Claimant: Gainfoot Pty Ltd

Respondent: Traveston One Pty Ltd

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

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated 22 October 2007 is **$68,714.04** including GST.
2. The date on which the amount became payable is **11 October 2007**.
3. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
4. The Respondent is liable to pay the ANA's fees and the adjudicator's fees

Signed: ..... Date: 13/11/07

Chris Lenz Adjudicator

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Background

1. Gainfoot Pty Ltd (referred to in this adjudication as the "Claimant") was engaged by Traveston One Pty Ltd (referred to in this adjudication as the "Respondent") to undertake construction works in relation to supplying and installing pumps and pipes for boreholes (the "work") at Traveston in Queensland (the "site"). The work on the site was involved with the Traveston Development (the "project").

2. The Claimant's material alleges that a credit agreement was signed by Mr. Ellis as CEO of the Respondent and Mr. Chadband on behalf of the Claimant on or about 14 March 2005, and thereafter that 12 written quotations were provided progressively from 18 May 2006 through to September 2006 for labour and materials associated with the work on the project.

3. Tax invoices were provided from September 2006 through to January 2007 for work done and materials supplied on the project (the "tax invoices").

4. On 25 September 2007 a payment claim for $70,591.19 was sent to the Respondent's PO Box at Eumundi and identified the 30 tax invoices and the amounts associated with each tax invoice. This payment claim identified that it was a payment claim made pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act").

5. The Respondent's provided a payment schedule (the "schedule") dated 9 October 2007 in response to the payment claim. In the schedule, the Respondent argued that:

   a. the payment claim was invalid as it had not been properly served;
   b. the Claimant had not provided a reference date for the payment claim;
   c. it had rights of set off for damages for breach of contract, delays and defects.

6. The Claimant made a written application for adjudication on 22 October 2007 (the "application"), and the Respondent's solicitors provided an adjudication response on 31 October 2007 (the "response").

Appointment of Adjudicator

7. The Claimant applied in writing to the Institute of Arbitrators and Mediators Australia ("IAMA") on 22 October 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 24 October 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 29 October 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 I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have therefore been properly appointed under the Act as required by s23(2) of the Act.

11. On 6 November 2007 I wrote to the parties noting that the Respondent argued in the response that it had not received Annexure "A" to the Claimant's application in the material served on it. I requested submissions from the Respondent by 5pm on 7

November 2007 as to whether the Respondent had signed the document identified in Annexure "A" and what effect the document had on the contract between the parties.

12. I also asked for the Claimant then to respond by 4 pm on Thursday 8 November 2007, with its submissions in reply. I received submissions from the Respondent in time, but had nothing from the Claimant in reply.

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

Material provided in the adjudication

14. Claimant's Material
    a. the application dated 22 October 2007 in support of its payment claim for $70,591.19 (including GST);
    b. Claimant's submissions in support of the application (the "application submissions") attaching:
        i. Written credit agreement dated 14 March 2005;
        ii. 12 quotations for various parts of the project (the "quotations");
        iii. The payment claim;
        iv. The 30 tax invoices (the "invoices");
        v. An adjustment note dated 9 October 2006;
        vi. Correspondence between the parties
        vii. The payment schedule.

15. Respondent's Material
    a. the payment schedule dated 9 October 2007;
    b. the response dated 31 October 2007 with its submissions attaching:
        i. the payment claim;
        ii. a covering letter from the Claimant's solicitors;
        iii. an electrical invoice from John Buckley Electrical dated 30 March 2007;
        iv. an undated letter from Finance Express confirming interest charges of $10,000 per month;
        v. Statutory declaration of Anthony Ellis dated 31 October 2007
        vi. Submissions on the effect of Annexure A dated 7 November 2007, requested by me on 6 November 2007.

Construction contract

16. s3 of the Act requires that:
    a. 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
    b. the *construction work* that was carried out, or the related goods and services that were supplied for construction work, had to take place in Queensland.

17. 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."*

18. The Claimant argues that the contract for the work and material between the parties was partly written and partly oral and comprised:
    a. The Sales Agreement/Credit Application dated 14 March 2005;
    b. The quotations;
    c. Conversations between Mr. Ellis and Mr. Chadband.

19. The Claimant alleges that the work and the materials for the Respondent comprised the provision and installation of bore pumps, bore sensors, transfer pumps, pipework and water points suction and delivery (the "borehole equipment"). It also alleged that the Respondent was to supply electricity to the site and would pay within a reasonable time of invoice.

20. The Respondent argued that the contract was a series of oral agreements for the Claimant to supply and install goods at the Respondent's request, for which the Respondent agreed to pay the cost of the goods. It denied the conversations between Mr. Ellis and Mr. Chadband.

21. It further argued that there were terms implied into the contract that:
    a. the goods would be fit for their intended purpose and be of merchantable quality;
    b. the services supplied would be rendered with due care and skill, and that any goods supplied would be reasonably fit for the purposes for which they were supplied.

22. Although there is a dispute about the terms of the contract and how it was entered into, I find that there was a *contract, agreement or other arrangement* whereby the Claimant was to supply and install the borehole equipment for the Respondent. This falls within the definition of *construction contract*. I also find that the *construction contract* arose after 1 October 2004, because the material before me suggests that the earliest involvement between the parties regarding the borehole equipment was 14 March 2005, the date of the Sales Agreement/Credit Application.

23. I must establish that the *construction contract* related to *construction work* and the *supply of related goods and services* as defined in the Act.

24. Construction work is defined in s10 of the Act as:

> *"(1)* ***Construction work*** *means any of the following work –*
> *...(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, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;"*

25. I find the installation of the borehole equipment relates to pipelines, *water mains and wells* thereby satisfying the definition of *construction work*.

26. 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;"*

27. I find that the borehole equipment falls within the definition of goods under s11(a)(ii) of the Act as *plant or materials* and the *labour* to carry out the installation of this equipment falls within the meaning of *services* under s11(b)(i) of the Act.

28. I therefore find that the contract date was after 1 October 2004, and it related to *construction work* and/or the supply of *related goods and services* at Traveston which I find is in Queensland.

29. I find from the material that none of the exceptions contained within s3(2) and s3(3) of the Act applies to disqualify the *construction work* and *related goods and services* from the application of the Act; so I find that it is a matter which may be adjudicated.

30. I asked for submissions on the Sales Agreement/Credit Application, and the Respondent advised that it did not relate to the project, but to another project, for another entity, and that project was completed and paid for. The Claimant chose not to respond to those submissions, so I find that it did not form part of the *construction contract* as it referred to a different post box, and was an agreement with Tony Ellis, not the Respondent.

31. I find the quotations were signed by Mr. Ellis requesting that the Claimant proceed, so to this extent, I find that the contract was in writing.

Service of the payment claim and the adjudication application

32. I find from the material that the payment claim was served on the Respondent's post office box on 25 September 2007, because that is the date of the payment claim, and that is the date identified in the application. The Respondent does not take issue with the fact of service on the post box, and has not denied receiving the payment claim, or for that matter, the application.

33. However, the Respondent takes issue with service on the Respondent's post box and argues that this is invalid service of both the payment claim and the application. This is an important point and goes to the heart of the adjudication, and this issue needs careful consideration.

34. As the Respondent correctly identifies, service of the payment claim is one of the basic and essential requirements identified in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another* [2004] NSWCA 394 ("*Brodyn*").

35. The Respondent also referred to the case of *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 which, coupled with *Brodyn*, suggested that these cases are authority that service of the payment claim must be carried out in the strictest sense [paragraph 1.2 of the response].

36. S103 of the Act deals with service of notices and it provides:

"103 Service of notices

(1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.

(2) Subsection (1) is in addition to, and does not limit or exclude, the Acts Interpretation Act 1954, section 39 or the provisions of any other law about the service of notices."

37. The Respondent essentially argued that s109X(1)(a) of the *Corporations Act 2001* regarding service had to be adhered to, because the contract made no provision for service. It argued that service on the postbox did not fall within the *Corporations Act* provisions, or s39 of the *Acts Interpretation Act 1954 ("AIA")*.

38. It further argued that it could not be inferred that the Respondent would accept service of the payment claim if it was sent to the post box merely because there had not been objection to this address. It added that the sending of invoices to this address was not required by the Act, so that the Claimant's submissions that this was the address for service of the payment claim were irrelevant.

39. The Claimant submitted that:
    a. The Corporations Act was not a code, but merely facultative, and that the document must just come to the notice of the Respondent;
    b. It provided reference to a case reported at [2004] 1 Qd R 140, 141-3, but did not name the case. In this case it argued that Helman J, who referred with approval to Young J in the case of *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542 (*"Howship"*) who had held in the case of service of a statutory demand under s459E of the *Corporations Act* that *"to ignore admissions of receipt and, it should be noted, service, of the documents of the kind before me in this case, would be artificial in the extreme";*
    c. s39 of the *AIA* provided service of documents by post to the head office, a registered office or principal office of the body corporate;
    d. Service may be effected by means prescribed under the construction contract, and that it could be inferred that service could be on the postal address as the admitted postal address of the Respondent because all correspondence and invoices had been sent there, and that there was no objection for the Respondent about this address;
    e. The payment claim system set up under the Act was a *rough and ready system*, such that precise stringency should not be insisted upon, particularly where the Respondent did not deny ever having received the payment claim, not that it had been prejudiced in any way.

40. Neither party cited an authority directly on point of service of the payment claim on a post box, but it is clearly the critical issue in this adjudication. If the Respondent is correct that the payment claim is invalid if it had not been properly served, then there is no basis for adjudication such that any purported adjudication by me would be void.

41. I must therefore carefully consider this important point, and as a point of departure I find from the material that service of the payment claim and the application was made on PO Box 4512 Eumundi in Queensland, as the Respondent does not deny this. In fact it provided a payment schedule within time. As to the payment schedule, it was dated 9 October 2007, which is within the requisite 10 business day period to provide a payment schedule under the Act, and the Claimant did not argue this was out of time.

42. I also find that this was the post box of the Respondent because this was the address for the quotations, the invoices, the payment claim and the application. I find that the quotations to the post box provided in the adjudication, all carried an "Agreed" or other notation in reply from Mr. Ellis. Furthermore, in the response, in the annexure "C", John Buckley Electrical sent his tax invoice for his work to the Respondent at the post box.

43. I find from paragraph 1 of the statutory declaration of Anthony Ellis dated 31 October 2007 (the "Ellis statement") that he was the CEO of the Respondent, and therefore bound the Respondent in relation to the quotations provided by the Claimant. Given that the quotations (and invoices) had the post box as the address, and that Mr. Ellis did not deny this address for service of quotations under the contract which he approved, I have some difficulty understanding the Respondent's assertions that it was not the address for service under the *construction contract*.

44. The Respondent did not suggest that there was another address to which the quotations, correspondence, invoices, the payment claim and the application should have been sent. I accept Mr. Ellis' declaration that Respondent's property was 80 Howe Road, Traveston, and this address was on the facsimiles sent by the Respondent to the Claimant [see Annexures "F(a) and (b)" to the application.]

45. However, I find that these facsimiles were in response to communications with the Claimant, which included quotations and invoices, such that as a matter of commonsense based on the facts provided, the Respondent must have received these documents through the postbox.

46. It may have been a matter of convenience that the Respondent had given the Claimant the post box for correspondence, but it has not denied that this post box is an address of the Respondent. However, the Respondent states that the contract did not provide for the post box as the address for service for documents under the Act, so that the *Corporations Act* or s39 of the *AIA* needs to be satisfied.

47. I find that there is no express term in the *construction contract* dealing with service of documents, so a term would have to be implied for service to be valid; or alternatively the law in relation to service of payment claims and applications under the Act would need to allow for service on a post box. As I have said, neither party referred me to authority on point; however, I am compelled to deal with this live issue between the parties as a matter of principle, if I cannot find authority on point.

48. I have found the case of *Vanbeelen v Blackbird Energy Pty Ltd* [2006] QDC 285 *("Vanbeelen")* that dealt with this point. In that case, the contract said nothing about service of notices, as I have found in this *construction contract*. Notices, inter alia, were served on PO Box 730 SPRING HILL. Brabazon DCJ, at paragraph 80 posed the question whether service on a post box satisfied s39 of the *AIA*. He then referred to Master Lee's decision in the Supreme Court case of *In Her Majesty's Theatre Pty Ltd v Starstruck Pty Ltd* (1982) 6 ACLR 535 that found that service on a post box satisfied service under the Rules of the Supreme Court

> *"[80] The other permitted form of service is to send the document by post, telex, fax or similar facility to the appropriate office of the body corporate. Does that necessarily require delivery to a street address, or will delivery to a private post office box be sufficient? For a long time now, a request or invitation to send mail to a post office box of a corporation has been an everyday feature of Australian life. If that is the way a corporation wishes to receive its post, why should it not be a way of sending letters to it, within the meaning of s 39 of the A.I. Act?*
>
> *[81] The question is not without authority. In Her Majesty's Theatre Pty Ltd v Starstruck Pty Ltd (1982) 6 ACLR 535, Master Lee of the Supreme Court of Queensland (as he then was) considered a letter that had been sent to a post office box. It was sent to the principal office of the company. The only address given for the company was the post office box. That was the address in fact used for its business purposes. Service had to be effected according to O39 R52 of the Rules of the Supreme Court. That rule then provided that the document could be sent by post to the registered office, or the principal office, of the company. Master Lee said: "... I have considered all of the evidence and material in this case, and it seems in the particular circumstances of this case, there is some merit in the submission of counsel for the plaintiff that the 'principal office' of the defendant company in fact includes that post office box. As this might be thought to be placing an extended meaning on the term 'principal office' I do not need to rule in the plaintiff's favour based on this submission alone. ... Order 39 Rule 52(2) then deals with the situation where a party against whom a judgment is given has no address for service. In such a case a notice under the rules shall be deemed to be properly served on him if left*

or sent by post ... to the principal office, and if served by post, to have been served at the time at which it would have been delivered in the ordinary course of post. ... It seems to me that on all of the evidence in this case before me, including past communications between the parties and between the defendant and the solicitor for the plaintiff, by correspondence, notice of today's hearing has in fact been served on the defendant within the meaning of Order 39 Rule 52(1)."

49. Brabazon DCJ then referred to a Court of Appeal case in NSW, at paragraph 82 following as follows:

"[82] In MacRae v St Margaret's Hospital BC9907034 (NSW Court of Appeal 18 October 1999) the court was concerned with s 92A of the Workplace Injury Management and Workers' Compensation Act 1998. That section said that:

"... a claim for compensation is served on a person if ;

(a) it is given personally to the person, or

(b) it is delivered or sent by post to the residence or any place of business of the person ..."

[83] The hospital's letterhead stated "please address all correspondence to PO Box 381 Darlinghurst NSW 2010". The workman did that. In fact, the correspondence was received. (my underlining) *The Court took the view that, in effect, the letter had been sent to the hospital.*

[84] Meagher JA so held, saying that service by posting a claim to a post box in such circumstances was at the hospital's "place of business", the post office box being either part of its place of business or a means of access to that place of business. (my underlining)

[85] The majority, Priestley JA and Davies AJA found for the workmen on a different ground. They found that posting to the post office box would be sufficient substantial compliance with the Act. (my underlining) *It was accepted that a post office box is not a place of business. As Davies AJA said:*

"20. In my opinion, the sending of a document by post to a business person's post office box is an appropriate and possibly the most appropriate way of sending the document by post to the person's place of business. That is because post office boxes are used by businesses to achieve greater reliability in the delivery of postal articles. ... In my opinion, the sending of mail to a nominated post office box is the appropriate and efficient means of sending mail to a business person and it is common practice for businesses to have a post office box and for their customers and other persons dealing with them to use it." (my underlining)

50. Brabazon DCJ was dealing with an originating application for summary judgement in which he found that service of the payment claim on the post box was good service under the Act, and that the payment schedule was delivered late, which meant that the Respondent was liable to pay the payment claim amount. Accordingly he found for the claimant and gave judgement. It was incumbent upon His Honour to consider whether there was a serious question to be tried in line with the principle of *Fancourt v Mercantile Credit Ltd* (1983) 154 CLR 87. His Honour had to be satisfied about proper service in that case, because it was fundamental to allowing judgment, and he importantly allowed service on the post box.

51. Adjudication is not a court proceeding, where the rights of the parties can be finally determined. Nevertheless, if a Court can find proper service on a post box in a contested application, then an adjudicator must take notice of this approach. I need to consider the facts in this adjudication to see if they fit within *Vanbeelen*.

52. I find that the Respondent was a business person from the Respondent's own material. In paragraph 7.4(a) of the payment schedule it said that it was unable to *get its business up and running* from which the logical conclusion is that it is a business person.

53. I also find that the post box was used by the Respondent for its business, because not only did it receive mail from the Claimant through the postbox, but John Buckley, the Respondent's electrician also used this address. I find as a matter of commonsense that the Respondent must have advised the Claimant and John Buckley of the postbox, because its own facsimile page that it sent to the Claimant did not have the postbox number identified on it. Accordingly, without material to the contrary, I find that it was a practice for the Respondent to use its postbox for business.

54. Prima facie therefore *Vanbeelen* applies in this adjudication, so it is important to consider the Respondent's submissions. Although neither party provided me with *Vanbeelen*, I did not consider necessary to ask for submissions on this case, as I am required to consider the material before me. Justice Wilson in *Abel Point Marina (Whitsundays) Pty Ltd v Thomas Uher and Sea Slip Marinas (Aust) Pty Ltd* [2006] QSC *("Abel Point")* at paragraph 20, held that an adjudicator is not obliged to seek further submissions. Wilson J said at paragraph 20, that an adjudicator must afford the parties procedural fairness, but my primary obligation is to make a decision on the material before me (my underlining).

55. In my view, the issue had been ventilated with the Respondent arguing that service on a post box was deficient, and the Claimant arguing that service on the post box is acceptable. The fact that I have found a case on point, which neither party referred me to, does not mean that I am compelled in the tight time frames required by the Act, to seek submissions from the parties. It would make adjudication unworkable, if this was a requirement.

56. Nevertheless, the Respondent's submissions are cogent, even though they did not refer to *Vanbeelen* which is District Court Authority. It may be *Vanbeelen* is not authority that binds me in this adjudication, so I need to consider the Respondent's submissions in some detail.

57. The Respondent's reference to *Brodyn* and the essential requirement of service of the payment claim is correct; but *Brodyn* did not state that payment claims could not be served by sending it to the post box.

58. *Emag* dealt with the service of an application on the Respondent's solicitor, and it was held that this was not good service, because it was held that the solicitor did not have instructions to accept service. The case turned on the service point, because it was found that adjudicator had adjudicated the dispute before the time within which the adjudication response could have been delivered. This was crucial to the Respondent's rights, which effectively were curtailed by the adjudicator not considering the response.

59. The facts in *Emag* do not apply to this case because service was made on the Respondent, and I have found that the Respondent received the payment claim and application, as this was not denied. It responded within the time frames required by the Act in relation to both documents it was entitled to serve, viz. the payment schedule and the response. The only issue is whether service on a post box complied with the Act, and *Emag* does not deal with this important point and is therefore distinguishable.

60. It appears as if the Respondent referred to *Abigroup Constructions Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425 as authority that service on a post box is not good service. However, this case does not deal with that point at all. It was another summary judgement case, and the facts were that the payment claim was not served on the respondent, but on a quantity surveyor who acted for the financier.

This was one of a number of facts that lead the Court to find that there was a serious question to be tried, and summary judgment was not allowed.

61. The Claimant's reference to the judgement of Helman J, where His Honour considered *Howship*, I have found to be the case of *Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd* [2003] QSC 98, which must have been reported later in the Queensland Reports. At paragraph [9] His Honour's reference to *Howship* and the approval of Young J's principle that, *"To ignore the admission of receipt and, it should be noted, service, of documents of the kind before me in this case would be artificial in the extreme."* This case dealt with the very rigorous requirements of service of a statutory demand under s459E of the *Corporations Act*, which has the consequence of deemed insolvency, if a respondent does not challenge the demand within 21 days of service. The effect of finding that receipt of the demand had occurred by facsimile, despite such a mode of service not being stipulated by the law, meant that the respondent was unable to set aside the statutory demand, which no doubt had serious consequences.

62. As a matter of principle, it seems to me that to require service on a physical address under the Act is reading too much into s103 of the Act. I accept that there is no express provision under the *construction contract* about service, and I am loathe to embark on an inquiry about whether such a term could be implied, because that would require submissions from the parties, and the time frame for adjudication is so short.

63. I find that it is not necessary to consider whether such an implied term exists, because as I have identified, the law allows service of a payment claim on a post box as being acceptable, to satisfy s39 of the *AIA*. I am prepared to extend this principle to the service of an application as well, particularly since there is no evidence that the documents were not received. Furthermore, the Respondent took its opportunity to respond, so the merits of the case are able to be ventilated, and adjudication should proceed.

64. With respect, I agree with Helman J, that to ignore the fact that the documents were received, would be *artificial in the extreme*, and I do not believe that Parliament would require a more onerous service regime under the Act than that required under the *Corporations Act* for statutory demands, where parties' rights may be finally determined. Under this Act, the parties' rights are preserved under s100, so it is illogical to consider that service of notices under this Act would be more strict than under legislation that finally determines parties' rights.

65. Accordingly, I proceed with adjudication, on the basis that service of the payment claim was in accordance with s17 of the Act, and service of the application was valid.

Scope of the adjudication

66. 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.

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

    "In deciding an adjudication application, the adjudicator is to consider the following matters only (my emphasis added)*:*

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

68. Unfortunately, there are no submissions on interest from either party, and I am obliged to decide on the rate of interest that applies to the adjudicated amount. I have already requested submissions under s25(4) of the Act relating to the missing annexure A to the application, which is the "Sales agreement/Credit Application", but *Abel Point* is authority that I am not obliged to ask for submissions. I will turn to interest later.

69. 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.

70. Before considering the value of the payment claim, it is appropriate to deal with the counterclaims and set offs, and delays identified in paragraphs 7 and 8 of the response.

Set offs for damages for breach of implied terms and submissions on delays

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

72. Although the Respondent identified terms that are implied by statute, for which it claims that damages occurred as a result of breaches of those terms, I have no power to consider damages suffered by the Respondent unless they are provided for within the contract. I am constrained to construe the *construction contract*. Even if the *Sale of Goods Act 1896* and the *Trade Practices Act 1974* imply terms into the contract dealing with quality issues, I can only consider set off, if the contract allowed set-offs for damages. The Respondent does not assert that there is an implied term that allows for set-off of the Respondent's damages under the contract, and I find that there is no such express term.

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

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

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

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

76. In this case, it is the Respondent claiming set-off for its damages for breach of contract in paragraph 7 of it submissions. These damages arise out of the breach of the contract, rather than arising within the contract for which there may be a mechanism to facilitate compensation. Hodgson JA's comments that, *any amount that is truly payable as damages for breach of contract is not an amount due for construction work* can apply in this instance to the Respondent's claim for set-off. I have no jurisdiction to consider such a claim.

77. Accordingly, I reject any claim by the Respondent for damages for breach of contract by way of set-off. This means I will have no further regard to any material in support of these breaches.

78. Furthermore, the Respondent's reference to delays in paragraph 8 of the response, for which the Claimant was allegedly responsible, is not something that I am able to consider. Nothing in those submissions impacts on the value of construction work, or goods and services supplied, or on the estimated cost to rectify any defects.

79. However, the payment schedule identified damages for delays of $20,000, but there is no basis given by the Respondent for having the right to set off these damages under the contract. I cannot find any such basis, so the set off for damages for delay is rejected. Accordingly I have no further regard to any of that material in support of the submissions regarding delays.

Entitlement and the reference date

80. 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."*

81. 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*
>
> *(b) if the contract does not provide for the matter—*
>
> *(i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and*
>
> *(ii) the last day of each later named month."*

82. The *construction contract* makes no reference to a date for progress claims, and the Respondent in the payment schedule paragraphs 1.4 to 1.6 argues that the Claimant did not refer to a reference date, so the payment claim was invalid.

83. I have difficulty understanding why the Claimant must identify the reference date for the payment claim to be valid. It is not a requirement under s17 of the Act. I accept that the Claimant must make a payment claim from a reference date, for it to have entitlement under s12 of the Act, but so long as it has done so, I do not find that it is necessary for the Claimant to identify that date. The Respondent has not provided me with any authority supporting its submission.

84. In the application the Claimant referred to the Respondent's assertions in paragraphs 1.4 to 1.6 and made reference to the case of *Cant Contracting Pty Ltd v Casella & Anor* [2006] QCA 538 as authority that a payment claim could be for the whole contract price. I do not understand this submission, as it did not bear on the reference date issue.

85. Given the contract does not provide a reference date; the Act identifies the reference date as the last day of each later named month. The last tax invoice was dated 31 January 2007, which identified the balance of the work being carried out, and the supply of extra fittings at Traveston Water Plant. I find that this is the last month in which work was done and materials provided. There would be other reference dates in the successive months after January 2007, and I find that the payment claim of 25 September 2007 would be from any of these reference dates.

86. Accordingly, I find that the Claimant has an entitlement to a progress claim under s12 of the Act, and I now need to value the claim, taking into account that I am not prepared to allow the set off for damages for breach of contract and delays outlined above.

Amount under the contract

87. It is evident from the payment schedule, that if I find that the payment claim is valid, the Respondent then tabulated the amounts it found it was liable to pay. I have found that the payment claim is valid, and where there is no dispute about the amount on an invoice, then I find that that amount is agreed and therefore payable by the Respondent.

88. This means that the Claimant is entitled to at least the sum of **$49,418.69** being the undisputed invoices less the adjustment note issued on 9 October 2006. The only invoices about which there is a dispute are tax invoices no's:

(a) 153672	for $3,273.45
(b) 153689	for $1,918.45
(c) 154867	for $16,159.55
TOTAL	**$21,351.45**

89. I will consider each tax invoice and the contending submissions to decide on the appropriate value for the work done and materials supplied.

90. Invoice 153672 for $3,273.45.

a. The Respondent's submissions in paragraph 3 of the payment schedule were that the bore pumps and fittings supplied for borehole 9 were faulty, and that it expended costs of $1,000 by engaging an independent contractor to fix the bore. This amount was reduced to $842.60 for John Buckley Electrical in the response, and his tax invoice was attached as annexure "C";

b. The Respondent argued that the Claimant had not provided a statutory declaration to support its allegations that the bore and bore pump were in good working order. I do not find that it is necessary that a Claimant is required to provide statutory declarations, as it is adjudication of a payment claim, not a Court trial. I note that Mr. Ellis did provide a statutory declaration deposing to faults in paragraph 7, but it is very general, and it is not clear the extent of the faults referred to. It does not expressly refer to this invoice;
c. The Claimant refuted the payment schedule allegations and stated that all equipment was tested and was working. The material on this point is somewhat equivocal; however, I find that John Buckley did carry out work on the site, and that on balance it related to this invoice. It appeared that the work that he did rectified the problem, so I am not prepared to find that the equipment remained faulty;
d. I do not accept the Claimant's application submissions in paragraphs 11 and 13 that because the Respondent had not taken issue with Claimant about the quality of goods and services supplied, that it was now estopped from claiming any forms of defects in the works performed. I was given no authority in support of those submissions;
e. To my mind the terms of the contract regarding quality are implied by statute as asserted by the Respondent, and their existence is not controverted by the Claimant in the application. I would need more material from the Claimant, for example, regarding representations from the Respondent, reliance by the Claimant on these representations, and detriment suffered by the Claimant before being satisfied that the Respondent is estopped from now complaining of the defects. There is no such material provided to me, so I do not find that the Claimant can raise an estoppel argument on the defects;
f. Accordingly, I accept that $842.60 was the cost to rectify the defects for borehole 9, but that otherwise the Claimant is entitled to be paid for the work done and materials supplied. **I find therefore that the balance of $2,430.85 is payable to the Claimant.**

91. Invoice 153689 for $1,918.45
a. The payment schedule incorrectly identifies invoice number 153692 in paragraph 4, whereas the correct number was identified in the table attached to the payment schedule, and I am satisfied that invoice 153689 is the correct number, as the Respondent noted in the response;
b. The Respondent argued that the Claimant acknowledged in the payment claim that it had not installed the equipment relating to the invoice. Whilst I find express reference to this in the actual invoice, I cannot understand that the amount claimed of $1,918.45 includes installation costs. The payment claim refers to supply and delivery of the filters, and expressly excludes installation.
c. The Respondent has not satisfied me that installation was a cost included in the supply and delivery price. It merely asserts that non-installation is acknowledged by the Claimant, which has not satisfactorily discharged its onus.
d. I find that the filter was supplied and delivered, and that there is no material to suggest that the price invoiced required installation as well;
e. Accordingly, **I find that the Claimant is entitled to be paid for the materials supplied in the sum of $1,918.45**.

92. Invoice 154867 for $16,159.55
a. In the response the Respondent argues that the bore water sensors that were installed were not installed correctly and were faulty, and the Claimant had not rectified them, and those that were not installed were also faulty and had not been rectified and/or installed;
b. The Respondent also said [paragraph 6.3] that there was power at the site and a standby generator was also available to counter the Claimant's assertions in the application [application paragraphs 25(h) through to (k)] about the lack of power;

c. It criticised the Claimant for not providing a statutory declaration in support of the application, but the Ellis statement did not attest to its response assertions about power, when it could have done so. I draw the inference that Mr. Ellis could not attest to this fact, particularly when he had attested to a number of other facts to counter the Claimant's assertions;
d. The Respondent argued that the Claimant had its own generator and referred to invoice 153188 to demonstrate that it could have used this generator to do the testing. Invoice 153188 was dated 13 October 2006, and invoice 154867 was dated 30 November 2007, nearly 6 weeks later. I am not prepared to draw the inference that this generator could have been used, particularly in circumstances where I find that the works were suspended by Mr. Ellis. He admits as much in paragraph 7 of the Ellis statement;
e. The Claimant had asserted that the reasons why no more equipment (apart from the 2 bore sensors) was installed in the bores was that the works were suspended by Mr. Ellis, and that it was impossible to test the bore sensors because there was no electricity supply;
f. Accordingly, on balance (without cogent controverting evidence) I find that there was no power available at the site for the testing to take place, and also that Mr. Ellis suspended the works;
g. The Ellis statement referred to his suspension because of the Claimant's faulty goods supply in paragraph 7. He makes reference to incompatible digital bore sensors in that paragraph. I find that the only bore sensors referred to, are those in this invoice;
h. The Respondent essentially requires me to make a finding that the reason for the suspension was that the goods were defective. The thrust of its case is that without material by way of statutory declaration from the Claimant, I should make this finding;
i. The Claimant on the other hand stated in the application [paragraph 18] that the Hempsall was told by Mr. Ellis that the reason for the suspension was that the Respondent was suffering from financial problems, and that until its financial position changed, it did not want the Claimant to continue to work
j. The Ellis statement did not join issue with this important point, and Mr. Ellis merely attested to not having spoken to Mr. Chadband, not that he had not spoken to Mr. Hempsall about financial problems. There is no denial about the Respondent's financial problems in the Ellis statement and I find this a telling point;
k. Annexures F(a) through to F(i) are faxes or emails between the parties from 2 April 2007 to 30 July 2007 (the "refinancing documents") in which the theme is the Respondent's refinancing of the project and promises that payment would then be forthcoming. There are no documents within this group that contain any denials about the extent of liability of the Respondent to the Claimant;
l. I have already said that I am not prepared to consider that an estoppel is raised to prevent the Respondent from asserting that work done and materials supplied are defective. However, this is not the point at issue in relation to this invoice. The Claimant says that the works were stopped due to the Respondent's lack of finance, and this has not been expressly denied in the Ellis statement;
m. It is clear that the Respondent has only paid $178.95 of approximately $70,000 claimed, and the refinancing documents point to the Respondent's financial problems, which are not denied in the Ellis statement. After consideration of the documents, on balance I find that the works were suspended because of financial difficulties faced by the Respondent; and that this was the primary reason for the suspension.
n. There are no corroborating documents provided by the Respondent to support its assertion in the Ellis statement that suspension was due to defects, or indeed that there were defects complained about. If the Respondent had complained of defects, it would have been very easy to have said to the Claimant in the refinancing documents that one of the reasons for non payment is the defective

work done and materials supplied; particularly since the project was over a lengthy period of a year;

o. However, the Respondent has now asserted the existence of defects, such that it says it is not liable to pay the amount of $16,159.55 because the Claimant has breached the implied terms of quality, and also that it is not clear whether units which have not been installed are included in the tax invoice;

p. The Respondent has not identified any amount between $16,159.55 and $0 to which I could give consideration. Essentially it argues that the breach of contract entitles the Claimant to no payment for this item whatsoever;

q. On balance, I am not satisfied that the bore sensors were faulty, as there is only a one paragraph reference to the defects in the Ellis statement, when I would have expected that he would have been able to substantiate the extensive submissions in the response about the alleged defects. The Claimant has made a number of submissions in paragraph 25 denying that the bore sensors were defective, and the Respondent in the response chose not to directly join issue on these points, and the Ellis statement did not deny the Claimant's assertions, apart from the one reference in paragraph 7;

r. I have found that the reason for the suspension in December 2006 was the Respondent's financial difficulty and that at that time there was no complaint about defects. The equipment may now be defective about which I make no finding, but this could be for a number of reasons for which the Claimant may not be responsible;

s. I therefore find that at the time of delivery by the Claimant of the sensors that they were not defective and that it was not possible to test them because there was no electricity available;

t. However, it is clear that only 2 of the 5 sensors were installed, so I am not prepared to allow the Claimant the installation costs for the sensors. I have not been given a basis for determining the individual installation cost of each sensor. Having regard to the quotation no.JOB006273 dated 21 September 2006, I note that the installation and testing was quoted to be $1,034.55, and I therefore deduct this amount from the invoice because the majority of the sensors were not installed;

u. Therefore, **I find that the Respondent is liable to pay $15,125.00 for the supply of the sensors.**

93. Other issues canvassed by the parties

a. The Respondent in the Ellis statement devoted nearly a page to allegations of unprofessional supply of services and conversations with Hempsall or Blackley. Essentially Mr. Ellis says that the agreement with the Claimant required the provision of a key worker and an assistant (the "personnel"), and that the work had to be complete within a specific time;

b. I have found from the material that the construction contract was partly oral and partly in writing, with the writing comprising the quotations accepted by Mr. Ellis on behalf of the Respondent in signing them, or making some note on them;

c. It is not possible on the material provided by either party to determine the extent of the oral terms in the *construction contract*. Paragraph 4(c) of the application identified conversations between Ellis and Chadband, but the Respondent denied those conversations in paragraph 3 of the Ellis statement.

d. The references to conversations with Hempsall and or Blackley in the Ellis statement did not mean that there was contractual significance in these conversations, and it is unclear whether either gentleman had the power to bind the Claimant. The Claimant stated in paragraph 15 of the application that they were employees of the Claimant. There is no evidence that Hempsall was the agent of the Claimant, so it is unsafe for me on the strength of the Ellis statement alone, to find that the construction contract included terms about the personnel and the time.

e. In any event, it does not appear that much turns on the alleged unprofessional supply of services because I am not required to make a value judgement of either

party's conduct, unless it translates into having an effect on the value of the construction work or any defects that may need rectification. The Ellis statement does not go that far, but merely makes assertions, presumably in support of its allegations of delays in paragraph 8 of the response. I have already found that I am unable to consider delays to the contract because there is no right of set off under the contract.

Due date for payment

94. Neither party has pointed me to a provision in the contract about due date for payment, so I find that the *construction contract* makes no provision about the due date for payment.

95. Accordingly, s15(1)(b) of the Act, has the effect that the due date for payment is 10 business days after the payment claim was made. The payment schedule identifies that the payment claim was received on 27 September 2007, and I find that this is the correct date of receipt, which is 2 days after posting the claim.

96. I therefore calculate the due date for payment then to be 11 October 2007.

Entitlement to interest

97. Neither party made submissions on interest. s15(2)(a) applies because I find that there is no rate of interest under the contract. The Supreme Court rate of 10% is prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*.
98. I do not consider that it is appropriate for me in circumstances where there are no submissions from either party to consider whether this is a *construction contract* to which s67P of the *Queensland Building Services Authority Act* (the "QBSAA") applies. This provision allows for a penalty rate for interest to apply if it is a building contract to which the QBSAA applies. I consider the matter on the material before me, and I do not consider it appropriate to ask for submissions, which on this point are likely to be complex, to discern whether a penalty rate may apply. Accordingly, I make no finding that the QBSAA applies.
99. Accordingly, I find interest at 10% in accordance with s15(2)(a) of the Act.

The adjudicated amount

100. I tabulate the adjudicated amount from the decision as follows:

Undisputed invoices and adjustment note	$49,418.69
Invoice 153672	$2,430.85
Invoice 153689	$1,918.45
Invoice 154867	$15,125.00
SUBTOTAL	$68,892.99
Less paid to date	$178.95
TOTAL	**$68,714.04**

101. **The adjudicated amount is $68,714.04**

Due date for payment

102. **I have already found that the due date for payment is 11 October 2007**

Rate of interest

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

Authorised Nominating Authority and Adjudicator's fees

104. s34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has substantially succeeded in the quantum of its claim. The Respondent's defence was based on:
    - an invalid payment claim because it was served on a post box;
    - an invalid payment claim because it did not identify a reference date;
    - the rights of the Respondent to set off against the claim for damages for breach of contract and/or delay;
    - its right to set off for rectification of defective work.

105. The only defence that I found was sustainable was that for $842.60 for defect rectification in a claim for over $70,000. The Claimant has been out of pocket for monies of up to a year and has been forced to have the matter adjudicated, in circumstances where I have not found that the Respondent was justified in denying liability.
106. Accordingly, I am prepared to disturb the status quo provided in ss34(3) and 35(3) of the Act and decided that the Respondent should pay all the ANA's fees and all my fees

Chris Lenz
Adjudicator

13 November 2007