


Claimant: SMAV Pty Ltd

Respondent: Watpac 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"), regarding the Claimant's payment claim for \$421,750.90, decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated 14 January 2008 is **\$386,904.99 including GST**
2. The date on which the amount became payable is **12 January 2008**.
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:.....

Chris Lenz Adjudicator

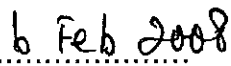
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Background

1. SMAV Pty Ltd trading as Transcape Constructions (referred to in this adjudication as the "Claimant") was engaged by Watpac Pty Ltd (referred to in this adjudication as the "Respondent") to undertake construction works involving landscaping and irrigation work (the "work") at Pioneer Park, CONDON in Queensland (the "site"). The work on the site was part of the Thuringowa Riverway Stage 2, Sports Precinct (the "project").
2. The parties entered into a written subcontract on 10 November 2006 for the work.
3. On 11 December 2007, payment claim No.14 for \$421,750.90 (including GST) was served on the Respondent. This payment claim identified that it was a payment claim made pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act").
4. The Respondent's provided a payment schedule (the "schedule") dated 20 December 2007 in response to the payment claim. In the schedule, the Respondent stated that there was a negative amount of \$74,266.26 owing. The effect of this schedule meant that the Claimant owed money to the Respondent due to variations and back-charges.
5. The schedule:
 - a. Identified deficiencies with service of the payment claim;
 - b. Identified failures of the Claimant to provide documents in accordance with contract clauses 10(a), (b), (d)(ii), (d)(iii), (d)(v);
 - c. Stated that the claim included amounts not stated in the last progress report;
 - d. Stated that rejected or unapproved variations were being claimed, and that complete and substantiated justification was required of the EOT claims for submission to the Superintendent;
 - e. Identified liquidated damages, and other back-charges.
6. The Claimant made a written application for adjudication on 14 January 2008 (the "application"), and the Respondent's solicitors provided an adjudication response to the adjudicator on 22 January 2008 (the "response").
7. The response was not served on the Claimant until 11.00am on Tuesday 29 January 2008, which was on the fourth day of adjudication, and this occurred because the Claimant's solicitors advised on 25 January 2008 that the response had not been served.
8. The response identified a significant number of issues that the Respondent argued meant that the Claimant was not entitled to any payment. These issues included:
 - a. Preliminary matters regarding the:
 1. "mischievous conduct of the Claimant",
 2. the fact that the Claimant had not proved its claim,
 3. the failure by the Claimant to provide supporting evidence to allow me to reach a different view than those of the Superintendent and others,
 4. the failure to provide sufficient material verifying contractual entitlement,
 5. the failure by the Claimant to counter the Respondent's deductions of back-charges
 - b. The Adjudication application being out of time because the schedule was served on 20 December 2007;

- c. The contract being unenforceable against the Respondent because the Claimant was unlicensed;
- d. The payment claim did not comply with Clause 10 of the contract;
- e. The claim not made in accordance with Clause 13 of the contract;
- f. The justification for the Respondent's quantification of the claim.

Appointment of Adjudicator

- 9. The Claimant applied in writing to the Queensland Law Society ("QLS") on 14 January 2008 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.
- 10. I find the application was to QLS, as an authorised nominating authority, with registration number N1061878, thereby satisfying s21(3)(b) of the Act.
- 11. By letter dated 15 January 2008, QLS 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 16 January 2008 sent to the Claimant and to the Respondent by facsimile, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.
- 12. I have no interest in the contract, and 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.
- 13. On 25 January 2008 the Claimant's solicitors wrote to me and the Respondent and advised that the response had not been served on the Claimant. I wrote to the Respondent's solicitors (copied to the Claimant's solicitors) on 25 January 2008 stating that if the response had not been served, then it needed to be served forthwith.
- 14. On 29 January 2008, the Claimant again wrote and advised that it had not received the response, and the Respondent's solicitors wrote to me and the Claimant's solicitors advising that they expected the response to be served by 1pm on that day. On 29 January 2008 the Claimant's solicitors again wrote to me and the Respondent's solicitors advising that they had been served with the response at 11.00am on that day.
- 15. In all correspondence from the Claimant's solicitors they advised that their client reserved its rights about the non service of the response.
- 16. On 31 January 2008, the Claimant's solicitors wrote to me stating that the Respondent was relying upon reasons that had not been expressed as reasons in the payment schedule, and requested that I ask for further submissions from the Claimant pursuant to s25(4) of the Act.
- 17. My obligation is to adjudicate the payment claim in accordance with the Act, and I identify the material in the adjudication, and the threshold issue of jurisdiction before considering the application and response in detail.

Material provided in the adjudication

- 18. Claimant's Material
The application dated 14 January 2008 in support of its payment claim for \$421,750.90 (including GST) attaching:

- i. Attachment A – The construction contract
- ii. Attachment B – The payment claim
- iii. Attachment C – The payment schedule
- iv. Attachment D – Claimant's submissions
- v. Attachment E – Affidavit of Scott Michael Dobson, with 78 attachments

19. Respondent's Material

- Tab 1 - The response submissions
- Tab 2 – Letter serving the adjudication application
- Tab 3 – Respondent's payment schedule
- Tab 4 - s39 of the Acts Interpretation Act 1954
- Tab 5 – Statement of Anthony O'Brien with Annexures, some which were not included
- Tab 6 – Statement of Mark Beckett
- Tab 7 – QBSA license search of Claimant
- Tab 8 – copies of cases and legislation referred to in the submissions

20. Letters from Claimant and Respondent to me relating to the response and request to be asked for submissions, referred to elsewhere in the decision.

Construction contract

21. In order for an adjudicator to have jurisdiction 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.
22. It is therefore necessary to consider the parties' construction contract falls within the Schedule 2 definition of *construction contract* under the Act which provides:

*“**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.”*

23. The Claimant included the construction contract in Attachment A of the application, and the Respondent accepted this document in paragraph 6 of the response submissions. I find that it is a contract, but I must be satisfied that it related to an undertaking by the Claimant to carry out construction work, or supply related goods and services for the Respondent.
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;....
(e)(v) site restoration, landscaping...”

25. I find that the contract for landscaping falls within s10(1)(b) relating to construction of works forming part of land, and specifically within the word *landscaping* in s10(e)(v). I find that irrigation falls within s10(1)(b) relating to *pipelines* and *water mains* and maintenance of works forming part of land, which works falls specifically within the word *landscaping* in s10(e)(v).

26. I therefore find that the Claimant undertook to carry out construction work for the Respondent under a contract, which is a construction contract under the Act. I will now refer to it as the “contract”. I find that the date of the Formal Instrument of Agreement attached to the contract is 10 November 2006, which is after 1 October 2004.
27. I find that the location of the site is Condon, which is in Queensland.
28. Accordingly, I am satisfied that s3 of the Act has been satisfied, and there is no material from either party to suggest that any of the exceptions under s3 of the Act apply to preclude the matter from being adjudicated.
29. I therefore proceed to adjudicate the matter. In so doing, there a number of important issues canvassed by the Respondent in the response, which the Respondent argues are jurisdictional points, and in my view they need to be dealt with before descending into the merits of the payment claim, as they are threshold issues, some of which affect the jurisdiction to proceed.
30. However, it is prudent to ensure that the basic and essential requirements identified by the Court of Appeal in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another* [2004] NSWCA 394 (“*Brodyn*”) are satisfied before considering these threshold points.
31. I have already established that there is a construction contract to which the Act relates, which is the first basic and essential requirement.
32. Furthermore, I have found that there was an adjudication application made to QLS and that I have been appointed as the adjudicator, which satisfies the third and fourth basic and essential requirement of *Brodyn*.
33. I accept that there is an issue regarding the timing of the adjudication application, but this is a more detailed requirement according to Hodgson JA at paragraph 54 of *Brodyn*, and I will consider this in more detail later,
34. The second basic and essential requirement is that I need to be satisfied that there was service of the payment claim.

Service of the payment claim

35. I find from the material that the payment claim was served on the Respondent, as the Respondent refers to the payment claim in paragraph 6 of the response submissions, and it served a payment schedule on the Claimant.
36. On page 2 of the payment schedule, in a “tick a box” list of particulars, the Respondent identified that the payment claim was not served correctly, and referred to Clause 37 of the contract. It does not elaborate further in the payment schedule about any deficiency in service, and I cannot glean from clause 37 of the contract what may have been deficient in relation to service. Furthermore, the Respondent had an opportunity in the response to explain what was deficient, and I cannot find any submissions on this point.
37. Accordingly, I find that service of the payment claim took place in accordance with the Act, thereby satisfying the second basic and essential requirement.
38. The fifth basic and essential requirement is considered under the next heading *scope of the adjudication*.

Scope of the adjudication

39. s26(1) of the Act requires that I am to determine:
- The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the “**adjudicated amount**”); and
 - The **date** on which any such amount became or becomes payable; and
 - The **rate of interest** payable on any such amount.
40. 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):

- the provisions of this Act, and to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
 - the provisions of the construction contract from which the application arose;*
 - 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;*
 - 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;*
 - the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”*
41. 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. 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 from the parties.
42. 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), and unless I am of the view that natural justice demands that submissions be sought, I will not ask for submissions, as it delays adjudication of a payment claim, which is designed to be a speedy process.
43. The failure by the Respondent to serve the response until half way through day 4 of the adjudication has not assisted the adjudication process. Although it is a requirement under s24(5) of the Act, that the response be served, there does not appear to be any time limit within which this is to occur, and an adjudicator has no power to compel parties to abide by the Act.
44. In my view the lack of a prescriptive time within which the response is to be served on the Claimant is a deficiency in the Act, because late service of a response may disadvantage the Claimant. In this case, on day 6 of the adjudication the Claimant asked for the opportunity to make submissions.
45. Late service of the response has the potential to delay the adjudication process because consideration of additional submissions may require the adjudicator to seek an extension of time from both parties. Alternately, if one party does not consent to the extension, it makes the adjudication process even more difficult, because of the limited time frame within which to adjudicate.
46. However, the Act does not contain any time within which the response be served, and I am obliged to have regard to the provisions of the Act. In response to its request to be allowed to make submissions, I advised the Claimant that submissions would only

be sought if natural justice required them, particularly given that the Act contemplates that the response is the last shot in the dispute.

47. 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 threshold issues and the substantive issues.

Threshold issues

48. Before traversing the submissions in relation to the important issue threshold issues, I refer to the response submission 7 wherein the Respondent refers to the documents that it relies on, and in paragraph (f) refers to a statutory declaration of Anthony O'Brien ("O'Brien"), and in paragraph (g) to a statutory declaration of Mark Beckett ("Beckett").
49. I find that neither of these documents are statutory declarations, as part 4 of the Oaths Act 1867 deals with statutory declarations and s14 specifically provides:

"14 Form of declaration

In all cases where a declaration in lieu of an oath shall have been substituted by this Act or by virtue of any power or authority hereby given or where a declaration is directed or authorised to be made and subscribed under the authority of this Act or of any power hereby given although the same be not substituted in lieu of an oath heretofore legally taken such declaration unless otherwise directed by the powers hereby given shall be in the following form—

'I A.B. do solemnly and sincerely declare that [let the person declare the facts] and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1867.'

50. In the document of O'Brien, on the last unnumbered page, I find the words deponent, with a signature and a witness, whom I find is a JP, but his statement was not solemnly declared with a conscientious belief in its truth. I therefore find that this is only a signed statement of O'Brien, which has been witnessed by a JP.
51. Similarly, Beckett's document has not been solemnly declared with a conscientious belief in its truth, and although it has been signed, it has not been witnessed.
52. Accordingly, I find that neither document is a *statutory declaration*, and therefore cannot have the probative value of a statutory declaration, so when evidence is being evaluated, I must find that they attract less weight than a document that has been properly sworn or declared. I now refer to these documents and *the O'Brien statement* and *the Beckett statement*.
53. In paragraph 7(f) of the response, the Respondent submitted that some of the Annexures referred to were not able to be included in the O'Brien statement because of the time frame, but were available to me on request.
54. If Annexures were not provided because the Respondent did not have time to include them, it appears as if the Respondent feels that by referring specifically to these documents, then I could ask for the missing Annexures during adjudication.
55. I am not prepared to ask for missing Annexures, as I am not in a position to cure the time frames under the Act, and I will only consider the material before me as required by *Abel Point*. The only means whereby I could ask for these missing documents is if I exercised the powers under s25(4) of the Act, and asked for submissions. *Abel Point* is authority that I am not obliged to ask for submissions, and I am not prepared

to do so, as it raises the requirement of asking for submissions from the Claimant, all because some Annexures were not provided by the Respondent in the time allowed under the Act.

56. As a consequence, and after having carefully reviewed the O'Brien statement and the Annexures provided to me, I find that the following documents were not in attached to the O'Brien statement:
- a. AO4(iv);
 - b. AO5(iii);
 - c. AO11;
 - d. AO13(iv);
 - e. AO15(i) and (ii);
 - f. AO18(viii);
 - g. Numerous site instructions and letters referred to in paragraph 54;
 - h. AO18(ix), (x), (xi) and (xiv);
 - i. AO20(ii);
 - j. AO21;
 - k. AO23(iii);
 - l. AO24(i) and (ii);
 - m. AO28;
 - n. AO29(ii);
 - o. AO30;
 - p. AO31(ii);
 - q. AO32(ii) and (iii);
 - r. AO33;
 - s. AO34(i) and (ii)
57. There were some erroneous numbers provided to documents, but I was able to identify the documents being referred to, as they were sufficiently described.
58. I also find as an important introductory point to the threshold issues that, without controverting evidence, the payment claim was served on 11 December 2007. Accordingly, whether the payment schedule was served on 20 December 2007 or 21 December 2007 does not detract from the fact that whichever date is correct, the payment schedule was within 10 business days of service of the payment claim as prescribed by the Act.
59. Furthermore, I find that the payment schedule had a scheduled amount of (\$74,266.26) which was less than the claimed amount of \$421,750.90, which means that it is a division 1 payment schedule under s21(1)(a)(i) of the Act, and this has a bearing on when the adjudication application had to be lodged.
60. In considering the Preliminary matters and other substantive matters raised early on in the response, before the quantum of the payment claim and payment schedule are considered, I have somewhat reversed the order in which these matters were raised, so as to provide reasons that (hopefully) are easier to follow.

Service of the application outside the time required under the Act (response #42-67)

61. An adjudicator cannot ignore the provisions of the Act, particularly in relation to the strict time limits required by the Act, so that if the timing of the adjudication application is outside that prescribed by the Act, then adjudication ought not proceed. However, this is a critical point, and it can only be taken in the adjudication response, so that if I am of the view that the Respondent has made out its case, I would feel compelled to give the Claimant an opportunity to make submissions on this point.

62. The Respondent says that it served the payment schedule on the Claimant twice by facsimile on 20 December 2007 and also by email on that date, and provided a "statutory declaration of Anthony O'Brien" [paragraphs 6(b) and 6(c)] supporting those facts.
63. The Respondent argues therefore that the adjudication application had to be lodged on or before 11 January 2008 to comply with the time frame under the Act, so that lodgement by the Claimant on 14 January 2008 was out of time.
64. The Respondent argues that the Claimant did not provide a fax log supporting the Claimant's assertions that the facsimile transmission of the payment schedule was not received in full, and that it was mischievous for the Claimant not making any reference to the fact that it also had the payment schedule emailed to it.
65. It appears that the Respondent wants me to make a finding in its favour on the basis of lack of credibility of the Claimant.
66. I am not prepared to draw any adverse inference from the Claimant not providing a fax log. The Claimant provided an affidavit of Scott Michael Dobson ("Dobson affidavit") which I find was properly sworn before a solicitor, and contained properly identified documents as attachments.
67. In the Dobson affidavit, Mr. Dobson swears that when he was at work on 21 December 2007, he discovered that the Claimant had only received 5 pages of the Respondent's letter dated 20 December 2007, and he attached those in SMD6, which are the first 5 pages of a 13 page document. This document reflected transmission receipt at 18.30 on 20 December 2007.
68. He said that he contacted the Respondent and said to the Respondent that he had only received the first 5 pages of the document sent by facsimile on 20 December 2007. He says that the Respondent then sent a further 8 pages of the document, which Mr. Dobson attached in SMD7, and these reflected transmission receipt at 10.12 on 21 December 2007.
69. I have sworn evidence of Mr. Dobson regarding receipt of part of the document at 18.30 on 20 December 2007 (5 pages), and another 8 pages on 21 December 2007. I find that the number of pages totals 13 pages, which I find is the total number of pages of the document identified as the payment schedule by the Respondent in Annexure AO3(i) of the O'Brien statement.
70. I also find that the SMD6 and SMD7 documents combine to be identical to that identified in Annexure AO3(i) and this is described by the Respondent as the payment schedule. I also find that the first page of the payment schedule expressly states that it was "*Issued by facsimile only*".
71. The Claimant asserts that the date of service of the payment schedule was 21 December 2007, and it bears both the legal onus and evidentiary onus to prove its claim. I am prepared to accept that the Claimant has discharged its evidentiary onus as to the date of service of the payment schedule, because it has been supported by Mr. Dobson's facts on oath. Accordingly, I find that the evidentiary onus now shifts to the Respondent to displace this evidence with cogent evidence to the contrary.
72. The Respondent says that service of the payment schedule was 20 December 2007 for which it has a fax log, which it says proves that service took place on that date.
73. The fax log is attached to the unsworn O'Brien statement, so if it was a pure contest between Messrs Dobson and O'Brien on the point (after taking into account the

surrounding circumstances and applying commonsense), I would have to prefer the evidence of Mr. Dobson, because his evidence is on oath.

74. However, the fax log can stand alone, without additional support from Mr. O'Brien; but does it prove that the document was received at the other fax machine?
75. McDougall J at paragraph 30 in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2005] NSWSC 378 ("*Soliman 2005*"), referred to the question of facsimile receipt, as follows:

"There may be some question as to how a document shown to have been faxed, with the fax log of the sending machine recording 'OK' as the result, would not have been received on the addressee's fax system. But there was no evidence, expert or otherwise, that would enable me to address this question; and I do not think that I can take judicial or other notice of the workings of such machines."

76. I agree with His Honour that I cannot take judicial notice that a fax log, of itself, proves that the payment schedule was twice received by the Claimant's fax on 20 December 2007. There is no expert evidence provided by the Respondent to demonstrate that this follows as a matter of fact.
77. Accordingly, I am not prepared to accept that the Respondent has discharged its onus in relation to service by fax on 20 December 2007. This means that I do not find it necessary to ask the Claimant for submissions on this point, since it has already discharged its evidentiary onus.
78. I therefore find that as a matter of fact that the Claimant has proved that the payment schedule was received on 21 December 2007. I am drawing a distinction between the issue of serving a payment schedule (which the Respondent focuses on) and receiving a payment schedule, which is what the Act refers to. I will also have to consider what is meant by the payment schedule, because the parties are at odds about the contents of this document, but I will firstly refer to the rules governing timing of an adjudication application.
79. I refer to the Act to understand how the timing of the adjudication application is actually prescribed by the Act. s21(3) of the Act states:
- "An adjudication application-*
- (a) must be in writing; and*
 - (b) must be made to an authorised nominating authority chosen by the claimant; and*
 - (c) must be made within the following times –*
 - (i) for an application under subsection (1)(a)(i) – within 10 business days after the claimant receives the payment schedule"*
80. I have found that the payment schedule was one to which s21(3)(a)(i) of the Act applies, which means that the Claimant was required to lodge an adjudication application within *10 business days after it receives the payment schedule*
81. There is some importance in my mind attached to the meaning of the word "receives" which has not been dealt with by the Respondent. The Respondent's submissions simply argue that service of the payment schedule was made on 20 December 2007, which means that the adjudication application was out of time.
82. The word *receives* in this context has Full Court authority in NSW. In *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* [2006] NSWCA 259 (19 September 2006) ("*Falgat*"), Hodgson J at paragraph 63 held:

"63 In my opinion, the word "receive" in s17(3)(c) [NSW equivalent of s21(3)(i), my comment] does not necessarily require that the document come to the notice of a person authorised to deal with the document on behalf of the claimant. In general, in my opinion, it would be satisfied once the document has arrived at the claimant's registered office or place of business and is there during normal office hours."

83. Accordingly, in line with *Falgat*, it is of significance that there is reference to a document arriving at a place of business and being there during normal office hours. Therefore, even if I had not found as a matter of fact, that the payment schedule had been served by fax on 21 December 2007; it would follow from *Falgat* that the payment schedule should be there during normal office hours.
84. As a matter of commonsense, I find that 1830 on 20 December 2007 is after office hours, so that as a matter of law, even if the fax was found to have been served at 18.30 as the Respondent contends (which I do not find), then it would only have been received during office hours, which was the next day being 21 December 2007.
85. The Respondent, however, does not only rely on service by facsimile, but also refers to service by email on 20 December 2007 to which I must now turn. The Respondent submits that it is quite mischievous for the Claimant to have made no reference to email service of the payment schedule.
86. I do not see that the Claimant was obliged to make reference to service of a payment claim by email because I cannot make a finding that it should have expected a payment schedule to be served by email. The payment schedule, I have already found said that, *"Issued via facsimile only – 4755 0422"*.
87. In paragraph 55 of the response, the Respondent submits that the O'Brien statement demonstrates that previous payment schedules had been served on the Claimant by email. I could find no such evidence whatsoever in the O'Brien statement of any past emails of payment schedules.
88. Accordingly, I cannot accept that the Claimant ought to have been on alert about payment schedules by email, or that a waiver or estoppel arises preventing the Claimant from denying the Respondent had the right to serve by email.
89. This finding is further strengthened by my finding that the contract specifically provides for notices at Clause 37, which provides:
- (a) Subject to this Clause any notice necessary of required or allowed to be given in accordance with this Agreement shall be deemed to be sufficiently given if delivered by hand or is sent by pre-paid post or where so required by this Agreement be certified mail or facsimile transmission...*
- (c) The Builder may issue any documents in respect of the Act (including a payment schedule under the Act) by hand, by pre-paid post, by certified mail or facsimile transmissions addressed to the person...."*
90. There is nothing in the contract that makes reference to email service of notices, so I cannot find that the Claimant ought to have addressed this in the application because the contract did not require it.
91. The Respondent, however, refers to s39(1) of the *Acts Interpretation Act* (the "AIA"), which is specifically referred to in s103(2) of the Act, and argues that a "similar facility" contemplated by the AIA, includes email, so that the payment schedule could be served by email.

92. I do not agree that email falls within the definition of similar facility. As a matter of statutory interpretation, I construe the list of *telex, facsimile or similar facility* ejusdem generis i.e. *similar facility* must take its meaning from the list. The first two items in the list actually print out the transmission on paper, and I do not find that this is the case for email.
93. As a matter of commonsense an email can be printed out, however, it is not something that automatically occurs, and in my view the *similar facility* contemplated by the AIA would have to do this to form part of the list. I therefore reject the Respondent's submissions on this point.
94. The Respondent then refers to the provisions of the *Electronic Transactions (Queensland) Act 2001* (the "ETA") to support its argument that it could serve the payment schedule by email. I accept the Respondent's submissions that the ETA could apply to the provision of payment schedules, but one must look to the words of the ETA before accepting that emailed payment schedules are allowed.
95. s11 of the ETA provides:
- "11 Requirement to give information in writing**
(1) *If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).*
(2) *The circumstances are that—*
 (a) *at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and*
 (b) *the person to whom the information is required to be given consents to the information being given by an electronic communication.*
96. I refer to s11(2)(b) of the ETA and find there is no evidence on which to make a finding that the Claimant consented to the payment schedule being given by email. *Consents* is defined in Schedule 2 of the ETA as:
 "includes consent that can be reasonably be inferred from the conduct of the person concerned..."
97. There is no evidence from such consent from the O'Brien statement, or anywhere else in the Respondent's material, apart from its submissions. I find that submissions that make specific reference to factual support from a statement, which then provides no such factual support, must of necessity be treated with extreme caution.
98. Accordingly, I find that the ETA does not allow service by email in this instance. Even, if I am incorrect in this finding, I refer again to the authority of *Falga* and find that the email transmission in AO(3)(ii) was sent at 18.33 on 20 December 2007, which I find is after business hours on that day. Accordingly, applying *Falga*, the email (as a matter of law) would be considered to have been *received* in the context of s21(3)(c)(i) of the Act during business hours on 21 December 2007.
99. I do not accept the submissions of the Respondent that the wording of s103 of the Act not being mandatory but facilitative, and the cases it refers to, in any way detracts from my findings. The "merely facultative" submission supported by *Falga* does not help the Respondent because I have found against it as a matter of fact on fax and email (and law regarding *receiving* a payment schedule and the inability to serve by email in this case), and there are no other modes of service on which the Respondent relies as a matter of fact.

100. I am therefore left with the finding that the payment schedule was received on 21 December 2007. However, the Claimant argues that I should only consider the "payment schedule" attached in its Attachment C, which essentially excludes the 20 December 2007 letter of 7 pages, 5 of which had been sent by fax on 20 December 2007 and the other 2 pages on 21 December 2007.
101. I do not agree with the Claimant that it is not possible to identify the 5 pages received on 20 December 2007 as part of the payment schedule. Those 5 pages were 5 pages of a 7 page letter dated 20 December 2007, and the date on the first of the 5 pages was 20 December 2007, with a letter reference (T023. TRANS 055). The payment schedule that the Claimant concedes is the payment schedule specifically refers to the letter attachment dated 20 December 2007 (7 pages) and Transcape Subcontract analysis.
102. I accept the Respondent's submissions that a document can be incorporated by reference into a payment claim and the reference to *T&M Buckley Pty Ltd t/a Shailer Park Constructions v MG Constructions Pty Ltd & Ors* BS 8651 of 2006 (19 October 2006) is authority for that point. I cannot see how this principle should not apply to a payment schedule, so that I find that the payment schedule, as attached to the Respondent's material, will be considered by me in the adjudication comprising the:
- a. Payment schedule dated 20 December 2007;
 - b. Transcape Subcontract analysis;
 - c. Letter dated 20 December 2007.
103. Even if I am incorrect in this finding, as a matter of law, the case of *Falgat* supports the view that the 5 pages SMD6 document was only received on 21 December 2007 during business hours, by which time the other 8 pages were received from the Respondent, which totals 13 pages of documents, as listed in a, b and c above.
104. Accordingly, I proceed further with adjudication, on the basis that service of the payment schedule (of the full 13 pages) took place on 21 December 2007. This means that I find that the lodgement of the adjudication application on 14 January 2008 was within the time prescribed by the Act as being on the 10th business day after it had received the payment schedule on 21 December 2007.
105. I now turn to the next threshold issue of the contract being unenforceable because the Claimant was unlicensed.

Contract unenforceable against the Respondent (response #68-90)

106. The Respondent has put an allegation of unlicensed contracting directly in issue, whilst conceding that it was not raised in the payment schedule. This means that the Claimant would not have had notice that such a matter was likely to be raised, such that there is no reference to licensing in the adjudication application.
107. In paragraph 21 and 22(a) of the response, however, the Respondent submits that the Claimant has been mischievous in being selective about what documents were provided to me, and that the Claimant should have made reference to the issue of licensing and that it must have known that its license did not allow it to undertake drainage work.
108. Given that the Respondent had not raised unlicensed contracting as an issue in the payment schedule, I could not possibly draw any adverse inference from the Claimant not dealing with this issue in the adjudication application. I therefore reject the Respondent's submissions about the alleged selectivity of the Claimant in the application.

109. Nevertheless, I must consider the Respondent's submissions on licensing as it argues that this is a jurisdictional point to which I must have regard because I must consider the Act and the contract.
110. The Respondent refers to the decision of Hodgson JA in *The Minister for Commerce (formerly Public Works & Services) v. Contrax Plumbing (NSW) Pty. Ltd. & Ors. ("Contrax")* [2005] NSWCA 142, [but only to paragraph 34, when paragraph 35 is particularly relevant (with respect)], where His Honour said:
- "34 In my opinion, this suggested anomaly loses force when one considers the true effect of s.22(2). It is true that paragraph (d) of s.22(2) limits the submissions of the respondent that can be considered under that paragraph to submissions duly made by the respondent in support of the payment schedule; and in my opinion, that does have the effect of excluding, from consideration under that paragraph, reasons included in the adjudication response that were not included in the payment schedule.*
- 35 However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs*
111. The Respondent also referred to the case of *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19 ("*John Holland*"), which the Respondent erroneously (with respect) stated was a Supreme Court decision. The Respondent submitted that an adjudicator was obliged to consider a submission as to jurisdiction, which was not raised in the payment schedule, provided it was relevant to issues arising under the construction contract or the Act.
112. Hodgson JA in *John Holland* held at para 48, with reference to his earlier decision in *Contrax* said:
- "However, it is to be noted that I said that the adjudicator was required by pars.(a) and (b) of s22(2) to consider matters "if he or she thinks [they are] relevant to the construction of the Act, the construction of the contract, and the validity of the terms of the contract having regard to the provisions of the Act. To put this another way, I was saying that the adjudicator should not ignore something which he or she is aware of and also believes is of real relevance to issues under pars.(a) and (b), simply because the matter was not raised in submissions duly made by the respondent. Of course, if the matter has not been so raised, there may be questions of natural justice to the claimant that needs to be addressed, perhaps by calling for further submissions or by arranging a conference; but that is another issue. However, the requirement for natural justice to the claimant is a further reason why the adjudicator would not be required to consider such matters under pars.(a) of (b) unless he or she thought they were really material to issues arising under those paragraphs"*

113. It is clear from these two authorities that it is not automatic that an adjudicator must consider all submissions that relate to issues under s26(2)(a) and (b) of the Act. s26(2)(a) relates to the provisions of the Act, and to the extent that they are relevant, the provisions of the *Queensland Building Services Authority Act 1991* ("QBSAA"), Part 4A. S26(2)(b) relates to the provisions of the construction contract from which the application arose.
114. In both *Contrax & John Holland* Hodgson JA held that the adjudicator must consider matters which he or she thinks is relevant. Therefore, if I do not consider a matter relevant to interpreting s26(2)(a) and (b), then I am not compelled to consider the matter.
115. This differs with the Respondent's submission at paragraph 70 of the response that an adjudicator was required to consider a submission as to jurisdiction.
116. I have been referred to the case of *Cant Contracting Pty Ltd v Con Casella and Michelle Lyndsay Casella* [2006] QCA 538 ("*Cant*") as authority that licensing is relevant to the contract. This case went on appeal from De Jersey CJ's decision that a builder was entitled to summary judgement on a payment claim despite the Respondent arguing at the hearing that a builder was not licensed.
117. De Jersey CJ held that the failure by the Appellants to raise the requirement for a license in the payment schedule, precluded them from raising it as a defence in a summary judgement application. In separate judgements, but all agreeing with the orders that were made, the Court of Appeal ordered that the summary judgement be dismissed with costs.
118. Williams JA, at para 29, held that the Chief Justice was wrong in relying upon *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another* [2004] NSWCA 394 ("*Brodyn*") as authority in support of his granting summary judgement. Whilst it was obiter, at para 33, His Honour held that "*Parliament could not have intended that pursuant to the Payment Act an unlicensed contractor could immediately recover the whole of the contract price for doing the work, in the face of a statutory prohibitions in the Building Act on such contractor recovering any monetary consideration, other than as specified in s42(4) for doing work under the contract.*"
119. Jerrard JA at para 44 noted that it was not denied by the Respondent that it was an unlicensed builder. His Honour held that the Respondent was not entitled under ss 12 or 13 of the Act to a progress payment because it was prohibited from doing so by s42(3) of the BSAA, and, at para 48, held that was the basis why the summary judgement should be set aside.
120. McMurdo J at para 50 noted that the Respondent builder, for the purposes of the appeal, had to be treated as unlicensed. At para 55, His Honour held that there was a difficulty with the Act because an unlicensed builder is not entitled to enforce its contract by virtue of s42 of the BSAA. In para 57, His Honour held that s42 of the BSAA is not within Part 4A of the BSAA, such that an adjudicator could not consider s42 of the BSAA because of the limitations contained within s26(2) of the Act.
121. His Honour held further at para 59 that:
- "...there could be a genuine question as to whether the builder is relevantly unlicensed. In particular there could be questions of fact going to the classification of work for the purposes of the licensing requirement, which cast doubt on whether the builder held the licence appropriate for the agreed work. But that is not a matter*

which could be investigated by the adjudicator, who would be confined to a consideration of the matters listed in s26(2)."

122. His Honour held further at para 61 that:

"It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts, especially when the making of such a contract involved an offence by the builder. Ultimately, it far from appears that the Payments Act was intended to override the disentitlement according to s42; the contrary appears. In my view the Payment Act operates only where there is a construction contract of which the terms as to payment are enforceable by the builder."

123. Whilst *Cant* dealt with a summary judgement application, and not adjudication, I cannot ignore the Court of Appeal finding that an unlicensed contractor is not entitled to make a progress payment. Accordingly, I am of the view that the licensing status of the Claimant is important, despite not it being raised in the payment schedule.

124. I must closely consider the Respondent's submissions, and if I find that they are sufficiently supported by cogent evidence, then I will request submissions from the Claimant under s25(4) of the Act to afford it natural justice

125. I cannot consider licensing in the context of s26(2)(a) of the Act because it expressly limits reference to the QBSAA to only Part 4. I find Part 4 does not include s42 of the QBSAA, which prohibits unlicensed contracting, so it is not appropriate to consider the licensing issue under s26(2)(a) of the Act.

126. s26(2)(b) on the other hand makes reference to the provisions of the contract from which the application arose, and on a narrow reading of that clause, one could argue that licensing has nothing to the provisions of the contract.

127. However, the Respondent at paragraph 78 of the response submissions took me to Clause 6 of the contract, which deals with *Compliance With Statutory Authorities*, and also refers to an implied term that the Claimant would hold all appropriate licences, citing *Byers v Dorotea* (1986) 69 ALR 729. I am satisfied that the contract provisions, both express and implied, touch on the issue of licensing of the Claimant, and that I must consider the Respondent's submissions.

128. However, to my mind it is not appropriate in adjudication for a respondent to raise a jurisdictional defence about unlicensed contracting in the response for the first time, and then adduce little evidence in support.

129. Cross on Evidence (2004), 7th Australian edition, LexisNexis Butterworths, Chatswood (Cross) at paragraph 9010 on page 290, states:
"For those reasons prosecutors on the more serious criminal charges, or those carrying graver consequences, and plaintiffs in some civil cases, have higher hurdles to surmount than when they are making less serious allegations or those with more trivial consequences. This led Lord Denning to speak of degrees of proof within the same standard:

'....So also in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It

does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

130. Applying the law from Cross, I find that I need particularly compelling evidence from the Respondent of unlicensed contracting, because the consequences of such a finding is that the Claimant's payment claim is prohibited from being made, which is a serious matter going to the heart of jurisdiction. If I find such sufficient evidence from the Respondent, then and only then, will I consider that the evidentiary onus shifts to the Claimant for its submissions on the matter.
131. The Respondent has attached a license search of the Claimant, and I find that it is a "Builder Restricted to Structural Landscaping". However, I cannot go on any inquiry about what is meant by this license, because it is not something to which I can have regard. McMurdo J held at paragraph 59, which bears repeating that *"...there could be a genuine question as to whether the builder is relevantly unlicensed. In particular there could be questions of fact going to the classification of work for the purposes of the licensing requirement, which cast doubt on whether the builder held the licence appropriate for the agreed work. But that is not a matter which could be investigated by the adjudicator, who would be confined to a consideration of the matters listed in s26(2)."*
132. I find no evidence in the Respondent's material that the Claimant's structural landscaping license does not allow it to carry out drainage work. I have not been given an explanation of what work such a licensee can actually carry out, and I have not been provided with a definition of what is meant by drainage work, and what license is appropriate to carry out that work. There is no evidence of the Claimant having been prosecuted for unlicensed contracting.
133. As to the degree of unlicensed contracting, the Respondent argues in paragraph 73 of the response that the Claimant's work includes significant drainage work, and that this can be seen from the contract and specifications. In attachment 6.0 of the contract there is reference in paragraph 6.2 to two volumes of specifications from Cox Rainer, but these were not provided to me.
134. I have referred to attachment 1.0 of the contract, which identifies the "Trade scope of works for landscaping/irrigation, and paragraph 2.0 of that document identifies the extent of work. Suffice is it to say that items a) through to n) are a comprehensive list of what work is required, and it is only item j) that refers to Main Oval Sub Soil Drainage including trenching, uPVC pipes, fittings, geotex fabric etc. None of the other items refer to drainage, and they appear to me [apart from m) and n), which are generic items] as a matter of commonsense, to relate to landscaping or irrigation.
135. I then referred to the payment claim lodged by the Claimant to determine how much work involved Main Oval Sub Soil Drainage (because the Respondent says that it is significant work), and I calculated that the claim included \$136,672 for this work (on page 6 of the payment claim), out of a total contract value of \$2,337,768.00 (on page 9 of the payment claim). This equates to less than 6% of the contract works, so I am not prepared to find that this drainage work was significant as asserted by the Respondent.
136. I find that the Respondent has not discharged its onus in clearly establishing that the Claimant is not licensed to carry out the work under the contract. Accordingly, it is not necessary for me to ask the Claimant for submissions.

137. I have found that the Claimant is a *Builder Restricted to Structural Landscaping* and there is nothing in the material to suggest that this is not an appropriate license to carry out the work under the contract.
138. Accordingly, the Claimant is not prohibited from lodging a payment claim, and I reject the Respondent's submissions in paragraph 90 of the response that no monies are due and payable to the Claimant.

Claim not made in accordance with Clause 13 of the contract (response #118-132)

139. The Respondent submits that that I *am required to consider its submissions* regarding the operation of Clause 13 of the contract in accordance with s26(2)(a) and (b) of the Act, despite the fact that it was not an issue raised in the payment schedule.
140. Earlier under the issue regarding unlicensed contracting I said that I am not compelled to consider these submissions; but that it is only if I think they are relevant to s26(2)(a) and (b) of the Act that I am compelled to consider them.
141. In support of this finding, I repeat what Hodgson JA in *John Holland* held at para 48, with reference to his earlier decision in *Contrax when His Honour* said: *"However, it is to be noted that I said that the adjudicator was required by pars.(a) and (b) of s22(2) to consider matters "if he or she thinks [they are] relevant to the construction of the Act, [my underlining]..."*
142. In *John Holland* there is useful guidance given by the Court of Appeal in dealing with submissions of this kind, because in that case the Respondent RTA made submissions ostensibly dealing with the adjudicator's lack of jurisdiction, which had not been raised in the payment schedule.
143. His Honour considered whether instead of them being submissions as to the adjudicator's jurisdiction, the Respondent's submissions were really reasons for withholding payment. In that event, the reasons should have been in the payment schedule; such that submissions on them in the response could be *duly made* under the NSW equivalent of s26(2)(d) of the Act.
144. His Honour characterised the submissions as reasons for withholding payment, which therefore contravened the NSW equivalent of s24(4) of the Act, which prohibits response reasons that had not been made in the payment schedule.
145. At paragraph 33 and following in *John Holland* His Honour had this to say:
- "33 In my opinion, this distinction does not justify a narrow view as to what amounts to reasons for withholding payment. If a respondent does not propose to pay any amount included in the payment claim for any reasons said to justify non-payment of that amount, then in my opinion that is withholding payment and the reasons are reasons for withholding payment. It does not matter whether the reasons relate to non-performance of work, bad work, set-offs or cross-claims of any kind, contractual provisions limiting the claimant's right to payment or statutory provisions limiting the claimant's right to payment, or indeed any other suggested justification. Any other view would do violence to the language "withholding payment for any reason", and be contrary to the plain purpose of s.20(2B) to avoid new submissions being introduced late in a process going ahead on a brief and strict timetable. I agree with what Palmer J said on this matter in Multiplex Constructions Pty. Limited v. Luikens [2003] NSWSC 1140 at [65]-[68]....*

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

40 In my opinion, RTA's jurisdiction submissions were plainly such reasons. Against a background where the Superintendent had made a determination of \$1,815,458.61 in respect of the detonator dump claim, Holland's payment claim included \$7,965,509.13 in respect of that claim. There were broadly two ways of challenging Holland's entitlement to that sum in accordance with ss.9 and 10: one was to say that, on the criteria provided by the contract, Holland was not entitled to it; and another was to say that ss.9 and 10 limited Holland's entitlement to amounts determined in accordance with contractual mechanisms. RTA's payment schedule adopted the first way; but while it referred to the Superintendent's determination, it did not say anything to the effect that ss.9 and 10 limited Holland's entitlement to amounts determined in accordance with the contractual mechanism, or to suggest that any such point was being taken. Mere reference to the Superintendent's determination did not of itself suggest this, since it would also support a contention that the case made by Holland was insufficient to show an entitlement under s.9 or s.10 that was different from that determined by the Superintendent.

41 There is some force in a submission made by Mr. Walker to the effect that the Act applies to a whole range of persons participating in the building industry, so it would be unreasonable to expect too much sophistication and precision in payment schedules; and thus that specific reference to the amount of the Superintendent's determination should be regarded as sufficient to raise the point that, under ss.9 and 10, the amount to which the claimant was entitled was limited to the amount determined in accordance with the contractual mechanisms. I do not think it necessary to decide whether that approach should be given weight in the case of an apparently unsophisticated respondent. It does not seem to me appropriate to give weight to it in the case of RTA. In circumstances where, as mentioned above, the weight of authority was against limiting a claimant's rights in that way, RTA should have signalled in the payment schedule that it was contending contrary to that authority, so that Holland would be given an opportunity to deal with that contention in its adjudication application.
[my underlining]

146. In line with the guidance afforded by John Holland is therefore necessary to carefully consider whether the submissions about Clause 13 of the contract go to my jurisdiction, or whether they are reasons for withholding payment.
147. In so doing I start with what His Honour said in paragraph 41 above, and that is in effect that a sophisticated respondent "should have signalled in the payment schedule that it was contending contrary to that authority, so that Holland would be given an opportunity to deal with that contention in its adjudication application."

148. In the payment schedule, I find that the Respondent has a "tick a box" proforma on page 2 of 3 of that document. In part B of the schedule, it specifically states *"Is any part of the claim barred by clause 13 because it was not notified to the Builder? If yes provide particulars."*
149. The Respondent had identified "No" to this question, and yet by making the submissions in the response, it is now effectively saying "Yes", which is contrary to what it has already signalled to the Claimant in the payment schedule.
150. I do not consider such thorough detail on a proforma of the Respondent as evidence of an *apparently unsophisticated respondent*, so I find that it should have alerted the Claimant that it was going to take this point. However, for whatever reason it chose to not raise this issue in the schedule.
151. Accordingly the Claimant would not have been alerted to this future challenge, and yet in the response paragraph 121, the Respondent argues that the Claimant has not provided any evidence of compliance with clause 13 of the contract.
152. I cannot accept that the Claimant should be required to provide evidence of compliance in an adjudication application, if it was not challenged about this issue in the payment schedule.
153. The effect of Clause 13, if not complied with by the Claimant, is clearly identified in subclause (a) which provides:
(a) *The Builder shall not be liable upon any claim, action, demand, or proceeding by the Subcontractor, whether under the Agreement or at general law or in respect of or arising out of:*
(i) *a breach of contract;*
(ii) *a direction from the Builder (including a direction to perform a variation);*
(iii) *an adjustment to the Contract Sum;*
(iv) *or otherwise;*
unless within 7 days (or a lesser time where required under the Head Contract) after the first date upon which the Subcontractor could have been aware of the breach, Direction or entitlement to bring the claim, action, demand or proceeding the Subcontractor has given to the Builder the prescribe notice."
154. The basis of the Respondent's submissions, as I understand them, are that clause 13 is relevant to the contract, and that any submission that could be raised by the Claimant about such a clause being void could be met with the case of *John Goss Projects v Leighton Contractors Limited* [2006] NSWSC 798 (*"John Goss"*).
155. The contract in *John Goss* precluded claims for variations if the correct notice was not lodged within 10 business days. In that case, the Court held that such a clause did not prohibit the Claimant from making claims under the Act, provided the correct notice was given, such that it was not contrary to the provisions of the NSW equivalent of s99 of the Act.
156. I will return to *John Goss* later, however, for present purposes, after careful consideration of the material, I find that the issues surrounding clause 13 of the contract are reasons for withholding payment. In fact, the contract specifically

precludes the Claimant any right to claim unless the prescribed notice has been provided.

157. I do not see that it is a case of jurisdiction, which could prevent me from adjudicating the material, but rather, as Hodgson JA put it “.. *the submissions were to the effect that the correct exercise of jurisdiction would be to adopt the amount reached by the contractual mechanisms, rather than to apply the contractual criteria to reach a different result.*”

158. In effect, the Respondent is saying that Clause 13 prevents the large percentage of the payment claim, which relates to variations from being claimed, such that there are no monies due and payable. That is a submission which requires me to adopt the amount reached by the contractual mechanism, rather than an exercise in jurisdiction.

159. Accordingly, I reject the submissions regarding the Clause 13 because they do not go to jurisdiction, and therefore are not submissions to which I can have regard, because they raise reasons for non payment that were not in the payment schedule, which contravenes s24(4) of the Act.

Payment claim does not comply with Clause 10 of the contract (response #91-117)

160. The payment schedule identifies a “tick a box” list on page 2, which deals with clause 10 requirements. In the schedule, it asserts that:

- A progress report under clause 10(a) was not provided;
- The payment claim was not served on the correct date – see clause 10(b) and clause 10(i);
- There was no statutory declaration as to the work performed and claimed for under clause 10(d)(ii);
- There was no evidence of superannuation/redundancy payments under clause 10(d)(iii);
- There was no certificate under clause 6 pursuant to clause 10(d)(v).

161. Paragraph 95&96 of the response deal with the failure of the Claimant to provide the progress report, and in particular there is a reference to the O’Brien statement that the report was not and still has not been provided by the Claimant.

162. I can find nothing in the O’Brien statement about the Claimant’s failure to provide this report. In fact, given the earlier assertion in the response that the O’Brien statement demonstrated that the Claimant had received previous payment schedules by email, when the statement proved no such thing; I now have concerns about attaching too much weight to the submissions of the Respondent, unless there is corroborating evidence.

163. If the submissions purport to demonstrate no entitlement of the Claimant with corroborating evidence from the O’Brien statement, which is not provided, I draw the inference that there is no such evidence available from Mr. O’Brien. His statement is very comprehensive such that it would have been easy for him to add the corroborating evidence. In paragraph 5 of his statement he refers to the conduct of the Claimant, which is confined to:

- Not providing written requests for EOT’s;
- Providing little response to written complaints about poor performance
- Making limited attempts to provide any programmes

164. If the Claimant had failed to provide the report, then it could have been very easy for him to have said so in paragraph 5. The fact that he did not do so

leads me to draw the inference that he could not say that the Claimant had failed to do so. I am of the view that the Respondent has the evidentiary onus to prove the failure to provide the report because it is relying on this failure to deny payment, and it has not discharged this onus through Mr. O'Brien.

165. I will turn to the "tick a box" payment schedule assertion of the Claimant's failure to provide information required by Clause 10 after considering the other alleged breaches of Clause 10(d)(ii), 10(d)(iii) and 10(d)(v).

166. The O'Brien statement also failed to corroborate the assertions in paragraph 98 of the response about the alleged failure to provide:

- a. a statutory declaration that it had claimed for all work to the date of submission;
- b. evidence that it has made all contributions to superannuation, redundancy funds etc;
- c. a certificate stating that it has complied with all its obligations under Clause 6 of the contract.

167. I draw the inference that the Respondent is unable to prove that these documents were not provided through Mr. O'Brien.

168. I am therefore left with the "tick a box" assertions in the payment schedule, and I find there is nothing further in the payment schedule (including the 20 December 2007 accompanying letter) to substantiate the Claimant's failure to provide this information. Accordingly, I am not satisfied that the Respondent has discharged its evidentiary onus about the Claimant's failure to provide these documents.

169. In paragraph 93 of the response, the Respondent says that the Claimant should have responded to its allegations about the failure to provide these documents, and (in paragraph 94) that its failure to do so, means that I should conclude that any evidence would have been contrary to the Claimant's case.

170. I agree that the Claimant must prove its case, and I find that there is nothing from the Claimant demonstrating that it has provided the requisite documents, and I find no corroborating evidence from the Respondent that these documents were not provided. This means that the issue is evenly balanced and in order to succeed the Claimant must discharge the legal and evidentiary onus.

171. I am therefore obliged to consider the issue that has been raised by the Respondent about whether Clause 10(g), which precludes recovery without the requisite documents being provided, is void under s99 of the Act.

172. The Respondent correctly says that the Claimant has not made these submissions (paragraph 102 of the response), and it may be called upon by me to make these submissions if I find that the Respondent has demonstrated on its submissions that the Clause may not be void.

173. The Respondent refers to *Ministry for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823 and argues that this case is distinguishable because it delayed the ability to submit a payment claim for 200 days after the reference date.

174. The Respondent argued that *John Goss Projects v Leighton Contractors Limited* [2006] NSWSC 798 ("*John Goss*") was the case that I should apply, because the Court held that a clause barring claims for variations that did not

have a requisite notice lodged within 10 business days, was not void under the NSW equivalent of s99 of the Act.

175. McDougall J was the judge in *John Goss* and His Honour has extensive experience in dealing with the NSW equivalent of the Act. In paragraph 79 – 81, His Honour said:

“79 Clause 45 in broad substance applies to claims for payment over and above what is called the “Contract Amount” – ie, the basic stipulated contractual remuneration “excluding any additions or deductions which may be required to be made” (see definition in cl 1). It is to be contrasted with the “Contract Sum”, which is the contract amount increased or decreased by “any additions or deductions ... which may be required to be made” (ibid).

80 Where John Goss wishes to claim an amount over and above the Contract Amount (for example, for a variation, or for delay or disruption costs), it is required, as a precondition of such a claim, to give notice under, and complying with the terms of, cl 45. It is obvious why a head contractor in Leighton’s position might stipulate for such notice. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable Leighton to monitor its overall exposure to the subcontractor. Thirdly, it will enable Leighton to assess its own position vis a vis its principal. No doubt, there are other good reasons for stipulations of the kind found in cl 45.

81 It is correct to say that cl 45 operates to bar claims if the notice provisions in it are not followed. But it does not follow that cl 45 is thereby inconsistent with the rights given under the Act, so as to attract the operation of one or other of the alternatives set out in s 34(2).

82 As I have said, the ground of invalidity alleged by John Goss was that the requirement to notify a claim within 10 business days of the occurrence of the events giving rise to it was inconsistent with the right given by s 13(4) to bring a payment claim within 12 months after cessation of work under the contract. I do not accept that submission. Clause 45 says nothing about the time when a payment claim may be made. Its concern is to limit entitlement to work that might be comprised in a payment claim, whenever the payment claim is made. Provided notice is given in accordance with cl 45, the work that is the subject of the notice may be included in a payment claim made at any time, subject of course to the general provisions of the Act relating to progress claims and their contents.”

176. I now turn to Clause 10(g) of the contract which provides:

“(g) No amount is payable to the Subcontractor in respect of any progress claim unless:

(i) the Subcontractor has given the Builder a Progress Report and progress claim in accordance with this Clause;

(ii) the Subcontractor has returned an unamended executed Agreement to the Builder and the Builder has executed this agreement;

(iii) The Subcontractor has complied with Clause 10(d) and has given the Builder all of the documents, certificates and evidence stated in Clause 10(d) and Clause 10(i).”

177. s 99 of the Act provides:

“99 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.

(2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it—
(a) is contrary to this Act; or
(b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or
(c) may reasonably be construed as an attempt to deter a person from taking action under this Act.”

178. The progress report and all the documents required in Clause 10(d) are not to my mind the same type of document that was required in *John Goss*. In the latter, the Claimant had to provide a notice regarding variations within 10 business days, but if it had done so then it could proceed to make a payment claim, as McDougall J said in paragraph 82.

179. In this case, however, Clause 10(g) of the states that reports, statutory declarations, superannuation contributions and certificate of compliance with all statutory authority requirements had to be provided for any amount to be payable to the Claimant.

180. In my view this clause modifies or restricts the Act by preventing payment, unless these additional documents were provided. These documents are in my view not putting the Respondent on alert as to a variation claim as in *John Goss*, but are operating more as a condition precedent to payment. Clause 10(d)(ii), in particular, requires that the Claimant provide a statutory declaration that it has claimed for all work to the date of submission, and releases the Builder from any other claims not notified under Clause 13 or included in the payment claim.

181. In my view, any reasonable person would consider that the effect of this clause was to modify or restrict the operation of the Act, which is to simply allow for progress payments to flow on a regular basis in the construction industry, with the parties legal rights preserved under s100 to take whatever contractual points they wish in another forum.

182. Accordingly, I find that Clause 10(g) is void, which means that the Claimant does not have to demonstrate that it has provided these documents.

183. There is one further issue raised by the Respondent under this heading in paragraph 106 of the response and that is the operation of Clause 10(k) of the contract regarding a final payment claim. The Respondent admits that it had not raised this issue in the payment schedule (paragraph 108 of the response) but again says that I am required to consider this as a matter of jurisdiction.

184. For the reasons already outlined, I am not prepared to consider matters relating to the operation of the contract, as one going to my jurisdiction; so that the failure to raise it in the payment schedule means that it is prevented by s24(4) of the Act from raising it as a submission.

185. Accordingly, I reject all the Respondent's submissions in relation to Clause 10 of the contract and the Claimant is entitled to have its payment claim adjudicated.

Preliminary matters*Conduct of the Claimant (response #21-23)*

186. I do not consider the conduct of the Claimant as a relevant threshold issue to be considered prior to adjudication. I may make findings about the conduct of the Claimant, and the Respondent for that matter, whilst evaluating the probity and weight of the evidence, but that will take place during adjudication.

Claimant not proven its claim (response #24-29)

187. At paragraph 25 of the response, the Respondent argues that there is insufficient documentation on which I can make a finding that there are any monies due and owing.

188. I agree that the Claimant must prove its case as identified in paragraph 29 of the response. However, if the Respondent is trying to make submissions about the alleged insufficient documentation and evidence in the response, then I reject these submissions, because they are not reasons that were included in the payment schedule, which means they contravene s24(4) of the Act.

189. I will leave the sufficiency of the documentation to adjudication and the Claimant's onus of proof, and do not consider this as a threshold issue.

Step into the shoes of the Superintendent (response #30-34)

190. This series of submissions seem to be making the same point as in paragraphs 24-29 of the response.

191. I am obliged to make up my own mind based on the material before me, and I do not consider this as a threshold issue.

Serious consequences of the Act (response #35-36)

192. This series of submissions seems to be making the same point as paragraphs 30-34 of the response.

193. Again, I am obliged to make up my own mind based on the material before me, and I do not consider this as a threshold issue.

Backcharges (response #37-41)

194. These submissions deal with similar issue to those above, and I am mindful of the duty to value the work completed under the contract, and will make up my own mind based on the material before me. I do not consider it a threshold issue.

195. Having canvassed all the points raised by the Respondent under the threshold issue umbrella, it is now necessary to adjudicate the matter, and it is first necessary to ensure that the Claimant has an entitlement to lodge the payment claim.

Entitlement and the reference date

196. 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."

197. Therefore the right to progress payments is governed by the reference date, which is defined in Schedule 2 of the Act as:

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

198. The second schedule of the *contract* refers to clause 10 (on page 29 of the contract) and identifies the time for making of progress claims as the 4th day of each month. Clause 10(b) of the contract refers to the second schedule date, and clause 53(c)(i) defines “reference date” of the contract as this date in the second schedule.

199. Accordingly, I find that the Claimant has an entitlement to a progress claim under s12 of the Act, and in the month of December 2007, the reference date for a progress claim in that month is 4 December 2007.

200. I have found that the payment claim was made on 11 December 2007, which I find is from the reference date of 4 December 2007.

201. I now need to value the claim, taking into account that I am not prepared to disallow claims as outlined in the threshold issues above.

Amount under the contract

202. There are a whole host of items that need consideration, and for ease of review I have tabulated the payment claim, payment schedule (and response, if applicable) and the adjudicated amounts in Annexure 1 at the end of the decision in a Scott Schedule.

203. The bulk of the dispute between the parties relate to variations, a lot of which are negative variations, and backcharges.

204. The common ground that I am able to establish is that both parties agree the value of the contract sum of \$2,367,648.00, and after submissions were sought from me on 5 February 2008 and received from the Claimant on that date and on 6th February 2008 from the Respondent, it is evident that both parties agree that the Respondent has paid the Claimant \$2,042,201.82.

205. The Claimant submits that it has completed \$2,484,802.93 worth of work (including variations), and the Respondent says that it has completed \$2,357,648.00 (excluding variations).

206. I will firstly analyse the contending points of view and the material to make a decision on the value of the work completed under the contract. To this amount will be added the variations (if any) and the backcharges (if any), and then I will subtract the amount that has previously been paid to determine the adjudicated amount.

207. In the payment schedule [page 1] the Respondent identifies that the value of works performed (excluding variations) was \$2,357,648.00. However, on the final page of the Subcontract analysis there was reference to a deduction of \$10,000.00. This means that the value of works determined by the Respondent is \$2,367,648.00 leaving aside its rights to backcharge for this documentation (which it does not advance any further in the response). This is the contract sum.

208. The Claimant in the payment claim identifies the value of work not completed as \$29,860.00, and if one deducts this from the contract sum, the figure of \$2,337,788.00 is derived for the work done to date under the contract, excluding variations and backcharges that may apply.
209. The Claimant is therefore claiming \$29,860.00 less than the contract sum for the work done to date, whereas the Respondent only reduces the contract sum by \$10,000.
210. Given it is the Claimant's claim, I will use the figure of \$2,337,788.00 as the base figure of work done to date rather than the higher figure from the Respondent, to which the variations and backcharges will then be added or subtracted.
211. The approach that I will follow with respect to the variations and backcharges is to use the payment claim items and payment schedule response in the Scott Schedule format used by the Claimant, since I find that it has accurately transposed the amounts and details for the items that were claimed (apart from item 19, where there was an \$800 error). I have followed the item numbering system of Claimant to make it easy for both parties to follow.
212. There is a very useful cross referencing that has been provided by the Claimant in the Scott Schedule, where the Claimant numbered each line in the Respondent's subcontract analysis, so that it easy to compare the items and their value from either party. It appears that the items identified in the payment schedule as *Refer SAA for approved details* have not been included in the payment claim, so there was no need to refer to them in the Scott schedule.
213. If there is no dispute about a variation item between the payment claim and payment schedule, then it is simply carried to Annexure 1, without any further discussion. However, those items that are in dispute or have been specifically discussed in the application or response are considered in more detail and are listed below.
214. For these items listed below, I have evaluated the contending arguments and evidence for each item that is in dispute before deciding on the amount for that item. These amounts will then be carried to the Annexure 1 Scott Schedule at the end of the decision.
215. In dealing with the contending points of view in the variations and the backcharges, I firstly consider whether there is a legal entitlement to claim, or reduce a claim by back charging, before considering the evidence of quantum

VARIATIONS – 48 Items claimed, 26 items not disputed

2. Screen planting to oval

216. The parties essentially agree on the sum of \$51,235.37. In fact the Respondent has excluded 37c, but otherwise it is agreed, and I accept the amount claimed.

4. Deletion of turf near entry

217. The parties now agree that this amount should be (\$868.75), as this was conceded by the Respondent in paragraph 135.

5. Backcharge for the supply of the water truck

218. The Claimant in paragraph 7(b) of Mr. Dobson's affidavit argues that there was an agreement for 50% of the costs of the water truck.
219. In paragraphs 8 and 9 of the O'Brien statement there is considerable reference to the issue of the need for water for dust suppression, and watering of trees. Annexure AO4(iv) detailing the actual cost of the water truck was not provided in the material.
220. However, there was considerable evidence of the amount of water needed to fulfil dust suppression and tree watering and Mr. Dobson essentially concedes as much and the issue comes down to quantum. Mr. Beckett in paragraph 4 of his statement also identifies that the Claimant did not carry out any dust suppression
221. Although the AO4(iv) has not been attached, I am satisfied that the Claimant was responsible to provide this water under the contract, and it appears that it is a considerable amount of water that was needed.
222. I am satisfied the Mr. O'Brien had said that the Claimant would be charged 50% of the cost, and that is what the Claimant was charged, and that Mr. Dobson may have misunderstood the discussion, which I accept took place on 14 November 2007.
223. Accordingly I allow a deduction of \$7,100.00 in accordance with the contract.

9. Credit for trucks supplied for sand

224. In paragraphs 140-143 of the response the Respondent says that it engaged a transport company to arrange for extra trucks to deliver sand to the site, because the Claimant had failed to deliver the sand in a timely manner, and the Respondent had to mitigate any further delays to ensure that the Main Oval would be ready for a 20/20 game on 31 December 2007.
225. The Claimant conceded that a deduction of \$17,612.54 was a variation, because this amount had been deducted by McCahill from costs that McCahill was to charge the Claimant for sand delivery. The Claimant said that it passed this saving on to the Respondent as a variation, because essentially others were delivering the sand to the site.
226. Mr. Beckett in paragraph 5 of his statement gave evidence of the circumstances surrounding the engagement of McCahill, but I am not prepared to find that the Claimant agreed with this arrangement, as asserted in paragraph 5(e) of his unsworn statement, because it was denied on oath by paragraph 7(c)(vi) of Mr. Dobson's affidavit.
227. Mr. Dobson attached documents SMD 11, 12, 13 and 14 which corroborates his assertion of an arrangement between McCahill and the Respondent to reduce the invoice to the Claimant, and identifies the variation issued by the Claimant.
228. The letter dated 25/7/07 from the Respondent to the Claimant identifies that it had made arrangements for McCahill to be engaged
229. As to the entitlement by the Respondent to deduct monies associated with mitigation of its loss regarding the Claimant's delays, I cannot find a specific provision that allows this to take place.

230. Clause 4 deals with damages, and this has not been relied upon, and the only other clause I could find was Clause 20 dealing with the Claimant's default, entitling the Respondent to take over a whole or part of the works.. There is no evidence that this clause was relied upon, as there was no notice of that occurring. The Respondent may well have a damages claim for this amount, but that must be dealt with in another forum.

231. Accordingly, I can find no entitlement for this deduction under the contract to which I can refer. However, the Claimant has raised a variation by deduction and I am satisfied that this amount of \$17,612.54 should be deducted in the variations.

10. Irrigation connection through slabs

232. In paragraph 41(c) of the O'Brien statement the Respondent now agrees with the claim of \$2,685.00.

19. Delete concrete to bench area

233. There is a contest about valuation of the deduction, but not that the variation should be made. Whilst the Claimant has provided an explanation on oath as to why it differs from the Respondent's valuation due to the need to still provide an expansion joint, it is not clear how the quantum of the expansion joint has been derived. I am satisfied with the variation deduction based on BOQ rates identified in SMD 15, which is the Respondent's adjustment advice, because I have no means of knowing from the material the cost of the expansion joint.

234. I therefore allow the deduction of \$4,652.51.

22. Pram ramp BOQ rate

235. This claim relates to a variation taken out of the hands of the Claimant because it had failed to complete the work according to Mr. O'Brien's paragraph 17 (a). Mr. Dobson does not really deal with the issue of the circumstances surrounding the pram ramp [paragraph 7(e)], and seem to focus on the BOQ rates at \$150.00 each, without making it clear why such rates apply.

236. The variation clause 15(c) deals with variation valuation, and BOQ rates apply if deemed appropriate by the Respondent [Clause 15(c)(i)], but otherwise by agreement, which if not possible, then by a fair and reasonable valuation of the Respondent [Clause 15(c)(ii)].

237. I have reviewed the explanation given by Mr. O'Brien, and I accept that he has expertise as a quantity surveyor to confirm that the figure given by Mite Constructions was reasonable. I agree with his figure of \$1,200 for each pram ramp as being a reasonable figure, and I find that the BOQ figure of \$150.00 per pram ramp is too low for this type of work, such that Clause 15(c)(i) is not applicable. I find that the parties did not agree on a rate [Clause 15(c)(ii)], which therefore activates the fair and reasonable valuation provision, and that \$1,200 per ramp is a reasonable figure for the variation, and I apply this amount as a deduction under this variation.

25. Pram ramp BOQ rate and concrete removal

238. This claim relates to a variation whereby the Claimant's works were taken to be defective. Mr. Beckett at paragraph 6, and Mr. O'Brien 'statement paragraph 21(c) confirm that the works were defective.

239. I have had regard to Mr. Dobson's paragraph 7(f)(ii) where he said that they did not need replacement, but on balance in this case, it appears that two

separate people confirmed the defects required rectification, and Mr. O'Brien said that the Claimant had been given the opportunity to repair or replace them, but had not done anything.

240. Mr. Dobson did not deny that he had been asked to rectify the ramps, and I find that the ramps were defective. It really then becomes a valuation of variation exercise, or alternatively a valuation of the cost of rectifying the defects under s14 of the Act.

241. I prefer to consider that it is a valuation of the rectification of defects, given that I found that the work was defective, and I am satisfied that the cost of \$3,000.00 to demolish (\$600.00) and rebuild the ramps (\$2,400.00) (as found previously to be reasonable) was again a reasonable figure.

242. I understand that re-establishment costs were paid to the contractor because of the need to rebook a bitumen pour, which caused additional costs to be incurred. In the construction industry, as a matter of commonsense, such events occur, when there was a degree of urgency in the having this work done, and I find that there was this urgency from Mr. O'Brien's paragraph 24(e).

243. I therefore accept the Respondent's figure of \$6,500.00 as a reasonable figure in the circumstances.

27. Rectification of crane area on oval

244. The parties now agree that this amount should be \$5,016.60 as this was conceded by the Respondent in paragraph 156.

29. Clean pump station

245. This is another difficult issue because of the contending views of both parties as to the sufficiency of definitive evidence pointing to the Claimant's liability for having caused the gravel to be deposited in the pump station.

246. The Respondent in paragraphs 25-29 of the O'Brien statement points to a number of facts suggesting the Claimant is responsible for this material:

- Claimant had possession of site from late September 2006, and was responsible for dewatering Scope of Works Clause 2.19.0
- Material removed was material put in by Claimant on oval
- Claimant responsible for its work area and prevention of any damage. However, the promised AO11 (Arena Works Specification Clause 39.9.4) was not attached
- No other contractor would have used the material found in the pump station
- The Claimant failed to find the source of the problem and find likely solutions
- The Claimant has been paid for a specified product, which it has failed to do

247. Mr. Beckett adds very little to the facts in his statement.

248. The Claimant argues in paragraph 7(g) of Mr. Dobson's affidavit that the material could only be deposited in the pump house through damage to the Ag pipes, and that other had access to the site, who may have damaged the ag pipes.

249. I apply commonsense to this scenario, and have to make a judgement on the facts before me. On the balance of probabilities, I find that it more likely

than not, that the person most likely to be responsible for this deposit of material, would be the Claimant, rather than some unknown possible damager of the Ag pipes.

250. The payment schedule stated that Mite Constructions had a video recording in late December 2006 demonstrating that the stormwater system was clean. After that time, the Claimant was working on the site using the gravel.

251. Although I do not have the missing AO11, it would appear logical in the construction industry that a works specification would make a person on a site responsible for their work and responsible to not cause damage elsewhere.

252. I therefore find that deposit of gravel in the pump station was probably indirectly caused by the Claimant, and this constitutes a defect in the work taken in its wide sense, as parts of the materials in the work were deposited in the pump station.

253. I am therefore satisfied that the defect needed to be rectified, and although there is no supporting documentation to substantiate the costs of cleaning the pump station, which was contaminated with gravel, I can consider that a sum of \$9,327.00 could be expended to rectify the defect and I am satisfied that it is a reasonable estimated cost to do so.

32. Goal post sleeve installation

254. The parties have now agreed that the amount of \$9,024.00 is payable, as this was conceded by the Respondent in paragraph 161.

34. Gully pits

255. The backcharge of \$5,000 identified by the Respondent in payment schedule is based on an alleged defect in there being no gully pits installed. In the covering letter [page 3], the Respondent says that it contracted the works to Mite Constructions, and the works have not been completed in accordance with the specifications.

256. The Respondent further said that the Claimant was contracted by Mite Constructions to carry out all subsoil drainage works associated with roadworks.

257. In paragraph 163 of the response, the Respondent repeated the payment schedule allegations, and said that the schedule was a true assessment as identified by the O'Brien statement paragraphs 31-33 and the Beckett statement. There is nothing in the Beckett statement about gully pits.

258. In paragraph 31 of the O'Brien statement, Mr. O'Brien states that the Claimant was contracted by Mite Constructions to do this drainage work and has failed to install gully pits, and in paragraph 32 that it has failed to provide QA documentation required, and that it has assumed responsibility for the work [paragraph 33].

259. I cannot understand the Respondent's assertions. It appears to me from all the Respondent's material that the Respondent concedes that it engaged Mite Constructions to do drainage work, which included gully pits. Mite Constructions, in turn, contracted the Claimant to carry out this work on its behalf. This work is defective in that gully pits have not been installed as required.

260. However, I cannot see anywhere in the material from the Respondent that it entered into a contract with the Claimant to carry out this drainage work. I find that the contract for this works remained as between Mite Constructions and the Respondent. I cannot see the basis the Respondent can backcharge the Claimant under the contract, because this is not work under the contract between the Claimant and Respondent.

261. I therefore agree with paragraph 7(i) in Mr. Dobson's affidavit, and find that no deduction is allowable under the contract.

35. Dowels and keyjoints to paths

262. The payment schedule stated that this claim was pending approval from RCP, and in the attached letter on page 3, the Respondent said that the Claimant had provided substantiation of the claim, and that it had been resubmitted for the Superintendent's approval.

263. I therefore have some difficulty understanding why in the response paragraph 169, the Respondent rejects the Claimant's allegations, which merely relate to the reduced value of the variation, with a copy of the two variations attached [SMD 26 & 27]. The Respondent again refers to the O'Brien statement and that of Mr. Beckett to identify the correct assessment of the work, but once again Mr. Becket has nothing to say.

264. In paragraph 34 of the O'Brien statement, Mr. O'Brien argues that the claim took nearly 12 months to prepare, it was quite large and need assessment and verification, and needed to be duly verified and that the Respondent had the right to reject it because of its lateness, and that the Claimant failed to prepare the variation in accordance with Clauses 13 and 15 of the contract.

265. I am compelled to reject all these submissions because they now include reasons that were not in the payment schedule, and contravene s24(4) of the Act. I cannot understand, in any event, how the Respondent could have put this variation forward to the Superintendent if it thought that it had no merit.

266. Accordingly, I will allow this Claimant its claim for this item.

36. Irrigation repairs to Thuringowa City Council

267. The parties now agree that this amount should be (\$868.75), as this was conceded by the Respondent in paragraph 135.

38 and 39. Repairs to subsoil drainage on arena

268. This claim has been difficult to evaluate because the critical issue is whether the damage caused to the subsoil drains installed by the Claimant on the oval was caused by other subcontractors and other persons on the site.

269. It is clear that Cardno issued site instructions on 7 March 2007 about the pumping subgrade [SMD 28], which required immediate attention, and on 12 March 2007 a further instruction emanated from Cardno as to what remediation was required [SMD 29].

270. The Claimant in the affidavit of Mr. Dobson [paragraph 8(b)] swears that the damage was caused by other subcontractors and other parties for which the Respondent was responsible. He swears that the remediation work, which was the subject of the two variations raised by the Claimant, viz. RSS6222 and RSS6218 [SMD 30 and 31] were instructed by the Respondent. These variations referred to Transcape instructions 0392 and 0389 respectively, but these documents were not attached. These amounts are the amounts in the claims of \$5,952.00 and \$31,711.70 respectively.

271. In reply, the Respondent in paragraph 170 and 171 of the response, referred to the basis that the costs were developed for KLN who was involved in a dispute with a civil contractor, and that KLN had a similar backcharge against the Claimant for damage by the Claimant to their conduits, and that neither party is accepting liability for any damage.
272. In paragraph 173 of the response, the Respondent states that the O'Brien statement and that of Becket establishes the grounds set out in the payment schedule. Once again there is nothing in Mr. Beckett's statement to provide any assistance in this regard, which means I am left to consider the unsworn statement of Mr. O'Brien as the basis for the Respondent's denial, which are contained in paragraphs 36 to 40.
273. In paragraph 36(a) it appears that Mr. O'Brien does not deny that heavy equipment traversed the site, as it was necessary to access the Main Oval, but that the Claimant had failed to warn about the possibility of damage, and [paragraph 36(b)] that if the work had been completed earlier, the problem would not have occurred. Mr. O'Brien argues [paragraph 36(c)] that there was no substantiation that all of the damage was caused by others and not the Claimant.
274. In paragraph 37, he goes further and argues that it was the Claimant that has caused the damage. In paragraph 38 he argues that latent conditions are the Claimant's responsibility, but this is not comprehensible, as there was no allegation in Mr. Dobson's affidavit about latent conditions. He then attaches some site instructions [AO13(i)] relating to other areas where the subgrade had to be brought up to specification, where there was no construction traffic. I cannot make any finding on these site instructions, as it is by no means clear to me whether the subgrade problems in these areas were the same, as the area in dispute.
275. If anything, this comment suggests that there was a further admission that other subcontractors had traversed the subgrade over the subsoil drains. However, the AO13(ii) attachment referred to Rod Weeks comments about the Claimant's need to adhere to their own construction methodology, and that that he was a little concerned about transport of materials because of the inappropriate equipment and methods being used potentially causing damage to the subsoil drains and materials essentially they may be responsible for the damage.
276. The AO13(iii) attachment purportedly attaching the RFI 352 Arena methodology did not have the methodology attached and neither was the stop works order AO13(iv) attached. In addition, AO15(i) and AO15(ii) were also not attached, so I am unable to consider the effect of these documents.
277. In paragraph 38(i) to (k) Mr. O'Brien says that he could not verify any of the works because they were not supported by day work sheets, and that in his opinion, these ledger hours claimed were more likely to relate to rectification of the Claimant's own poor adherence to construction methodology, and that the Claimant had submitted their costs to comply with Rod Weeks' instructions to essentially repair their own works.
278. In paragraph 38(l) Mr. O'Brien denies ever having instructed the Claimant to carry out these works.

279. In paragraph 39 it is evident that this has become a claim between subcontractors on site about damage to one another's work, which includes the rectification of the main oval claim by the Claimant. In the attached correspondence [AO14(ii)] dated 6 December 2007, Mr. O'Brien says that he did not want to get involved, but he did not raise any issues about the Claimant being responsible for these costs and that there was an issue about the substantiation of these costs.

280. I accept that this is over 6 months after the claims have been lodged for this work by the Claimant, but if Mr. O'Brien had concerns about the quantification, or that the Claimant was responsible for its own defect rectification, he could well have said that as late as December 2007, if he felt so strongly about the matter. I concede that he was dealing with two "warring subcontractors"; however, if he thought they either or both were in the wrong, he could simply have refused to be the conduit through which the claiming and counterclaiming took place. It therefore points to him not being clear about the Claimant's lack of bone fides, even as late as December 2007.

281. I have had to make a difficult call based on the paucity of information, but there is an affidavit swearing that the work was instructed by the Respondent relating to damage caused by other contractors. The Respondent does not deny that other contractors may have operated in the area, but asserts that the Claimant was responsible for these costs because it had caused the defects. Mr. O'Brien's denial of the instruction to rectify the area, has of necessity to be given less weight than an affidavit of Mr. Dobson swearing that it was instructed by the Respondent

282. On balance I therefore prefer the Claimant's version because the evidence was on oath. I am mindful of what Rod Weeks said in his email [AO13(ii)], but I note that he said he was "a little concerned" about transport of materials, which I do not put as high as being the actual cause of subsoil drain failure. Furthermore, it is not clear the extent of the work that Rod Weeks is referring to.

283. On balance I find that the rectification work was ordered by the Respondent, and it should pay for this work.

40. Changes and adjustments to pontoon path

284. I cannot find any further material from the Respondent in support of its deduction of \$180.00 for the bobcat in the payment schedule. The Claimant does not seem to have made any further submissions. The amount is not material, but there is no further evidence to demonstrate the bobcat deduction is justified, so I will allow the Claimant's claim.

41. Mowing strip to practice nets

285. The Subcontractor analysis in the payment schedule said this claim was pending approval for the Superintendent, and that it was valid but not in the right format, and this was repeated in the response paragraph 175. In paragraph 177 the Respondent then rejects the Claimant's allegations and refers to the O'Brien [paragraph 42] and Beckett statements. Mr. Beckett has nothing to say on the matter.

286. Paragraph 42 of the O'Brien statement identifies a number of problems with the format of the claim and argues that the BOQ rates should have been applied. He concedes that the claim is in the similar format, as identified by Mr. Dobson in paragraph 8(d), but that the font size is smaller.

287. I cannot find that the claim should be disallowed, as it was said to be valid in the payment schedule, but some format issues have not been satisfied. I accept Mr. Dobson's sworn evidence that there was no BOQ rate for this work, and that it was reasonable, and that the format was the same as previously approved claims. I find that the Respondent must have accepted the amount claimed, despite the formatting problems, as it had been sent to the Superintendent for approval.

288. There is nothing that I can find in the contract that requires the Superintendent to give approval before a variation claim in the contract is accepted, so I accept the Claimant's submission 15 in this regard. The Superintendent is dealing with the Head contract issues, and does not have role to play in this contract.

289. I therefore find that the claim is justified, for work that the Respondent does not deny has taken place, and I allow the claim.

43. Concrete works to transformer area

290. The payment schedule expresses uncertainty as to whether this item has already been measured in the BOQ, and that the client's Quantity Surveyor has already verbally said so.

291. This much was reinforced by the O'Brien statement, which confirmed that a QS input was necessary. There was nothing from Mr. Beckett on this point, despite it being referred to in paragraph 181 of the response

292. Mr. Dobson swears that this works was not in the BOQ, and with contending viewpoints, I prefer the sworn evidence, so I will allow the claim.

44. Concrete blindings to players and umpires enclosures

293. The payment schedule identifies that this claim was pending approval from the Superintendent, and on page 4 of the attached letter, the Respondent believed it was a valid claim, but it needed to be represented in the appropriate format.

294. Mr. Dobson swears that this format is the same as other approved claims, which Mr. O'Brien denies in paragraph 45, to which he attaches a copy of the variation. I have not been pointed to the correct format to make any comparison, so on balance I accept the sworn evidence over the unsworn evidence, and will allow the claim.

295. In so doing I wish to add that there does not appear to be any provision in clause 15 of the contract dealing with variations that requires approval by the Client's Quantity Surveyor.

47. Ergon Energy damage

296. The payment schedule covering letter on page 4 states that the Respondent believes it is a valid claim, but not in the right format, so that it needs to be resubmitted, which is confirmed in paragraph 46 of the O'Brien statement, which also adds that the Client's QS has not made its assessment.

297. I have already said that I find no requirement for the Client's QS to approve the variation in Clause 15 of the contract. As to the format, Mr. Dobson again says that it is in the same format as other approved claims, and on balance I accept his sworn evidence, and I allow the claim.

48. Irrigation repairs damage by fence posts

298. The parties now agree that this amount of \$513.80 is payable as this was conceded by the Respondent in paragraph 190.

BACKCHARGES – 8 Items counterclaimed, all items disputed

38. Replacement of 8 security fence posts damaged by bobcat (\$480.00)

299. This backcharge was identified by the Claimant in the Scott Schedule, but it does not appear to have been considered by the Respondent so I ignore any further reference to it, and deduct no amount for it.

50. Irrigation sprays to arena (\$20,000)

300. The Respondent says in paragraph 192 of the response that it has withdrawn the backcharge, pending approval of the Main Oval by Rod Weeks, which has not yet been signed off. For my valuation of construction work, particularly in relation to backcharges, I am obliged to follow s14(1)(b)(iv) which requires me to value the estimated cost of rectifying defective work, providing I find that it is defective.

301. Since the Respondent withdraws the backcharge because the irrigation sprays are pending approval from Rod Weeks, I cannot find that the work is defective, and therefore there is no need to estimate the cost of rectification. Accordingly, I do not accept this backcharge and deduct no amount for it.

51. Re-establish T3 area behind mound, Weir School side (\$5,000)

302. In paragraph 195(d) of the response the Respondent says that the area is naturally restoring, so it is withholding the backcharge. Accordingly, I cannot find that the work is defective, and I find no deduction allowable.

52. Pontoon ramp RL is incorrect (\$20,000)

303. In paragraph 198 of the response the Respondent argues that the Claimant failed to adhere to directions regarding pouring the path to RL's. In O'Brien's statement at paragraph 53(a) he said that the Claimant failed to acknowledge that the path needed to achieve relative heights and slopes, and purported to attach AO18(viii), a document from the Landscape Architect. I find that no such document was provided.

304. Even if it was provided, I have not been told to what RL's and slopes the path was constructed, so I would be unable to compare to the RL's and slopes on the drawing.

305. I have to therefore evaluate the merits of this defect. On the one hand there is a sworn affidavit from Mr. Dobson stating at paragraph 9(c)(iii) that the Respondent was involved in establishing the position and RL's of the path, and that there was no basis for the backcharge.

306. In paragraph 9(c)(ii) he attaches a site instruction SMD38 from the Superintendent about pouring the path, and there was no evidence on the site instruction that a drawing from the Landscape Architect was attached, or even referred to.

307. On the other hand Mr. O'Brien in his statement paragraph 53 says that the area has been defecting. However, at paragraph 53(b)(iii) he says that there is pending resolution of the incorrect heights and slopes of the concrete path with the Superintendent.

308. Mr. Beckett in paragraph 8 of his statement referred to this issue and that the path was not as per the design criteria and that the path was set out by the

Respondent but that the Claimant had failed to pour to this set out. I have some difficulty understanding what is meant by the path not meeting the design criteria, and whether the set out by the Respondent was incorrect. His is an unsworn statement, compared to a sworn affidavit of Mr. Dobson, whose evidence to which I must attach more weight.

309. Given that it appears that the Superintendent is trying to resolve the heights and slopes, it may not be a defect. From the sworn evidence of Mr. Dobson, I find that the Respondent knew of the levels and slopes, such that if it is finally defected in the future, then I do not find it is defect for which the Claimant is responsible. I therefore reject this backcharge.

53. General cleaning (\$20,000)

310. In paragraph 54 of the O'Brien statement he refers to numerous site instructions and letters detailing where the Claimant had failed to comply with directions. None of these directions and letters were attached to the statement.
311. He then listed in paragraph 54(a)(i) to (v) a whole list of a number of charges associated with (presumably) payments made to Mite and site labour day works sheets and Council costs for maintenance. None of these invoices, proof of payments were attached.
312. Mr. Beckett's statement paragraph 9 referred to a lack of Claimant's labour to keep the site clean, the majority of the works included removal of trade debris and cleaning as well as the continual re-erection and maintenance in safety fencing. However, this list is at odds with the list provided by Mr. O'Brien, and contains no quantification.
313. I am at a disadvantage of not knowing precisely what these costs entailed and how they have arisen because I have not been provided with copies. However, they do not appear to me to be general cleaning costs, but costs for maintenance, repairs, excavation etc, and I am not prepared on the basis of these bare assertions to find that these are costs for general cleaning.
314. Accordingly, even if there was a basis for this backcharge, I reject the claim for this backcharge in that there is no substantiation of general cleaning costs.

54. Telstra Pit Lids (\$10,000)

315. In paragraph 55(a) of the O'Brien statement, he says that the Claimant did not take care to ensure concrete slurry did not enter the Telstra lids.
316. In paragraph 206 of the response the Respondent says that the reasons for the backcharge as identified in Mr. Beckett's statement. I see nothing about Telstra pits in his statement.
317. The Claimant says in the affidavit of Mr. Dobson paragraph 9(e) that it is not responsible for preparing lids for adjacent landscaping, and that the Respondent has provide no evidence of substantiating any problems with the lids, or a methodology of calculation.
318. I do not accept, as a matter of commonsense that a lid installer should prepare the lids for concreting. The person pouring the concrete ought to take care that slurry does not enter the lids, and I find that the Claimant was that person.

319. Although I have not been provided with documentation supporting the costs identified by Mr. O'Brien, I find that the lids had to be demolished and replaced as stated in paragraph 55(c), and that a figure of \$10,000.00 is a reasonable cost for doing so, based on Mr. O'Brien's expertise as a quantity surveyor.

320. The alleged belligerence of the Claimant is entirely irrelevant to whether the backcharge is payable, but I do find that this backcharge is payable on the basis that the work was defective, and this is the estimated cost for rectifying the defects. I allow the backcharge.

55. Delays to finishing landscaping works (\$140,000)

321. This is the most significant amount being backcharged by the Respondent. In the *Transcape Subcontract analysis* in the payment schedule the Respondent argues that it was claiming 28 days delay at \$5,000 totalling \$140,000.

322. In the covering letter (Item 6 on page 5) of the payment schedule, the Respondent argued that the Claimant had made no effort to mitigate delays and that:

- Firstly it failed to provide staff in the first month of the contract in August 2006
- Secondly it did not source sand samples to meet specifications
- Thirdly it delayed the project by several months and failed to accelerate the works to make up for lost time.

323. In the covering letter (Item 1 on page 6), the Respondent added that the costs of delay and liquidated damages:

- Are to be fully assessed
- Related to delays regarding sand samples
- The Claimant provided numerous short term programs, but failed to meet them
- The Claimant did not have sufficient resources on the project
- It apportioned 28 days damages at *our liquidated damage rate of \$5,000.00 per calendar day against your contract which is a significant departure from the 6 month delay to contract works*
- Regardless of liquidated damages, Watpac had borne costs approaching \$420,000.00
- It estimated the total cost to be in the vicinity of \$480,000 and with liquidated damages being applied, the cost would be in the vicinity of \$1,000,000

324. The nub of the quantum of the claim is \$140,000 based on 28 days at \$5,000.00 per day, so I do not need to consider the other costs that the Respondent alleges that it has incurred.

325. In paragraph 56(q) through to (t) of the O'Brien statement, Mr. O'Brien confirms the basis of a delay cost as \$140,000 based on 28 days times \$5,000.00 per day.

326. In paragraphs 207 to 210 of the response the Respondent reiterated its position that it had identified in the payment schedule, but added (in paragraph 210 of the response) that the paragraphs above (?) identify the sums incurred by the Respondent as a result of the delay, and that in the alternative the Respondent was entitled to at least the sum of \$5,000 per day, as its liability to the Principal irrespective of whether such liability has accrued or not.

327. In the Claimant's submissions in the application (paragraphs 34 to 44) the Claimant argues that:

- a. It was an attempt to claim general or liquidated damages for delay;
- b. Liability for liquidated damages arose if the contract provided for it, but that it was firstly necessary to establish:
 - i. A commencement date
 - ii. The date for practical completion, as extended under the contract
 - iii. The date of practical completion
- c. Once those facts are established, the Claimant said, it was a matter of calculating the days after the date for practical completion that the date of practical completion occurred;
- d. Which was then subject to the validity of the liquidated damages clause, and any disentitling conduct by the principle (sic) whom I take to be the Respondent in this context;
- e. The contract did not state a commencement date;
- f. The date for practical completion is not stated in the contract;
- g. There is no liquidated damages as such, as the Second Schedule identifies the Builder's liquidated damages as the costs incurred by the Builder by reason of the delay, which the Claimant argues is not a liquidated amount;
- h. Further, in the payment schedule there was no cogent evidence of the actual damages incurred by the Respondent;
- i. Further that there was no evidence that it had incurred a liability to pay \$5,000 a day liquidated damages to the Principal;
- j. The Respondent could not commit an act of prevention and then rely upon a damages clause in the contract as identified in the case of *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 ("*Shirlaw*"). The Claimant argued that the facts of this case are very similar to *Shirlaw*.
- k. Finally, that I was not bound by the Respondent's determination even if an offsetting claim has arisen as per *Transgrid v Walter Construction Group* [2004] NSWSC 21.

328. As a point of departure, I firstly say that I find that there are no facts to establish that the Respondent has committed any act of prevention, so I cannot agree with the Claimant that the Respondent's conduct prevents it from being entitled to rely upon Clause 4. The material points toward the Claimant causing some delays to the project, not the other way around.

329. The Respondent has maintained that it is entitled to \$140,000 based on a delay of 28 days x \$5,000 per day. That is the basis of its claim, whether or not it also says that it has incurred other amounts of damages for delay.

330. Insofar as the other claims for damages are concerned, they have not been pursued in the alternative, as the Respondent's basis for this claim of \$140,000 is a calculation. The other claims for damages have not been substantiated by the Respondent as actual costs incurred.

331. I have only been provided with the O'Brien statement [paragraph 56(u)] in which he says that the *Respondent's costs to maintain staff and account for preliminary costs exceeds \$400,000.00*, but I have not been given any supporting evidence of records from the Respondent. Even if I could consider these *actual costs* incurred by the Respondent, I do not consider that it is appropriate for me to do so in adjudication, as such a sum is not *liquidated*, but requires evidence and evaluation of such evidence. No evidence has been provided, particularly in the payment schedule, so the Claimant was not put in

a position to meet such evidence in the application, and I am not prepared to consider any possible alternative claim for damages, which is hinted at in paragraph 210(a) of the response.

332. This leaves me with a claim for liquidated damages, and the contract must be analysed to see if the Respondent is entitled to deduct an amount for liquidated damages.
333. Clause 4(c) specifically states that where the Claimant fails to bring the works to practical completion by the date for practical completion then the Claimant must pay to the Respondent by way of liquidated damages, the sum stated in the Second Schedule for each day of delay.
334. Schedule 2 of the contract states:
"Clause 4
Builders liquidated damages: Costs incurred by the Builder by reason of the delay
Principal's liquidated damages: \$5,000 per calendar day
335. Neither party referred me to authority as to the meaning of the well-known term *liquidated damages*. I referred to Osbourne's Concise law dictionary (1983) 7th ed, Sweet and Maxwell, London, which describes them as a *genuine covenanted pre-estimate of damages for an anticipated breach of contract, as contrasted with a penalty. The sum fixed as liquidated damages is recoverable*. In my view, *Costs incurred by reason of delay* is not a covenanted pre-estimate of damage, so it is not a liquidated damage.
336. Accordingly, I find that contract does not provide for liquidated damages in Schedule 2, so it is not possible for me to apply a liquidated damages rate to an identified delay. Furthermore, it has not clear from the material what the date for practical completion of the project was. Practical completion is defined in the contract to take the meaning from the head contract, and the Respondent provided no evidence of the date for practical completion that was identified from the head contract.
337. I am satisfied that the date of practical completion from AO2 and AO32(i) was 26 October 2007, but not for the date for practical completion, so it would not be possible to perform the simple arithmetic calculation, even if there had been an agreed liquidated damage rate.
338. This is contrasted with the Principal's liquidated damage of \$5,000 per day, which I find is a liquidated damage, but that applies to the Principal, not the Respondent.
339. The Respondent claims in paragraph 210(b) that it is entitled to deduct \$5,000.00 per day, being its liability to the Principal, irrespective whether such liability has accrued or not.
340. I cannot agree with such a submission. Clause 4(d) provides for the Claimant to indemnify the Respondent against any loss...including all damages, losses or costs payable by the Respondent to the Principal in the amount stated in the Second Schedule or at law.
341. Therefore, for the Respondent to rely on this clause to claim the \$5,000 per day, there must be an amount payable by the Respondent to the Principal (i.e. there are monies due), and there is no evidence of such a liability having arisen.

342. Support for such a view can be found in *Merritt Cairns Construction Pty Limited v Wulguru Heights Pty Limited* [1995] 2 Qd R 521 ("Wulguru") where McPherson J held on page 526 that:

"The expression 'money due' is not apt to describe a claim which, as regards liability, has not yet been determined, and, as regards quantum, has not yet been ascertained. The Principal's claim for damages for delay is an assertion of a liability which at present is entirely contingent in character. ...

Until judgement is given in a money sum, or there is an agreement or an award of the amount being claimed as damages for delay, it cannot be said that the Principal is 'entitled' to deduct any money in respect of that claim. Both its title to the money and its right to deduct it remain in dispute."

343. Accordingly, I am unable to allow deduction of the backcharges on this alternative basis put forward by the Respondent. This means that whatever facts are contained in the Respondent's submissions regarding delays to counter those of Mr. Dobson in his affidavit paragraphs 10 through to 34, found in paragraphs 58 through to 81, they do not create entitlement for the Respondent to claim damages

344. The Respondent may well have claims against the Claimant for delays, but it will have to seek these damages in another forum, and I reject the backcharges of \$140,000.00

58. Costs associated with temporary road construction (\$6,000)

345. In paragraph 211 of the response the Respondent says that it engaged Mite Constructions to construct a temporary road to allow the delivery of sand and gravel during inclement weather. This is supported by the O'Brien statement paragraph 57, as suggested by paragraph 213 of the response, but there is no support from Mr. Beckett's statement as alleged in the response submissions.

346. The Claimant says that it was not part of the contract to provide temporary roads, and it was not asked to do so, nor was the Respondent authorised to contact Mitec on its behalf.

347. It may well have been a sensible approach to provide a temporary road to facilitate gravel deliveries, but the Respondent has not pointed me to a provision of the contract to allow the Respondent to direct other parties to carry out this work at the Claimant's cost.

348. If this is a damages claim for this work, I have no provision under the contract to which I have been referred, to allow me to value that this work formed part of the contract. Furthermore, this work cannot be considered as work to rectify a defect, because there is no defect in evidence here.

349. Accordingly, this backcharge is rejected.

Due date for payment

350. Clause 10(h) of the contract provides that the due date for payment is 25 working days, presumably after the claim is made. S67U of the QBSAA provides that subcontract, as defined by s67D, must not have a due date for payment exceeding 25 business days. I find that this subcontract falls within

the definition in s67D of the QBSAA, as it is between 2 building contractors, and the Claimant is a subcontractor to the Respondent, and the work is part of a wider project.

351. Clause 2 of the contract refers to working 6 days a week (excluding Sundays, public holidays and RDO's). Business day under Schedule 2 of the Act refers to the definition in the AIA, which excludes Saturdays and Sundays, and public and special holidays. I therefore find that 25 working days is less than 25 business days.

352. Accordingly, s15(1)(b) of the Act, applies to allow the 25 working days for payment after the payment claim was made. The payment claim was served on 11 December 2007. I therefore calculate the due date for payment then to be 12 January 2008, excluding 25, 26 December 2007 and 1 January 2008 public holidays and Sundays.

Entitlement to interest

353. 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*.

354. 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.

355. I have considered the matter on the material before me, and I do not consider it appropriate to ask for submissions.

356. Accordingly, I find interest at 10% in accordance with s15(2)(a) of the Act.

The adjudicated amount

357. Annexure AO32(i) attaches the certificate of practical completion dated 26 October 2007. Clause 11(e) of the contract provides that retention monies in excess of 2.5% must be returned, and I find that \$117,823.05 has been held in retention. I find that half of this retention must now be released to the Claimant, as it is now 6 February 2008.

358. The amount of variations and backcharges (Annexure 1)	\$ 115,336.83
Value of works to date:	\$2,337,788.00
SUBTOTAL	\$2,453,124.83
Less paid to date	\$2,042,201.82
	\$ 410,923.01
Less retention	\$ 59,191.20
TOTAL	\$ 351,731.81
GST	\$ 35,173.18
TOTAL INCL GST	\$ 386,904.99

359. The adjudicated amount is \$386,904.99 including GST

Due date for payment

360. I have already found that the due date for payment is 12 January 2008.

Rate of interest

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

Authorised Nominating Authority and Adjudicator's fees

362. ss34 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.

363. The Respondent's defence was based on a number of threshold points, some of which were jurisdictional points, none of which succeeded. I spent a large part of the adjudication dealing with these points

364. 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

6 February 2008

ANNEXURE 1 – SCOTT SCHEDULE

Item No	Description	Applicant Claim	Respondent's value	Adjudicated amount	Reason
	VARIATIONS				
1	Site soil to turf areas	(\$37,202.50)	(\$37,202.50)	(\$37,202.50)	No dispute
2	Screen planting to oval	\$51,235.37	\$51,235.00	\$51,235.37	Essentially agreed
3	Remove bore	\$480.00	\$480.00	\$480.00	No dispute
4	Delete turf to kerb area	(\$868.75)	(\$868.75)	(\$868.75)	No dispute
5	Size reduction of trees	(\$3,672.00)	(\$3,672.00)	(\$3,672.00)	No dispute
6	Chicane rails willows intersection	\$1,488.00	\$1,488.00	\$1,488.00	No dispute
7	Survey charges	(\$1,450.00)	(\$1,450.00)	(\$1,450.00)	No dispute
8	Water truck	(\$3,550.00)	(\$7,100.00)	(\$7,100.00)	Respondent entitled
9	Credit for trucks supplied for sand	(\$17,612.54)	(\$31,175.00)	(\$17,612.54)	Respondent not entitled
10	Irrigation connection through slabs	\$2,685.00	\$0.00	\$2,685.00	No dispute
11	Generator slab	\$2,037.69	\$2,037.69	\$2,037.69	No dispute
12	Delete synthetic turf	(\$14,840.00)	(\$14,840.00)	(\$14,840.00)	No dispute
13	Post repairs	(\$220.00)	(\$220.00)	(\$220.00)	No dispute
14	Supply and lay mesh reinforcement	\$31,590.00	\$31,590.00	\$31,590.00	No dispute
15	Sculpture artwork footings	\$4,986.00	\$4,986.00	\$4,986.00	No dispute
16	Additional turf to practice oval	\$4,435.20	\$4,435.20	\$4,435.20	No dispute
17	Irrigation point to practice wicket	\$865.00	\$865.00	\$865.00	No dispute
18	Granite under stairs	\$516.35	\$516.35	\$516.35	No dispute
19	Delete concrete to bench area	(\$3,852.51)	(\$4,652.51)	(\$4,652.51)	Accepted Respondent val
20	Delete rain tree	(\$375.00)	(\$375.00)	(\$375.00)	No dispute
21	Concrete bike path	\$4,255.60	\$4,255.60	\$4,255.60	No dispute
22	Pram ramp BOQ rate	(\$300.00)	(\$2,400.00)	(\$2,400.00)	Accepted Respondent val
23	Mite repair damaged water main	(\$770.00)	(\$770.00)	(\$770.00)	No dispute
24	Mite repair damaged conduits	(\$9,228.00)	(\$9,228.00)	(\$9,228.00)	No dispute
25	Pram ramps BOQ rate and concrete removal	(\$600.00)	(\$6,500.00)	(\$6,500.00)	Accepted Respondent val
26	Water charges	(\$573.75)	(\$573.75)	(\$573.75)	No dispute
27	Rectification of crane area on oval	\$5,016.60	\$5017.00	\$5,016.60	No dispute
28	NQ concrete sawing	(\$549.78)	(\$549.78)	(\$549.78)	No dispute
29	Clean pump station	\$0.00	(\$9,327.00)	(\$9,327.00)	Respondent entitled
30	Garden and swale repairs	\$1,408.80	\$1,408.80	\$1,408.80	No dispute

31	RPZ installation	\$9,440.00	\$9,440.00	\$9,440.00	No dispute
32	Goal post sleeve installation	\$9,024.00	\$5,000.00	\$9,024.00	No dispute
33	Road sweep	(\$1,000)	(\$1,000)	(\$1,000)	No dispute
34	Gully pits	\$0.00	(\$5,000.00)	\$0.00	Respondent not entitled
35	Dowels and key joints to paths	\$28,520.00	\$5,000.00	\$28,520.00	Claimant entitled
36	Irrigation repairs Thuringowa City Co	\$2,680.00	\$2,685.10	\$2,680.00	Taken amount claimed
37	Bike path landscape	\$27,042.55	\$27,042.55	\$27,042.55	No dispute
38	Repairs to subsoil drainage on arena	\$31,711.70	\$0.00	\$31,711.70	Claimant entitled
39	Repairs to subsoil drainage on arena	\$5,952.00	\$0.00	\$5,952.00	Claimant entitled
40	Changes and adjustments to pontoon path	\$8,268.00	\$8,088.00	\$8,268.00	Respondent not entitled
41	Mowing strip to practice nets	\$1,905.50	\$0.00	\$1,905.00	Claimant entitled
42	Concrete path repairs to cross over area	\$1,895.00	\$1,895.00	\$1,895.00	No dispute
43	Concrete works to transformer area	\$976.00	\$0.00	\$976.00	Claimant entitled
44	Concrete blindings to players and umpires enclosure	\$1,632.00	\$0.00	\$1,632.00	Claimant entitled
45	Supply and lay washed turf	\$300.00	\$300.00	\$300.00	No dispute
46	Pontoon path infill	\$303.00	\$303.00	\$303.00	No dispute
47	Ergon Energy damage	\$2,516.60	\$0.00	\$2,516.00	Claimant entitled
48	Irrigation repairs damage by fence posts	\$513.80	\$0.00	\$513.80	No dispute
	BACKCHARGES	Respondent	Claimant	Adjudicated amt	
38	Replacement of 8 security fence post damaged by bobcat	(\$480.00)	\$0.00	\$0.00	Not pursued by Resp
50	Irrigation sprays to arena	(\$20,000.00)	\$0.00	\$0.00	Not defective
51	Re-establish T3 area behind mound, Weir school side	(\$5,000.00)	\$0.00	\$0.00	Not defective
52	Pontoon ramp RL is incorrect	(\$20,000.00)	\$0.00	\$0.00	Not defective
53	General cleaning	(\$20,000.00)	\$0.00	\$0.00	No substantiation
54	Telstra pit lids	(\$10,000.00)	\$0.00	(\$10,000)	
55	Delays to finishing landscaping works	(\$140,000.00)	\$0.00	\$0.00	No LD's payable
58	Cost associated with temporary road construction	(\$6,000.00)	\$0.00	\$0.00	No entitlement or defect
			TOTAL	\$115,336.83	