147,193.00	$94,780.77	$104,029.46
12 RET install works	$33,635.51	$33,635.51	$33,635.51
13 Qld antenna tilt adj	$23,961.60	$23,961.60	$23,961.60
14 CDMA equivalence	$75,743.23	$75,743.23	$75,743.23
15 Site strengthening	$34,528.00	$34,528.00	$34,528.00
16 HPA installation	$366,130.84	$26,253.68	$366,130.84
17 Site fault rectification	$67,082.00	$43,707.00	$67,082.00
18 Site fault rectification	$328,166.00	$325,646.00	$328,166.00
	$3,031,855.06	**$1,641,488.66**	**$2,674,054.04**

206. **The adjudicated amount is therefore $2,674,054.04 excluding GST**

Due date for payment

207. s15(1)(a) provides the due date for payment under the contract, if the contract provides about the matter. The Claimant argues that the due date for payment is 30 June 2007 because the payment claim was served on 31 May 2007 based on Clause 9.3 of the contract.

208. The Respondent did not engage on this issue in either the payment schedule or the response, but did identify on the first page of the response that the due date for payment was 30 June 2007. I am therefore prepared to accept that this was the due date for payment under the contract.

209. However, I need to consider the further provisions of s15(1)(a) of the Act as to whether the contractual provision is void under s16 or whether it is void under ss67U or 67W of the *Queensland Building Services Authority Act 1991* (the "QBSA Act"). There is nothing to suggest that the provision is void under s16 of

the Act, which is a pay when paid provision, as I do not find that the contract makes any reference to pay when paid, so s16 of the Act is not enlivened.

210. ss67U or 67W of the QBSA Act 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 I will need to consider whether either of these sections apply to this adjudication.

211. S67U of the QBSA Act refers to construction management trade contracts or subcontracts. *Construction management trade contract* is defined in s67B of the QBSA Act and I find that this contract does not fit within the definition, as one of the contracting parties is not a principal.

212. S67W of the QBSA Act refers to a *commercial building contract* which is defined in s67A of the QBSA Act as a *building contract* that is not a construction management contract or a subcontract. I need then to decide whether this contract is a *building contract* under the QBSA Act. *Building contract* is defined in s67A as a contract, other than a domestic building contract, for carrying out building work in Queensland.

213. *Building work* is defined in Schedule 2 of the QBSA Act but does not include work of a kind excluded by regulation. Regulation 5 in the *Queensland Building Services Authority Regulation 2003* deals with what is not building work, and ss(t) refers to:

> *"construction, maintenance, or repair of communications installations performed for a public company..."*

214. I find that the construction work in this adjudication is being carried out for Telstra which I find is a public company, so I find that the work is not *building work*.

215. Accordingly, this contract is not for *building work*, so it cannot be a *building contract* under the QBA Act, so s67W of the QBSA Act does not apply to this adjudication.

216. I therefore find that the contractual provision that the due date for payment is 30 June 2007 is not void, which means that s15(1)(a) says the progress payment becomes payable on the day it becomes payable under the contract.

217. I find therefore that the **due date for payment is 30 June 2007**.

Entitlement to interest

218. In paragraph 30 of the application, the Claimant confirms that the contract does not provide for interest, and the Respondent has not commented upon this submission. s15(2)(a) applies when 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.

219. However, 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 which must be considered 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.*

220. 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 Telstra 3GSM 850 contract is nothing to do with such buildings. This means that it is not a *domestic building contract* and s67P of the BSAA may apply.

221. s67P of the QBSA Act provides for interest of late progress payments in relation to a *building contract*. I have already found that find that the work is not *building work*, and therefore s67P of the QBSA Act does not apply.

222. Accordingly, the interest rate remains that of the Supreme Court of 10%.

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

Authorised Nominating Authority and Adjudicator's fees

224. 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 largely succeeded in its claim to the extent of approximately 90% of its claim. The principle that costs follow the event is a factor that I did consider in this case. However, the Respondent did concede further claims in the response, which saved adjudication costs, and quite some time was devoted to evaluating the merits of claim 11 for extra works and miscellaneous variations.

225. The amount of adjudication time devoted to this claim was disproportionate to its value, but was required because of the contest between the parties. In some cases the Claimant had not provided substantiating documentation in the application, which meant that it could not succeed on some of the claims for particular sites. I awarded approximately $10,000 more than what the Respondent was prepared to pay for this claim, but not the additional approximately $50,000 the Claimant was seeking. Furthermore, the additional extra works claim 10 was rejected entirely, which also required quite some anlysis.

226. On balance, I am inclined to not disturb the equal share of fees identified in ss34(3) and 35(3), and decide that each party bear the ANA's fees and my fees equally.

Chris Lenz
Adjudicator

18 July 2007

ANNEXURE A

Site #	Name	Claim $	Response $	Adj $	Reason See text above
1	Alex Hills	3105.00	2,000	2,000	
8	8 mile plains	173	0	0	
9	Everton Pk	222.75	0	0	
19	Shute Harb	202.5	0	0	
19	Shute Harb	20.25	20.25	20.25	
19	Shute Harb	1282.5	1282.5	1282.5	
19	Shute Harb	2160.00	0	0	
42	Loganholme	3105.00	2,000	2,000	
50	Sproule Cstle	157.5	0	0	
50	Sproule Cstle	1822	0	0	
50	Sproule Cstle	480	0	0	
50	Sproule Cstle	600.00	0	0	
50	Sproule Cstle	40.50	40.5	40.5	
52	Mt. Oscar	675	0	0	
52	Mt. Oscar	90	0	0	
67	Beenleigh	900	900	900	
90	Mt.Glorious	112.5	0	0	
98	Belmont	600	0	600	
107	Mt. Boulder	3240	0	3240	
107	Mt. Boulder	900	0	900	
155	Toowong LD	2070.90	0	0	
155	Toowong LD	243	0	0	
157	Wurtulla exch	780	0	780	
157	Wurtulla exch	1050	0	1050	
161	Caloundra For	251.25	251.25	251.25	
161	Caloundra For	75	75.00	75.00	
185	Maroochydore	187.5	0	187.5	
247	Clermont RT	4314.00	4314.00	4314.00	
247	Clermont RT	1301.25	1301.25	1301.25	
263	Coolum	750.00	750.00	750.00	
425	Milne Hill	1400	1400	1400	
425	Milne Hill	600	600	600	
425	Milne Hill	3246.75	3246.75	3246.75	
455	Svenssons Hts	1755	1755	1755	
507	The Gap Res	41400.00	41400.00	41,400.00	
547	Veresdale	1537.5	0	1537.5	
610	Boykambil	1294.5	1294.5	1294.5	
676	Eimeo	495	0	0	Withdrawn
713	Samford E	135	0	135	
791	Rocky North	2430	0	0	
791	Rocky North	1642	0	0	
791	Rocky North	562.5	0	0	
273	Milmerran	1614	0	0	
273	Milmerran	3361.60	3361.60	3361.60	
310	Normanby 5 w	1080	0	1080	
310	Normanby 5 w	1440	0	1440	
377	Raglan RT	270	0	0	
381	Biloela RT	5047.8	0	0	
381	Biloela RT	5432.53	0	0	
382	Smiths Hill	5432.53	5432.53	5432.53	
382	Smiths Hill	1141.65	1141.65	1141.65	

400	Westwood Rg	750	0	0	
413	Tieri exch	4109.48	0	0	
413	Tieri exch	4097.4	0	0	
849	Yuleba Sth	4312	4312	4312	
849	Yuleba Sth	995.25	995.25	995.25	
849	Yuleba Sth	5432.53	5432.53	5432.53	
849	Yuleba Sth	2370	2370	2370	
849	Yuleba Sth	2677.8	2677.8	2677.8	
1011	Manly West	3075	0	0	
5950	Mt Cn Cruaich	126.5	0	0	
5950	Mt Cn Cruaich	920	0	0	
5950	Mt Cn Cruaich	345	0	0	
5950	Mt Cn Cruaich	126.5	0	0	
6568	Beachmere	303.75	0	0	
6568	Beachmere	600	0	0	
8272	Wild Horse Nth	225	0	0	
8272	Wild Horse Nth	90	0	0	
8358	Lang Park	1230	0	1230	
9819	Orchid Beach	4312	4312	4312	
9819	Orchid Beach	974.01	974.01	974.01	
9819	Orchid Beach	234.09	234.09	234.09	
9931	Marcus Beach	360	360	360	
9931	Marcus Beach	180	180	180	
931	Rocky Nth	-1080	-1080	-1080	
931	Rocky Nth	-1485	-1485	-1485	
			TOTAL	**104,029.46**	