

Adjudication Application no. 30311

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| Authorised Nominating Authority | Institute of Arbitrators & Mediators Australia |
| Adjudicator | Chris Lenz |
| Registration Number | J622914 |
| Claimant | Dragonfern Industrial Supplies Pty Ltd |
| Respondent | Linmel Accommodation Solutions Pty Ltd |
| Project | Construction of Modular Buildings at BRB Modular Factory Works, 41 - 55 Platinum Street, Crestmead, Queensland 4132 |
| Payment Claim | Served 12 February 2013 for an amount of \$312,876.57 including GST |
| Payment schedule | Served 7 March 2013 for amount of \$115,545.91 |
| Adjudication Application | 21 March 2013 |
| Adjudicator's Acceptance | 26 March 2013 (email & letter) |
| Adjudication Response | None |
| Adjudication Decision | 15 April 2013 |
| Adjudicated Amount | \$280,898.90 including GST |
| Due Date for Payment | 26 February 2013 |
| Rate of Interest | 10% |
| Apportionment of Adjudication Fees | Claimant 50% Respondent 50% |

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A. DECISION

I have made a decision under the *Building and Construction Industry Payments Act 2004* ("BCIPA"), and in respect of the claimant's payment claim, that:

- the amount of a progress payment be made by the respondent to the claimant is the adjudicated amount,
 - the date upon which the payment claim is due,
 - the rate of interest at the rate of interest, and
 - the parties are liable to pay the adjudication fees (being the fees of the adjudicator and the authorised nominating authority) in the proportions,
- are as shown on the first page of this decision.

B. REASONS

I. Background

1. Dragonfern Industrial Supplies Pty Ltd (referred to in this adjudication as the "claimant") was engaged by Limmel Accommodation Solutions Pty Ltd (referred to in this adjudication as the "respondent") to construct modular buildings at the BRB Modular Factory works at 41-55 Platinum Street, Crestmead in Queensland 4132 (the "work").
2. The Claimant commenced work on site on 31 October 2012 (although work had been planned to be commenced on 24 August 2012), and on 12 February 2013 it provided a notice of suspension of work because of non-payment of a payment claim served on 18 December 2012.
3. The work carried out on the modular buildings (each SPQ with a floor area of 52.8 m²) included:
 - (i) sheeting and insulation of floors;
 - (ii) framing, insulation and erection of walls;
 - (iii) installation of fibreglass showers;
 - (iv) insulation and sheeting of rooves;
 - (v) fitting of windows and doors and hardware;
 - (vi) installation of reveals and architraves;
 - (vii) installation of gutters and downpipes;
 - (viii) external cladding;
4. The claimant asserted that it was a sub-sub contractor to BRB Modular with whom the respondent had a sub contract;
5. BRB Modular had a sub contract with FKG to provide the accommodation units at Roma

II. Application to an ANA and appointment of Adjudicator

6. The claimant applied to the Institute of Arbitrators and Mediators ("IAMA") on 21 March 2013 for adjudication. By letter dated 25th of March 2013 IAMA referred the adjudication application no. 30311 for me to determine.
7. IAMA is an Authorised Nominating Authority under BCIPA and I am a registered adjudicator under BCIPA with registration number J622914.
8. By letter dated 26 March 2013 sent by email and post to the claimant and to the respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.

9. The claimant advised IAMA that it had provided all the documents in a dropbox which it submitted had been accessed by the respondent, which it said meant that service had occurred. However, no date and time for such service was alleged, and I am not satisfied that electronic service of the application was affected.
10. However, I am satisfied that a hard copy of the application and the USB discs were posted by express post on 22 March 2013, which I am satisfied would have been delivered on the next business day, which I find was 25 March 2013. Therefore the Respondent had until 3 April 2013 to provide a response, which I find that it did not provide.
11. I find therefore that an adjudication application was made to an authorised nominating authority on 15 March 2012, and that there was a reference to an appropriately registered adjudicator within the time limits prescribed under BCIPA.

III. Material provided in the adjudication

12. I only received an adjudication application, and no adjudication response was received from the respondent.

a. Claimant's Material

The adjudication application documents comprised the following:

- (i) Adjudication Application served on 21 March 2013 for \$312,876.57 with the claimant's submissions (the "application") comprising 3 pages together 15 pages of submissions as well as the payment claim and a payment schedule; and
- (ii) 3 USB's containing various documents (the "USB numbers 1, 2, 3"); and by means of the electronic facility of a "dropbox", which I accessed in response to an email in which the following folders containing documents were provided under the headings described:
- (iii) Disc 1, which was identical to USB 1 containing:
 - (a) 22 Roma transit defects photos taken by L Jones;
 - (b) 35 BRB variation photographs taken by L Jones;
 - (c) A quote both in Excel and in PDF format for the project;
 - (d) an audio recording of a meeting held on 23rd of January 2013;
- (iv) Disc 2, which was identical to USB 2 containing:
 - (a) FKG Roma's photos of stage 1a rows 1 to 5 together with defects lists;
 - (b) FKG Roma BRB building number plan;
- (v) Disc 3, which was identical to USB 3 containing:
 - (a) a folder containing FKG Roma defects sheets;
 - (b) a folder containing FKG Roma photos stage 1a rows 6 to 7;
 - (c) a folder containing FKG Roma photos stage 2a;
 - (d) FKG Roma BRB building number plan
- (vi) Dragonfel v Linmel adjudication application containing:
 - (a) the adjudication application;
 - (b) the adjudication application submissions;
 - (c) Lee Jones statutory declaration; andthe following folders:
 - (d) 1a Notices under the Act;
 - (e) contract documents;
 - (f) variation documents;

- (g) defects documents;
- (h) payment claim;
- (i) payment schedule

b. Respondent's Material

13. The respondent provided no adjudication response.

IV. The Construction Contract

14. On page 2 of the submissions, the applicant submits that the contract involving carpentry work in the construction of modular, transportable buildings is partly written and partly oral, and in support of the submissions refers to the following documents, which, apart from the drawings, were provided:
- (i) the respondent's confidentiality agreement dated 20 November 2012;
 - (ii) the respondent's invitation to tender for the carpentry packages 1 and 2 dated 12 September 2012;
 - (iii) the applicant's conditional quote provided on or about 2 September 2012;
 - (iv) 85 A3 drawings of the modular buildings (not provided in the application);
 - (v) the respondent's purchase orders;
 - (vi) Lee Jones statutory declaration and R Williams's statement;
 - (vii) the respondent's schedule of payments identifying payment terms of 10 days.
15. I need to decide whether these documents demonstrate that there is a "construction contract" under BCIPA.
16. Schedule 2 of BCIPA states that a **construction contract** means a "contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."
17. Before analysing the issue of a contract, agreement or other arrangement, I first turn to the issue of whether the claimant carried out construction work.
18. Construction work is defined in section 10 of BCIPA and on page 3 of the claimant's submissions (and which are not controverted by the respondent because there is no adjudication response), the claimant said that the work fell within the definition of construction contract because it involved the construction of modular buildings which fell within the meaning of section 10(1)(a) of BCIPA which provides:
- "the construction, ...of buildings or structures, whether permanent or not, forming, or to form, part of the land;"*
19. The claimant did not refer specifically to section 10(1)(e)(iv) which also provides:
- "the prefabrication of components to form part of any building, structural works*
20. I am satisfied that by carrying out the construction of modular, transportable buildings, that the claimant carried out construction work in accordance with the definitions in section 10 (1) of BCIPA.
21. I need to decide whether the contract whereby it undertook to carry out this work is a construction contract within the meaning of BCIPA.
22. It is important to consider the meaning of construction contract because the claimant refers to a series of documents which it asserts comprises the construction contract, but there is a lack of clarity as to precisely what is considered the contract.
23. Turning again to the definition in schedule 2 contract a **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."

24. This is an *elastic* definition and in the case of *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd Anor* [2012] QCA 276, Philippedes J held that:

[56] In my view, his Honour was clearly correct in stating at [77] that —a contract or arrangement is a construction contract if it contains an undertaking of the type specified in the definition of construction contract, notwithstanding that it contains other undertakings or imposes other obligations not within the definition||. It also accords with the approach taken in New South Wales in respect of equivalent legislation: see *Brian Leigh Smith v Coastivity Pty Ltd* [2008] NSWSC 313 at [35]; *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd* [2011] NSWSC 604 at [30]. What is required for the purposes of the definition of —construction contract|| is that it is one under which a party undertakes to carry out some —construction work||.

25. If one considers the documents provided by the claimant which I have identified in some detail in the “claimant’s material” above, I am satisfied that the claimant provided a quote to carry out work dated approximately 2 September 2012 which mirrored the scope of work identified in the invitation to tender dated 12 September 2012. I find that subsequently purchase orders were raised by the respondent for work to be carried out.
26. I am also satisfied from the statutory declaration of Lee Jones that the claimant undertook to carry out construction work for the respondent, which falls within the explanatory decision identified by Philippedes J above, such that the work falls within the definition of *construction contract* under BCIPA.
27. Mr Jones in his statutory declaration refers to the contract being for the respondent, and I find that the claimant was a sub contractor to the respondent. What is not as clear from the statutory declaration is the role of BRB Modular.
28. After having considered Mr Jones’ statutory declaration, together with the submissions of the claimant on page 3 and the payment schedule documents making reference to BRB Modular, I draw the inference that the respondent was a sub contractor to BRB Modular, which had a contract with FKG for accommodation units at Roma.
29. I am therefore satisfied that there was a construction contract to which the payment claim related.
30. I am also satisfied from the claimant’s submissions (which are not controverted by the respondent) that the contract does not fall within any of the exceptions to BCIPA and that no notice of claim of charge has been given under the *Subcontractors’ Charges Act 1974*.
31. Accordingly, the contract, I have found was for work at 41 – 55 Platinum Street Crestmead in Queensland, may be adjudicated.
32. Before I consider the payment claim and payment schedules as part of the adjudication process, there are 2 important jurisdictional issues that have been raised in the claimant’s submissions that require my attention.

V. Jurisdictional issues

33. Although adjudication is an adversarial process within Queensland’s common law jurisdiction in which the parties are expected to put forward their cases, there are times when an adjudicator is required to be inquisitorial as to his or her jurisdiction, particularly if, as has occurred here, there is no adjudication response.
34. The reason for an adjudicator having to carry out such an inquisitorial inquiry is that adjudication decisions are subject to review by the Supreme Court which may find an adjudicator’s decision void for want of jurisdiction.

35. Section 26(2) of BCIPA prescribes a limited list of matters which the adjudicator is to consider, as the introductory words to the section states, "*In deciding an adjudication application, the adjudicator is to consider the following matters only* -". However, as has emerged from case law in Queensland, decisions in favour of claimants who have been unlicensed have been set aside because the court has held that BCIPA cannot be used to enforce a contract which is unenforceable by virtue of the provisions of section 42 of the *Queensland Building Services Authority Act 1991*.
36. Accordingly, in my view, before launching into a detailed assessment of the payment claim and payment schedule, as is required by sections 26(2)(c) and (d) of BCIPA, I need to consider 2 jurisdictional issues which have emerged from the claimant's submissions.
37. The 1st issue raised by the claimant on page 1 of the submissions is that the payment schedule was served on 7 March 2013, which it says is outside the time allowed under BCIPA.
38. The 2nd issue raised by the claimant on page 3 of the submissions is the issue of whether the claimant is required to hold a Queensland Building Services Authority licence.

c. Payment schedule served on 7 March 2013

39. The applicant submitted on page 1 of its submissions, and I find, that it served a payment claim on 12 February 2013. The applicant also stated that the payment schedule was due on 26 February 2013 and I find that this is 10 days from the date of service of the payment claim.
40. The claimant provided an email from the respondent dated 27 February 2013 in which the respondent referred to invoice number 1036 dated 12th of February 2013 (which I find is the payment claim), and the email referred to a letter from the respondent dated 14 February 2013 to which the respondent alleged there had been no response.
41. The claimant did not provide me with a copy of this letter dated 14 February 2013. However, in the email the respondent stated that a formal response, and I draw the inference that the respondent was referring to a response to the payment claim, *would be issued on 7 March 2013 with a fully reconciled account and final payment schedule*.
42. The claimant asserted that on 7 March 2013 the respondent provided a payment schedule, and a copy of this payment schedule was provided in the adjudication application.
43. The payment schedule was provided in folio 7 of the adjudication application documents, which consisted of:
 - (i) a 1 page document dated 7 March 2013 referring to unpaid invoices (the "payment schedule summary");
 - (ii) a document headed BRB Capex DF BC - 02;
 - (iii) a document headed FKG Roma DF BC - 01;
 - (iv) a document headed FKG Roma DF BC - 03;
 - (v) a document headed FKG Roma DF BC - 04;
 - (vi) a document headed FKG Roma DF BC - 05;
 - (vii) a document headed FKG Roma DF BC - 06;
 - (viii) a document headed FKG Roma DF BC - 07;
 - (ix) a document headed FKG Roma DF BC - 08;
 - (x) a document headed FKG Roma DF BC - 09;
 - (xi) a document headed FKG Roma DF BC - 10;

- (xii) a document headed FKG Roma DF BC - 11;
 - (xiii) a document headed FKG Roma Photos and Defects Register Postal Receipt and reference to 2 USB sticks (the respondent's USB sticks);
 - (xiv) a document headed FKG Roma Site Plan and Building Register Dragonfern.
44. The claimant also provided the respondent's USB sticks which contained a significant number of photographs together with lists of defects and I have referred to the contents of disk 2 and disk 3 above.
45. In response to the photographs and the defects alleged in the respondent's USB sticks, the claimant provided a USB -disc 1, which it said was provided in response to the payment schedule defect items.
46. **I am satisfied that the respondent provided a payment schedule on 7 March 2013** which consisted of a significant amount of detail relating to alleged defects in support of the "back charges" identified on the payment schedule summary.
47. On page 7 of the claimant's submissions, the applicant asserted that the payment schedule did not fulfil the legislative requirements for a valid payment schedule in that it did not identify the payment claim to which it related, and further that the respondent gave no reason for withholding payment of the claimed amount.
48. I do not agree with the claimant's submissions as to the validity of the payment schedule as regards identification of the payment claim and reasons for withholding payment. When one considers the respondent's 27 February 2013 email in context, it specifically referred to the payment claim and the reference to the payment schedule to be delivered on the 7 March 2013. On 7 March 2013 the payment schedule identified back charges and the details of the back charges by reference to list of defects, photographs, and timesheets of personnel involved in carrying out work on the modular units at Roma.
49. The payment schedule referred to "grand total unpaid" of \$115,545.91 after taking off the back charge amount of \$68,937.99 from the sum of the claimant's invoices numbers 1026 through to 1032 which it totalled as \$184,483.90. I am satisfied that the contents of this payment schedule complies with section 18(2) & (3) of BCIPA, and I find that the scheduled amount is \$115,545.91.
50. The payment schedule did not make reference to invoice number 1034 for the variations, but to my mind that does not invalidate the contents of the payment schedule.
51. I am satisfied from the claimant's submissions on page 2, and having read the document, that the respondent's schedule of payments email on 15 October 2012 (which was before the claimant commenced work) identified the payment terms as 10 days from the date of the payment claim. I therefore find that payment was required within 10 days of service of the payment claim, and I agree with the claimant's submission that this was likely to be 10 *business days*.
52. I therefore find that the **due date for payment was 26th of February 2013**.
53. I accept the claimant's submissions on page 7 that the respondent did not pay the scheduled amount by the due date for payment.
54. I do not have the benefit of an adjudication response from the respondent to counter the submissions of the claimant on page 7 of the submissions that it, despite asserting that the payment schedule did not fulfil the legislative requirements for a payment schedule, was prepared to accept that it was a payment schedule for the purposes of this payment claim.
55. Section 26(2)(a) of BCIPA requires me to consider the provisions of BCIPA and a number of cases referred to the strict timing requirements of BCIPA, and an

- adjudicator cannot merely adopt the submissions of a claimant regarding its acceptance of the respondent's non-adherence to BCIPA.
56. At first blush, it appears as if the issue relates to the late provision of the payment schedule, outside the 10 day requirement identified in section 18(4)(b)(ii) of BCIPA, and I turn to analyse this aspect initially.
 57. Having read section 18 of BCIPA fairly carefully, and then having reviewed the whole Act generally, with a focus on time limits and the meshing of times between the payment claim, the payment schedule and adjudication, it does not appear to me that the later delivery of the payment schedule in this particular case, suggests that an adjudication cannot proceed.
 58. I accept that there is reference to a 10 day timeframe for delivery of payment schedule; however, this is provided in subsection (4), which says that subsection (5) applies if no payment schedule is provided within the time frame, resulting in the respondent being liable to pay the claimed amount on the due date for payment.
 59. The claimant has not taken the point that section 18(5) applies as a matter of course because the payment schedule was late. Rather it has chosen to seek adjudication of its payment claim on the basis that a payment schedule has been served, and it is engaged with the respondent on the issues identified in the payment schedule.
 60. On page 1 of its submissions the claimant stated that the adjudication application was made under section 21(1)(a)(i) and (ii) of BCIPA which essentially acknowledges service of a payment schedule, with the scheduled amount being less than the claimed amount and a failure by the respondent to pay the whole or part of the scheduled amount by the due date for payment.
 61. In my view both parties have engaged directly with one another about the validity of the payment claim and the costs of rectification of defects alleged by the respondent to be a backcharge in the payment schedule.
 62. To my mind, the failure to provide a payment schedule within 10 business days is not a prescriptive time requirement under BCIPA which goes to the validity of the payment schedule. Section 18(1) of BCIPA states that a respondent "*may reply to the claim by serving a payment schedule on the claimant*, which to my mind means that it is not obliged to do so.
 63. If the respondent provides a payment schedule later than the 10 business days as in this instance, it runs the risk of having summary judgement in Court entered against it, or being confronted with an adjudication application in which the claimant asserts that there is a debt due and payable by virtue of the provisions of section 18(5) of BCIPA. However, in this case the claimant has taken neither route, but has rather engaged with the payment schedule in the adjudication and provided submissions to counter the back charges identified in the payment schedule.
 64. I appreciate that the claimant states that it has made its adjudication application under section 21(1)(a) of BCIPA, which is engaged *if the respondent served a payment schedule under division 1*. I am satisfied that the respondent did serve a payment schedule under division 1, despite it being served outside the 10 business days identified in section 18(4) of BCIPA.
 65. It is not appropriate to my mind to say to a claimant in these circumstances, particularly since there are no adjudication response submissions in support of the allegation of a late payment schedule, that the claim cannot be adjudicated because the payment schedule was "late". I have not been asked to deal with a late payment schedule, and I do not find a provision in BCIPA that makes a payment schedule late of itself.

66. It is however necessary to ensure that the adjudication application was made within the time prescribed by BCIPA, because if those strict time limits are not met, then according to the Court of Appeal case of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, per McDougall J who held:

211 The language of s 17(2) is clear. Where there has been no payment schedule and no payment, an adjudication application "cannot be made unless" the requisite notice is given within the specified time. The words "cannot be made" suggest strongly that, in the absence of notice, there is no right to make an application.

67. I have found the payment schedule was served on 7 March 2013, and for the adjudication application to be valid for a payment claim under:

(i) **subsection (1)(a)(i) of BCIPA:**

s21(3)(c)(i) requires that the application be made within 10 business days after receipt of the payment schedule. I find that the application was made on 21 March 2013, which is within 10 days of service of the payment schedule

(ii) **subsection (1)(a)(ii) of BCIPA:**

s21(3)(c)(ii) require that the application be made within 20 business days after the due date for payment. I have found the due date for payment to be 26 February 2013, and making an application on 21 March 2013 is within 17 business days from the due date for payment, which is within the requisite 20 business days.

68. *Chase*, is authority in relation to the timing of adjudication application, where McDougall J held that:

"222 For those reasons, I conclude that, in circumstances to which s 17(1)(b) of the Security of Payment Act applies, the requirement set out in s 17(2)(a) is a condition of the right to make an adjudication application, and satisfaction of that condition is an element of the jurisdiction of the adjudicator – the power of the adjudicator to determine the application in accordance with s 22(1). Put shortly, the giving of notice in time is a jurisdictional fact."

69. In this case I am satisfied for the reasons stated above that the adjudication application was made within time as a jurisdictional fact such that the adjudication can proceed on the basis that I have jurisdiction.

d. Claimant's need for a licence

70. This is an extremely important consideration in the context of this adjudication, particularly given that there was no adjudication response to which I could have regard in making a finding as to the claimant's ability to make this adjudication application.

71. On page 3 of the claimant's submissions, the claimant asserted, "*The claimant is not required to hold a QBSA licence for the work undertaken under this contract.*"

72. A little earlier on page 3 the claimant had stated that, "*the work is not residential construction work under QBSA Regulation 9 (b), 13 (1), (c) to (e) and 13 (2).*"

73. I do not consider the reference to *residential construction work* as having any bearing on whether or not a claimant is required to be licensed.

74. In *Cant Contracting P/L v Casella & Anor* [2006] QCA 538, the Court of Appeal established that an unlicensed contractor is unable to utilise BCIPA for payment of a payment claim. Williams JA at paragraph [30] held that:

"Because s 42(3) of the Building Act provides that an unlicensed contractor "is not entitled to any monetary or other consideration" for doing work pursuant to the contract, such a contractor cannot be said to have an entitlement to progress payments pursuant to ss 7, 12 and 17 of the Payment Act."

75. At paragraph [48] Gerard JA held that:

"Their current pleading, that the plaintiff was not entitled to any benefits under the 2004 Act by reason of it not holding the appropriate class of licence, if upheld, has the result that neither ss 17, 18, or 19 of the 2004 Act could be availed of by the plaintiff. It follows that summary judgment for the plaintiff in the amount of \$493,339.45 should be set aside."

76. Finally, McMurdo J held that:

"[61] This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder's entitlement being according to its contract. The long title of the Payments Act describes it as an "Act to imply terms in construction contracts ..." 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 s 42; the contrary appears. In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder."

77. To my mind there is no utility in an adjudicator simply ignoring the issue of licensing of a claimant on the basis that section 26 (2) of BCIPA limits the issues for which an adjudicator must have consideration. In particular in s26(2)(a) of BCIPA, the only reference to the QBSA Act is reference to part 4A, and section 42 of the QBSA Act does not fall within this part. To proceed with an adjudication, however, without having given consideration to the issue of licensing, to my mind falls foul of the Court of Appeal authority in *Cant*.

78. I appreciate that an adjudicator's function is not generally inquisitorial, and in cases where there is no adjudication response, the adjudicator is not obliged to consider arguments that a respondent may have raised, as this is contrary to the adversarial system upon which the common law system is based.

79. Nevertheless, given that the issue of licensing lies at the heart of whether a claimant is entitled to exercise contractual rights for payment, I need to consider section 42 of the QBSA Act despite there being no adjudication response submissions that contradict the claimant's submissions that no licence is required for the work.

80. In *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd and Ors* [2012] QSC 158, McMurdo J held that:

If the plaintiff can prove that the defendant, by the Contract, undertook to perform unlicensed work so that the Contract was unenforceable, then it would follow that the Payments Act did not apply and the adjudication was of no effect.

81. There is no reference in the QBSA Act to prefabricated modular buildings. The claimant has correctly identified the only areas in the Queensland Building Services Authority Act Regulations 2003 (the "Regulations") where there is only reference to prefabricated buildings is found in regulation 13, but this refers to residential building work.

82. However, rather than dealing with the submissions in a piecemeal fashion, it is appropriate to consider the whole issue from basic principles and this requires the inquiry to commence with reference to section 42 of the QBSA Act, which provides as follows:

"42 Unlawful carrying out of building work

(1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.

(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.”

83. In *Dart*, McMurdo J held that:

[20] The defendant attempted to lead evidence as to the opinion of the Queensland Building Services Authority as to the scope of work authorised by this licence. I upheld the objection to that evidence. The proper interpretation of this regulation is a question of law.

84. It is therefore necessary for me to consider the Regulations and the Act as a question of law, and schedule 2 of the Act is the point of departure because it defines “building work” and “building” both of which are vital to construing the statute. The claimant provided me with no authorities to support its contention that it was not required to be licenced, so I consider the matter from 1st principles.

85. *Building work* is defined as

“(a) the erection or construction of a building; or...”

86. There are no specific provisions under this definition that incorporate prefabricated buildings or the activity associated with constructing those type of buildings. Accordingly I have referred to the definition in “(a)” above as the best all encapsulating definition which requires further analysis.

87. *Building* is defined as, “includes any fixed structure”, which is unsatisfactory to determine whether a modular building, which is not yet fixed to the ground, is a building.

88. I find that all the work carried out by the claimant was work in constructing the modular buildings, which I consider as *prefabricated* buildings, and am satisfied that the claimant was not required to fix these buildings to the land at Roma. However, the definition of *building* is inclusive, so it may well also include prefabricated structures.

89. I have referred to the Regulations and did not find that prefabricated buildings fell within the exclusion provisions of regulation 5 which provides what is not *building work*.

90. I have already identified the extent of the work carried out by the claimant in paragraph 3 above under the heading “Background”, and I find that this work falls within the scope of work described under the licence class for carpentry which provides as follows:

“Part 16 Carpentry licence

1 Licence class

Carpentry.

2 Scope of work

(1) Construct and erect timber and steel wall framing and roof structures.

(2) Construct and erect non-load bearing internal partition walls.

(3) Install windows and doors including framing.

(4) Erect ceiling and subfloor framing.

(5) Install timber and sheet flooring.

(6) Install exterior cladding, fascias and soffits.

(7) Install metal roofing.

(8) Construct timber stairs.

(9) Fix internal linings, panelling and mouldings.

(10) Install door and window locks and furniture.”

91. The claimant stated in the application that it does not have a licence and on page 1 of the application it is stated that a BSA licence number was not applicable. In my

view the work carried out by the claimant falls within the definition of the scope of work contained within a carpentry licence.

92. However, the important issue for consideration as identified in the cases of *Cant* and *Dart* is not so much whether a claimant has or does not have a licence, but rather whether section 42 of the QBSA Act precludes the claimant from enforcing a contract. I refer again to section 42 and subsection 3 in particular, which is the important section in this context. It provides:

(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.

93. Accordingly, rather than considering whether or not the claimant needs to have a carpentry licence, it is more apposite to focus on the provisions of section 42 of the QBSA Act in more detail, because the central focus of the Court of Appeal and the Supreme Court in the cases mentioned above is whether or not a claimant is entitled to enforce a contract.

94. I've considered section 42 of the QBSA Act in more detail and note that there is a qualifying provision in relation to sub contractors which I find applies in this instance, which is s42(5A), and it provides as follows:

"(5A) An unlicensed person who, as a subcontractor, carries out, or undertakes to carry out, building work for a licensed trade contractor, does not contravene this section if the work is within the scope of the building work allowed by the class of licence held by the contractor."

95. Accordingly the inquiry must now be whether the claimant falls within this qualifying provision (and I note that the claimant made no reference to this at all in its submissions), and I have already found that the claimant is a sub contractor to the respondent.

96. In the application, on page 2 the claimant made reference to the BSA licence number of the respondent as 1241444, and I have searched the QBSA website and confirmed that the respondent holds a builder low-rise licence and has held that since 4 October 2012.

97. I have already found that work commenced on 31 October 2004 so that the claimant carried out work once the respondent held a licence.

98. It is necessary therefore to establish whether the work carried out by the claimant falls within the scope of building work of a builder low-rise licence held by the respondent.

"Part 4 Builder—low rise licence

1 Licence class

Builder—low rise.

2 Scope of work

(1) Building work on a class 1 or class 10 building.

(2) Building work on classes 2 to 9 buildings with a gross floor area not exceeding 2000m², but not including Type A or Type B construction."

99. I found the definition of building classes on the BSA website as a table, and in my view classes 1 and 2 buildings referred to single detached dwellings or sole occupancy dwellings, and that the buildings constructed by the claimant fall within class 3, which is defined as follows:

"Class 3

A residential building, other than a Class 1 or 2 building, which is a common place of long term or transient living for a number of unrelated persons.

Example: boarding-house, hostel, backpackers accommodation

or residential part of a hotel, motel, school or detention centre. “

100. I therefore find that the work carried out by the claimant falls within subsection (2) of the scope of work, as it is a class 3 building which falls within “classes 2 to 9” as identified in that subsection.
101. I have already found that the floor area of each modular building is 52.8 m², and to my mind the claimant was merely replicating each modular building on a number of occasions, so that it is not appropriate to sum the floor area for each modular building to determine whether the entire work carried out by the claimant exceeded the limitation of 2000 m² under subsection 2 of the scope of work for a builder low-rise referred to above.
102. The reasons for doing so is that I have found that the claimant did not install modular buildings in Roma, which if it had done so may have meant that the gross floor area for all modular buildings added together would exceed 2000 m². I have found that the claimant merely prefabricated the buildings within the factory, and each building at a floor area of 52.8 m².
103. What is more important is to determine whether the work included Type A or Type B construction because this would make the work fall outside the definition in subsection 2. I referred again to the BSA website which defined a class A and class B building as follows:

| <u>Rise in storeys</u> | <u>Class of building</u> | <u>Class of building</u> |
|------------------------|--------------------------|--------------------------|
| 3 | <u>2,3,9</u> A | <u>5,6,7,8</u> B |
| 2 | B | C |
| 1 | C | C |

104. I find that each modular building is a single-storey which means that according to the table identified above that it is a type C building, and this means that the work carried out by the claimant falls within subsection 2 of the scope of work identified above.
105. Accordingly, I conclude that the respondent had a class of licence which covered the work carried out by the claimant, which means that section 42(5A) applies, and the claimant is not precluded from enforcing the contract under BCIPA, because it is not in contravention of s42(3) of the QBSA Act, even though did not have a licence.
106. I find therefore that I have jurisdiction to consider the payment claim and payment schedule in more detail in order to decide the amount to which the claimant is entitled, the due date for payment and the rate of interest applicable.

VI. Payment Claim

107. I have found the payment claim in invoice 1036 amounting to \$312,876.57 including GST.
108. The claimant has claimed interest on the overdue amounts in accordance with BCIPA in the payment claim, which I do not consider appropriate because that is a calculation that must be carried out by the adjudicator on the adjudicated amount.
109. Accordingly, I have disregarded the interest claim under the payment claim.
110. Invoices 1026 through to 1032 refer to work for which purchase orders had been given, and my Annexure A identifies the purchase order number together with the transaction number found in the payment schedule for ease of reference.
111. Invoice number 1034 amounting to \$113,950 excluding GST essentially deals with the variation is claimed by the claimant.

112. I'm satisfied from what Mr Lee Jones says in his statutory declaration that on Friday, 23 November 2012 the respondent agreed to the variations for 70 buildings at \$1125 per building plus GST, and that an order for 40 of those buildings were provided by the respondent, but not for the final 30.
113. I am therefore satisfied that the claimant was entitled to claim for 30 buildings at \$1125 per building plus GST.
114. I am also satisfied that BRB agreed to a variation in relation to 70 buildings at \$770 per building plus GST at this same meeting.
115. However, a payment claim is issued to the person liable to pay, and at first blush it appears as if a payment claim ought to have been made to BRB Modular for this variation. However, I have not found that there is any direct contractual arrangement between BRB Modular and the claimant.
116. I have found by inference from the facts provided to me and from the claimant's submissions that the respondent had a contract with the BRB modular, and from page 2 of Mr Lee Jones a statutory declaration, I am satisfied that the BRB modular had agreed to pay the respondent for the variations that it had authorised the claimant to carry out, and that the respondent agreed to pass on the payment to the claimant.
117. The claimant provided a tape recording of a conversation between Mr Lindsay Waho of the respondent and Mr Lee Jones of the claimant that Mr Jones in his statutory declaration says took place on January 23 (the "recording").
118. There is no adjudication response to counter Mr Jones's assertion and I am satisfied that the conversation did take place as recorded because Mr Jones swore to it in his statutory declaration.
119. I find from the recording at 8:3 to 8:40 of the recording, that Mr Lindsay Waho said that BRB modular had paid the respondent all the monies that had been held up before Christmas 2012, and that the respondent was in the process of paying the sub contractor's "this week".
120. Accordingly, I am satisfied that the payment claim for the variation authorised by BRB Modular could have been directed at the respondent (as the person liable to pay) because it had undertaken to pay the respondent for the monies to be received from BRB Modular for the variation, and that these monies had been received from the BRB Modular. Therefore I'm satisfied that the claimant was entitled to the variation of 70 buildings at \$770 per building plus GST.
121. The final variation claim in invoice 1034 relates to Roma works in the sum of \$26,300 plus GST. The difficulty with this claim is that there is nothing in the submissions dealing directly with the basis of this claim.
122. Mr Lee Jones at pages 2 and 3 of his statutory declaration refers to work carried out by the claimant at Roma, and he identifies personnel and the times taken by these personnel at Roma. However, there is no rate referred to in the submissions that is alleged to have been agreed by the parties for this work to be charged to the respondent. He did not explain this claim in his statutory declaration.
123. It appears as if it's only after a passage of time in December 2012 that Mr Jones realised that the work being carried out by his personnel related to defects that had occurred after the claimant had completed its work at BRB Modular. However, he does not point to any agreement with the respondent that this work would be paid for and the submissions do not do that all with this claim.
124. Accordingly, I am not satisfied that the claimant has discharged its onus in relation to the claim for \$26,300 including GST, and I reject this aspect of the claim.

VII. Payment Schedule

125. I have already considered some aspects of the payment schedule when discussing the timing of the service of it.
126. The claimant asserts on page 7 of the submissions that there are no reasons for non-payment in the payment schedule, and I have already found that the reference to backcharges, together with the list of defects and the photographs support, constitute reasons for non-payment.
127. I have considered the payment claim and the payment schedule, and it is apparent from the payment schedule that the respondent has accepted the amounts in invoices 1026 through to 1032, as the total of those amounts (including GST) came to \$184,483.90 from which it then deducted the back charges.
128. It is evident (as already identified above) that invoice number 1034, which is one of the invoices referred to in the payment claim, has not been referred to in the payment schedule.
129. As I mentioned previously, the claimant has not sought to argue that a *late payment schedule* means that the amounts in the payment claim due and payable by virtue of section 18 (5). Despite the payment schedule not engaging about this invoice which relates to variations, I have had to be satisfied that all the claims within invoices 1034 are claimable, and I have considered the claim under the payment claim heading above.
130. The payment schedule deals with a whole lot of back charges by way of deductions, and to counter those assertions the claimant provided its submissions in Disc 1 under the folder "answers to Linmel defect photos". The claimant acknowledged 30 defects for which it was responsible (out of a whole list of hundreds of defects) which included items such as "film not removed correctly" and "scratches to door jamb".
131. Whilst I accept the claimant's submissions that it is responsible for these defects, I have no means of calculating the value of those defects because there is no adjudication response submission to deal with these items. Accordingly, I am unable to value the defects acknowledged by the claimant, and the claim is not discounted by this amount.
132. More importantly there were references to back charges and the building defects in the recording. There is a particular passages referred to in the submissions at times 8:58 – 9:00 that the defects are waived by the words of Mr Lindsay Waho that, "*All I want you to know, in relation to defects is... there is none*". I am not satisfied that these words were said, as it is not at all clear from the recording (which is very indistinct at this point) that this is what the respondent said.
133. However, at approximately 9:50 I heard the respondent's Mr Lindsay Wahoo say, "I'm not going to worry about back charges", and he had earlier said that the respondent had found that the fixing of the defects was "painless" and respondent had absorbed the pain.
134. He was discussing this issue in the context of the slow payment and had said that in response to the slow payment, the respondent had gone to site and rectified the defects and at 8:30 to 8:38 he said that BRB Modular had paid the respondent all the monies which would now flow through to the sub contractors.
135. At 22:18 to 22:30 that the respondent was alleged to have admitted that all damage the building was done on the loading, transportation and erection at the final destination, but I did not hear any reference to transportation and erection at the final destination as the tape had stopped at approximately 22:30.

136. However, at 22, 27, Mr Lindsay Waho stated that, "I know every room had cracked there and there because when it was picked up..." I draw the inference from this recording that the respondent was acknowledging that the damage caused to the buildings was at least caused by the loading of the buildings.
137. I draw the inference from the conversation that the respondent acknowledge that the loading was not the responsibility of the claimant, and that the respondent was not claiming back charges, particularly given that the defect rectification work was "painless".
138. Accordingly, given the statements made by Mr Lindsay Waho about the back charges and the cause of the defects, and the fact that there was no adjudication response provided, I'm not prepared to accept that the back charges are justified.
139. This conclusion is strengthened by the fact that the long list of defects provided by the respondent, appeared to be a defects list and I infer that this list had been created by FKG at Roma, and these defects were those observed at Roma, and not at BRB Modular's premises. I find that the claimant was not responsible for defects at Roma, but only at the BRB Modular's premises, and there is no way of distilling from the long list of defects and the photographs what defects could possibly have occurred at BRB Modular, and I have no assistance from adjudication response submissions.
140. I am satisfied from what Mr Robert Whitaker says in his statement dated 20 March 2013 that each building was subject to a QA check by both the respondent and BRB modular once the claimant had finished each stage of the building process, because such a procedure for a rushed project on a "production line" is a logical process to ensure quality control. I'm satisfied from what Mr Whitaker says that there were, however, some buildings that were sent to Roma without being complete, and that the claimant was then asked to complete the buildings at Roma. Nevertheless, in the main I am satisfied that the building is constructed at BRB Modular had been satisfactorily constructive because they needed to adhere to a QA process.
141. I am satisfied from what Mr Whitaker says and from page 3 of Mr Lee Jones' statutory declaration that the defects alleged to be present in the buildings, arose after the buildings had left BRB Modular's premises. Accordingly, as I've stated previously I am not satisfied that any of the respondent's back charges justifiably relate to defects in the claimant's work.
142. I now turn to the adjudicated amount of the progress payment heading which totals up the amounts to which I find the claimant is entitled.

VIII. The amount of the progress payment

143. Adjudication requires valuation of the payment claim for work done under a construction contract. Valuation is made, either by means of a specific provision dealing with valuation of the particular work under the contract: s14(1)(a) and s14(2)(a) of the Act; or by having regard to other contractual rates or prices or agreed variations and estimated costs of rectifying defects: s14(1)(b) and s14(2)(b) of the Act. These provisions of BCIPA on valuation provide:

"13 Amount of progress payment

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

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

14 Valuation of construction work and related goods and services

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

- (a) under the contract; or*
- (b) if the contract does not provide for the matter, having regard to--*
 - (i) the contract price for the work; and*
 - (ii) any other rates or prices stated in the contract; and*
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and*
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.*

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued--

- (a) under the terms of the contract; or*
- (b) if the contract does not provide for the matter, having regard to--*
 - (i) the contract price for the goods and services; and*
 - (ii) any other rates or prices stated in the contract; and*
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and*
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect.*

144. I find that the contract has provided for certain amounts contained within the payment claim and in particular invoices 1026 through to 1032 all have purchase orders identifying the appropriate amounts. As I've said previously, the payment schedule does not dispute these amounts and I am satisfied that the amount of \$184,483.90 (which includes GST) is the appropriate amount for those invoice numbers. In Annexure A, I have provided the adjudicated amount for these invoices, with the addition of GST.

145. However, invoice number 1034 consists of variations and the contract does not provide for these amounts so I am obliged to make valuations in accordance with section 14 of BCIPA, and I refer in particular to subsection (iii) which states that, "any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount".

146. I have already found that there was agreement in relation to the variation amounts relating to the 70 buildings at \$1125 per building plus GST (of which 30 buildings had not yet been paid) as well as \$770 per building plus GST. I therefore value those variations as per the claimed amount because Mr Jones on page 2 of the statutory declaration swears to these amounts as being agreed. I have added these amounts in Annexure A.

147. Under the heading "payment claim" above, I have found that the claim for the Roma work is not supported by the submissions or by Mr Jones's statutory declaration and I have therefore rejected this aspect of the claim.

148. The payment claim dispute may be summarised in a table as follows:

IX. Summary of the adjudicated amount

149. I provide a summary table of the **adjudicated amount of \$280,898.90** which I have calculated in order to assist the parties, with a more detailed layout provided in Annexure "A."

| Description | Amount | Reason |
|---|---------------------|---|
| Invoices 1026 through to 1032 | \$184,483.90 | These items were identified in the various purchase orders, and referred to in the payment claim, and accepted by the respondent the payment schedule |
| Invoice 1034 – variation dealing with 30 buildings at \$1,125 per building (plus GST) | \$37,125.00 | Claimant discharged onus from Lee Jones' Statutory declaration, and no adjudication response to refute this agreement |
| Invoice 1034 – variation dealing with 70 buildings at \$770 per building (plus GST) | \$59,290 | Claimant discharged onus from Lee Jones' Statutory declaration, and no adjudication response to refute this agreement |
| Invoice 1034 – variation dealing with Roma works at \$26,300 (plus GST) | \$0 | Claimant did not discharge onus that it was entitled to this variation and there was no reference to there being an agreement for such work from Lee Jones' statutory declaration |
| TOTAL ADJUDICATED AMOUNT | \$280,898.90 | |

X. Due date for payment

150. s15 of BCIPA deals with the due date for payment, and I have already found that the due date for payment was 26 February 2013, 10 business days after the payment claim

as provided by the construction contract, which is consistent with the provisions of section 15(1)(a).

151. I have already found that the due date for payment was 26 February 2013.

XI. Rate of interest

152. I do not find that the contract provides an interest rate.

153. The claimant's submissions on page 6 said that, "the contract was not subject to the QBSA" and it claimed the late payment interest at the Supreme Court rate pursuant to section 15(2)(a)(1) of BCIPA.

154. I find that no such provision exists and the relevant provision is 15(2)(a) of BCIPA which refers to section 59 (3) of the *Civil Proceedings Act 2011* and this section provides:

59 Interest after money order

(1) This section does not apply in relation to a proceeding for a cause of action arising before 21 December 1972.

(2) Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.

(3) The interest is payable at the rate prescribed under a practice direction made under the Supreme Court of Queensland Act 1991 unless the court otherwise orders.

155. , I am satisfied that the interest is at the rate prescribed by the practice direction of the Supreme Court, and practice direction number 22 of 2012 provides the interest rate to be 10%.

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

XII. Authorised Nominating Authority and Adjudicator's fees

157. The default provision contained in s34(3)(b) of BCIPA makes the parties liability for the ANA's fees is in equal proportions, unless I decide otherwise. The same approach applies to the adjudicator's fees in s35(3) of BCIPA, with equal contributions, unless I decide otherwise.

158. The claimant has obtained the bulk of what it claimed and there was no adjudication response.

159. However, a lot of time spent on this adjudication was dealing with the 2 jurisdictional issues which were important to allow the adjudication to proceed. In my mind these issues should have been traversed in more detail by the claimant in submissions to obviate the need to me to carry out a lot of research and analysis on these two important points. Furthermore, some of the references to the recorded conversation of the meeting on 23 January 2013 did not appear to accurately capture what was said, and some other statements in the conversations had not been referred to in the submissions, when they were important.

160. Accordingly, I am not satisfied that I should disturb the default provision because of the time I had to spend dealing with the jurisdictional issues, which to my mind ought to have been expanded upon by the claimant since it was seeking adjudication.

161. Accordingly, the claimant and respondent are equally liable to pay the ANA's fees under s34(3)(b) and my fees under 35(3) of the Act.

Chris Lenz

Adjudicator



15 April 2013

ANNEXURE A Dragonfern v Linmel adjudication

| | |
|---------------------|--------------------------|
| \$16,771.26 | GST |
| \$184,483.90 | Total payable |
| -68937.99 | Less back charges |
| \$115,545.91 | Total payable |
| | \$280,898.90 |