

Amended Adjudication decision: Application no. 5433

(s 28 of the Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator : Chris Lenz J622914)

Application Details

Claimant Ceratec (Hong Kong) Ltd

Name : Claimant

ACN/ABN :

Address : Room 1205, 12 F The Broadway, 54 – 62 Lockhart Road, Wanchai, Hong Kong

Respondent Transcity Joint-Venture

Name : Respondent

ACN/ABN : ABN 83 822 813 340

Address : 80 – 83 Jephson Street, TOOWONG, QLD

Project Legacy Way Project

Type : Design, supply and install tunnel panels

Location : TOOWONG, QLD

Payment Claim

Date : 22nd May 2015

Amount : \$2,042,092.37 including GST

Nature of claim Complex

Payment Schedule

Date : 5 June 2015

Amount : Nil dollars

s20A Notice Date : N/A

Application Detail

Application Date : 22 June 2015

Acceptance Date : 26 June 2015

Response Date : 14 July 2015

Adjudicator's Decision

Jurisdiction : Yes

Adjudicated Amount : **\$827,011.28 (including GST).**

Due Date for Payment : **30 June 2015**

Rate of Interest : **3.16%**

Claimant Fee Proportion (%) : **50%**

Respondent Fee Proportion (%) : **50%**

Amended Decision Date : **16 September 2015**

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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 in the proportions I have decided, as shown on the second page of this decision.

B. REASONS

I. Background

1. Ceratec (Hong Kong)Ltd (referred to in this adjudication as the "claimant") was engaged by Transcity Joint-Venture (referred to in this adjudication as the "respondent"), to carry out design, manufacture, supply and installation of architectural panels and its support system for the tunnel fit out works for the Legacy Way Road Tunnel project in Brisbane in Queensland (the "work").
2. The parties entered into a contract for the work on 14 February 2014, which included Annexure E – General Conditions of Contract (the "GCCC").
3. The payment claim dated 22 May 2015 for \$2,042,092.37 including GST, comprised contract works together with variations, additional works and claims less what had been paid to date.
4. The payment schedule dated 5 June 2015 assessed the payment claim at \$NIL.
5. The adjudication application dated 22 June 2015 was served on the respondent on 22nd June 2015, and the adjudication response was served on me on 14 July 2015 and on the claimant by 16 July 2015.
6. On 16 July 2015, I requested an extension of time to provide the adjudication decision until 18 August 2015, which was granted by the parties on 17 July 2015.
7. On 18 July 2015 the claimant submitted that, pursuant to s24b(7) of the *Building and Construction Industry Payments Act 2004* ("BCIPA") that it proposed to provide a claimant's reply by Thursday 6th of August 2015, because the adjudication response included new reasons.
8. On 28 July 2015, as a result of the claimant exercising the right of reply, I requested an extension of time until 8 September 2015 to provide my decision which was granted by the parties.
9. On 6 August 2015 my agent received the claimant's reply.
10. On 14 August 2015 my agent received unsolicited submissions from the respondent dealing with the claimant's reply.
11. On 26 August 2015 my agent received unsolicited submissions from the claimant in response to those of the respondent.

II. Application to the QBCC and appointment of Adjudicator

12. The claimant applied to the Queensland Building and Construction Commission ("QBCC") on 22 June 2015 for adjudication, and the QBCC referred the matter to me.
13. I am a registered adjudicator under BCIPA with registration number J622914.
14. I accepted the adjudication application on 26 June the 2015 and thereby became the appointed Adjudicator.

III. Material provided in the adjudication

15. I received the application in 3 lever arch boxes comprising 10 volumes, in 13 lever arch folders and it included the payment claim [**Volume 3**] and payment schedule [**Volume 4**], and the schedule included an identical copy of the contract to that provided by the claimant in **Volume 2** of the application.
16. In the application, the claimant provided copies of 46 cases in support of the application.
17. I received a response on 14 July 2015 in 3 lever arch boxes comprising 9 volumes from the respondent.
18. In the response, the respondent provided copies of 103 cases in support of the response.
19. The claim was for a sum over \$750,000, which, according to schedule 2 of BCIPA means that it is a *complex payment claim*.
20. The claimant exercised its right of reply, because it alleged that new reasons for non-payment had been introduced by the respondent, and the claimant provided submissions which were received on 6 August 2015.
21. On 14 August 2015 my agent received unsolicited submissions from the respondent dealing with the claimant's reply.
22. On 26 August 2015 my agent received unsolicited submissions from the claimant.

IV. Threshold issues

23. In Section 2 of the payment schedule, from paragraphs [19] through to [96], the respondent identified 5 reasons for non-payment under the heading, "*Reasons why the Payment Claim is invalid under the Act*", and I have considered these as threshold issues because the respondent submitted that they go to jurisdiction. These issues are as follows:
 - (i) Claimant not licensed under the QBCC Act;
 - (ii) The *reference date* under BCIPA had not arisen, or alternatively the payment claim was partially invalid;
 - (iii) Payment claim failed to properly identify construction works and services;
 - (iv) Claims in the nature of a global claim or total costs claim;
 - (v) Claims for work not completed.
24. In Section 4 of the adjudication response, the respondent abandoned its objection to the *licensing issue*, paragraphs [45] and [46], which means I do not need to consider this issue further.
25. However, in the response, it maintained its other reasons for non-payment, paragraphs [47] through to [113].
26. Accordingly, I need to deal with the parties contending submissions in relation to these reasons in order to establish jurisdiction before adjudicating further.
 - a. *No reference date, or payment claim partially invalid*
27. This was an important issue, particularly given that on 27 February 2015, the respondent exercised its right to terminate the sub contract with the claimant.
28. The respondent's payment schedule identified primarily that the payment claim was totally invalid, paragraphs [34] through to [57].
29. At paragraph [42], the respondent said that the earliest *reference date* under the contract for any given month was the 20th day of that month.
30. However, the respondent submitted that the *reference date* was calculated as the latest date under clause 19.3 of the GCCC, which required that the claimant demonstrate the date that it provided the respondent with:
 - (i) a Work program; and
 - (ii) Security.

31. At paragraphs [44] and [45] of the payment schedule, the respondent submitted that the claimant had failed to provide a Work program, such that a *reference date* under the contract had not arisen in accordance with the process *worked out under the contract*.
32. Furthermore, paragraphs [46] and [47] of the payment schedule, the respondent submitted that the claimant was required to provide 2 unconditional undertakings, each for 2 ½% of the contract sum in accordance with *Item 10* of the contract particulars and clauses 3.1 and 3.3(a) of the GCCC, and that it failed to do so, such that a *reference date* never arose.
33. The claimant's application submissions from paragraphs [17] through to [72] contested the respondent's submissions.
34. The response submissions from paragraphs [47] through to [86] supported those of the payment schedule and countered those in the claimant's application.
35. I now deal with each of the submissions separately.

No reference date

Works program

36. The respondent's argument commenced with s12 of BCIPA, in which the term *reference date* is provided. It then referred to Schedule 2 of BCIPA for the definition of this term, and submitted that it fell within the definition identified in (a), as being a date *worked out under the contract*, because clause 20.2 of the GCCC provided that the parties agreed that a *reference date* would be worked out in accordance with clause 19.3 of the GCCC.
37. It then referred to clause 19.3 (b)(iv) of the GCCC which specifically required the claimant to provide a Work program.
38. The respondent also referred to clause 14.2 of the GCCC which it said obliged the claimant to:
 - (i) prepare a Work program for the respondent's approval before commencing work under the contract; and
 - (ii) promptly update and obtain the respondent's further approval to the Work program, which it argued the claimant had failed to do.
39. The respondent's argument was that the consequence of the claimant's failure to do so meant that no *reference date* arose under a process worked out under the contract (payment schedule paragraph [45]).
40. In paragraphs [17] through to [28] of the application, the claimant contested this failure to comply with its obligations regarding the Work program.
41. In paragraph [18(a)] of the application, the claimant said that as a matter of fact, it had complied with its obligations in respect of the Work program, and this was amplified in paragraphs [26] through to [28] of the application, in which reference was made to:
 - (i) the statement of Mike Smart (in **Volume 1**);
 - (ii) a program bundle (in **Volume 7**);
 - (iii) paragraphs [210] through to [214] of the application; and
 - (iv) a summary dated 15 June 2015 in response to Section 2, item 2.1 (a) (in **Volume 1**).
42. In particular, the claimant argued that it had provided an original Work program on 3 March 2014 (paragraph [6] of Mike Smart's statement), which was subsequently updated, and furthermore that it submitted weekly programs at the weekly site meeting (paragraph [26] of the application).
43. In paragraphs [47] through to [63], together with paragraphs [252] through to [273] of the response, the respondent disputed what the claimant had alleged in the application, and reiterated its own position provided in the payment schedule.
44. In line with the parties' submissions, I have separated the contending submissions about the requirement for a Work program, in order to analyse whether or not the claimant had complied with clause 14.2 of the contract (the "analysis").

45. However, in my view, it was not necessary to initially make a finding whether the claimant satisfied this contractual obligation, before deciding whether the contractual obligation attracted the s99 BCIPA prohibition referred to below.
46. The analysis about the claimant's Work program contractual obligation was made with the factual matrix provided by the parties, and it then provided the input into the s99 BCIPA test identified by Applegarth J in *Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd & Anor* [2014] QSC 293 (*Lean Field*) as whether or not:
 - (i) the obligation was onerous; or
 - (ii) such as to make a reference date a theoretical possibility only; and
 - (iii) whether the contractual obligation provided a benefit under BCIPA.
47. The reason for this approach, is if the Work program obligation [clause 19.3(b)(iv) of the GCCC] was found to be void, then it would not matter whether or not the claimant complied with it.
48. If however, after the analysis and the consequential evaluation of the contending s99 BCIPA arguments, I find that the contractual obligation does not transgress s99 of BCIPA, then it will be necessary to return to the analysis and make a finding as to whether as a matter of fact, the claimant has satisfied this contractual obligation.

The analysis

49. It appears from the evidence that the respondent was not satisfied with the claimant's programming, including the resourcing identified in the programs, which the respondent argued was inadequate (paragraph [5.1] of Tim Brown statutory declaration).
50. The respondent also argued that the claimant had failed to have panels onsite for installation at the times required, such that these delays were caused by the claimant, paragraph [5.27] of Tim Brown statutory declaration.
51. It is evident that the respondent's argument focuses on the need for the claimant to provide a Work program that met with the *respondent's approval*. The respondent argued that this approval was not provided, and that it had ongoing concerns which it expressed to the claimant about the programs. This is the theme contained in the statutory declaration of Tim Brown sworn on 14 July 2015, in section 5, paragraphs [5.1] through to [5.35].
52. The claimant argued that it had satisfied the contractual definition of a Work program, and that in several instances, the respondent had failed to advise it within 20 days whether or not the Work program had been approved. This is evident from the statement of Mike Smart (paragraph [6] where he said he prepared a program on 3 March 2014, within the definition of Work program) (paragraph [7]), and no approval or withholding approval was received within 20 business days (paragraph [8]).
53. It is evident from the parties' respective arguments and the facts supporting those arguments that coordination of the myriad of activities within the tunnel was extremely complex. The need for three-weekly look-ahead programs which were reviewed on a weekly basis demonstrated the need for programming and coordination.
54. I find that the three-weekly look-ahead programs were provided by the respondent (paragraph [4.82] through to [4.90] of Tim Brown's statutory declaration) as this was also confirmed by the paragraph [31] of Mike Smart's statement.
55. However, I also find that there was weekly input from the claimant (paragraphs [30] through to [36] of Mike Smart's statement) who said the claimant provided 3-week look-ahead programs to Mr Bannerman, and this was not controverted by Mr Brown in his statutory declaration.
56. It appears to me from what Mr Smart said, which is not directly controverted by Mr Brown, that the claimant had provided an *initial works* program and update programs to the respondent from time to time.

57. The issue then becomes whether these programs met with the respondent's *approval* in compliance with clause 14.2 of the contract. The respondent, supported by Mr Tim Brown's statutory declaration argued that approval for the programs had not been given.
58. In paragraph 5.1 of Tim Brown's statutory declaration, he said that, "*CHK never had a TJV approved program while undertaking its work. In my view, this was because CHK never provided a program that was compliant with the Contract.*"
59. For example, at paragraph [5.2] of his statutory declaration, he said that the 3 March 2014 preliminary program (the "*initial program*") was inaccurate for example because:
 - (a) the contract quality plan was not submitted at the time depicted, but was only provided in April/May 2014;
 - (b) the TBM tunnel's typical panels and frame designs were not submitted on 17 February 2014 (as depicted), but on 14 March 2014 (in a deficient state);
 - (c) the manufacture timing included in program was never achievable, in terms of design review and approvals.
60. I have called these the respondent's "*list of complaints*" about the initial program.
61. The difficulty that I have with the respondent's argument is that it was only on 9 May 2014, when the respondent provided revised dates for access, paragraph [5.3] of Tim Brown's statutory declaration], that the *initial program* appears to have been challenged. There is no evidence that the *list of complaints* formed part of that challenge, and Mr. Brown is silent about this.
62. This is consistent with Mike Smart's statement in paragraphs [8 & 9], where he said there was no withholding of approval by the respondent within the 20 business days, and that on 15 May 2014 the claimant provided an updated program in response to revised access dates given by the respondent in accordance with the respondent's request.
63. I am not satisfied that Mr Brown's objections to the *initial program* identified in paragraph [5.2] of his statutory declaration troubled him at the time, because his objections to the lack of a quality plan and the panel and frame design only appear to have emerged for the first time in his statutory declaration.
64. He provided no evidence of having complained about these issues previously, so I am prepared to accept that at that time the respondent had not voiced any objection to the *initial program*.
65. In addition, the respondent also argued that claimant needed to provide updated programs to the respondent's satisfaction in order to comply with clause 14.2 (b) of the contract.
66. The claimant provided its response to the respondent's objections regarding the Work program in tab 4 of **volume 1**, in which it provided submissions identifying a total of 12 issues between March 2014 and February 2015 regarding the program and more working level programs. It provided a program summary which identified dates of correspondence or interaction between the claimant and respondent (the "event"), a description of the event, together with comments and a cross reference to the attachment in the program bundle in **volume 7**, (the "program summary").
67. Whilst at paragraphs [60] through to [63] of the adjudication response, the respondent made reference to the program summary, it did not directly engage to controvert the facts identified in the program summary, apart from making reference to what Mr Brown had said in his statutory declaration.
68. I have already found that there appeared to be no objection to the *initial program* because the respondent did not advise of approval or withholding it within 20 business days.
69. However, there are also contending facts about the follow-up updated programs raised by Mr Brown, about which the parties are in dispute that may need consideration.
70. This consideration requires a far deeper "blow by blow" analysis of all of the evidence regarding each and every updated program, and as I have mentioned previously, this

analysis will only be conducted if I find that clause 19.3(b)(iv) does not fall foul of section 99 of BCIPA.

71. I will carry over the findings of the analysis so far to the “*Conditions precedent to reference date arising not void*” heading below.”
72. Before doing so, I will deal with the further allegation that the *reference date* does not arise because of the claimant’s alleged failure to provide security.

Failure to provide security

73. In paragraphs [46] and [47] of the payment schedule, the respondent identified 2 alternatives as follows:
 - (i) it argued in paragraph [46], that if the claimant accepted the respondent’s position in section 6, paragraph 2.2 of the schedule, then the respondent conceded that the claimant had provided *security* in accordance with the contract;
 - (ii) it argued in paragraph 47 in the alternative, that if the claimant disputed that retention monies were the *security* under the contract, then the respondent relied upon the express terms of the contract requiring unconditional undertakings to be provided, which it said the claimant had failed to provide, such that a *reference date* had not arisen.
74. In paragraphs [29] through to [31] of the application, the claimant disputed the respondent’s submissions regarding the failure to provide security, by referring to a deed of variation dated 17 June 2014, in which the parties agreed to allow for cash retention.
75. I note that in paragraphs [64] and [65] of the response that the respondent did not press its arguments regarding the failure to provide security.
76. I therefore find that the alleged lack of security is no longer in dispute, such that the *reference date* argument regarding security falls away.

Conditions precedent to reference date arising not void

77. At paragraph [48] of the payment schedule, the respondent foreshadowed the possibility that the claimant would submit that either requirement identified above, was void pursuant to s99 of BCIPA.
78. In submissions paragraph [48] through to [57] of the payment schedule, the respondent explained that these requirements did not annul, exclude, modify or otherwise change the effect of BCIPA, nor could they reasonably be construed as an attempt to deter a person from taking action. I note it made no submissions on s99(2)(a) about *being contrary to the Act*.
79. It submitted that the requirements were not onerous and were basic processes required under nearly all construction contracts. The respondent submitted that, “*contractual preconditions affecting when a reference date accrues under the Act, are still enforceable.*”
80. The respondent cited the case of *Lean Field* (referred to above) in support of its submissions. It referred to Applegarth J’s finding that that s99 of BCIPA, “*will not simply sweep away any contractual provision that conditions whether and when a reference date arises*, paragraph [68].
81. The respondent referred to the test identified by His Honour, at paragraph [75] – [76] regarding the application of section 99 of BCIPA as follows:
 - (a) “*whether the term is onerous or otherwise impedes the making of a payment claim, including whether it makes reference date more of the theoretical possibility than an actuality; and*
 - (b) *whether the condition has a corresponding benefit or utility in achieving the Act’s purpose.*”
82. In support of test (a) above, at paragraph [53] of the payment schedule, the respondent argued that the provision of a Work program was not an overly onerous one and which did

- not make a reference date more of a theoretical possibility than an actuality. It argued that the claimant's failure to provide the Work program was a result of its inability to manage the work, rather than being an onerous provision.
83. I note that this submission avoids the *respondent's approval* component of clause 14.2 of the contract. I have already found Mr Smart provided the respondent with an initial works program and updated programs together with weekly input into the 3 week look-ahead programs. Accordingly, I'm satisfied that the claimant provided Work programs, and the issue becomes the *respondent's approval* of them.
 84. In support of test (b) above, at paragraph [64] of the payment schedule, the respondent argued that the, "*condition of providing a Work program had a benefit in achieving BCIPA's purpose because there was a direct nexus between any payment claim and the progress of work under the contract.*" It argued that, "*it enabled the respondent to monitor the progress of the works, and prepare for likely claims and assess what it expects the entitlement of the contract will be based on the program.*"
 85. From paragraphs [32] through to [57] of the application, the claimant argued that the contractual preconditions [clause 19.3(b)(iv) of the GCCC] were invalid by reason of section 99 of BCIPA, with the consequence that there was a *reference date* from which the claimant could make a payment claim.
 86. In the response from paragraphs [47] through to [63], and particularly at paragraph [63], the respondent reiterated that the claimant's failure to comply with its contractual obligations in relation to Work program as required by clause 19.3(b)(iv) of the GCCC meant a *reference date* had not arisen.
 87. At paragraphs [39], [40] and [41] of the application, the claimant made reference to the cases of *John Holland Pty Ltd against Coastal Dredging & Construction Pty Ltd* [2012] 2 QdR 435, *State of Queensland v T & M Buckley Pty Ltd* [2012] QSC 265, and the case of *BWH Solutions Pty Ltd v Altitude Constructions Pty Ltd* [2012] QSC 214 as recent authorities regarding pre-contractual conditions falling foul of s99 of BCIPA.
 88. The respondent, in its response, at paragraph [74] contested that each of those cases provided the support suggested by the claimant.
 89. As to *John Holland*, the respondent argued that the claimant had erroneously described the effect of this authority. It argued that the *reference date* in that case, had already accrued, but was then purported to have been deferred. I agree with the respondent that it was not a case where the contract required the contractor to meet preconditions, "*before a reference date could be calculated*", as identified in paragraph [39] of the application.
 90. Having regard to paragraph [21] of the judgement of Fraser JA, His Honour explained that clause 12.6(i) of the contract in question purported to have the effect of *deferring* an already *accrued* reference date.
 91. At paragraph [20] of the application, the claimant submitted that clause 19.2(c) of the GCCC provides that payment claims were to be submitted in accordance with the payment claim time set out in *Item 41* of the contract particulars.
 92. *Item 41* identifies *Payment Claim Times* and refers to clause 19.2(c)(i) of the GCCC and then says "Refer Schedule 1".
 93. Having regard to the contract, and paragraph [21] of the application, the claimant identified that *Item 41* of the contract particulars, which referred to Schedule 1 of the contract regarding payment claim times. It identified that progress claims were to be submitted on the 20th day of each month, having regard to note 3 and note 4 in the schedule.
 94. In my reading of the Schedule 1, in note 3, the contract provides, after the first 4 progress claims, the following:

"Thereafter (after the first 4 installation progress claims) the contractor's progress claim for the installation works shall be submitted on the 20th day of each month for the value of the works executed in accordance with this contract."

95. However, clause 19.2(c) of the GCCC includes the words, "subject to clause 19.3", to which the claimant did not make reference.
96. Clause 19.3 deals with the date upon which a contractor should be entitled to lodge any payment claim being *deferred* by general preconditions, and one of those is the requirement to provide a Work program.
97. In my view, the wording of the contract suggests that the *reference date* is worked out as being the later of the Schedule 1 dates of the 20th of each month [clause 19.3(a)], or after the satisfaction of the listed preconditions [clause 19.3(b)].
98. I am unable to find from the contract that the Schedule 1 *reference date* has already *accrued* by operation of the contract, and is then *deferred*, because that is inconsistent with the wording of the contract. Accordingly, *John Holland* is not an authority directly on point to assist the claimant.
99. As to *T & M Buckley*, I agree with the respondent that this case does not assist the claimant because again, it is not a case of a *reference date* already having accrued and then being subject to the occurrence of particular conditions.
100. As to *BWH Solutions*, the respondent argued that it was irrelevant to the circumstances of this contract. It argued that the contract clause in that case required each progress claim to include a prescribed declaration, and was not dealing with the *accrual* of a *reference date*.
101. Whilst I agree with the claimant that the case is authority that there is no requirement in BCIPA for a payment claim to be accompanied by a statutory declaration, the present dispute does not deal with a payment claim being accompanied by certain documents, but rather is involved with working out the latest date in which a payment claim can be made.
102. Accordingly, I do not find that the case supports the claimant's argument.
103. Both the claimant and the respondent made extensive reference to *Lean Field*, and in my view the principles identified in this case assist in determining whether s99 of BCIPA is activated.
104. At paragraph [66], Applegarth J distinguishes between 2 categories of case. In the first category, His Honour refers to cases where the *reference date* had arisen and then the contract purports to provide certain conditions, thereby rendering the payment claim ineffective and the reference date being *deferred*.
105. The second category of case is where a *reference date* had not arisen because of the contract purports to provide that no *reference date* arises until certain conditions are fulfilled. His Honour said that *Lean Field* was dealing with this 2nd category, and I find that this is the category governing this dispute.
106. The paragraph [68] and [69], His Honour said that:
 - (a) not every provision that conditions a reference date, is void as a result of section 99 of BCIPA;
 - (b) not every provision that conditions a reference date can be said to be immune from the operation of section 99.
107. At paragraphs [71] and [72], His Honour said that it was impossible to say whether the contractual condition was valid or invalid, and that there were no hard and fast rules about the validity of such conditions. As the respondent stated at paragraph 75© of its response, each case depends on its own facts and the analysis of the relevant contractual provision.
108. In my view, after carefully considering the contending submissions and having regard to the analysis referred to above, in my opinion, the facts point to the *subjective state of mind* of the respondent governing the *approval* of the Work program. My reasoning is as follows.

109. The respondent had to approve the Work program under clause 14.2 for both the initial program and any updates.
110. There is no evidence from the respondent that the initial program, about which it now has a list of complaints, had been challenged by the respondent with the list of complaints within the 20 working days after it had been delivered by the claimant to the respondent.
111. The respondent's current argument in paragraph [68] of the response is that, "*CHK failed to submit a compliant Work Program in accordance with its obligations under the Contract.*" The theme of Mr Brown's statutory declaration of the series of failures by the claimant to satisfy the Work program commencing with the initial program, suggests that failure occurred at the outset.
112. Taken to its logical conclusion, this means that a *reference date* would never have accrued from March 2014 up until this claim, because the date on which a payment claim can be made is governed by a whole series of preconditions contained within clause 19.3, as well as the respondent's *approval* required under clause 14.2.
113. Applegarth J in *Lean Field* held at paragraph [30] that:
"*The first and subsequent reference dates are worked out by reference to the conduct of the contractor after the formation of a contract in commencing work. In such case the existence of a reference date is conditioned by the conduct of one of the parties. There's nothing absurd about such an outcome. Subject to limits imposed by s99 and the assumption in section 12, that there will be a reference date under a construction contract, the parties should be free to agree provisions for the timing of claims for progress payments by reference to post-formation events, including events that depend on a party's conduct.*"
114. As can be seen from this extract, *Lean Field* allowed a reference date to be worked out under the contract having regard to the conduct of the claimant. However, at paragraph [69], His Honour held:
"*For example, a provision which stated that a reference date only arose once the principal was of the opinion that it should pay a progress payment might have the practical effect of making the existence of a reference date dependent upon the subjective state of mind which might never exist. It might make the existence of a reference date and the statutory entitlement to a progress payment illusory.*"
115. At paragraph [70], His Honour, held:
"*For example, it is possible to imagine a condition which provided that a reference date arises a few days after a contractor has provided a basic document which simply estimates what work will have been done by the time of the reference date and its expected value. Such a condition might be said to reduce the element of surprise in the payment claim that is delivered after the reference date arises and enable the principal to prepare for its payment.*"
116. This proposition is consistent with His Honour's earlier recognition that a reference date may be governed by the conduct of the claimant. However, his reference is to the provision by the contractor of a basic document providing an estimate of an expected value is made in the context of *facilitation of prompt payment claims*. I have found that the claimant did provide Works programs, such that in that context any governing of the reference date by the claimant's conduct was satisfied, and it's the respondent's *approval* conduct that needs consideration.
117. At paragraph [75], His Honour said that:
"*The extent to which a particular condition is contrary to the Act or purports to change the effect of the Act depends upon its content and practical consequences. In assessing the validity of such condition a useful enquiry is whether it facilitates or impedes the purpose of the Act.*"
118. At paragraph [88], His Honour referred to the *possibility* of a reference date, not its actuality. He also explained the issue of *utility*, in the context of *facilitating the payment of*

- a progress payment*, and in my view this is what needs to be demonstrated by the respondent, and it has failed to do so.
119. At paragraph [87], His Honour demonstrated that a failure by the claimant to deliver a draft payment claim on a particular date lacked *utility* as far as the claimant was concerned. He said that the *utility*, as far as the respondent (in that case) was concerned, meant that the mandatory requirement prevented a reference date from arising and extinguished what would otherwise have been a statutory entitlement to a progress payment. In *Lean Field* that was found to be fatal to the respondent, because the contractual requirement fell foul of s99 of BCIPA.
 120. I have already found in the analysis above that the claimant provided the initial program and updated programs throughout the duration of the contract. However, despite not complaining within the time frame required by the contract about the initial program, the respondent has now provided a list of complaints.
 121. In my view that demonstrates that the respondent's *approval* is within the subjective state of mind of the respondent, as identified in paragraph [51] of the application.
 122. The respondent in the response, at paragraph [76(a)] engaged with the claimant's argument about the subjective state of mind of the respondent in approving the work's program, but says:

Further, TJV denies approval of the program is within the 'subjective state of mind' of TJV as asserted by CHK. Whether the work program is current and required to be approved by TJV is an objective matter, having regard to whether the program reflect the current status of the works. Objectively, this was not the case."
 123. This submission is not compelling as the Australian Oxford dictionary definition of *approval* is:

"1. the act of approving. 2. an instance of this; consent; a favourable opinion..."
 124. *Approval* of the respondent, with respect, must contain an element of subjectivity, as *consent* or a *favourable opinion* must be within the respondent's state of mind, because it is only the respondent that can provide the consent or have a favourable opinion.
 125. I cannot accept that *approval* is something objective that somehow stands apart from the respondent's consent or favourable opinion.
 126. The respondent did not focus on the alleged latest failure by the claimant to satisfy the Work program to deny the *reference date for this particular claim*, but argues generally that the claimant never complied with its contractual obligation.
 127. As I have said the respondent did not demonstrate that it had provided its list of complaints in relation to the initial program, within the 20 days required by clause 14.2 (a) of the GCCC about which it now makes a complaint, which reinforces the subjective nature of the approach to the approval, as it now denies that approval was ever given.
 128. I therefore agree with the claimant (paragraph [51] of the application), that the approval of the Work program, being in the subjective state of mind of respondent *may never be satisfied*.
 129. Furthermore, Mr Brown at paragraph 5.1 of his statutory declaration said:

"CHK never had a TJV approved program while undertaking its work. In my view, this is because the CHK never provided a program that was compliant with the Contract."
 130. In the circumstances, I find that the clause 19.3 GCCC requirement is onerous because it is made the *reference date more of a theoretical possibility than an actuality* as demonstrated by the conduct of the respondent in now not providing approval of the Work program, without demonstrating its earlier objection to it.
 131. There is also force in the claimant's argument, at paragraph [52] of the application submissions, that the Work program did not form part of the contract, which I find is correct, and yet the date of approval of the Work program, governed a vitally important statutory entitlement, that is the existence of a *reference date*.

132. Furthermore, I'm not satisfied with the respondent's argument that there was a direct nexus between the progress claim and being able to monitor the progress of works under the contract, such that it needed a program to do so (paragraph [76(b)) of its response submissions. It argued that it reduced the element of surprise in any payment claim and allowed the respondent to prepare for payment of that claim. That argument had been raised in *Lean Field* in the context of an estimate being provided to the respondent for *facilitating the payment of a progress payment* – not a Work program. I therefore reject the respondent's submission, because *Lean Field* only provides support in the case of a claimant's estimate.
133. It appears from all of the material in the adjudication that the claimant had made 40 previous payment claims, and it had been previously paid for work done by it. In the application at Tab 6 in **Volume 1**, the claimant provided payment claim number 3, and payment claim number 39 as examples. I do not have evidence as to specifically what claims were paid in those payment claims; however, if the claimant had never provided a Work program, as alleged by the respondent, the respondent seemed to be still able to make assessments and monitor the progress of the works.
134. I therefore find that there was no corresponding benefit to the respondent for the approval of a Work program, creating a reference date. I have found that the claimant provided an initial program and updated programs, which may be satisfactory to the respondent, because payments were previously made.
135. I'm satisfied with the submissions in paragraphs [53] to [57] of the application in this regard.
136. I find that clause 19.3 of the GCCC was a significant impediment on the statutory entitlement to a reference date, and in my view s99 of BCIPA is engaged to render the Work program requirements of clause 19.3 of the GCCC, as void.
137. In accordance with *Lean Field*, paragraph [90], I find that clause 19.3 lacked utility in facilitating the purposes of BCIPA, and extinguished what otherwise would be a statutory entitlement to a progress payment such that it is contrary to BCIPA [s99(2)(a)].
138. I have already found that both parties identified that Item 41 provided for a reference date on the 20th of the month.
139. I accepted that the contract was terminated on 27 February 2015, and it will be necessary to determine the reference date for this claim, and in doing so, I refer to *the partial invalidity heading* below for further analysis.
140. Given that I have found that clause 19.3(b)(iv) of the GCCC is void, it is not necessary to consider the alternative submissions of the claimant in relation to estoppel, waiver and the prevention principle because each of these submissions were also directed at establishing that there was a valid reference date, despite the absence of approval of the claimant's Work program.

Claim's partial invalidity

141. The respondent argued in the alternative in the payment schedule that the payment claim was partially invalid, paragraphs [58] through to [57].
142. The claimant's application submissions from paragraphs [73] through to [84] contested the respondent's submissions.
143. The response submissions from paragraphs [82] through to [86] supported those of the payment schedule and countered those of the claimant's application.
144. At paragraph [59] of the payment schedule, the respondent argued that the last reference date to accrue was 20 February 2015, and that no further reference date arose. At paragraph [65] of the schedule, the respondent referred to the case of *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67 as authority that once a contract

- had been terminated, in circumstances where the reference date is worked out under the contract, then no further reference date arises.
145. The application submissions (paragraphs [73] to [76]) refer to alleged admissions of the respondent about reference dates with which the respondent takes issue in paragraph [84] in the response. It is not necessary for me to find whether or not the respondent has made admissions in relation to the reference date.
146. The respondent explained that its concession about reference dates was only if its primary submission regarding reference dates was not accepted. In that context the respondent asserted that the last reference date, which could have accrued under this contract was 20 February 2015.
147. What the claimant essentially submitted in paragraphs [77] through to [81] of the application is that the reference date could be extended to the date of termination. It cited the case of *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2013] QSC 293 as authority. "Where there is an accrued reference date in respect of which a claimant has not previously made a payment claim, the date forms a proper foundation for a payment claim."
148. It also made reference to *Kellett Street Partners Pty Ltd v Pacific Rim Trading Co Pty Ltd & Ors* [2013] QSC, ostensibly in support of the proposition, that the claimant had not extinguished its rights, so it still had an accrued reference date available.
149. The response submissions, paragraph [84(e)] submitted that the issue was not whether a reference date had accrued, but whether the payment claim included work done after the reference date.
150. The respondent argued that both cases cited by the claimant supported the respondent's position. It made reference to Mullins J, at paragraph [17], where Her Honour said in that case that the claimant had not claimed for any work undertaken after the reference date. The respondent submitted this supported the respondent's position.
151. Furthermore, in paragraph [84 (e)] the respondent referred to *Hill v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865, that a claimant was entitled to make a claim in respect of all the construction work done at that reference date (my underlining).
152. In addition, in paragraph [84 (f)] the respondent referred to *Patrick Stevedores Operations No 2 Pty Ltd v McDowell Construction (Aust) Pty Ltd* [2014] NSWSC 1413 which it argued supported the proposition that if a contract is terminated before a reference date in respect of that work arrived, this meant that no reference date in respect of that work can arise.
153. I have already found that a reference date can be worked out under the contract for this payment claim, and that is the 20th day of each month. Given that the contract was terminated on 27th of February 2015, the reference date available I find was 20 February 2015.
154. I am unable to find that the next reference date of 20 March 2015 is available for work carried out by the claimant between 20 February and 27th of February 2015, because the contract was terminated before then, in line with the authority of *Patrick Stevedores*.
155. I'm not satisfied that the claimant has provided authority that in the circumstances of termination that one can extend the definition of reference date up until the date of termination, as it has attempted in paragraph [81] of the application by utilising clause 24.3 of the contract. I agree with the respondent that clause 24.3 in this context is dealing with a contractual entitlement and not one governing a reference date under BCIPA.
156. Accordingly, the claimant is not entitled to payment for the works carried out between 20 February 2015 and 27 February 2015, as identified in paragraph [82] to [84] of the claimant's application. I will have regard to the value of the work completed in that period identified in volume 1 of the application, together with the contending submissions of the respondent in paragraph [86] when, and if I get to valuation.

157. There is no point in dealing with these contending submissions at this stage, when jurisdiction has not yet been established.

b. Failure to identify construction work and services

158. In paragraph [68] through to [78] of the payment schedule, the respondent argued that the payment claim failed to properly identify the construction works and services claimed under BCIPA.
159. The claimant's application submissions from paragraphs [85] through to [102] contested the respondent's submissions.
160. The response submissions from paragraphs [87] through to [95] supported those of the payment schedule and countered those of the claimant's application.
161. By way of the observation I note that Mr Brown made no complaints in his statutory declaration, in paragraph 3 about the claim and the identification of the construction work.
162. He said that he was the person who assessed the monthly payment claims and prepared payment schedules. At paragraph 3.8, he said he assessed this payment claim and developed the payment schedule, and as I said there appeared to be no complaint from him about it.
163. The respondent relied upon 3 cases in support of its submissions. These were *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 at [141]; *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Limited* [2011] 1QDR 17 at [29], and *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd & Ors* [2004] NSW SC 258 at [18] – [19] and [45] – [47].
164. In the reference to *Seabay*, the respondent said that payment claim must “*identify the work sufficiently to enable the respondent to understand the basis of the claim and provide a considered response to it.*” Those propositions are supported by authority provided by the claimant to which I will refer later.
165. Vickery J in that case provided 7 factors derived from a number of cases for consideration of whether a payment claim was invalid. At paragraph [141(e)], His Honour held that, “*The payment claim will not be a nullity for failure to comply with s 14(2)(c), unless the failure is patent on its face, and this will not be the case if the claim, in a reasonable way, identifies the particular work in respect of which the claimant is made.*”. That proposition is also supported by the claimant's authorities.
166. In reference to *Neumann*, the respondent said that the payment claim must be considered in light of the strict timeframes under the Act. However, that submission must be put in context, because in *Neumann*, the respondent was required to reconstruct the previous 11 claims made by the claimant in order to prepare a responsive payment schedule.
167. In *Neumann*, the substantial part of the claim was only identified as follows:
“Add previously claimed & unpaid \$467,775.37”
168. Her Honour said that in the short time frame under BCIPA, for the respondent to carry out such reconstruction of previous claims was inappropriate and she found that the payment claim did not identify the construction work to which the claim related.
169. The respondent relied upon this case as authority that it is not required to guess the basis upon which the payment claim was made, and it would need to provide all possible responses in this schedule, having regard to s24(4) of BCIPA. However, this submission fails to recognise the facts of this particular dispute, in which the payment claim exceeds \$750,000, which I found is a complex claim.
170. The claimant takes issue with that submission in paragraph [100] of the application, because it is submitted as this was a complex claim, the respondent was entitled to provide any reasons for withholding payment in its adjudication response because of s24(5) of BCIPA.

171. In reference to *John Holland*, the respondent argued that, “A payment claim which asserts a right to be paid, but does not adequately substantiate the entitlement with records such as invoices or timesheets is also invalid for failure to identify the works or services to which it relates.
172. *John Holland* must be put in context, because it essentially dealt with a number of claims in which the claimant:
 - (a) made a claim on the basis of a variation, and when challenged by the respondent in the schedule, then in its application brought the claim on a separate contractual basis;
 - (b) made a claim for consulting engineering services without any reference to timesheets supporting this claim, and did not put forward a contractual basis for the claim. The respondent rejected the claim on the basis that no timesheets had been provided, and in the application, the claimant then provided the timesheets, together with a contractual basis for the claim;
 - (c) made a claim in which there was no detail whatsoever of how the claimed amount was made up, and when the respondent challenged that in the payment schedule that no timesheets had been provided in support, in the application, the claimant for the first time set out the various details in relation to the claim, including supplying timesheets.
173. The respondent has not argued with any particularity about its complaints in relation to the payment claim. In paragraph [75] it provides a list of deficiencies about the payment claim, but does not descend into particular challenges with it, with which it is possible to engage in order for me to analyse those deficiencies.
174. If the respondent had been able to identify complaints similar to those that occurred in *John Holland*, that the payment claim in specific instances was deficient, and then demonstrated that those deficiencies had been purportedly cured in the application, as had occurred in *John Holland*, its arguments may have been more compelling.
175. In its response, the respondent merely said at paragraph [95], that the increase in the volume of material made in support of the claim from 53 pages in the payment claim to 10 volumes in the application, served to highlight “*the paucity of information given by the claimant in support of its payment claim*”.
176. Unfortunately, this complaint does not appear to withstand the claimant’s challenge and the cases provided by the claimant in its application. Essentially, the claimant argued that the case of *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QCA 381 was the authority regarding the extent of identification required for a payment claim to be valid.
177. The claimant submitted that *Buckley* was applied in *Unifor Australia Pty Ltd v Katrd Pty Ltd atf Morshan Unit trust t/as Beyond Completion Projects* [2012] QSC 252, and *QCLNG Pipeline Ltd v McConnell Dowell Constructions (Aust) Pty Ltd* [2011] QSC 292.
178. At paragraph [90] of the response, the respondent said the “*paucity of material provided with the payment claim left the respondent to guess at the basis upon which the work was claimed and how it was to be valued*”, and repeated its submissions in paragraph [75] of the payment schedule.
179. Furthermore, at paragraph [93] of the response, the respondent submitted that the payment claim did not adequately identify the work performed and how that work was to be valued (my emphasis). There was no authority provided by the respondent in support of the identification of the work being performed and how it was to be valued.
180. In my opinion, the respondent’s submissions failed to recognise the importance of the principles outlined in *Buckley*, and its reference to previous authorities, that the claim must just in a reasonable way identify the work the subject of the claim, and it is not a nullity unless the failure to do so is patent on its face.

181. Philippides J provided the leading judgement, and at paragraph [35], with reference to the NSW Court of Appeal case of *Nepean Engineering Pty Ltd* against *Total Process Services Pty Ltd (in lic)* (2005) 64 NSWLR 462, agreed with Hodgson JA's findings that, "A payment claim did not cease to satisfy the requirement concerning identification because it could be subsequently shown that the payment claim was not entirely successful in identifying all of the work."
182. At paragraph [36], Her Honour made reference to and agreed with the decision of Santow JA in *Nepean* that sufficient identification was required, "to enable the respondent to understand the basis of the claim" and disavowed the notion that there was an legal necessity to include any material directly merely to persuading a respondent to accept a payment claim."
183. In my view that creates some hurdles for the respondent's argument, because I find that Mr Brown expressed no difficulty in his statutory declaration in understanding the basis of the payment claim.
184. In *Unifor*, Daubney J held at paragraphs [11] that a tax invoice that incorporated a spreadsheet by way of reference, was sufficient to meet the threshold of a claim being reasonably comprehensible and sufficiently identifying the work.
185. At paragraph [92] of the response, the respondent submitted that it was unclear the basis upon which the claimant said *Unifor* was authority, because the respondent said that extremely comprehensive documents had been incorporated by reference in *Unifor*.
186. Turning to the case of *QCLNG* with which the respondent made no objection, Peter Lyons J (paragraph [60] of the judgement), applied *Buckley*, in circumstances where the payment claim consisted of a 6 page spreadsheet together with references to VP53 (to which was attached a covering letter), as well as L0921, L0923 and L0936 and the Interim Consolidated Claim regarding stand down costs to which there were a number of appendices, which appeared to deal with costs on a daily basis.
187. His Honour, at paragraph [67], referred to respondent's objections in that case to being unable to identify staff, plant and equipment, for which deductions were allowed and the deductions calculated in the total.
188. At paragraph [68], His Honour held that such a criticism was adopting too stringent an approach to the requirements of s17(2)(a) of BCIPA, and found that the extensive material provided was sufficient to explain the extent of related goods and services for which the payment was claimed, and the difficulty relating to the correlation of staff in respect of deductions did not mean that there was a failure to identify the construction work. He added that, at a practical level, the extent of information provided in *QCLNG* seemed to be far greater than what had been considered sufficient in *Buckley*.
189. Having regard to the extent of material identified in *Buckley*, so as to make a comparison with this case, I note that in *Buckley* the payment claim documents comprised 4 discrete claims to which 3 attachments were provided regarding a sediment control claim, suspension costs, and interest on late payments.
190. I have reviewed the payment claim of 53 pages and find that I can comprehend what it sets out to claim from the respondent in that it comprised:
- (a) A 1 page summary which identified each claim in the summary by reference to item numbers;
 - (b) a summary of the contract work by reference to the same item numbers which are those in Part E – Schedules – Schedule 1 Payment of the Contract, which was provided in **Volume 2** of the application;
 - (c) a summary of set-offs;
 - (d) summaries of payments received by reference to those item numbers;
 - (e) identification of the supply of quality documentation per separable portion area of the contract;

- (f) an index to the variations/claims/additional works;
 - (g) variations/additional work summaries followed by the rate build-up for each claim item with cross references to items of the claimant's correspondence with identification numbers of each item of correspondence;
 - (h) a statutory declaration about payments to workers and subcontractors; and
 - (i) sub-contractor monthly reports.
191. The Court of Appeal in *Buckley* found that there was sufficient identification of the payment claim with far fewer documents than in this adjudication, which is persuasive.
192. Furthermore, failure of the respondent to demonstrate in the payment schedule and the response:
- (i) as to what precise deficiencies there were in the payment claim, apart from its generalised objections in paragraph [75] of the schedule regarding its difficulty in responding the payment claim in the payment schedule; together with
 - (ii) no objections, having being raised by Mr Brown in his statutory declaration; as well as
 - (iii) no reference in the response to where, the claimant in the application had provided additional material to cure deficiencies in the payment claim, apart from a general observation that 10 lever arch folders were provided in the application, compared to 53 pages in the payment claim,
- leads me to conclude that the payment claim sufficiently identified the work, and I reject the respondent's objections to the adequacy of the payment claim.

c. Global claim or total costs claim

193. In paragraphs [79] through to [87] of the payment schedule, the respondent argued that components of the payment claim were properly described as a global claim or total costs claim, including claim CL 06 for prolongation costs.
194. The claimant's application submissions from paragraphs [103] through to [112] contested the respondent's submissions.
195. The response submissions from paragraphs [96] through to [109] supported those of the payment schedule and countered those of the claimant's application.
196. At paragraph [83], the respondent argued that a global claim could only be pursued as a claim for damages breach of contract and therefore could not be validly made under BCIPA. However, the respondent has provided no authority in support of this proposition, and at paragraph [98)c)] of the response it echoed this proposition without any authority.
197. In paragraph [84] of the payment schedule, the respondent referred to the case of *Laing O'Rourke Australia Construction Pty Ltd v H & M Engineering and Construction Pty Ltd* [2010] NSWSC 818, where it said McDougall J had identified the elements of a global claim necessary to be established for them to be applicable to payment claims.
198. *Laing* was a case involving the NSW equivalent of BCIPA, in which McDougall J did not find that a global claim could not be considered by an adjudicator under the NSW equivalent of BCIPA.
199. His Honour found that in considering the global claim, the adjudicator had not considered the respondent's expert report, and statutory declarations in support of the payment schedule. Accordingly, the adjudicator's decision was found to be void.
200. To my mind as a matter of principle, if a contract makes provision for a claimant to claim damages, I cannot accept the respondent's proposition that a global claim cannot be entertained by an adjudicator, as a matter of jurisdiction, given global claims deal with damages, and a contract allows a claimant's entitlement to damages.
201. It is in my view, a separate matter whether the claimant has demonstrated all of the contractual ingredients for being able to make a damages claim under the contract, but that requires an analysis of the merits of the claim to which I will make reference below.

202. The claimant's submission at paragraph [109], suggested that the case of *Mainteck Services Pty Ltd v Stein Huertey SA* [2014] NSWCA 184 allowed global claims in certain circumstances.
203. *Mainteck* was not a case involving the NSW equivalent of BCIPA. It is, however, NSW Court of Appeal authority supporting the principles regarding global claims identified by Byrne J in *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681. At paragraph [193], Leeming JA, with whom the other 2 justices agreed said that Byrne J's analysis had been praised internationally, and rightly so.
204. However, at paragraph [205], His Honour said that:
"In a global claim, a significant cause of loss not attributable to the defendant is fatal. Even Dr Hadar, whose book. Global Claims in Construction (Springer 2011) is highly support of global claims, acknowledges at 163, by reference to the reasoning of Byrne J, that:
It is accordingly clear that if a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense or matters that are not the responsibility of the client.
That was why the neutral delays and Maintech's decision not to install a half crane were regarded as determinative by the referee."
205. At paragraph [103] of the application, the claimant submitted that its claims were not global claims or total costs claims. At paragraph [110] of the application, the claimant submitted that the payment claim was calculated in accordance of the contract, and that there were claims for delay claims as a direct result of the respondent's actions.
206. I am therefore satisfied that, whether or not the claimant has made a global claim, about which I've not yet made any finding, it is not prohibited under BCIPA, such as to preclude an adjudicator's jurisdiction. As I have already mentioned, the respondent provided no authority in support of such a proposition.
207. Furthermore, if it was a matter of jurisdiction, then, in my view it is likely that McDougall J in *Laing*, despite not having the respondent arguing the prohibition of global claims, was likely to have made some comment about that, if he had thought that global claims were prohibited in adjudication.
208. Accordingly, I do not accept that global claims are outside an adjudicator's jurisdiction, and I will further consider the respondent's submissions regarding global claims under its contractual arguments below.
209. I therefore turn to the final jurisdictional point advanced by the respondent.

d. Claims for work not completed

210. In paragraphs [88] through to [96] of the payment schedule, the respondent argued that works that were not complete could not be the subject of a valid payment claim.
211. The claimant's application submissions from paragraphs [113] through to [118] contested the respondent's submissions.
212. The response submissions from paragraphs [110] through to [113] supported those of the payment schedule and counted those of the claimant's application.
213. At paragraph [90] of the payment schedule, the respondent referred to Schedule 2 of the payment schedule, which identified each claim made by the claimant for contract works and variations, and the respondent said that it had identified and made appropriate adjustments to the claim where amounts claimed had not been completed by the claimant.
214. The respondent did not identify anything in particular, that emerges out of Schedule 2, about which I could make a decision on jurisdiction.
215. Schedule 2 consists of an entire lever arch folder containing spreadsheets, correspondence, programs, photographs, etcetera. To my mind it is not possible to consider such a schedule at a threshold stage regarding jurisdiction.

216. At paragraph [118] of the application, the claimant said that it had not claimed for any work not completed at the time of termination of contract.
217. At paragraph [111] of the response, the respondent said that its submission was that the claimant had made claims payment for works, which had not been completed by the claimant at the date of termination.
218. The respondent referred in its payment schedule to the case of *Quasar Constructions Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116 as authority that an adjudicator does not have jurisdiction to award amounts for incomplete works.
219. I accept that this is correct, but it is not possible at a threshold stage to make an assessment of what works may or may not have been complete. Accordingly, in my view it is appropriate to continue to adjudicate and consider the issue of alleged incomplete work at the time of the deeper analysis of the merits of the claim.
220. Accordingly, I'm satisfied that I have jurisdiction to commence the adjudication, and in doing so, it is necessary to establish that it involves a construction contract under BCIPA.

V. Is it a Construction Contract within BCIPA?

221. In Part 2 of the application submissions [paragraph 2.2(b) (1)] which references **Volume 2**, the claimant provided a copy of the contract document dated 14 February 2014 comprised Parts A through to G (not used). As mentioned in the heading *Material provided in the adjudication* above, the identical contract document was attached to the payment schedule [**Volume 4** folder 1]
222. Given that the contract documents are identical, I am the satisfied that the documents provided in **Volume 2** under cover of a letter from the respondent dated 17 February 2014, constituted the contract.
223. At paragraph 1.2 of the application, the claimant identified that the **scope of works** involved the design, manufacture, supply and installation of architectural panels and its support system for the tunnel fit out works for the Legacy Way road tunnel project in Brisbane.
224. There are no controverting submissions from the respondent in the adjudication response to deny this.
225. In part E – schedules to the contract, schedule 2 identified the scope of works, to which the claimant had made reference to in paragraph 1.2 of the application. It is evident from paragraph 1.2 of schedule 2 that the architectural lining were to be provided in the:
- (i) TBM tunnels;
 - (ii) Western connection;
 - (iii) Eastern connection.
226. I am satisfied that the **scope of work falls** within the definition of *construction work* in s10 of BCIPA, and in so far as the design work is concerned within s11 of BCIPA as *related goods and services*.
227. I'm satisfied that under the contract, the claimant had undertaken to carry out construction work and supply related goods and services to the respondent within the definition of schedule 2 of a *construction contract* under BCIPA.
228. I am therefore satisfied that the claimant prima facie fell within 12 of BCIPA to which I must give consideration.

VI. Payment Claim

229. In Part 2.1(c) of the adjudication submissions, the claimant referred to a copy of its payment claim that it had provided to the respondent - in **Volume 3** of the adjudication application.

230. Under cover of a letter dated 22nd of May 2015, the claimant attached payment claim number 41, which it had endorsed, as required by s17 (2)(c) of BCIPA.
231. I have identified the specific documents comprising the payment claim, and listed them below because it is one of the primary documents required to be considered by me [s26(2)(c) of BCIPA].
232. The **payment claim** comprised the following documents:
- (i) a 1 page summary sheet identifying 4 components to the claim
 - (a) 1. Contract works amounting to **\$7,255,695.36**
 - (b) 2. Variations, additional works, claims and set off amounting to **\$1,188,001.27**
 - (c) 3. Deductions – previous payments and set off amounting to **\$6,587,250.84**
 - (d) 4. GST amounting to **\$185,644.58**
 generating a total amount including GST of **\$2,042,090.37**, as required by s17(2)(b) of BCIPA;
 - (ii) a summary of contract work comprising 4 pages;
 - (iii) a summary of variation/additional works/claims comprising 2 pages;
 - (iv) a summary of set offs comprising 1 page;
 - (v) a summary of payments received comprising 1 page;
 - (vi) item 1 (J) supply of quality documentation comprising 3 pages;
 - (vii) summaries of variations/claims/additional works with the following reference numbers:
 - (a) VO 02 Additional silicone sealant
 - (b) AWo5 Supply and installation of Top Hat washers
 - (c) AW o6 Reinstalling loose panels incorrectly installed by others
 - (d) AWo8 Supply of additional VE panels
 - (e) AWo9 Extra survey work
 - (f) AW10 Additional work relating to cable tray
 - (g) AW11 Stainless steel anchor bolt
 - (h) CLo3 Idling cost of resources due to 18 July 2014 suspension
 - (i) CLo4 Idling cost on 5 and 6 November 2014 – DPM monitoring
 - (j) CLo5 Transcity's provision of services – site containers
 - (k) CLo6 Adjustment to contract sum
 - (l) CLo7 Loss of productivity on 26 November 2014 – DPM result
 - (m) CLo8 Idling cost of resources on 15 December 2014.
 - (viii) The following variation summaries – all excluding GST:
 - (a) VO 02 – 2 pages claiming \$53,616.83;
 - (b) AWo5 – 4 pages claiming \$28,867.95;
 - (c) AW. o6 - 2 pages claiming \$4505.76;
 - (d) AWo8 – 2 pages claiming \$59,255.20;
 - (e) AWo9 – 3 pages claiming \$19,589.47;
 - (f) AW10 – 2 pages claiming \$10,467.88;
 - (g) AW11 – 1 page claiming \$8381.85;
 - (h) CLo3 -2 pages claiming \$3193.34;
 - (i) CLo4 – 2 pages claiming \$34,637.50;
 - (j) CLo5 – 1 page claiming a deduction of \$142,126.95;
 - (k) CLo6 – 5 pages claiming \$895,003.60;
 - (l) CLo7 – 2 pages claiming \$15,473.81;
 - (m) CLo8 – 2 pages, claiming \$26,302.75
 - (ix) Marcus Praetorius' statutory declaration dated 20 May 2015;
 - (x) Subcontractor monthly report – 3 pages dated 20 May 2015

233. The payment schedule did not reject that the payment claim stated an amount, and was endorsed, and I am satisfied by reference to the payment claim that it complies with s17(2)(b) and (c) of BCIPA.
234. The payment schedule, however, disputed that the payment claim properly identified the construction work, which was the subject of a *threshold issues* point referred to earlier, and I found against the respondent on this point.
235. I therefore find that the payment claim also satisfies s17(2)(a) of BCIPA;
236. I am therefore satisfied that the payment claim in **volume 3**, complies with s17(2) of BCIPA.
237. I now turn to the payment schedule to deal with the issues raised by the respondent, apart from the threshold issues already dealt with above.

VII. Payment Schedule

238. In **Volume 4** of the adjudication application, the claimant provided the respondent's payment schedule in 2 folders. The respondent in the adjudication response did not take issue that the payment schedule provided was not correct, so I am satisfied that this is the document provided to the claimant by the respondent.
239. I am therefore satisfied therefore that the payment schedule is that provided in **Volume 4** (in 2 folders) of the application.
240. I have identified the structure of the payment schedule because it is the other primary document to be considered in this adjudication [s26(2)(d) of BCIPA].
241. The payment schedule was divided into 6 sections as follows:
- (i) Section 1 – Overview;
 - (ii) Section 2 – Reasons why the payment claim is invalid under the Act;
 - (iii) Section 3 – Contractual requirements;
 - (iv) Section 4 – Valuation of contract works;
 - (v) Section 5 – Variations, additional works and other claims;
 - (vi) Section 6 – Deductions, adjustments and set off; together with
 - (vii) Schedule 1 – which was the contract;
 - (viii) Schedule 2 with its *detailed assessment and appendices*.
242. I have already considered Section 2 of the payment schedule under the *Threshold Issues* above.
243. *Section 3 of the payment schedule*, which relates to the *contractual requirements* contain a significant number of important contractual issues for consideration.
244. These payment schedule submissions (paragraphs [97] through to [290]) together with the contending submissions in the application (paragraphs [119] through to [261]), and those in the adjudication response (paragraphs [114] through to [420]) dealt with the *claimant's entitlement to its claims*. I have called these collectively, the "*Section 3 submissions*".
245. I have considered the parties contending submissions regarding the *Section 3 submissions* in order to decide on the validity of the *contractual requirement*, as a matter of principle. However, I then had to delve deeper to establish the facts to apply to those principles.
246. This required consideration of the documents from both parties regarding the schedule submissions in *Section 4 through to Section 6* dealing with valuation, variations etc, and the respondent's deductions because:
- (i) it was necessary to consider the actual facts, in order to apply them to the *contractual requirements* that I find to be valid;
 - (ii) the claimant had provided its contending submissions to the payment schedule sections 4 to 6 in **Volume 5**, Folder 1; and
 - (iii) the claimant had provided its *Claim entitlement documents* in **Volume 5**, Folder 2

247. This was to ensure that I considered all the relevant documents regarding the *claimant's entitlement*, about which the respondent had numerous objections.
248. The documents in the adjudication were particularly voluminous and sometimes difficult to follow because:
- (i) the respondent, no doubt, out of an abundance of caution, provided repetitive submissions. Its payment schedule submissions numbered 663, and the response comprised 1155 submissions. It also provided extensive documents in support which are identified below;
 - (ii) the claimant, **in response to the payment schedule**, in its application, made generalised references to its documents as demonstrating its entitlement without sometimes engaging directly with the respondent's payment schedule submissions;
 - (iii) the claimant's **Volume 1(8)** it had 261 submissions opposing sections 1 to 3 of the payment schedule, but it provided 1 folder countering the payment schedule submissions 327 through to 663 in part of **Volume 5**, Folder 1.
 - (iv) the claimant also provided **Volume 10** to counter the payment schedule – Schedule 2 – *detailed assessment and appendices*;
 - (v) in addition, the claimant provided its *Claimant's Entitlement documents* in **Volume 5**.
249. Before descending into the contending submissions, I considered it important to identify the structure and contents of the adjudication application and response documents because in this hard-fought adjudication it was important to keep track of all relevant documents.

VIII. Adjudication application

250. The adjudication application comprised the following:
- (i) **Volume 1**, comprising the following parts:
 - (a) QBCC application form.
 - (b) Reconciliation of payment claim and respondent's assessments with explanatory narrative;
 - (c) Claimant's alternative valuation of delay costs regarding claim CLo6;
 - (d) Claimant's summary dated 15 June 2015 regarding response to section 2 of payment schedule, which dealt with the *Threshold Issues*;
 - (e) Statement of Mike Smart;
 - (f) 2 examples of prior progress claims;
 - (g) Response to alternative position on payment claim regarding valuation of works performed between 20 February 2015 and 27 February 2015;
 - (h) Submissions in response to the payment schedules **sections 1 to 3 only**;
 - (ii) **Volume 2** containing contract documents and deeds of variation;
 - (iii) **Volume 3** containing the payment claim;
 - (iv) **Volume 4** (2 folders) containing respondent's payment schedule;
 - (v) **Volume 5** (2 folders) containing:
 - (a) claimant's response to payment schedule **sections 4 to 6 only**;
 - (b) claimant's *Claim Entitlement Documents* comprising full and detailed summaries of each item claimed in the payment claim;
 - (vi) **Volume 6**, comprising the claimants reply to the valuation of contract works;
 - (vii) **Volume 7**, comprising the *Summary of Programme Bundle*;
 - (viii) **Volume 8**, comprising *Delay Claim Related Correspondence*;
 - (ix) **Volume 9**, comprising 2 folders of copies of cases;
 - (x) **Volume 10**, comprising the claimant's reply to **section 6** of the payment schedule.
251. These documents, together with the payment claim, are considered to determine whether they demonstrated the claimant's entitlement. In the decision below I have made reference to the claimant bearing the overall onus.

252. Ideally, in a complex dispute of this nature, issues emerge directly from the contending submissions. However, in this adjudication, finding the contending submissions required review of a number of documents.
253. In my view this is not fatal to the claimant, provided it has already established its entitlement by discharging its onus in its documents. Although, it makes the investigation and analysis more difficult, I am mindful of my obligation under s26 (2) of BCIPA which obliges me, amongst other things, to consider:
- (a) 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;
 - (b) 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.
254. Nowhere in BCIPA does it constrain the parties to demonstrate that the issues emerge only from the contending submissions, and I am obliged to consider all submissions including relevant documentation, from both parties that have been *properly made*.
255. I now turn to the structure and contents of the adjudication response, being mindful that, apart from where the respondent is claiming a set off, it bears no legal onus in the adjudication.

IX. Adjudication response

256. **Volume 1**, comprising the respondents submissions;
257. **Volume 2** comprising the statutory declaration of Tim Brown;
258. **Volumes 3 to 8** comprising copies of cases;
259. **Volume 9, comprising** correspondence and other documents referred to, which were not in the payment claim, payment schedule or adjudication application;
260. **a USB flash drive** containing electronic copies of the payment claim, payment schedule, and adjudication application.
261. I have now identified all of the documents involved in this adjudication, which I have read with varying degrees of scrutiny, because the relevance of some of them, has not been immediately apparent.
262. I considered appropriate, at this stage to provide a summary of the parties' dispute within the contractual framework that emerged from all this material, before descending further into the detailed contest.

X. The parties' dispute in a practical context

263. The respondent was engaged by the Brisbane City Council to be the design, construct, maintenance and operating contractor for the Legacy Way Tunnel connecting the Western Freeway to the Inner-City Bypass.
264. The claimant was engaged as a subcontractor to design, manufacture, supply and install architectural panels and its support system for the tunnel fit out works for Legacy Way.
265. The tunnel component of the Legacy Way project consisted of 2 running twin tunnels (double carriage ways, both ways in each tunnel):
- (i) the westbound tunnel (WB); and
 - (ii) the eastbound tunnel (EB); each collectively with:
 - (a) a cross passage (XP) side;
 - (b) a non-cross passage (NXP) side.

266. The southern carriageway of the eastbound tunnel and the northern carriageway of the westbound tunnel were the XP side's for each tunnel as they were linked with one another by the cross passages.
267. The cross passages were spaced at 120 m intervals throughout the length of the tunnels.
268. Each tunnel was divided into 3 areas:
- (i) the TBM tunnels - which was also described as a separable portion 2;
 - (ii) the Western connection - which was also described as a separable portion 3; and
 - (iii) the Eastern connection - which was also described as a separable portion 4.
269. All the architectural panels in the project were Vitreous Enamelled (VE) panels with the majority of the panels classified as the typical VE 1 panels.
270. There were approximately 20 different types of special panels, the majority of which were of 4 types, VE 2, the 3 and VE 4. These panels were erected in the vicinity of special mechanical, electrical or intelligent transport system (ITS) services required for the safe operation of the tunnel.
271. The architectural panels were mounted on a support system that itself was connected to the tunnel with anchors, to which brackets were attached, and these brackets were connected to the sub-frame system.
272. The sub-frame system comprised vertical c-channels to which were attached 2 lateral adjustment angles and associated brackets.
273. The claimant was one of a number of sub contractors working within the tunnel, who were carrying out their own construction, fit out activities at the same time. These included:
- (i) rectification of the already constructed sub base, and "chip sealing" this pavement;
 - (ii) installation of electrical pits;
 - (iii) construction of continuously reinforced concrete pavement (by hand and machine);
 - (iv) rising main installation (i.e. water pipes);
 - (v) slip formed concrete roadway barriers;
 - (vi) cross passage concrete works;
 - (vii) architectural panels;
 - (viii) tunnel defects and close out
274. The respondent had to coordinate the activities of all the sub contractors in order to deliver the finished tunnel to the Brisbane City Council. In doing so, it held regular weekly meetings with the sub contractors to review weekly activities and develop 3 week look-ahead programs (with input from the sub contractors), in order that all subcontractors could plan and execute their works in a timely manner.
275. The claimant's obligations essentially involved:
- (i) obtaining approval for the design of its architectural panels system, which included the fasteners and washers of the support system;
 - (ii) designing and manufacturing the architectural panel system;
 - (iii) supplying and *installing* the architectural panel system in the tunnels.
276. The claimant's activities to *install* the architectural panel system comprised:
- (i) surveying the tunnel in order to set out the correct locations of the anchors;
 - (ii) drilling and installing the anchors and wall brackets;
 - (iii) installing the sub-frame (1st fix);
 - (iv) levelling the sub-frame (2nd fix);
 - (v) installing the VE 1 panels;
 - (vi) installing the special panels;
 - (vii) final quality assurance.
277. The contract signed between the claimant and the respondent on 14 February 2014 identified a number of key dates as follows:

- (i) Access Date - forecast to be 30 June 2014, with flexibility either way of 6 calendar weeks;
 - (ii) Work Commencement Date -forecast to be 7 July 2014, with flexibility either way of 6 calendar weeks;
 - (iii) Dates for Practical Completion;
 - (a) for whole project 20 November 2014;
 - (b) 15 November 2014 for separable portion 2;
 - (c) 19 September 2014 for separable portion 3;
 - (d) 26 September 2014 for separable portion 4.
278. The contract was a schedule of rates contract, and Schedule 1 provided for *payment of discrete activities*. The following were the payment categories and the basis of payment:
- (i) Item 1 - design was paid on a lump-sum basis;
 - (ii) Items 2, 3 and 4 comprised supply and installation of panels and support structures for the TBM tunnels (separable portion 2), separable portion 3 and separable portion 4 respectively. Supply and installation was as follows:
 - (a) supply and delivery at various per square metre rates;
 - (b) installation was also at various square metre rates, and divided into the following categories:
 - i. installation 1 – set out and drill anchors;
 - ii. installation 2 – install sub-frame – 1st fix;
 - iii. installation 3 – level sub-frame – 2nd fix;
 - iv. installation 4 – VE panel.
279. On page 31 of the contract, the average production allowed for in the contract was *2,170 m² per week per crew*.
280. The Work Commencement Date was adjusted to 7 August 2014 and Date for Practical Completion to 31 December 2014.
281. During the project, the claimant and the respondent communicated with each other about a series of complaints regarding lack of access in which the claimant referred to delays caused by the respondent, and made claims for extensions of time, all of which were rejected by the respondent.
282. The respondent explained that the claimant's own installation inefficiencies and lack of materials at critical times was the cause of the claimant's delays.
283. The claimant asserted that it had provided Works programs and updates during the project, but the respondent complained about their inadequacy.
284. In addition, during the project, the respondent increasingly urged the claimant to improve its productivity and obtain more resources, otherwise, it advised that the claimant would not finish by the Date for Practical Completion of 31 December 2014.
285. The claimant did not complete its sub contract by 31 December 2014.
286. On 18 February 2014, the claimant summarised the respondent's failures to grant EOT's, and requested that it review its decision in relation to EOT's, otherwise it would seek to have the matter dealt with as a formal dispute under the contract.
287. Also on 18 February 2015, the claimant provided a Notice of Claim – Price Adjustment to contract sum regarding the changed order and sequence of works resulting in substantial delays (a *prolongation claim*) to achievement of practical completion dates resulting in a claim of \$1,380,255.77 (excluding GST) price adjustment.
288. On 27 February 2015, the respondent terminated the contract for convenience.
289. Thereafter, the claimant lodged its payment claim which is the subject of this adjudication, and the prolongation claim - CLo6 was reduced to \$895,003.73 (excluding GST).
290. In this payment claim of just over \$2 million including GST, there was a significant contest about CLo6, because this *prolongation claim* due to the failure of the respondent to

hand over works areas alone amounted to a sum of \$895,003.73 (excluding GST).

Essentially, this claim, taking into account GST, amounted to nearly half of the entire payment claim.

291. Although the payment schedule throughout contests the payment claim; a significant number of the submissions related to the claimant's failure to demonstrate entitlement for any delay claims because of the claimant's failure to comply with the contractual conditions precedent for extensions of time.
292. The payment schedule also incorporated a significant series of submissions dealing with lack of jurisdiction for this dispute to be adjudicated, which took me some time to consider and reject.
293. I now turn to *Section 3 of the payment schedule* to consider the entitlement objections.
294. This section of the payment schedule contains the largest number of objections to entitlement and needs close evaluation to ensure that all objections are properly considered.

XI. The claimant's entitlement - contractual requirements

295. *Section 3 of the payment schedule* divided the contractual objections into the following categories:
- (i) extensions of time. I have categorised these as "EOT OBJECTIONS" and they contain the largest number of objections within section 3. The rest of objections I have categorised as OTHER CONTRACTUAL OBJECTIONS and they are:
 - (ii) need to submit an updated Work program;
 - (iii) delay costs;
 - (iv) variations;
 - (v) price adjustments for change to progress of work;
 - (vi) time bars under clause 18.1;
 - (vii) no entitlement to quantum merit
296. These submissions challenged the claimant's payment claim entitlement, particularly those in item 2 in the payment claim headed "*Variations, additional works, claims and set off*", which subtotals \$1,188,001.27.
297. A careful analysis is made to ensure that all the appropriate factors (both legal and factual) and the parties' submissions are taken into account in deciding this entitlement.
298. Each category is considered separately under their respective headings.

EOT OBJECTIONS

e. Extensions of time

299. From paragraphs [97] through to [201] of the payment schedule, the respondent provided extensive submissions supported by authority, demonstrating that the claimant had failed to comply with the conditions precedent, so that the claimant was therefore time barred from having any extension of time (EOT).
300. The claimant in paragraphs [119] through to [209] of the application contested these submissions.
301. In the response submissions from paragraphs [114] through to [251] the respondent supported the payment schedule submissions and countered those of the claimant in the application.
302. This is a pivotal issue because it may preclude the claimant's entitlement to any delay damages. However, as I have said previously, my present analysis is to decide on the principles argued by the parties, to which I will then apply the facts found elsewhere.

303. The respondent provided its *extensions of time* objection submissions under 10 subheadings, which are abbreviated for ease of identification, some of which also included *further sub headings*, as follows:
- (a) contractual requirements (*contract provisions*);
 - (b) overview of clause 15 (*overview*);
 - (c) contractor bears all the risks of delays, unless it satisfies all conditions precedent (*all risks*);
 - (d) failure to comply – delay not caused by a listed cause in clause 15.2 (a) (*not listed delay*);
 - (e) failure to comply – strictly with clause 15.2(e), with subheadings (and my abbreviations) as follows:
 - i. purpose of the notice provisions (*notice*);
 - ii. time bars are enforceable conditions precedent (*precedent*);
 - iii. time at which the notices of delay must be issued (*NOD*);
 - iv. time bars not a penalty and are enforceable (*not a penalty*);
 - v. time bars not contrary to s99 of BCIPA (*not void*);
 - vi. respondent not waived, nor estopped from enforcing time bars (*estoppel and waiver*);
 - vii. conclusion on time bars (*conclusion*);
 - (f) failure to comply – strictly with clause 15.2(d)(i) (*claimant not responsible*);
 - (g) failure to comply – demonstrate it was actually delayed in achieving PC (*actual delay*);
 - (h) failure to comply – not otherwise delayed by an event not entitling EOT (*non-EOT event*);
 - (i) limit on EOT entitlement – in relation to access to site (*access issues*);
 - (j) global delay claim (*global claim*);
 - (k) adjudicator cannot step into shoes of principal and unilaterally provide EOT (*no EOT jurisdiction*).
304. The claimant responded to the payment schedule under these *further subheadings*, generally in **Volume 1** of the application, so these have been considered where necessary.

Contract provisions

305. Paragraphs [97] and [98] of the payment schedule provided the overall basis of the respondent's objections that, because the claimant has not complied with clause 15 of the contract, it was not entitled to any delay damages under clause 14 of the contract.
306. It added that, even if the claimant was entitled to a claim under clause 14 of the contract, its claim was misconceived without any contractual or legal basis.
307. The claimant, at paragraphs [119] and [120] of the application, argued that:
- (a) it had satisfied the contractual requirements, as far as it was able to; and
 - (b) the respondent had failed to comply with its contractual obligations regarding the claimant's notifications of delay;
 - (c) such that the claimant was discharged from any further obligations.
308. The claimant added that the time bars were a penalty and unenforceable, and that the prevention principle applied, and the time bar was a penalty and therefore void.
309. In support of its submissions, it referred to the statement of Mike Smart in **Volume 1**, the Delay Claim related correspondence in **Volume 8**, and CLo6 in **Volume 5** (abbreviated as the "*supporting documents*").
310. At paragraph [114] through to [117] of the response, the respondent took issue with the claimant's submissions, and submitted:
- (a) the claimant had plainly failed to satisfy the contractual requirements for EOT's, and merely argued that the conditions precedent were unenforceable.

- In particular, the respondent said that the issue was not whether or not the claimant was “*able to comply* with the contractual requirements”, but whether it *actually complied* (my emphasis). By not complying, the respondent argued that it meant that the claimant bore the risk of delays and had no entitlement to an EOT;
- (b) its denial that it, the respondent, failed to comply with its obligations in responding to the claimant’s notifications because:
 - i. the claimant had failed to satisfy the conditions precedent; and
 - ii. the respondent said that it had advised the claimant (the “*advice*”):
 - a) of its failure to satisfy the conditions precedent; and
 - b) of the requirements to satisfy the conditions precedent.
 - c) In its footnote to these submissions, and in support of them, the respondent made reference to 5 of its letters to the claimant that were included in **volume 8**, which it said demonstrated the *advice*;
 - (c) even, which it denied, if the respondent had failed to comply with this obligation, it argued that the claimant had no legal or other bases to say that the claimant was discharged of any asserted obligation;
 - (d) its denial that the time-bar condition precedent was unenforceable, or void for any of the reasons raised by the claimant, and particularly denied:
 - i. the prevention principle operated against the respondent to render the time bar condition precedent void; or
 - ii. that the time bars was a penalty or otherwise offended s99 of BCIPA;
 - (e) as to the claimant’s reference to the *supporting documents*, the respondent argued that they:
 - i. had no bearing on the legal merits of the claimant’s submissions, and could only be used to establish whether the facts supporting those legal arguments had been made out;
 - ii. did not demonstrate as a matter of fact that the claimant had satisfied the conditions precedent, nor that the respondent had failed to respond to the notifications.
311. Essentially, the respondent’s argument regarding the supporting documents is that there are only *repositories of fact* (my definition) which could support the claimant’s legal submissions made elsewhere in the application. Until I have considered these documents in my analysis, I am not in a position to determine whether this is correct.
312. My ensuing analysis applied the fundamental issue of *onus* as the *blueprint*, because there were a considerable number of objections raised by the respondent to the payment claim, which were responded to by the claimant’s submissions in the application, but which did not always directly engage with those of the respondent.
313. In my view, the claimant bears the *legal* and *evidentiary onus* of its entitlement to its payment claim (the “overall onus”). Whilst it is a rapid dispute resolution system that merely affords interim payments, which does not affect any rights that the parties to the construction contract have against one another [s100 of BCIPA], this does not detract from the claimant’s *overall onus*.
314. Whilst the respondent may raise a whole host of legal objections to the claimant’s payment claim, to which it may provide evidentiary support, it does not bear the *legal onus* to disprove the claimant’s claim. If, however, the claimant discharges its overall onus, the *evidentiary onus* shifts to the respondent.
315. I have said this to explain this *blueprint* that I have used in analysing the parties’ contending submissions and facts, in order to navigate the maze in this hard fought adjudication.

316. As adjudication is a rapid dispute resolution process, there is a danger that claimant's *overall onus* is lost in the detail, such that whilst an adjudicator does not *rewrite the contract*, the effect of the decision (viewed objectively) could be construed as doing precisely that.
317. Accordingly, the ensuing analysis, whilst possibly appearing tedious, is to ensure that the *blueprint* is applied satisfactorily to the contending facts and submissions.
318. I now apply the *blueprint* identified above to the issues that have emerged about the contractual requirements, but recognised that the claimant can demonstrate its *onus* anyway it chooses.
319. However, despite it being an adjudication and not court proceedings, there remains a limit on any investigation to glean this *onus* because of:
- (i) The time available; and
 - (ii) The need to do justice between the parties.
320. Accordingly, it is not for an adjudicator to do the claimant's work regarding establishing this *onus*, because that is entirely the claimant's obligation.
321. The reason why I had to make this observation is that often in the contending submissions, in response to the payment schedule (particularly in **Volume 5**, Folder 1); the claimant has used the words, "*Please refer to Claim Document CLo6*", without separately engaging with a particular submission of the respondent.
322. In accordance with the claimant's submissions, I have referred to CLo6, but in so doing I have not used a legal vacuum cleaner to draw in all the facts, and then closely examine the contents to find somewhere facts that could demonstrate the *onus*. Such an approach would be entirely inappropriate.
323. Accordingly, it remains for the claimant to demonstrate the *overall onus*. As I have mentioned elsewhere, the first review of these submissions is to decide whether the principles identified in the objections are correct, which if so, requires descending into the detail to see whether the facts bear out the respondent's submission.

Overview

324. In paragraphs [99] of the payment schedule, the respondent provided a summary of clause 15 of the GCCC.
325. At paragraph [121] of the application, the claimant made no comment about this submission, because it said that the respondent had repeated what was in clause 15 of the contract.
326. It was not necessary to make any finding regarding this submission, so I progress to the further subheading submissions.

All risks

327. At paragraphs [100] to [103] of the payment schedule, the respondent emphasised that the claimant *bore all the risk of all delays*, unless the conditions precedent in clause 15.2 were satisfied. The respondent argued that the *onus* was on the claimant to demonstrate otherwise, and to fulfil the contractual conditions precedent, such that if it had failed to do so, there was no entitlement to an EOT.
328. The respondent argued that the claimant had failed to do so, and therefore it was not entitled to any EOT.
329. At paragraph [122] of the application, the claimant argued that it had satisfied the conditions precedent and said that the respondent's submission repeated what the respondent had asserted in its arguments under "the *Overview*" above. It added that, where it had not satisfied the conditions precedent, the claimant referred to its submissions on conditions precedent in the application.

330. I do not agree with the claimant that the respondent's submissions merely repeated what it had said in the *Overview*; because under this heading the respondent emphasised the necessity for the claimant to demonstrate:
- (a) why it had not borne the risk of delay, and
 - (b) that it had satisfied the contractual conditions precedent.
331. Where the claimant made reference to its submissions on conditions precedent in the application, without reference to particular paragraphs of its submissions, I infer that it is referring to its submissions disqualifying the conditions precedent from applying because they are an unenforceable time bar or a penalty, and therefore void (the "*disqualifying factors*").
332. I will deal with the *disqualifying factors* at the appropriate point later in the decision, and for now will deal with the contending submissions under each subheading.
333. Turning back to paragraph [122] of the claimant's application, it argued, by reference to the reasons "*set out in this Adjudication Response*" that it had satisfied the conditions precedent. I take this to mean the claimant meant the *reasons set out in the adjudication application*, because otherwise the submission would be illogical.
334. I have already said that the claimant sometimes chose not to engage with each and every submission of the respondent in the payment schedule in its submissions in **Volume 1(8)**. This is a case in point, because it made the general submission that it had satisfied the contractual conditions precedent, without specifically controverting the respondent's payment schedule submissions under this *All risks* heading.
335. Nevertheless, as I have said, the claimant is entitled to demonstrate its overall onus, whichever way it chooses, and I have had regard to **volume 5** of the application, because (in folder 1), it provided its "*Claim Entitlement Documents*" in folders 1 and 2 regarding each aspect of the payment claim.
336. Furthermore, the claimant at paragraph [120] of the application, referred to CLo6 in **volume 5** (which is folder 2) as supportive of its submissions that it has complied with the contractual requirements.
337. On occasions, therefore, as identified in this decision, I have considered **volume 5**, folders 1 and 2 relating to the *Claim Entitlement Documents* in the analysis of the claimant's onus, in addition to the contending submissions of the parties, because I consider that it contains submissions *properly made*.
338. For present purposes, I firstly refer back to the claimant's earlier submission in paragraph [119] of the application in which it submitted that it had satisfied the contractual requirements for EOT's (paragraph [119 (a)] of the application.
339. However, the claimant added a *qualification* in its submission about which the respondent took issue in paragraph [115(a)] of the response, and that was, "*to the extent that it was able to*".
340. This *qualification* has not been further explained by the claimant in its submissions, apart from its reference to the *supporting documents*.
341. The respondent in the response (paragraphs [115(a)] argued that, whether or not the claimant was "*able to*" comply with contractual requirements was beside the point as to whether *in fact*, the claimant had complied with them. This is an important consideration that will require further analysis.
342. The respondent, as I said earlier, argued in its submission that the *supporting documents* cannot be construed as legal submissions, but only *repositories of fact* supporting these submissions already identified.
343. After having considered the *supporting documents*, I do not agree; because **volume 5** (folder 2), to which the claimant had specifically referred in paragraph [120] of the application regarding CL o6, contained submissions and supporting documents demonstrating the claimant's entitlement to the delay claim. The fact that these

submissions were also not provided specifically in **volume 1 (8)** does not mean that they become mere *repositories of fact*.

344. The response submissions (paragraph [121] 2 [126]) reiterated its payment schedule submissions regarding the claimant taking *all risks* unless it satisfies all conditions precedent, and the claimant had to demonstrate this onus and argued that the claimant had failed to do so.
345. Given that both parties did not descend into the specifics, of the alleged failure or alleged compliance, it is necessary to look at some of the other subheading submissions regarding specific instances before being able to make a decision about this issue
346. However, I am mindful of the claimant's qualification which was that it has satisfied the contractual requirement, "*to the extent that it was able to*" and will analyse its facts and submissions surrounding this *qualification*.

Not listed delay

347. In paragraphs [104] through to [109] of the payment schedule, the respondent argued that an EOT entitlements under clause 15 was only available if the claimant was delayed by:
- (i) an allowable delay; or
 - (ii) for other causes expressly identified in the contract (the "other express causes").
348. The respondent provided the contract definition of "*Allowable Delays*" and also listed the other express causes in the contract, and argued that the claimant bore the onus to demonstrate entitlement, and that if it failed to do so, it had no EOT entitlement.
349. In paragraphs [123] to [125] of the application, the claimant referred to the *Delay Claim Correspondence* in **volume 8**, which it submitted demonstrated the causes of delay.
350. It added that the respondent had admitted at paragraph [106] of the payment schedule, that the claimant was entitled to an EOT if the respondent did not provide access, not exceeding 4 months.
351. In paragraphs [127] through to [134] of the response, the respondent reiterated what it had said in the payment schedule. It also engaged with the claimant about the *Delay Related Correspondence*, and argued that these did not show the causes of delay fell within clause 15.2(a) of the GCCC.
352. It submitted that the *Delay Claim Correspondence* did not articulate in any meaningful way what the delay claim was, let alone, that the cause of the event was one set out in clause 15.2(a).
353. I have difficulty understanding the respondent's generalised (i.e. not specific to any piece of correspondence) objections to the *Delay Claim Correspondence*.
354. I have looked at the *Delay Claim Correspondence* and it appeared from the correspondence to which I had regard that the delays referred to by the claimant were those listed as an allowable delay.
355. Whilst neither party has expressly made a submission on this point, I do not find that the contract required that the claimant was obliged to refer to the list of allowable delays and point out, which of the list, the particular claim referred to.

Failure to comply – strictly with clause 15.2(e) –

356. These were divided into a number sub-headings, each of which will be considered.

Purpose of the notice provisions (notice)

357. In paragraphs [115] and [116] of the schedule, the respondent referred to the notice provisions being an essential tool for the Legacy Way Project to which it made reference to the case of *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 at [103] as support for this principle.

358. The respondent emphasised that the need for the notices was to inform it of possible consequences of delay.
359. At paragraph [130] of the application, the claimant agreed on the purpose of notice procedure, but argued that it had provided notices of delay, by reference to the Delay Claim Related Correspondence in **volume 8**.
360. The parties are therefore in agreement that the respondent is entitled to be provided notices to manage the project.

Time bars are enforceable conditions precedent (precedent)

361. In paragraphs [117] through to [132] of the payment schedule, the respondent argued that the time bars were enforceable conditions precedent, and provided a number of cases in support of that proposition.
362. In paragraphs [131] through to [142] of the application, the claimant stated that it was impossible to provide the number of days claimed in accordance with clause 15.2 (3), because of the respondent's failure to notify when areas, the subject of delay notices, would be handed over (paragraph [133]).
363. At paragraph [134], the claimant said that it did not follow up with additional written delay notices because the respondent had already advised that no EOT's were to be granted, such that the claimant did not consider any further need to update the notices.
364. Somewhat curiously, at paragraph [135], the claimant argued that clause 15.2(f) of the contract allowed the claimant damages, where the respondent failed to grant extensions of time. The claimant argued that the alternative valuation, to which it made reference in its application, covered the period post-the date of practical completion to the date of termination.
365. I infer that the claimant has used this as a basis for a claim. That claim must be rejected, because, as has been identified by the respondent at paragraph [287] in the payment schedule, by reference to *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2003) 63 NSWLR 395 at 397, damages are not *amounts due for construction work*. In that regard I agree with the respondent's submission [145](d)] in the response that it is a claim for damages. Accordingly, they are not within the jurisdiction of an adjudicator to award.
366. At paragraph [136] of the application, the claimant admitted that it could not comply strictly with clause 15.2(e) because of the actions of the respondent, but where it was able to do so when matters were within its control, the correspondence in **volume 8** demonstrated the claimant's provision of delay notices.
367. This admission of not complying with a condition precedent is significant, because if the clause 15 contractual requirements are conditions precedent, the claimant will have to otherwise overcome the strictness of the conditions precedent by reference to its *disqualifying factors*, to which I've made reference above.
368. At paragraph [137], the claimant submitted that there was an implied term of nearly every construction contract that the parties promised the other that they would do all that was necessary to be done for the achievement of the contractual aim. It made reference to the cases of *Electronic Industries Ltd v David Jones Ltd* (1954) 91 CLR 288, and *Perini Corp v Commonwealth* [1969] 2 NSWLR 530. I have read both those cases and the *general proposition* identified is contained within them.
369. In *David Jones* the *general proposition* arose out of a requirement that, despite delays due to coal miners' strikes preventing electricity being used in department stores for advertising, when those strikes were over, David Jones was bound to perform the contract to allow the plaintiff, to install and exhibit televisions.

370. In *Perini*, on page 545 (lines at 25 through to 32), MacFarlane J repeated this general proposition, which had emerged from the case of *The Moorcock* (1889), 14 P. B. 64, and which had been cited with approval by the High Court in *David Jones*.
371. The respondent, at paragraph [146(c)] of the response did not take issue with the *general proposition*, and I'm satisfied that it is correct.
372. However, claimant argued that *Perini* was authority that this implied duty extended to not prevent nor hinder the occurrence of a condition precedent upon which that performance depends.
373. I was unable to find that the *general proposition* extended to having an implied term overcome conditions precedent in *Perini*. It was a case involving extensions of time (under clause 35 of that contract), which were not granted by the Director of Works, where the program was a contract document.
374. In my view, the term implied in that case, to satisfy the *general proposition*, was that the defendant was under an obligation to require its servant, the Director, to perform his duties under clause 35 in accordance with his mandate. It did not extend to overcoming conditions precedent.
375. At paragraph [146(d)] of the response, the respondent identified that there were a number of limitations to the implied duty identified in the *general proposition*. It argued that the duty to cooperate related only to enforceable obligations under the contract, and cited the case of *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSW at 104, 124 in support.
376. The Full Court referred to Lord Atkin's decision in *Southern Foundries (1926) Ltd v Shirlaw* [1940] ACs 701 at 717 who referred to "well-established law" that was a positive rule of law that prohibited conduct of a person 'of his own motion' to bring about the impossibility of *performance*, as this was itself a breach.
377. The Court asked the question 'Performance of what?' The Full Court answered this by saying it must be *the obligations of a party under the contract*, which depended upon the application of rules of enforceability and construction concerning written instrument. The court added that there cannot be a duty in bringing about something which the contract does not *require* to happen.
378. The respondent added that the duty only required performance of acts necessary to preserve the benefit of the contract, rather than a particular party to it, and provided 3 cases in support of this proposition.
379. The respondent further argued, by reference to *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Community Titles Scheme* [2013] QCA 354, that the duty would not operate to protect the interests of only one party, especially where that party fails to comply with its own obligations under the contract. It is necessary to examine this case to see whether it applies to this adjudication.
380. This case turned upon whether the respondent failed to perform its implied duty to cooperate to do what was necessary, on its part to enable the appellant to have the benefit of the contract. The failure of the respondent's duty was alleged to be the failure of its chairman to inform the Office of Fair Trading late in 2001, that there was an agreement between the parties that the appellant was a letting agent.
381. The agreement between the appellant and respondent was terminated by the respondent on the basis that the appellant did not have a real estate agent's licence.
382. However, it appeared as if the Office of Fair Trading, if it had known of a subsisting agreement, would have extended the appellants restricted licence.
383. In this case, Douglas J, with whom the other members of the Court agreed, held, at paragraph [15] that the appellant had breached the agreement by operating for over 2 years without a licence. In those circumstances, the respondent could not be held to be in breach of its duty to cooperate.

384. In my view, this case applies to that of the claimant in that it has admitted that it failed to strictly comply with clause 15.2(e) of the contract, which was a breach of that clause. Accordingly, in my view, by virtue of its own admissions, the claimant cannot rely upon the duty to cooperate to escape the consequences of its own breach.
385. Furthermore, in the High Court case of *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, the High Court regarding the appellant dismissal for pilfering as baggage handlers, rejected the implication of a term which was a custom of the industry, where an award operated to govern their employment
386. Brennan CJ, Dawson J. and Toohey J, at page 423, held that the fact of the inclusion of a term which, if it was breached, could found an action for damages, was not a ground for saying that the term was necessary for the reasonable or effective operation of the contract.
387. In this contract, clause 15.2(f), to which the claimant made reference earlier specifically provided that the claimant may have an action for damages for the respondent failure to grant an EOT. In this context, therefore, the contract contemplates the respondent's breach of granting an EOT, which may allow damages, which to my mind precludes the necessity for implying any further term regarding such a breach on the basis of a failure to cooperate.
388. It appears to me that if the respondent fails to grant an EOT, in circumstances where it is reasonable to do so, that is simply a breach of contract, about which the contract has something to say, and therefore there is no further need to imply that the duty to cooperate extends to stopping the agreed conditions precedent from operating in accordance with the agreement.
389. The extract referred to by the respondent in *Byrne* was the joint decision of McHugh and Gummow JJ, on pages 449 and 450, in which a term, although implied by law, may be excluded by express provision of the contract.
390. In this case, I find there is sufficient expression of contrary intent in the opening words to clause 15.2, which are:
"The Contractor agrees to bear the risk of all delays to the carrying out of the Work under the Contract from any cause and will not be entitled to any extension of the Date for Practical Completion, except that if all of the following conditions precedents are satisfied."
391. To my mind, this clause is so prescriptive with a *shopping list* of conditions precedent, to which the respondent has earlier made reference, that even if a term could be implied, the express contrary intention in clause 15.2, precludes its operation.
392. I have already found that the claimant is in breach of clause 15.2(e) insofar as its notices are concerned, such that *Famestock provides that* no term could be implied in any event.
393. Accordingly, given that I found that no implied term could arise, and even if one had arisen, it was specifically excluded by the contrary intention of the parties identified in clause 15.2, **I find that the claimant had failed to comply with the conditions precedent necessary for the granting of an EOT.**
394. Accordingly, unless I find that the other *disqualifying factors* referred to by the claimant overcome the conditions precedent, in my view, I am unable to be satisfied from the evidence the claimant is entitled to its prolongation claim under CLo6, because it is failed to satisfy the conditions precedent to allow it to make that claim.
395. The submissions regarding *disqualifying factors* emerge below, where they will be dealt with, but for the sake of completeness, I consider the other subheading submissions of the respondent objecting to the claimant's entitlement. The analysis is not as detailed because of my finding above.

Time at which the notices of delay must be issued (NOD)

396. In paragraphs [133] through to [137] of the payment schedule, the respondent made reference to the case of *State of Queensland v Multiplex Constructions Pty Ltd* [1997] QCA as authority that the claimant is obliged to advise the respondent within the time prescribed after the delay first occurred.
397. At paragraphs [143] and [144] of the application, the claimant stated that, by reference to **volume 8**, it had provided notice within 10 business days of delay is occurring. It did not challenge the *Multiplex* authority, and I am therefore satisfied that the claimant was required to comply with the notification within the 10 day time limit.
398. I have had difficulty distilling from the *Delay Claim Related Correspondence*, without any further assistance from the claimant, as regards the occurrence of a particular delay that it complied with the 10 day requirement. I appreciate that this is a difficult task, but the claimant agreed to follow clause 15.2 when it signed the contract in February 2014.
399. The respondent's letter dated 28 October 2014 (pages 27 through to 30 of this bundle) contained the respondent's complaints regarding the claimant's failure regarding its panel installation productivity, and the need to improve productivity and provide additional panel installation capacity to meet the contract completion dates in the TBM tunnel.
400. In response, on 29 October 2014 Mr Praetorius responded to this complaint letter in his letter number 38148 on 29 October 2014 (pages 31 through to 38 of the bundle), in which he asserted that the claimant was working diligently and without delay to meet the practical completion dates.
401. He denied that the delays were the claimant's responsibility, and attached a Summary of Delay Events which he said was non-exhaustive and indicated the extent of delays and disruptions to date (the "*summary*").
402. Mr Praetorius explained that the delays indicated in the *summary*, demonstrated that the delays were not minor and directly and significantly impacted upon the claimant's production rates and its program. He added that the claimant was prepared to take measures to increase its production rates and said, "*However, we consider that we are not solely responsible to do so to make up delays caused by others. We consider the latter requires acceleration measures for which we are entitled to additional payment.*"
403. Turning to the summary, which identified 7 delay events, it usefully identified the program activities ID, provided a description of the delay and the duration thereof, with some remarks. However, there was no cross reference to dates when these delays were encountered, nor any evidence of the claimant's letters to the respondent about the delays, which was required by clause 15 of the contract.
404. Furthermore, I am unable to find in this letter, reference to a particular identifiable program against which the delays could be measured, nor was a program attached to the letter or the *summary*.
405. In addition, it is not clear to me from Mr Praetorius' response, whether or not he conceded that the claimant may have borne some responsibility for the delays because of the following words used in his letter, "*However, we consider that we are not solely responsible to do so to make up delays caused by others*" (my underlining).
406. Given that the claimant bears the *onus*, I am unable therefore from **volume 8**, to be satisfied that the claimant had complied with the 10 day requirement. Furthermore, it had earlier made admissions that it had not always been able to adhere to this requirement in any event.
407. Accordingly, I am unable to be satisfied from the evidence that the claimant has discharged its *onus* regarding satisfying the timing of the notification of delays as required by clause 15.2(e) of the contract.

Time bars not a penalty and are enforceable (not a penalty)

408. These are the start of the *disqualifying factors* identified by the claimant.
409. At paragraphs [138] through to [145] of the payment schedule, the respondent explained that the doctrine of penalties did not apply to time bars.
410. It referred to the case of *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292, as authority that contractual provision does not amount to a penalty if it does not deprive a party of an accrued right.
411. It argued forcefully that the timing of the requirements regarding EOT notices was a precondition to any accrued rights for EOT's, such that the penalties doctrine had no application to this case.
412. In paragraphs [145] through to [149], the application referred to the respondent's submissions, but did not engage on the proposition that a penalty could only to the accrued rights. It merely stated that *Andrews*, was authority for the existence of a penalty.
413. It did not explain how *Andrews* applied in this particular case, and seem content to rest upon its argument that any loss suffered by the respondent in the claimant failing to communicate its claims, was trivial in comparison with the claimant being time barred from claiming EOT's and delay costs. It appears that on this basis, it argued that it is a penalty.
414. Furthermore, in paragraphs [166] through to [185] of the response the respondent expanded upon its payment schedule submissions and countered those of the claimant in the application.
415. Tellingly, it demonstrated that *Andrews* endorsed the principles of *Interstar* in *Andrews* at paragraph [30] through to [32]. I agree that the High Court held that if the Court of Appeal had confined its finding to the fact that the lack of accrued rights of the respondent did not attract the penalty doctrine, then that would have been sufficient for the Court of Appeal to dispose of the case.
416. The High Court then held the fact that the Court of Appeal went further in *Interstar* than that principle (the "wider finding"), meant that the High Court in *Andrews* rejected the wider finding.
417. I cannot agree with the claimant, because the failure by the claimant to advise the respondent of the existence and consequences of delays, in the case of a dynamic construction occurring in the TBM tunnels with a whole host of contractors trying to complete their works, does not suggest that any loss suffered was trivial.
418. I have no evidence from either party as to what loss if any, the respondent suffered as a consequence of the claimant's failure to adhere to the strict conditions precedent.
419. In any event the claimant has not explained as a matter of principle supported with authority that the adverse consequences of loss caused to the claimant by its failure to satisfy the conditions precedent, even if the loss to the respondent was trivial, should somehow be construed as a penalty.
420. Accordingly, I am unable to be satisfied from the evidence and the claimant's submissions and authorities that the claimant has established that the time bars are void because they are a penalty.

Time bars not contrary to s99 of BCIPA (not void)

421. In paragraphs [146] to [150] of the payment schedule, the respondent foreshadowed a possible argument by the claimant along these lines.
422. It argued, with support from the case of *John Goss Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707, that time bars have been found not contrary to the NSW equivalent of s99 of BCIPA.
423. This case was decided by McDougall J after the case of *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 in which he was also the Judge. This earlier case was

referenced by the claimant in its submission paragraph [154] as authority that it was not reasonable in the circumstances to have to comply with the time bar as it was preventing a person's entitlement to claim for *work done*.

424. Earlier, in its submissions in paragraphs [117] through to [132], the respondent had provided authorities suggesting that time bars were a condition precedent, one of which was *John Goss*, as well, as *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd & Ors* [2008] QSC 58 at [40].
425. In paragraph [150] through to [157] of the application, the claimant did not engage in the application with the respondent about these cases to counter the submissions of the respondent and its 2 cases.
426. I am satisfied that both those cases stand for the principle that the entitlement to an EOT only arises if the conditions precedent are satisfied.
427. The claimant also referred to its earlier submissions in response to section 2, item 2.1(c) regarding "*Conditions precedent to reference dates arising are not void*. I take it that the claimant is referring to paragraphs [32] through to [72] of its application (*earlier submissions*), to which I've already had regard.
428. Turning firstly to its earlier submissions, their main focus was in the context of a Work program requiring the respondent's approval, which by its nature had to be subjective. I found that this requirement was fatal to the respondent, preventing a reference date from arising, because it was not facilitating the purposes of BCIPA.
429. However, in this context, different considerations apply.
430. The respondent had provided the case of *John Goss* as direct authority in the context of the adjudication that time bars not contrary to BCIPA. I accept that the respondent highlighted that was not directly on point, because it was not dealing directly with EOT's, but rather with notice provisions. However, I am satisfied that the principles remain analogous to notices for EOT's.
431. The claimant referred to the case of *John Holland Pty Ltd against Coastal Dredging and Construction Pty Ltd and Ors* 2 QdR 435. It provided a copy of the case from [2012], QCA 150. This case was dealing with the *reference date* argument. However, Fraser JA, at paragraph [23], referred to *John Goss* and said his decision in *John Holland* was consistent with McDougall J's observations that case. Fraser JA held that *John Goss* was dealing with a different point, but said *John Goss* limited the entitlement to work that might be comprised in a payment claim, whenever it was made. To this end, therefore, I'm not satisfied that *John Holland* controverted anything held in *John Goss* about time bars.
432. Finally, the claimant, at paragraph [157] argued that the detriment suffered by the claimant if the time bars were enforced deprived its entitlements under BCIPA and was therefore void.
433. I cannot agree with this argument when the respondent has cogently explained that the contractual preconditions are essential to establish the claimant's entitlement to an EOT, such that until then, it has no accrued right to an EOT.
434. I am therefore unable to be satisfied from the claimant's submissions, and its cases in support that it has demonstrated that time bars are contrary to s99 of BCIPA.
435. *Respondent not waived, nor estopped from enforcing time bars (estoppel and waiver):*
436. In paragraphs [151] through to [156] the respondent referred to the 2 legal principle of the estoppel and waiver, and identified the requisite elements of each principal that needs to be satisfied for the claimant to be successful.
437. At paragraph [158] of the application, the claimant said that waiver and estoppel only related to the work program requirements.
438. Accordingly, there is no need for me to consider whether waiver or estoppel applies to the conditions precedent regarding the EOT requirements.

439. In any event, having regard to **volume 8**, as far back as 20 November 2014, in a letter number 15918, the respondent identified the contractual requirements regarding EOT's, and the failure by the claimant to satisfy the conditions precedent for the granting of any EOT's.
440. Accordingly, the evidence could not support any finding of waiver or estoppel.

Conclusion on time bars (conclusion)

441. Accordingly, I am unable to be satisfied from the evidence, and its submissions in support that the claimant has discharged its onus regarding the time bars being inapplicable. This then deals with the *disqualifying factors* that the claimant has put forward, to which I'd made reference earlier.
442. It follows that, given that it has failed to satisfy the contractual conditions regarding EOT's, it is not entitled to any prolongation claim, unless I am in a position to grant EOT's, to which I will give consideration below.
443. In so doing, I considered it important to consider the respondent's objections to the other reasons why the claimant is not entitled to EOT's, because this may have an influence on whether or not I should grant EOT's in the circumstances.
444. This is important because an adjudicator in making a decision must apply the terms of the contract agreed between the parties. If I am in a position to grant EOT's, which has not yet been established, I need to consider them in the context of the contract and the evidence before me. My power, if any exists, is to consider EOT's as if I were the respondent under the conditions of the contract.
445. It is not appropriate, as an adjudicator, if empowered by the contract, to grant EOT's, on any other basis.

Failure to comply – strictly with clause 15.2(d)(i) (claimant not responsible)

446. In paragraphs [161] through to [164] the respondent submitted that the claimant had wholly failed to demonstrate that it had complied with the condition precedent, and that it did not provide any evidence of spending any reasonable sum or revise its program.
447. In paragraphs [161] through to [164], the claimant submitted that it had taken all reasonable measures to mitigate the delay, and that it had deployed its resources elsewhere, which then resulted in claims for extensions of time, and at no stage stopped the work. It referred to pages 251 and 252 of the program bundle.
448. The program bundle provided a useful visual depiction of the project, and the activities access dates and installation sequence:
- (i) in accordance with the contract;
 - (ii) as actually occurred because of the access granted by the respondent.
449. Whilst it remains a useful visual tool, it does not demonstrate that the claimant had complied with the conditions precedent.
450. It also made reference to Mike Smart's statement and the program bundle in **volume 7**, to support its submissions.
451. Unfortunately, the generalised nature of the claimant's reference to both Mr Smart's statement, and the program bundle did not give me any assistance in establishing that clause 15.2(d)(i) had been complied with.
452. I appreciate that the program bundle summary identified 60 items that cross referenced a number of documents, but in the context of delays, the bundle appeared to deal mainly with the respondent's criticisms that the claimant had not provided sufficient production capacity for installation, and the claimant's arguments about the delays for which the respondent was responsible.

453. Given that I've not been provided any assistance by the claimant, in its submissions, I am not satisfied on the evidence and its submissions that it has demonstrated this onus that it strictly complied with clause 15.2(d)(i).

Failure to comply – demonstrate it was actually delayed in achieving PC (actual delay)

454. The claimant's paragraphs [165] to [169] of the application showed by reference CLo6 in **volume 5** that it had been actually delayed and that there was an actual impact upon the critical path.
455. The difficulty with this submission is that, at paragraph [169], the claimant said that the actual impact on the critical path could not be estimated because the respondent had failed to provide the actual area's access dates. It referred to Mr Tim Brown, excluding works on 3 February 2015, and that at the date of practical completion, it could not have known what impact these excluded works would have on the critical path.
456. I am not satisfied that the fact that Mr Brown excluded works created difficulties for the claimant because, at paragraphs 5.3, 4 and 5.35 of Mr Brown's statutory declaration, he made reference to a minority of panels that could not be installed, because in a small number of locations, access was not available.
457. At paragraph 5.34 he said that he'd identified as far back as mid-December 2014 that these panels could not be installed, and that in any event, the claimant had been unable to complete the other works by the Date for Practical Completion, and that no areas were complete at the Date for Practical Completion.
458. I am therefore not satisfied by this particular example provided by the claimant that the exclusion of certain works, which I find was advised in mid-December 2015 prevented the claimant from identifying the critical path before the Date for Practical Completion.
459. It may be that the claimant has selected an unfortunate example that the respondent was able to controvert.
460. Nevertheless, by reference to paragraph [207(d) & (e)] of the response the respondent said that even if the respondent had failed to provide actual access area dates. This did not prevent the claimant from demonstrating an actual impact on the critical path, and by taking work out of the claimant's works, it made it easier for the claimant to achieve practical completion.
461. The respondent referred to the case of *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 at [673] as authority that the claimant had the onus of demonstrating actual delay. The respondent referred to Warren CJ's decision, which held that an adjustment to the time of practical completion is only available where there has been an actual delay and the delay was caused by one of the events set out in the contract, and that any delay that does not affect practical completion for the relevant.
462. Accordingly, the respondent said that it was incumbent upon the claimant to demonstrate its onus, and it had failed to do so, thereby precluding any EOT.
463. I am not satisfied on the evidence and the claimant's submissions that it was the respondent's conduct that prevented the actual delay on the critical path from being established.
464. Accordingly, based on the available evidence and the submissions provided by the claimant, I am not satisfied that it has discharged its onus in relation to clause 15.2(a).

Failure to comply – not otherwise delayed by an event not entitling EOT (non-EOT event)

465. In paragraphs [170] through to [172], the claimant argued that it had identified that all delays were the responsibility of the respondent, and that the respondent had failed to identify what delays the claimant had allegedly caused, and that it could not do so because the claimant had not caused any delays.

466. The claimant is correct in this submission, in that in the payment schedule and the response, the respondent has failed to identify any delays which the claimant was responsible. However, it reiterated that the claimant bears the onus of demonstrating its entitlement, and in my view it is the claimant that bears the *onus* not the respondent.
467. Having regard to the facts provided to me, it is evident that the respondent in its correspondence in **volume 7**, and **volume 8**, complained about the lack of resources applied by the claimant, the lack of materials needed at critical periods, and the need by the claimant to provide more resources to complete by 31 December 2014.
468. By reference to Mr Brown's statutory declaration, it is evident that the delays associated with:
- (i) the split washers requiring independent testing by the University of Queensland, for which the claimant was responsible;
 - (ii) the delay in obtaining the Genuruk panel lifters meaning panels were not installed until 24 September 2014, as 2 examples of delays for which the claimant was responsible because they did not fall within the definition of *allowable delays* under the contract.
469. The respondent's submissions regarding the *Society of Construction Law Protocol* in paragraph [175] and [176] of the payment schedule, and paragraph [220] and [221] of the response that a proper analysis of the impact of delay events is only possible with the benefit of an updated program has not been controverted anywhere by the claimant.
470. Accordingly, based on the available evidence and the submissions provided by the claimant and the fact that it does not directly controvert the respondent, I am not satisfied that it has discharged its onus in demonstrating that it was not responsible for any of the delays during the period that it has claimed an EOT.

Limit on EOT entitlement – in relation to access to site (*access issues*)

471. In paragraphs [173] through to [185] of the application, the claimant countered the arguments put forward by the respondent in paragraph [180] through to [189] of the payment schedule that the claimant had to demonstrate that any delay arising out of its interference for access was as a result of the claimant's failure to coordinate its activities with those of the other sub contractors.
472. I am not satisfied with the respondent's arguments in relation to this issue, because it appears to skirt the fundamental issue as to whether access in accordance with the contract was provided.
473. It focuses on the claimant's failures regarding coordinating its activities with other sub contractors, but in my view there is sufficient evidence in the material to suggest that the other sub contractors had not completed works in specific areas, for example the construction of concrete barriers, or the existence of temporary water pipes, which denied the claimant access to complete its works.
474. I accept that the claimant was required to coordinate its activities with other sub contractors, but if those sub contractors had failed to carry out a particular activity in an area which thereby prevented the claimant from commencing/continuing with its work, then the issue of restricted access is raised.
475. I accept the claimant's submission [180] in the application that E & M contractors were given priority over the panel installation, because this was not directly controverted by the respondent.
476. Furthermore, the claimant submitted that the respondent provided no programs showing a dependency between the other contractors, and the panel installation activity of the claimant, and this has not been controverted by the respondent. Accordingly, I accept the argument of the claimant.

477. Having regard to the evidence and the parties' submissions, I am satisfied that the claimant demonstrated its onus in relation to the lack of access.

Global delay claim (global claim)

478. In paragraphs [190] through to [196] of the payment schedule, the respondent argued that the claimant's delay claim was in the nature of a global claim, as it said:
".. But has failed to identify how the number of days extension claimed arose from the alleged direction to change the sequences and order of Works. For example, its claim is based on the 'expected completion date' (without excluded work) being delayed by 40 working days. Ceratec fails to identify any credible delay analysis, including that it does not identify the causal link between the events of delay alleged and the quantum of delay claimed by Ceratec arising from this event."

479. It also argued that the delay costs claim by the claimant were not reflective of the losses actually incurred, and there was no causal connection to connect the alleged losses to the delays.

480. In paragraphs [186] to [188] of the application, the claimant referred back to its earlier submissions in relation to delay claims and said that in CLo6, it had demonstrated this causal link between the event of delay and the actual quantum of delay claimed, and also provided an alternative calculation based on cost/contract rates and actual resources.

481. I have difficulty with the claimant's submissions.

482. CLo6 in the *payment claim* identified the summary of variation/additional works/claims on paid to as a "*Claim for prolongation due to the JV failure to hand over works areas*". It referred to an attached valuation and summary of the correspondence.

483. The further summary, item 11, referred to in CLo6 as a claim for adjustment to contract sum to which was then attached 5 pages outlining the basis of the claim, which was dated 23 April 2015.

484. In the basis of claim, item 3 in the description was an *Allowance for installation per day (\$2,282,259.50/102 days), amounting to \$22,375.09 per day*

485. In item 4 4, the description provided was as follows:
"No. of days delayed (58 calendar days; 40 working days, excluding Saturdays, Sundays & public holidays)

Referring to TJV's letter ref: 00014158 dated 1/A/, the date for practical advice to 31/12 2014
31/12/2014

Referring to the JV's letter referenced: 00016958 dated 27/2/2015, the contract was terminated on 27/2/2015
27/2/2015.

40 days

486. In item 5, the amount claimed for the price adjustments was the allowance per day multiplied by 40 resulting in an amount of \$895,003.60
487. It then attached the claimant's two-page letter number 38213 dated 18th February 2015, in which the claimant provided a non exhaustive list of examples of directions requiring changes in the sequence and/or the works and that it claims an amount of \$22,375.09 per day for works completed after 31 December 2014, for which it was prepared to accept an adjustment to the contract sum.
488. On the next page the claimant attached its calculation dated 18th February 2015 for 62 working days, amounting to \$1,387,255.77.
489. The final document was a Summary of Delay Letters issued by the claimant comprising 33 items with date from 17 July 2014 through to 18 February 2015.

490. In **volume 5**, folder 2, the claimant then provided 62 pages of submissions in support of this CLo6 claim with numerous cross references to documents in the program bundle (in **volume 7**) as well, as attached appendices from 23 onwards, in **volume 5**, folder 2.
491. Having regard to CLo6, there is no detailed explanation, as to how those 40 days of delay are referred to particular delays for which the respondent is responsible.
492. I appreciate that the summary identified letters identifying delay, but taking an example at random, for example, item 9 in the summary, letter number 38153 dated 6 November 2014, which is provided in pages 45 to 47 of the program bundle and is described as notification of delay and disruption of panel installation at WB non-XP 18 – 19 due to cables being erected above the panels.
493. This letter identifies that the claimant had to miss out on the installation of 6 panels and reserved its right to claim the additional costs of returning to erect these panels and the delay time on its works. There is no follow-up correspondence provided by the claimant dealing with this particular delay, which falls within the CLo6, despite the claimant stating its rights to claim the additional costs were reserved.
494. It is not clear when the claimant returned to erect the 6 panels, and how it had disrupted the claimant.
495. Taking another example of item 22 in the summary of a letter number 38189 dated 22 December 2014 headed Notification of Delay – Disruption to Ceratec’s progress due to various events between 10 and 17 December 2014.
496. This letter makes reference to the period of delays, and that there was reference to attached emails and that all panel installation was on the critical path with an intention to claim an EOT. The letter ended on the basis that the details of the claims would be forwarded when they were known.
497. I was unable to find any follow-up correspondence from the claimant to demonstrate quantification of its claim, nor were any programs provided in the letter to demonstrate that this activity was on the critical path.
498. Accordingly, it is not abundantly clear from this claim document in relation to a particular delay, how it was on the critical path, and what resources had been affected, and the costs that were incurred in overcoming the delay.
499. This suggests that the claim could only be classified as a *global claim*.
500. However, as I said in the decision regarding *threshold issues* above, a claimant is not prevented, in adjudication to lodge a global claim.
501. However, the legal principles associated with global claims need to be adhered to for the claimant to succeed under this head, and the respondent referred again to the case of *Mainteck* at paragraph [243] of the response, in which the Court held at paragraphs [205] that a significant cause of loss not attributable to the respondent would be fatal to the claimant’s claim.
502. In fact in this paragraph [205], there is reference to Dr Haidar’s book *Global claims in Construction*, in which the author stated that the contractor must eliminate from the causes of his loss and expense or matters that are not the responsibility of the client.
503. In my view, having regard to the complaints by the respondent that the claimant had insufficiently resourced its installation personnel, the claimant’s delays caused by the failure to demonstrate that the split washers, which failed on 12% of the occasions, [paragraphs 4.36 through to 4.40 of Mr Brown’s statutory declaration], suggests that some of the delays during this period were attributable to the claimant.
504. Furthermore, I’m not satisfied that the claimant has made any meaningful attempt to demonstrate its actual costs associated with these delays. Instead, it has used an average daily installation cost arising out of a calculation is derived from the total installation costs divided by the number of days for which installation was to take place.

505. It is evident from schedule 1 of the contract regarding the schedule of rates, that there were different installation costs for particular components of installation, and it is in my view inappropriate for a claimant to lump all installation activities together, when it would be aware which installation activity was delayed and that what time with the direct effect on particular resources. Accordingly, I agree with paragraph [245] of the response that the use of a fictional daily rate with no causal connection between the periods of delay alleged is not a satisfactory method to demonstrate the actual costs incurred by the claimant.
506. Accordingly, having found that the claim was a global claim, I find that the claimant has failed to demonstrate that a significant cause of the loss was not attributable to the respondent.

Adjudicator cannot step into shoes of principal and unilaterally provide EOT (no EOT jurisdiction)

507. In paragraphs [197] through to [201] of the payment schedule, the respondent submitted that an adjudicator cannot award EOT's, when the respondent was under no obligation to grant EOT's.
508. In paragraphs [189] through to [209] of the application, the claimant submitted that an adjudicator could step into the shoes of the respondent and grant EOT's.
509. The claimant referred to the case of *Hervey Bay JV Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58, and submitted that an adjudicator could step into the shoes of the principal, where:
- (i) the principal's representative must exercise the power; and
 - (ii) where a power may be exercised, and he has made a decision not to exercise that power.
510. The claimant further argued that the principal's representative was required under the contract clause 2.9(b) to act honestly and fairly, and cited cases in support that the adjudicator was able to stand in the shoes of the respondent's representative and grant EOT's.
511. At paragraph [247 through to [251] of the response, the respondent identified that the case of *Hervey Bay*, in which there was a contractual intention to confer a discretion to grant an entitlement to an EOT, but no obligation to do so, an adjudicator would fall into jurisdictional error if they exercised the contractual discretion to grant an entitlement.
512. As the respondent said at paragraph [248(f)] of its submissions that the express intention of clause 15.3 is to confer a power on the respondent without any obligation that it exercise that power.
513. The respondent in the response had the last opportunity to make submissions in relation to this important issue and it did not do so, and in my view, I am constrained by *Hervey Bay* to not consider granting EOT's in this case.

OTHER OBJECTIONS

f. Updated Work program

514. From paragraphs 202 through to 216 of the payment schedule, the respondent identified the claimant's failure to provide updated Work programs.
515. The claimant's application submissions from paragraphs [210] through to [214] contested the respondent's submissions.
516. The response submissions from paragraphs [252] to [273] supported those of the payment schedule and countered those of the claimant's application.
517. In relation to this issue, I am not satisfied that the respondent can rely upon it, as a failure by the claimant to satisfy the conditions precedent.
518. As I mentioned under the jurisdictional objections on this point, two parties are involved in the Work program, and in this respect the respondent's subjective *approval* never being

granted, does not mean that the claimant had failed to comply with the condition precedent.

g. Delay costs

519. From paragraphs [217] through to [266] of the payment schedule, the respondent explained that the claimant had failed to comply with the condition precedent in relation to delay costs, and that disruption costs are not recoverable under clause 14.4.

520. The claimant's application, paragraphs [215] through to [246] contested the respondent's submissions.

521. The response submissions from paragraphs [274] through to [370] supported those of the payment schedule and countered those of the claimant's application.

522. I have already made a finding, in relation to delay costs that in so far as CLo6 is concerned, the claimant has no entitlement to them, because it:

- (i) failed to satisfy the conditions precedent; and
- (ii) also failed to demonstrate the actual costs that it reasonably incurred;
- (iii) have made a global claim, such that it was unable to demonstrate the connection between the actual costs in the direct result of the delay;
- (iv) is not entitled to damages in adjudication.

h. Variations

523. From paragraphs [291] through to [305] of the payment schedule, the respondent, whilst not expressly denying that it had directed variations, pointed to the claimant's lack of entitlement if it fell within clause 16.7 of the contract. It did not point to any particular instances where the claimant fell within clause 16.7 of the contract.

524. It argued that the pricing of variations was under clauses 17(c) or 17(d) and that the pricing document under the contract Schedule 1, section 1 for contract sum and section 2 for daywork rates, was the only pricing document applicable.

525. Insofar as dayworks were concerned, it said that the claimant had to provide dayworks' sheets that had been approved by the respondent on a daily basis.

526. The claimant's application, paragraphs [247] through to [254] dealt the respondent's submissions and essentially submitted that the claimant had identified its entitlement under clauses 17(c) or (d), and that it used dayworks' rates to variations.

527. The response submissions from paragraphs [371] through to [338] supported those of the payment schedule but did not engage with those submissions in the claimant's application.

528. Until I consider each variation, there is no need to make any finding about a principle arising out of these submissions.

i. Price adjustments

529. From paragraph [306] through to [321] of the payment schedule, the respondent argued that the claimant had failed to comply with the conditions precedents and clause 14.4 of the contract, such that it had no entitlement.

530. It argued that, apart from the express right to a claim under clause 14.3(f), or as a price adjustment for a variation or an EOT, for which it is entitled to claim its extra costs, the claimant otherwise had no entitlement to a price adjustment for change to progress of the works.

531. The claimant's application, paragraphs [255] through to [259] engaged with the respondent's submissions and submitted that it was claiming for delays and costs, and referred to CLo6 in **volume 5**.

532. The claimant expressly denied that it was claiming these costs as a variation.

533. The response submissions from paragraphs [390] through to [413] supported those of the payment schedule and sometimes engaged those of the claimant's application.

534. For example, at paragraph [398] it said that the claimant's claim for idling and stand down costs of labour, plant and equipment, could only be made under clause 14.4 of the contract, and the claimant had not demonstrated its entitlement to claim such costs.

535. I have already found that the claimant is not entitled to EOT's and therefore it is not entitled to costs under clause 14.4 of the contract.

j. Time bars under clause 18.1

536. From paragraphs 322 through to 324 of the payment schedule, the respondent referred to its earlier arguments relating to conditions precedent and reiterated that a strict notice requirement regarding prescribed notices with which the claimant had failed to comply.

537. The claimant's application, paragraphs [260] referred its earlier submissions in relation to the payment schedule time bars.

538. The response submissions from paragraphs [414] through to [417] reiterated those of the payment schedule and countered those of the claimant by emphasising the need to satisfy the conditions precedent.

539. Having already made a finding regarding the time bars being enforceable, and the failure by the claimant to adhere to them, there is no need for me to analyse these submissions any further.

k. No quantum meruit

540. From paragraphs 325 to 326 of the payment schedule, the respondent argued that if the claimant was seeking quantum meruit, this was not available under BCIPA.

541. The claimant's application, paragraphs [261] contested the respondent's submissions and argued that its claims were not based on quantum meruit.

542. Adjudication requires the valuation of construction work under the contract, and quantum meruit connotes the absence of a contract, so in my view, any claim for quantum meruit cannot be considered by an adjudicator.

543. However, I do not find that any of the claimant's claims are based on quantum meruit, so there is no need to consider this issue any further.

XII. Claimant's reply

544. Before descending into the merits, I must consider the *claimant's reply submissions* which the claimant said were in reply to new reasons made by the respondent in the adjudication response.

545. The reply comprised a lever arch folder with submissions, together with a statement by Allclad Systems Pty Ltd, a statutory declaration of Marcus Praetorius, and a comprehensive review of the 26 deduction items identified by the respondent.

546. In the response submissions [paragraph 39 through to 43], the respondent had alleged that it had raised no new reasons in its adjudication response (the "*pre-emptive no new reply submissions*").

547. I agree with the *pre-emptive no new reply submissions* that the claimant only has the reply right to *new reasons* as provided by s24B of BCIPA, and I will consider the reply about the new reasons carefully.

548. The respondent also provided me with unsolicited submissions on 14 August 2015 in response to the claimant's reply. At that time I briefly reviewed these submissions in case they dealt with jurisdictional matters, but have not considered them in this decision, because they merely reiterated the *pre-emptive no new reply submissions* to which I've had regard.

549. In my view it was inappropriate to consider these unsolicited submissions, because I would have then been obliged to ask the claimant for its further submissions in reply as a matter of natural justice. Accordingly, I continued with adjudicating.
550. However, the 26 August 2015 unsolicited submissions from the claimant argued that I should not consider the unsolicited submissions of the respondent, and questioned whether I should be asking for submissions on the point.
551. I had already decided not to consider those of the respondent, and I did not consider it necessary to write to the parties at the time, as there was no need for further submissions.

l. Alleged new reasons

552. At paragraph [2.6] of the claimant's reply it said that it had identified new reasons in the adjudication response, and that they went further than explaining and clarifying reasons given in the payment schedule.
553. At paragraph [2.9] of the claimant's reply, it argued that it was a question of fact whether or not the respondent had included new reasons in its adjudication response, and these were either:
- (i) new legal reasons; or
 - (ii) new factual reasons.
554. In so far as the new legal reasons were concerned, the respondent referred to part 3 of its reply, which dealt with "jurisdictional error" and invited me to determine the matter in accordance with BCIPA, and the terms of the contract.
555. I understood the claimant's submissions and continued to adjudicate precisely on that basis.
556. In so far as the new factual reasons were concerned, the claimant argued that the statutory declaration of Tim Brown:
- (i) Contained new reasoning for withholding payment;
 - (ii) this new reasoning was not included in the payment schedule, and in fact Mr Brown's statutory declaration was not in the payment schedule; and as such.
 - (iii) the claimant was entitled to reply to that new reasoning.
557. I agree with the claimant that as a matter of fact, if there are new reasons in the adjudication response which were not in the payment schedule, then any new reasons which have been put forward by the respondent, allows the claimant to a reply.
558. However, if I find that no new reasons have been advanced, then I will ignore any reply submissions advanced by the claimant in response.
559. At paragraph [2.12]. The claimant referred to new reasons to which the claimant was replying, and it divided its reply into the following categories:
- (i) Sections 1 containing a joint statement by the directors of Allclad responding to the new reasons contained in Mr Brown's statutory declaration from paragraphs 10 onwards;
 - (ii) Section 2, which was a reply to the new reasons identified in section 6, regarding the valuation of contract works in the adjudication response;
 - (iii) Section 3 which was the reply to new reasons relating to those contained in sections 7 regarding variations, additional works and other claims in the adjudication response;
560. Section 4, which was the reply to new reasons contained in section 8 – deductions, adjustments and set off in the adjudication response;
561. Section 5, which was a statutory declaration by Marcus Praetorius responding to the new reasons contained in Mr Tim Brown's statutory declaration from paragraphs 10 onwards.
562. At paragraph [2.14], the claimant said that in considering the issue of fees, any new reasons put forward by the respondent needed to be taken into account because it serves to increase the fees of the adjudication unnecessarily.

563. Given that a substantial part of the reply dealt with valuation, I considered it appropriate that consider the quantum under the merits of the claim below. At which time I will closely scrutinise the respondent's submissions to determine whether any new reasons have arisen.

XIII. Conclusion about the claimant's contractual entitlement

564. I have considered the submissions and the relevant documents in some detail, and applied them to the principles required to demonstrate contractual entitlement.

565. I find that I am unable to be satisfied from the evidence, and the claimant's submissions, that the claimant has discharged its onus regarding contractual entitlement for its prolongation claim CLo6 for the reasons identified above.

566. The contract signed by the parties required strict compliance with conditions precedent, and I find that the claimant did not comply with them in preparation for its prolongation claim.

XIV. The merits of the claimant's claim and the respondent's deductions

567. Whilst the above findings will no doubt be of concern to the claimant, it needs to appreciate that on the evidence presented by it and the submissions it provided in the adjudication that it failed to discharge its overall onus regarding CLo6, which is essential in adjudication.

568. It now leaves me to consider the quantum of the payment claim, and in order to not lose track of the quantum-related documents they are identified again.

569. The *payment claim* claimed under the following headings (together with the summary documents and details of each claim):

- (i) Contract works;
- (ii) Variations and additional works;
- (iii) Deductions and set offs.

570. The *payment schedule* responded (with supporting documents in folder 2, schedule 2) as follows:

- (i) *Contract works* - it identified 20 items with which it had a dispute;
- (ii) *Variations and additional Works* - it disputed 14 of the 17 items claimed;
- (iii) *Deductions and setoffs* - it identified 22 set off items, as well, as claiming retention.

571. The *application*, comprised the following documents:

- (i) **volume 1** - comprising:
 - (a) a summary of its claims;
 - (b) some calculations relating to an alternative valuation under CLo6;
 - (c) as well as the valuation of works completed after 20 February 2015;
- (ii) **volume 5** - comprising:
 - (a) its response to sections 4 and 6 of the payment schedule;
 - (b) its entitlement documents;
- (iii) **volume 6** - comprising:
 - (a) measurement bundle;
 - (b) valuation of contract works;
- (iv) **volume 10**, consisting of the claimant's reply to section 6 of the payment schedule regarding other adjustments, deductions and claims.

572. The *response* comprising:

- (i) **volume 1**, comprising:
 - (a) section 6 - valuation of contract works;
 - (b) section 7 - variations, additional works and other claims;
 - (c) section 8 - deductions, adjustments and set off.

- (ii) **Volume 2**, which was the statutory declaration of Tim Brown, which only dealt with quantum, insofar as he said that he had been involved in the payment schedule details spreadsheet, together with appendices 1, 2 and 3. I have included this document in the list for review, because the claimant in the reply says that it advanced fresh reasons for non-payment;
- (iii) **volume 9**, comprising:
 - (a) annexure item 1
 - (b) annexure item 1.2
 - (c) annexure item 3;
 - (d) annexure item 3.1;
 - (e) annexure item 4.1;
 - (f) annexure item. C Lo6;
 - (g) annexure item VO02;
 - (h) annexure item AW04;
 - (i) annexure item AW05;
 - (j) annexure item AW08;
 - (k) annexure item AW09, which contained no documents;
 - (l) annexure AW10;
 - (m) annexure item AW11 containing no documents;
 - (n) annexure CLo3;
 - (o) annexure CLo4;
 - (p) annexure CLo7;
 - (q) annexure CLo8;
 - (r) annexure SO03;
 - (s) annexure item 10;
 - (t) annexure item 11;
 - (u) annexure item 12;
 - (v) annexure item 13;
 - (w) annexure items 20 and 21;
 - (x) annexure item 26.

573. The *Reply* - insofar as it responded to new reasons, and I considered this issue at this valuation stage.

574. Having already closely read Mr Brown's statutory declaration to deal with the entitlement submissions, I read it again closely to discern whether it had identified any new reasons for non-payment.

575. This was in response to paragraph 2.1 of the reply, where the claimant submitted that the contents of Mr Brown's statutory declaration contained all new reasoning for withholding payment. In particular, at paragraph 2.12 (b)(1) and (5) of the reply. The claimant said that the new reasons were identified from paragraph 10 onwards.

576. I could not understand its reference to, from paragraphs 10 onwards, but having looked closely at paragraph 3.10 of Mr Brown's statutory declaration, I note that he does make reference to his involvement *in adding to matters in the response* (the "additions") as follows:

- (i) the contents of the detailed spreadsheet in which he identified that *he had supplemented some particulars*, he says he set out further comments regarding the claimant's prolongation costs, and expanded on the respondent's assessment of the set off claims. [Paragraph 3.10(a)];
- (ii) Appendix 1, he said that he set out the factual evidence *that expanded on the particulars* identified in that appendix [Paragraph 3.10(b)];
- (iii) the adjudication application, where he said that he'd assessed whether the application documents changed the assessment included in the detailed schedule, and unless

expressed to the contrary, the detailed schedule continued to set out the respondent's position. [Paragraph 3.11];

577. I was not clear what Mr Brown meant by the *detailed schedule*, because he'd earlier talked about a *detailed spreadsheet*, and I presumed that this was the document to which he was referring.

578. It is necessary to consider *the additions* progressively before deciding whether it is appropriate that they are additional reasons for which reply submissions are allowed.

579. If new reasons emerged, I considered the claimant's reply. Otherwise, the claimants reply submissions on that issue were ignored.

m. Methodology employed

580. The claimant remains obliged to demonstrate its entitlement to the quantum claimed after having dealt with the respondent's objections in the payment schedule.

581. However, equally the respondent had to demonstrate its entitlement to the quantum deductions where they have been denied as legitimate by the claimant.

582. I now turn to each aspect of the claim under the headings identified above to deal with the claimant's claim.

583. However, the payment schedule identified overpayments made to the claimant, so there were an additional 20 items of set-offs than those previously identified by the claimant.

584. The reason for the set-offs varied, and they will be dealt with progressively.

585. At the outset, because of the contending submissions regarding amounts *in dispute*, *further setoffs and deductions*, I considered the safest approach was to make a finding regarding the amount claimed by the claimant for *contract works* in this adjudication together with the *amount previously paid* as baselines against which to assess the adjudicated amount.

586. The reason for doing this is that the payment claim identified, and the adjudication application emphasised the *disputed amounts*, rather than claims for the total amounts for each contract item. The respondent engaged with the claimant on this basis. I appreciate that sometimes this caused confusion and uncertainty for the respondent. For example at paragraphs [459] and [460] of the response, the respondent identified that the amounts in dispute stated by the claimant regarding some items were not correct, as the items remained in dispute. However, the parties chose to engage with one another on this basis, so this methodology was considered the most efficient to ensure accuracy in calculating the adjudicated amount.

587. In addition, the respondent, in its payment schedule, not only dealt with the set offs identified by the claimant in the payment claim, but added further setoffs associated with overpayments and breaches of contract by the claimant, for which it argued a deduction was appropriate.

588. As a matter of prudence, I identified the variation, additional works and claims made by the claimant in this adjudication amounting to \$1,188,001.27. However, this amount was subject to argument, and I merely provided it as a signpost at this stage.

589. Accordingly, by using the contract amount claimed by the claimant in this adjudication, and then finding the appropriate deductions from all of the material, then adding any variation/additional work amounts, and subtracting the amount previously paid, I found an adjudicator's amount to which GST was added.

590. From the payment claim, which is not controverted by the respondent, I find that the contract amount claimed is \$7,255,695.36.

591. The parties agree that the amount previously paid was \$6,522,979.57.

n. Contract works difference in value \$456,179.56

592. In the adjudication the claimant identified that the difference in the contract works amount was \$456,179.56 based on the respondent's deductions amounting to \$406,239.37, together with a contract works measurement difference of \$49,940.19.
593. The claimant at Appendix 1 part A – value of works completed – particulars of overpayment on page 3 of Tab 2 identified 10 items which the respondent claimed had been overpayments. The amount of these overpayments totalled \$406,239.08.
594. The claimant, at appendix 2 provided a reconciliation of the valuation of contract works in the payment claim with the payment schedule, and this totalled \$406,239.37.
595. The payment schedule identified 20 contractual items, with which it had an issue, and each is now considered. I carry each amount found to be correct to a spreadsheet in the Appendix titles "*Contract Amount from the Payment Schedule*" in order that a final calculation of the amount can be accurate about electronically.

Design item 1(b) approval of AFC design \$-5730

596. I note in paragraph 3.4, with reference to item 3.1 in the adjudication response (page 118 & 119) that the respondent makes reference to this item, which it had provided in Appendix 1 item 3.1 of the payment schedule.
597. I noted that the claimant in volume 10, refers to item 3.1 and identifies that the design issues associated with cable tray is not being installed by others, in accordance with the drawings had caused problems. It alleged that the respondent was making the claimant liable for costs in carrying out a design that was needed due to incorrectly installed work by others that coordination of the design was not the claimant's responsibility.
598. Whilst the respondent identified engineering and design time associated with closing out incomplete design issues, it provided no substantiation of this figure, which it could easily have done by providing the invoice or timesheets from "Cardno".
599. I note its reference at paragraph [565], to the statutory declaration of Mr Tim Brown ostensibly supporting this calculation, however, his generalised references to the schedules, to my mind does not alter the fact that the details contained therein were sketchy to say the least. Had Mr Brown identified each deduction specifically with reference to his involvement, it may have been the more cogent.
600. I find therefore that the respondent has not discharged its onus.
601. Accordingly, I reject the respondent's deduction of \$5730.

Design item 1 (j) – QA documentation - \$4260

602. In the adjudication response paragraph 2.1 (pages 100 and 101), the respondent essentially argued that no amount was payable for this item because it all related to QA for installation, and the claimant had admitted that it had not done the QA for installation.
603. The claimant argued that it was entitled an amount for this, because it was seeking payment for QA documentation for supply of materials.
604. The respondent referred to Notes 1 and 2 in the Part 1.1 of the *Schedule of rates*, and argued that in relation to the supply items listed, there was a requirement for quality documentation to be provided for payment to be made, such that implicitly QA was included in the supply rates.
605. To my mind, this does not explain why this item is under the design heading in item 1, and I am satisfied from the material that the design was complete. In my view, the item relates to the design only.
606. However, the respondent had paragraph [438] identified that the claimant had conceded that part of this item included QA for installation.
607. I note in **volume 6** of the claimants reply to the valuation of contract works the claimant provided the QA documentation and shipping documents in support of its claim.

608. I do not have any alternative valuation for the installation component of QA and am not satisfied that the claimant's entitlement to this item is nil, and therefore accept this amount for the design component.
609. I therefore cannot accept the respondent's deduction of \$4260.

Supply item 2 – TBM tunnel

610. There were 9 items with which there was a dispute identified as follows:

Item 2(a) Supply and Deliver (S&D) typical panels \$-14,625.10

611. In the adjudication response (pages 113 to 116) that the respondent makes reference to this item, which it had provided in Appendix 1 item 1.2 of the payment schedule.
612. In **volume 6**, in the claimant's reply to the valuation of contract works, this item was not referred to by the claimant.
613. In the payment schedule, whilst the respondent identified the touch-up activities repairing nonconforming panels, it did not identify in its material where these panels were defective and the extent to which they were defective, such that it was not clear why the duration, allowing for carrying out the activity and for travel between panels was reasonable. It provided only 2 photographs support of its deduction.
614. It did provide Appendix 2, which appeared to refer to percentage completion of the various panels in various locations, but did not link this data to the assertions in Item 1.2 in Appendix 1.
615. If that had been the material upon which the respondent intended to rely, I would have found that it had not discharged its onus.
616. However, in the response it provided far more detail about this item by identifying the number of panels, the cost to repair by reference to punch lists which it provided in document 3 of Annexure Item 1.2 in Volume 9.
617. At paragraph [the 546(a)] of the respondent said that the assessment of the 750 panel requiring the repair by Mr Brown's statutory declaration. I was unable to find any reference to Brown statutory declaration to that effect, apart from his generalised statement that he was involved in reviewing the materials in the adjudication application. In my view that is not substantiating the existence of 750 defective panels.
618. To my mind, this level of detail constituted new reasons, in that they now made it quite clear the extent of defects in the panel, the number of panels supported by detailed punch lists, which if these had been provided in the payment schedule would have enabled the claimant to deal with this issue with far more information at its disposal.
619. Accordingly, I was prepared to consider any reply about this issue, in order that the claimant is accorded procedural fairness arising out of the amended BCIPA provisions.
620. In the reply tab 4.2, the claimant responded to these new reasons.
621. The claimant reiterated that the punch list provided by the respondent did not identify 750 panels that needed touch-ups.
622. In particular, at paragraph [18] of the reply. The claimant makes the point that the touching a procedure needed to be completed prior to installation of the panels, and its evidence was that there was no panels installed by it before 27th of February 2015 that required touch-ups.
623. Furthermore, the fact that these punch lists were prepared between 2 and 24 April 2015, in circumstances where the claimant had been off site for nearly 2 months, in circumstances where the respondent was then responsible for the site, suggests to me that it bore the risk of any minor defects to the panels.
624. Because of the emphasis given by the claimant that it was unlikely that these panels were defective. Given that the respondent admitted that the claimant had hung approximately 95% of the panels on the support frames in the TBM tunnels (for example,

see paragraph [533(a)] of the submissions), I find that the respondent has not discharged its onus.

625. Accordingly, I reject the respondent's deduction \$14,625.10.

Item 2(b) S&D panel support structure – XP side - \$742.05

626. In the adjudication response paragraph 2.2 (pages 101 to 102), the respondent referred to items 2(b), (g) and (h), together and argued that it had correctly measured these items, and referred to Mr Brown's statutory declaration in support and argued that quantity calculation was correct. It argued that it had provided a detailed breakdown of the measurements of work in appendix 2, to which I've made reference above.

627. The claimant provided measurement breakdowns in its application material, and it included specific reference to the measurement bundle in **volume 6**. However, having regard to this measurement bundle. I note that it refers to the "*Designed Quantity of Panels*", which to my mind cannot be as accurate as as-built drawings and a survey following the requisite method of measurement.

628. Accordingly, I prefer the evidence of the respondent, which had detailed every panel in appendix 2 of the payment schedule.

629. I'm satisfied, having regard to this material that the respondent is justified in deductions for these 3 items.

630. I note that the claimant's alleged that taken into account the \$30.37 in respect of item 2 (b), which means I accept the fully deducted amounts for each item.

Item 2(c) S&D panel support structure – non XP \$-9790.20

631. In the adjudication response paragraph 2.3 (page 103), the respondent referred to paragraphs [549] to [559] of its response submissions regarding its position on this deduction. In appendix 1 of the payment schedule, it made reference to the shortage of the adjustment angles in the sub-the frame materials in item 3, and that it needed to purchase 435 angles at a cost of \$10,500.

632. This is inconsistent with the deduction of \$9790.20 identified on page 1 of its detailed spreadsheet. I therefore will only consider the amount of \$9790.20 in this item.

633. The respondent essentially argued that it had paid for these items, and have not received these angles and it provided a series of purchase orders, demonstrating that it had ordered these materials, none of these purchase orders add up to either amount of \$9790.20, nor \$10,050, so it is unclear to me what the respondent's precise amount is.

634. The claimant took issue with this deduction, stating that it had provided sufficient sub-frame materials to complete the works, and had handed over the surplus to the respondent on termination. It explained that due to the lack of precision of the as built survey provided by the respondent, that the angles that it had ordered in accordance with the survey were incorrect. As a consequence, it ordered further angles when it discovered that it did not have sufficient. When the contract was terminated it cancelled this order, however, this amount was used as evidence of the costs of these further angles.

635. I note that the claimant does not deny that it needed to provide these materials on termination, after having been paid for the surplus that it had not used. I'm satisfied that as a result of the errors in that survey that 200 angles needed to be ordered by the claimant.

636. I'm satisfied that the respondent did have to purchase additional angles, but am not satisfied that 445 angles were required and prefer the 200 identified by the claimant because it had knowledge of the number of angles required during the project.

637. I am also not satisfied about the amount that the respondent said that it had paid should be used in the calculation, because the number of angles claimed is greater than what the claimant said was the correct amount.

638. I prefer the valuation of the 200 angles provided by the claimant of \$1843 as better evidence of the costs for this item.
639. Accordingly, I accept a deduction of \$1843 for this item.

Item 2(g) S&D – non typical panels - \$264

640. the See Item 2(b) above.

Item 2(h) S&D – Opening returns -\$100 80

641. See Item 2(b) above.

Item 2(i) Installation #1 Set out and drill anchors - \$5757.02

642. In the response at heading 2.4, it made reference to items 2 (i), 2(l), and 2(m) together at paragraphs [456] through to [471].
643. In so far as items 2(l) and 2(m) were concerned, the respondent referred to the detailed spreadsheet contained in schedule 2 of the payment schedule as well, as paragraphs [520] to [537] and [615] to [623], and [571] to [578] of the adjudication response.
644. In relation to all of these submissions, the respondent identified that the claimant had not accurately measured the actual quantities completed by it in accordance with note 8 to schedule 1 of part E of the contract, which set out the method of measurement as being the actual gross area of panel items.
645. The respondent identified that it had assessed the correct quantities based on the as-built drawings, and a survey conducted by it, and that the claimant had not adequately substantiated how it measured the quantities in respect of its work items.
646. The respondent concluded that the claimant had no entitlement to be paid the amounts claimed under these items. However, I needed the respondent's position on each deduction for comparison with those of the claimant and the submissions in relation to the amount for item 2(i) were not provided.
647. However, at paragraph [465(a)] of the response the respondent stated that the area for this item was 46,642.31 m², and not 46,885 52 m². The contract rate for this item was \$7.80, so I calculate that the respondent's assessment for this item should be \$363,810.02. I note that the amount claimed for this item was \$365,707.06.
648. I am satisfied that the respondent had carried out the more accurate assessment of the gross area in square metres, so I accept its area and by my calculation of the difference between these 2 items is \$1897.04. This is the amount identified by the claimant in **volume 6**, in the application, but it is sought to be paid this amount, whereas I find it is a deduction.
649. Accordingly, I accept that this is the deduction for this item of \$1897.04 because the claimant has been overpaid.

Item 2(j) Installation #2 install sub-frame – 1st fix \$-4166.58

650. At heading 2.5 relating to item 2(j) and item 2(k) in the response paragraphs [472] through to [487] the respondent asserted that the claimant had overstated the quantity completed for these work items, particularly given that the claimant admitted that it did not complete those work items.
651. The respondent referred to its payment schedule assessment for the areas for these items, which it said had been based on the as-built drawings and survey conducted, as identified previously, in accordance with note 8 to schedule 1 to part E of the contract.
652. The respondent asserted that the correct amount for this item was 46,146.88 m². It further alleged that it was the claimant incorrect measurements for which it had not provided any evidence that explained the difference and it maintained its measurements were correct.

653. In volume 6, the claimant again made reference to its measurement bundle supporting its finalised quantity of 46,704.23 m². However, again, this referred to the “*Designed Quantity of Panels*”, which to my mind is not as accurate as an as built drawing assessment and survey.
654. Accordingly, I prefer the evidence of the respondent that the correct amount was 46,146.88 m², which means correct amount for this item is \$673,044.76. I note that the claimant claimed the amount of \$677,211.34, which is a difference of \$4166.58, and I find this is the appropriate deduction for this item.

Item 2(k) Installation # 3 level slab frame – 2nd fix \$-6461.34

655. I have already found that I prefer the measurement of the respondent outlined under the previous item in which it included item 2(k) in its analysis.
656. For the same reasons as what I have found in the previous item, I prefer the respondent's measurement, which totalled 45,927.78 m², resulting in an amount of the \$702,695.03.
657. The claimant's claim for this item was \$709,156.38, which I find is incorrect, and the difference is \$6461.35, which I find is the correct amount to be deducted.

Item 2(l) installation#4 – VE panel \$-247,826.03

658. This is the most significant deduction asserted by the respondent in this adjudication, and essentially comprises a claim for the respondent conducting a quality assurance “sweep” throughout the project because the claimant had failed to carry out QA before it was terminated.
659. At paragraph [465] of the response, the respondent stated that the claimant had only completed 11,610.93m², as it had identified in its Detailed Spreadsheet in the payment schedule. This is inconsistent with its Appendix 2, showing that 44,529.69 square metres had been completed, and I therefore reject this assessment by the respondent.
660. It may be that it was using this assessment in the payment schedule as a line item to justify the deduction, but I cannot accept that it is a correct basis for deduction.
661. At paragraph [5 to 8] the respondent asserted that the cost for conducting this was a least \$226,890.72, which it identified in item 1 of its appendix 1 to the payment schedule.
662. The respondent acknowledged that its costs identified in this item were estimates only. However, the particulars of the alleged incomplete/defective work of the claimant identified in *item 1 of Appendix 1 of the payment schedule* consisted of allegations that:
- (i) in all locations of the TBM tunnels the panels which had been installed are not in compliance with the contract minimum requirements;
 - (ii) in some areas panels have been installed with plastic covers still on the face of the panels, and these need to be removed;
 - (iii) in some areas, the panels are dirty and require cleaning;
 - (iv) in no areas was a complete QA sweep completed to the satisfaction of capacity or IV/BCC;
 - (v) in no areas has any QA paperwork been completed by Ceratec confirming installation works have been completed in accordance with the approved ITP.
663. In relation to the cost breakdown, the respondent's assessment was as follows:
- (i) areas where the panel has been installed, but where no QA sweep has occurred, will be assessed at 66% complete. The reasoning for this is that rate for the full and final installation of each typical size panel (1230 mm times 2700 mm) equates to \$26.04 per panel;
 - (ii) On the basis that the QA sweep works to level, adjust, straighten, align the panels will take a total of 5 weeks to complete the TBM tunnels (both EB & WB) and require an

- eight-man team with equipment consisting of panel lift, DWP (boom lift), forklift, and a flatbed truck;
- (iii) Total estimated costs will therefore be \$226,970 over this 5 week period with breakdown per below
 - (iv) supervisor plus 7 man crew working 66 hours per week.
 - (v) Supervisor equals \$6040 per week.
 - (vi) Labour \$37,054 per week.
 - (vii) Equipment (EWP \$150, forklift \$150, flatbed truck at \$1500, panel lift \$500= \$2300/wk;
 - (viii) no allowance for transiting engineering or supervision team.
 - (ix) So $\$226,970/13284 = \17.08 per panel;
 - (x) note these are estimates only and actual costs incurred in these remedial works may be higher.
664. The respondent then identified the quantity of 13,284 panels complete, and that the units to be used was per panel, resulting in a deduction of \$17.08 per panel for an adjustment of \$-226,890.72.
665. The respondent claims this deduction in accordance with clause 19.4 and 19.5(c) and (d) of the GCCC.
666. The claimant in **Volume 10** in response to Item 1 argued, on page 4 of 8, that once the panels were installed, they became the property of the respondent. The justification for this was that the respondent had provided in the nominated installer agreement between the claimant and the respondent's containing this clause. It added (on page 5) that the claimant had failed to advise the claimant of any defects in the panels before the date of termination, and therefore the claimant had installed all panels in accordance with the contract (the liability argument).
667. In addition, at paragraph [9] on page 5, that the amount deducted was excessive and without justification (the "quantum argument").
668. Insofar as the liability argument is concerned, the respondent engaged with the claimant on this point at paragraph [533(f)] saying it was misguided and irrelevant, and that it referred to submissions elsewhere on this point.
669. I was unable to find the other submissions referred to. However, I agree with the respondent that a sub contract with its installer has no bearing on the claimant's responsibilities to the respondent regarding the panels. The fact that Mr Brown had been involved in the drafting and endorsing of this sub contract, is not in my view does not alter the contractual position of the claimant with the respondent. Accordingly, I reject the claimant's liability argument.
670. However, the claimant's submission that the amount deducted is excessive is a different matter.
671. As have already said, the respondent, as far as deductions and set-off are concerned bears the onus of the demonstrating entitlement and quantum. With the greatest respect to the respondent. I am unable to accept the respondent on this important issue of quantum.
672. In item 1 it states that it has assessed the panels as 66% complete insofar as QA is concerned. It provides no objective justification for that assessment, and to my mind it does not sit comfortably with Appendix 2, which demonstrates that, in relation to BQ Item 2(l), that 13,284 panels were complete out of a total of 13,870, which shows that 96% of the panels had been installed.
673. I appreciate the fact that installation does not mean that from a QA perspective the installation was "blemish free", but to make a subjective assessment that this demonstrated that the panels were only 66% complete, does not appear a reasonable assessment.
674. The respondent argued that the rate for the full and final installation of each typical size panel equated to \$26.04 per panel, but does not demonstrate how this figure is derived. I had regard to schedule 1 in part E of the contract which provides the schedule of

rates, item 2 (l) at the rate of \$7.50 per square, which calculates to \$24.91 per typical panel, and not \$26.04 per panel.

675. The respondent then made the assessment that it would take 5 weeks to carry out the adjustment activities in order to satisfy QA, but provided no tangible basis upon which this 5 weeks assessment was made.
676. To my mind it does not appear a reasonable assessment that panels 96% of which, having already been installed were only 66% complete, such that 34% of work still needed to be done to have the panels deemed satisfactory from a QA point of view.
677. Furthermore, to assess that this work would take 5 weeks to complete without any guidance as to how this figure was assessed, makes it impossible for me to make any determination based on the figures provided by the parties, as to what would be a reasonable estimate for the carrying out of this work.
678. I note that in the payment schedule, the respondent also made reference to Item 9.1 on this issue, which sought a deduction for a QA audit, but this does not assist in the assessment of the deduction about which I have to make an assessment.
679. Accordingly, given the respondent bears the onus regarding quantum in this respect, I am unable to accept this deduction, so I value it at nil dollars.

Item 2(m) Support structure E/O for – non XP side of tunnel \$-60,878.92

680. This is referred to in the payment schedule detailed spreadsheet and Item 3.2 in Appendix 1 of the payment schedule, as materials paid for, but not delivered in full.
681. Essentially, the basis for this deduction is that the angles provided by the claimant were only 3mm thick and not 5mm thick, which had been identified in Note 13 in Schedule 1.1 of Part E of the GCCC as t=5mm.
682. In the response, the respondent then argued that the basis of the deduction was that the angles were defective. I find that this was a new reason for the deduction, which was not in the payment schedule, and therefore also considered the reply submissions on this issue.
683. At paragraph [578] of the response, in response to those of the claimant, the respondent argued that the rate for item 2(m) required an angle thickness *equal* to 5 mm, not *up to* 5 mm.
684. I find that the design of these angles was approved by the respondent and that these angles were used on the project. I refer to the reply response paragraphs [9] through to [14] in which the claimant said that item 1.1 of schedule 2 of the GCCC required that the scope of works must satisfy the performance specifications, project specific technical standards, the contract, agreement and other conditions referenced in the contract.
685. Having accepted the claimant's design, for which the claimant was responsible, and which required that the angles be 3 mm thick, in circumstances where the claimant was required to adhere to performance specifications, and then seeking a deduction on the basis that the angles were defective after termination of the contract, requires to my mind more cogent reasons for the deduction in order that the respondent discharge its onus.
686. I ignore the claimant's submission at paragraph [15], that it would be unfair and unreasonable for the respondent to make this deduction after termination of contract. As an adjudicator, I am not required to decide whether things are fair and unreasonable. I am obliged to decide matters in accordance with the contract, and I am of the view that the respondent has failed to discharge its onus, because it:
- (i) has been unable to explain that the angle thickness of 5 mm was a requirement of the contract, in circumstances where the claimant was obliged to adhere to a performance specifications, in which its design established that a 3 mm thick angle was sufficient;

- (ii) the design was accepted by the respondent, and the angles were installed in accordance with drawings that had been certified by an RPEQ, approved by the independent verifier as well as the Brisbane City Council (paragraph [12] of the reply).
 - (iii) failed to demonstrate that the contract made provision for a deduction on the basis of a percentage difference in thickness of the angle. This is a critical factor in adjudication because the adjudicator is required to value in accordance with the contract, or what the parties have agreed.
687. Accordingly, I find that the respondent has failed to discharge its onus in relation to this deduction, which is valued at \$0.

Supply item 3 – Western connection

688. There were 4 items with which there was a dispute. These were rather difficult to follow because the parties sometimes did not directly engage with the amounts.
689. Furthermore, the payment schedule detailed spreadsheet identified reasons that made further reference to entries in Appendix 1, which dealt with entirely different work or materials supply activities than those identified in the payment claim.
690. I have separated the contending claims into 2 parts, but have discussed them sequentially. Under these headings, because that is how the parties had dealt with the matters.
691. However, in my spreadsheet A2, "*Disputed Contract Amount from Payment Schedule*", I have focused on the payment claim and detailed spreadsheet in the payment schedule and calculated, the deductions for those items.
692. I have another spreadsheet A4, "*Respondent's other deductions in the payment schedule*" which includes the other deductions under the same bill of quantities. Item number, together with other item numbers identified in the payment schedule.

Item 3(b) S&D panel support structure – 0-500mm offset \$-29,474.37

Payment claim and detailed spreadsheet dispute

693. This is referred to in the payment schedule detailed spreadsheet, which also in the heading *Detailed Reason for Difference* makes reference to Item 4 & 4.1 in Appendix 1 and Appendix 3 of the payment schedule, as materials paid for, but not delivered in full.
694. I deal with the Appendix 1 and Appendix 3 arguments and calculations under a heading *Respondent's other deductions for Items 3(b), 3(c), 4(b) and 4(c)* below, because, as I have said above, although they are under the same Bill of Quantities heading, they relate to other work.
695. The payment schedule detailed spreadsheet identified this deduction as \$29,474.37.
696. In the response headed 2.6, with reference to item 3 (b) and 3 (c) at paragraph [488] to [506] the respondent said that the payment claim for these 2 items were:
- (i) Item 3(b) \$12,798.42;
 - (ii) Item 3(c) \$6694.72.
697. In **volume 6**, regarding item 3(b), the claimant identified the difference between the claimed amount and the approved amount was \$12,798.33 and it claimed that the difference in this claim.
698. The claimant made reference to page 188 of the measurement bundle which identified the Western connection sub-frame and a measurement of 1832.42 m² for this item. It argued that the claimant had approved 1501 m² previously. It attached appendix 2 to its response, demonstrating that this was the amount measured by the respondent, which was then reduced again to 1416.89 m² on a 9 February 2015.
699. If I refer to the detailed spreadsheet for this item, I note that the respondent stated that the quantity approved at termination was 875.46 m², which translated to a value of

\$26,964.17, which it provided in its payment schedule, and the difference was identified as \$29,474.37.

700. To my mind the safest approach with the assessment of this item is to identify that the claimant is claiming \$56,438.54 for this item based on the measured amount identified above. Taking the value approved by the respondent at termination of \$26,964.17, the difference as identified in the payment schedule of \$29,474.37, which is the amount identified in the detailed spreadsheet.
701. The claimant said that these previous assessments by the respondent making reference to item 3(e) was incorrect because that dealt with cantilevered posts, and it maintained its claim of \$56,438.54 for this item.
702. The contest in relation to this item became one of measurement. At paragraph [482] of the response, the respondent said that it had assessed the quantities based on drawings and survey conducted in accordance with note 8 of schedule 1.
703. In other items. I have preferred the respondent's measurement to those of the claimant because the difference between the design or drawing areas claim by the claimant and the measurements provided by the respondent from as built drawings and survey did not differ significantly. For example, in relation to item 2(i) that I have dealt with above, had the respondent's measurements of 46,642.31 m², compared to the claimant's measurement of 46,885 52 m², which is a difference of 1%.
704. However, in this instance, the respondent's earlier measurement of 1501 m², was then reduced to 1416.89 m² on a 9 February 2015, and then became 875.46 m², a few weeks later at termination.
705. I am not satisfied that this measurement of the respondent, about which it provided no substantiation, prevails over that of the claimant. The claimant had used drawings from the measurement bundle, pages 145 to 152, which it summarised in a breakdown on page 188 to demonstrate the measurement for these items, and I prefer the claimant's measurement. I appreciate that the claimant's measurements have been out by a few percent from the as-built measurements carried out by the respondent for other items, but a 50% difference appears unrealistic.
706. I therefore find that the respondent has not discharged its onus in relation to this particular deduction, such that it is valued at \$0.

Respondent's other deductions for Items 3(b), 3(c), 4(b) and 4(c) - \$37,568 will

707. In the detailed reasons in items 4 & 4.1 of Appendix 2 and Appendix 3 make reference to:
- (i) an adjustment in item 4 of a deduction of \$37,568;
 - (ii) an adjustment in item 4.1 of a deduction of \$12,460;
 - (iii) an adjustment in appendix 3 of \$406.58.
708. At paragraph [583] of the response, the respondent submitted that the cost of materials that had not been provided by the claimant was \$37,568 and that the particulars of this build-up was set out in Appendix 1 to the detailed spreadsheet, and was supported by Mr Brown's statutory declaration.
709. I see no support, in Mr Brown's statutory declaration, apart from his generalised comments about him being involved in the calculations, and these deductions did not correlate with this item number.
710. In heading 3.6, regarding item 4, on page 121 of the response, from paragraphs [580] through to [588] the respondent says that item 4 relates to work items 3(b), 3(c), 4(b) and 4(c) for materials not provided by the claimant, and in its assessment the deductions amounted to \$37,568.
711. At paragraph [587(b)] of the response the respondent said that Tim Brown:

“...conducted a stocktake of the materials supplied by the claimant for these areas at this time, and it identified a significant shortage of anchors, threaded rod, epoxy, sub-frame materials, a AP₄ and AP₅ type cantilevered posts and various consumables like bolts, washers and isolation washers required to complete the installation in the eastern and western connections.”

712. I am unable to find in Mr Brown's statutory declaration a reference to a **stocktake**, nor was any attached to his statutory declaration. At paragraph 3.10(b) he did make reference to Appendix 1, based on his observations record an assessment of the work, costs, and associated matters, but there is no reference to a stocktake.
713. The claimant in **volume 10**, engaged with the respondent's deduction of \$37,568 for materials paid for, but not delivered, and said that it had delivered all these materials, which had been assessed and paid for in previous progress claims. It added that it had received no shortfall advice from the respondent on sub-frame materials upon termination, such that it denied that it now had any responsibility for missing materials.
714. It also argued that the respondent had no basis to deduct the approved amount for missing materials without proper records and notification.
715. In the response, at paragraph [587] the respondent said that the claimant's assertion that it supplied all the required materials was false, and that as at the date of termination the claimant had not commenced any installation work in either the Western and eastern connections, and that the **stocktake** identified the significant shortage and materials.
716. I'm unable to find any **stocktake** in the respondent's material, and am not satisfied therefore that it is demonstrated its onus.
717. In the circumstances, I am therefore unable to allow any deduction for these additional items 3(b), 3(c), 4(b) and 4(c), which I value at \$0.

Item 3(c) S&D panel support structure – 500 – 1500 mm offset \$-23,370.72

718. This is referred to in the payment schedule detailed spreadsheet which identified as a deduction of \$23,370.72, which also in the heading *Detailed Reason for Difference* makes reference to a Item 4 & 4.1 in Appendix 1 and Appendix 3 of the payment schedule, as materials paid for, but not delivered in full.
719. Item 4 of appendix 1 has already been referred to in 3(b) above, and amounted to a deduction of \$37,568.
720. Again, I deal with the Appendix 1 and Appendix 3 arguments and calculations under a heading *Respondent's other deductions for Items 3(b), and 3(c)* below, because, as I have said above, although they are under the same Bill of Quantities heading, they relate to other work.
721. In the detailed spreadsheet for this item it was clear that the claimant had claimed \$24,468 at termination for an amount of 611.7 m². Although the respondent had previously approved an area of 444.332 m², the quantity it identified in the detailed spreadsheet at termination was 27.43 m², amounting to \$1097.28, which resulted in a difference of \$23,370.72.
722. The claimant in **volume 6**, made reference to the S&D of the panels support structure, which is consistent with the payment schedule item, and in it the claimant referred to the quantity it had applied for of 611.7 m², amounting to \$24,468, and the approved amount by the respondent of 444.33 m², amounting to \$17,773.48.
723. Those amounts correlate with the detailed spreadsheet, except that the respondent identified that the quantity approved for determinations was 27.43 m², amounting to \$1097.28, which yielded a difference of \$23,370.72.
724. The claimant's submissions had not taken into account the revised reduced amount of the respondent, as it was using the previously approved amount of \$17,773.48, which meant the claimant said that the difference was that \$6694.72, whereas the correct figure

used the lower square metre area of 27.43 m² is \$23,300.72, as provided in the detailed spreadsheet in the payment schedule.

725. At heading 2.6 relating to Items 3(b) and 3(c) of the response, paragraphs [488] through to [506], the respondent argued, as previously, that its assessment was based on as built drawings and a survey conducted by it. However, details of that survey were not provided, and in contrast, the claimant made reference to the measurements that it had made, albeit from the drawings, which it said accurately reflected the amount of work carried out.

726. For the same reasons identified under 3(b) above, I prefer the evidence of the claimant as demonstrating the more accurate measurement, as there was no measurement provided by the respondent.

727. Accordingly, I value this deduction at \$0.

Respondent's other deductions for Items 3(b) and 3(c) -\$12,460

728. In item 4.1, which was another reference in the detailed spreadsheet, the respondent's amount for deductions of \$12,460 was associated with some design costs incurred by the respondent in closing at the claimant's design issues.

729. In the response, headed 3.7 relating to item 4.1 from paragraphs [589] through to [597], the respondent was dealing with design issues, and the build-up of the amount set out in appendix 1 and supported by the statutory declaration of Mr Tim Brown. Again I find no specific details in Mr Brown's statutory declaration, in relation to this issue, apart from the general references that he had made to the payment schedule and adjudication application materials referred to above.

730. The claimant contested this in **volume 10**, and said that the respondent had the contractual responsibility for design coordination of interfacing work, and that there was insufficient detail provided by the respondent to comment on the design issues and clashes with other work activities, and that there was no evidence of a clash on the approved drawings. The claimant also said that it had no knowledge of the design issues.

731. At paragraph [596] of the response the respondent submitted that the claimant's lack of knowledge of design was false and made reference to some emails from Tim Brown to Mike Smart and attached copies of the email said that there were many other design issues in relation to the Western connection.

732. The respondent added that the claimant was required to prepare a design that was fit for purpose and address interfacing work, and that the respondent was not obliged to coordinate its design. It said that the costs of rectification of the defective design should properly be deducted at \$12,460 in aggregate for items 3 (b) and 3 (c).

733. The respondent at item 4.1 in appendix 1 identified design costs that it incurred, but again it provided no substantiating documents regarding the quantum calculation, and given that it was obliged to demonstrate its onus, I am unable to be satisfied of this deduction.

734. Accordingly, I value this deduction at \$0.

735.

Item 3(j) S&D – Opening returns -\$705.60

736. This dispute relates to a measurement issue and the claimant referred to a measurement breakdowns for this item regarding panel sizes, which appears to be taken from the bill of quantities and the design measurement of panels.

737. This measurement was criticised by the respondent who said that the claimant had not demonstrated its onus in relation to this measurement, and that its as-built drawings and survey were more accurate. The respondent criticised the claimant's lack of substantiation, and argued that documents in the payment claim and application did not substantiate its onus.

738. However, this is a deduction, and despite referring to, as-built drawings and survey, the respondent relies upon its measurement summaries in appendix 1, together with references to payment claim 32 assessment and payment claim 34 assessment. However, it provided neither of those assessments for my consideration, and it bears the onus of proving a deduction.
739. Accordingly, having found that the respondent failed to demonstrate its onus, the deduction for this amount is \$0.

Item 3(k) Installation #1 Set out and drill anchors \$-17,851.13

740. The detailed spreadsheet for this item identified that 602.2 m² was the measurement approved at termination and the detailed reasons referred to appendix 1 item 6.
741. By reference to this item. The respondent's argument was that the set out was incomplete, such that the works in this area were assessed at 25%.
742. It provided a detailed explanation as to why the set out was incomplete and provided a calculation, demonstrating that 25% of 2408.8 m² resulted in a figure of 602.2 m², which it approved for payment for the Western connection and 240.35 m² for the eastern connection.
743. The claimant in **volume 10**, appears to make a concession that the survey work was incomplete, and focused on the fact that there was an agreement between the parties that every 4th anchor hole would be set out by the surveyor for which a payment of 85% was made (the "concession").
744. It added that as a matter of practicality, the installers would then use their templates to mark the positions of the extra holes, and would also carry out the measurements for the 15° set off once the position of the pre-tension cables had been established. It appeared to focus on this agreement, and the fact that the survey work using a surveyor, which was the hardest part, was over.
745. However, I'm not satisfied that the concession relieved it of its obligations to complete this work for payment to be made. Accordingly, I am not satisfied with the claimant's arguments.
746. I am satisfied that the respondent has demonstrated its onus by the detailed explanation, and that it has allowed the amount of 240.35 m for the eastern connection in item 4 (k).
747. Accordingly, I accept the respondent's deduction of \$17,851.13 for this item.

Supply item 4 - Eastern connection

748. There were 4 items with which there was a dispute identified as follows:

Item 4(b) S&D panel support structure - 0-500mm offset \$-6261.33

749. The detailed spreadsheet for this item identified that 22.56 m² was the measurement approved at termination and the detailed reasons referred to appendix 1 item 4 and 4.1 and Appendix 3.
750. The detailed spreadsheet itself provided a deduction of \$6261.33, but I was unable to find any substantiation for this measurement anywhere else in the payment schedule. It made reference to appendix 1 items 4 and 4.1 and Appendix 3. The arguments associated with them have already been dealt with above where I had found that the respondent had not demonstrated its onus.
751. Appendix 3 had 2 small deductions of \$135.53 and \$67.76 for item 4(b) in its spreadsheet, but I was unable to understand what this was trying to achieve.
752. Accordingly, I am unable to be satisfied that the respondent has discharged its onus so the value of the deduction is \$0.
- 753.

Item 4(c) S&D panel support structure – 500 – 1500 mm offset \$-10,414.80

754. The detailed spreadsheet for this item identified that 414.8 square metres was the measurement approved at termination and the detailed reasons referred to appendix 1 item 4 and 4.1 and Appendix 3.
755. The detailed spreadsheet itself provided a deduction of \$10,414.80, but again I was unable to find any substantiation for this measurement anywhere else in the payment schedule. It made reference to appendix 1 items 4 and 4.1 and Appendix 3. The arguments associated with them have already been dealt with above where I had found that the respondent had not demonstrated its onus.
756. Appendix 3 again had 2 small deductions of \$173.58 and \$86.79 for item 4(c) in its spreadsheet, but again I was unable to understand what this was trying to achieve.
757. Accordingly, I am unable to be satisfied that the respondent has discharged its onus so the value of the deduction is \$0.

Item 4(j) S&D – Opening returns \$-403.20

758. The detailed spreadsheet for this item identified that 63.08m² was the measurement approved at termination and the detailed reasons referred to assessment, or payment claim number 32 and 34. Neither of these assessments were provided from my consideration.
759. The detailed spreadsheet itself provided a deduction of \$403.20, but I was unable to find any substantiation for this measurement anywhere else in the payment schedule.
760. Appendix 3 identified this item, but had no amounts relating to it.
761. Accordingly, I am unable to be satisfied that the respondent has discharged its onus so the value of the deduction is \$0.

Item 4(k) Installation #1 Set out and drill anchors \$-7096.37

762. I refer to item 3(k) above where I have already in satisfied that the measurement of 240.35 square metres is correct and that the deduction of \$7096.38 identified in the payment schedule accurately reflects the difference between the respondent's latest measurement and the claimant's claim.
763. I'm satisfied that the respondent has discharged its onus in relation to this item, so that the deduction is \$7096.37.

Conclusion on Disputed contract amounts

764. I have transferred all the deductions to Appendix A2 *Disputed Contract Amounts from the Payment Schedule* of this decision, which is a spreadsheet. I have calculated that of the \$456,179.56 that the respondent claimed for contract deductions, **it is entitled to deduct \$40,422.00.**
765. However, the respondent had claimed a series of other deductions in the payment schedule, which I have considered below, and which are captured in Appendix A4 *Respondent's Other Deductions in the Payment Schedule.*
766. However, before doing so, I need to consider the claims for variations and additional works that are in the payment claim.

o. Variations and additional works

767. At paragraph 1 on page 4 of tab 2, the claimant identified its total claim of \$1,188,001.27 under this part comprising 17 items.
768. I have already found that there was no entitlement to prolongation claim CLo6, because the claimant had failed to satisfy the conditions precedent.
769. In relation to these variations and additional claims, the onus is on the claimant to demonstrate its entitlement. I now need to consider each other item in turn.

VO02 - \$53,616.83

770. This claim relates to additional silicone sealant for mechanical bolt installation has a chequered history in which the initial claim of \$76,068 used because it was based on 50,256 m², whereas the correct amount of the loop was 46,705 m².

771. I find that this activity was a variation directed by the respondent, because the respondent concedes this point.

772. The essential argument relates to the quality of labour required to carry out the variation.

773. At paragraph [834] of the response the respondent disputed that the variation took 448.4 man-hours to perform and considered that 224.2 man-hours would have been satisfactory. The respondent had merely halved the number of man-hours that had been carried out.

774. It argued that 2 people were not required for the carrying out of this work, but when the claimant demonstrated that it was not possible for one person to push the mobile working platform, the respondent made a concession that this was correct.

775. However, it identified that the 2 men could have been using their own caulking gun and working independently, such as there was no need for down time for the 2nd man.

776. I am not satisfied of the respondent's theoretical arguments of the activities needed to carry out this variation, which it directed, because the claimant actually carried out this work.

777. I'm therefore satisfied that the labour hours claimed by the claimant of 448.4 man-hours was correct. I accept the labour rate of \$78 per hour (inclusive of overheads and profit) was agreed, which results in a sum of \$34,975.20 for labour.

778. The parties had agreed that the cost of materials of \$9757.44.

779. The claimant relied upon an agreement with its nominated installer of 15% overhead and profit for additional works, however, I'm not satisfied that this sub contract with the nominated installer has any bearing on the contract rates between the claimant and respondent.

780. I note that the respondent said that the claimant had agreed (in document 1 of annexure VO02 in the adjudication response, by reference to the claimant's letter 38216), the claimant agreed that the rate of \$78 per hour was not subject to an additional amount for overheads and profit. In that letter under item 1. The claimant said, "Agreed, the rate 78/hr is not subject for OHP".

781. Accordingly, I value this amount at \$44,732.64 (which is the labour and material costs identified above).

782. I note the disagreement regarding what amount had been previously paid, and the claimant said, at paragraph 10, in **volume 5**, folder 1 that the respondent had had \$13,018.88 for this work, and the respondent did not take issue with this. In its submissions under heading 3.1 VO02.

783. Accordingly, the additional amount payable for this variation is therefore \$31,713.76.

AW04

784. This is a claim for the resetting of 290 base brackets. I note at paragraph [856] of the response, the respondent stated that it did not concede that the claimant was entitled to a variation for the setting of these works, but had elected in any event to pay for the additional work.

785. The issue then became one of valuation, and essentially it came down to a dispute about the number of replacements per hour per man that was considered reasonable.

786. Whilst the respondent referred to its own team carrying out an activity, ostensibly similar regarding replacing in adequate shims, it did not provide any substantiation for this activity, it may well have discharge its evidentiary onus.
787. Given that the claimant actually carried out this work, which was required, and which the respondent conceded, to my mind essentially meant that the contract was varied, even though the respondent had not issued a variation.
788. In those circumstances, the claimant is entitled to the variation using a valuation based on the contract rates and actual resources used and production rates achieved (as identified in paragraph [3.4] of the claimant's volume 5, folder 1 on page 11.
789. Accordingly, I'm satisfied that the claimant has discharged its onus in relation to this item, such that it is entitled to the additional \$17,719.00.

AWo5

790. This is a claim for the supply and installation of non-metallic top hat isolation washers.
791. At paragraph [876] of the response, the respondent identified that the claimant had failed to make a variation claim within the time required under clause 16.6 or clause 18.1 of the GCCC. By failing to adhere to those requirements, the respondent argued that the claimant had no entitlement to payment for this variation.
792. In the payment schedule, particularly at paragraph [456] also made this assertion about the claimant's failure abide by the contract conditions regarding notification of a claim.
793. The claimant in its application did not engage with the respondent about this important issue, and its failure to do so means that I have no submissions upon which to assess entitlement, apart from what the respondent has already identified as essentially a "time bar".
794. I'm therefore satisfied that the claimant had failed to abide by the variation requirements of notification under clauses 16 and 18 of the GCCC, such that it has no entitlement to this variation, it is therefore valued at nil.

AWo6

795. This claim essentially related to additional payment for the reinstallation of loose panels which had been removed, and it incorrectly installed by others.
796. There was a contest between the parties about the loose panels and some damaged panels. Essentially, the respondent said (paragraph [887 (b) and (c)] of the response that as a matter of fact, it was highly improbable that any other contractors would have reinstalled panels incorrectly after water seepage behind these panels had been identified. This is that neither Ben Wyatt nor Mike smart were on site at the time the panels were found to be defective, such that any assessment of the causes of damage was purely speculative.
797. Nevertheless, I find the email from Mr Brown constituted a direction for the variation regarding the loose panels for which the claimant was entitled to additional payment in accordance with the contract.
798. Having regard to the rate build-up identified in the payment claim of panel lifter for effectively one-day at \$1,000 and a forklift, for effectively one day at \$385, together with the overhead and profit that this amount of \$4505.76 is a proper valuation. I note, however, that the panel lifter of \$1,000 did not appear to be in the day work rates, however, the respondent did not challenge this rate under this item, so I assume that it had been agreed between the parties, otherwise the respondent would have denied this rate.
799. Accordingly, I value this variation at \$4505.76 .

AWo8

800. This is a claim for additional payment for the supply of additional panels, as requested by the respondent's Mr Brown on 5 February 2015.
801. The respondent (in the response paragraphs [907]) relies upon the time bar provisions referred to earlier, as a basis of denying this claim on the grounds that it did not receive (within 5 business days), the amount of the price adjustment. It also said that Mr Brown had observed damaged panels during installation, and provided a list of some defects.
802. However, Mr Brown did not provide any of this evidence in his statutory declaration, which to my mind tells against the respondent, as it had the evidentiary onus to demonstrate that all these panels that were claimed by the claimant were in fact replacement of defective panels.
803. In the payment schedule at paragraphs [485] through to [487] the respondent had referred to this time bar, and that the replacement panels related to the claimant replacing defective panels, such that no amount was payable for this additional work.
804. The respondent's assertion about the list of defective panels, supported by Mr Brown, according to the claimant demonstrated "new reasons" to explain why the claimant was not entitled to payment.
805. However, I note that at paragraph [487(b)] of the payment schedule, it identified damage and defective panels. Accordingly, I'm not satisfied that I may have regard to the Reply at tab 3 regarding this issue, and have not done so.
806. Nevertheless, in **volume 5**, folder 1, the claimant identified that it had provided at its own cost 125 standard panels as an allowance for replacement of any panels damaged by it during installation, and provided substantiation of the provision of these panels.
807. It also said that the respondent had made a request for the supply of spare parts on 21 October 2014, and this contained a cost for panels, and it provided a quotation.
808. It argued that the panel provided were in response to Mr Brown's direction for which it was entitled to payment.
809. The respondent at paragraph [909] of the response argued that the quotation which had in any event expired did not constitute a "pricing document", and added that if the claimant was entitled to make a variation claim, the reasonable amount would be \$17,874.
810. The issue associated with the time bars argument, is different from that which I accepted in an additional work claim above because in this case it is uncontroverted that the claimant was directed by Mr Brown to provide additional panels.
811. Having regard to the contract, clause 16.5 identified that the contractor should immediately give effect to the variation in accordance of contract, even if the price adjustment resulting from the variations may not been finally agreed or determined.
812. I did not see any qualification in this direction regarding uncertainties over panels that had been damaged by the claimant.
813. In my view, the respondent already was aware of what the costs of these panels were from the quotation, and I'm satisfied that this was sufficient to constitute an agreement regarding the cost of these panels such that Mr Brown's unequivocal direction to supply the panels did not require the notification of a variation pricing document in this instance.
814. The respondent wanted the panels, and it was a matter of urgency to ensure that they were completed prior to the Chinese New Year holidays, and the only issue regarding the cost estimate related to having the panels air-freighted to Brisbane, and otherwise it knew the price thereof.
815. Furthermore, I am satisfied that these panels did not relate to the panels that the claimant had already admitted it had replaced at its own cost.
816. Accordingly, I'm satisfied that the claimant has discharged its onus in relation to this item.

817. I decide the amount of \$59,255.20 for this additional work.

AW09

818. This a claim for additional survey work requested by the respondent for the setting out the works in the Western and eastern connection.

819. The parties are not in contest that this work constituted a request for additional survey work, but that it was limited to an extra 4 days, amounting to \$6092.80.

820. The respondent argued in paragraph [927] through to [932] that the email from Mr Brown was not a direction under clause 16.1 of the GCCC, and given that the claimant did not respond to the email and provided no evidence to support its claim that the work was actually carried out, it was only entitled to \$6092.80 .

821. It also argued that in any event, the respondent was time barred was time barred.

822. The respondent's argument essentially appears to surround the fact that it had only agreed to 4 days, whereas the further work that was carried out, which had been directed by the respondent on 21 January 2015 did not constitute an allowable claim under the contract.

823. In my view, the claimant had carried out this extra work, the respondent was aware of the rates for this work to be carried out, and it wanted that work to be carried out, such that the time bar issue to my mind again does not apply, such that the claimant is entitled to be paid for this additional work at the rates agreed.

824. Accordingly, I'm satisfied that the claimant has discharged its onus in relation to this item, and decide that it is entitled \$19,589.47 for this item

AW10

825. This claim relates to additional design required due to a cable tray that had been incorrectly installed by others, which required a solution for this design clash.

826. I note the respondent's objections related to there being no direction issued, and there was no compliance with the requirements of the variation clause.

827. The variation constituted a whole series of activities including an actual mockup, and it could not have been clear to the respondent what costs the activities would entail, as the solution was unknown.

828. In those circumstances, to my mind the time bar provisions apply because it was not a case that the respondent, as I have found previously, was aware of the cost of the variation, and had wanted the variation.

829. In this case, the respondent's reference to an RFI so that the client could get involved in the design clash is appropriate.

830. Accordingly, the claimant has failed to discharge its onus in relation to this item, and I value it at nil.

AW11

831. This claim relates to an alleged over claim by the respondent for the supply of certain stainless steel anchor bolts.

832. Allclad, who was the nominated subcontractor was unable to continue with the installation of sub-frames because it had run out of anchors, such that as a matter of urgency and discussions and agreement between the parties, the respondent purchased anchor bolts as a matter of priority.

833. The respondent argued the purchase of these bolts because the claimant had failed to supply them in accordance with the contract, which was a breach of contract would have been far more serious had the respondent not mitigated the potential consequences of delay, by paying for these bolts directly.

834. The claimant stated that the respondent had no responsibility under the contract to purchase these anchors and unilaterally decided to do so, and denied that there been an agreement that the respondent was to purchase these bolts.
835. In the circumstances of the urgency associated with the need for the sub-frame installation to continue, I am not satisfied that the claimant was discharged its onus, entitling it to a reduction based on the cost of supply of anchor bolts by the claimant compared to what the respondent had paid for these items, in circumstances of urgency.
836. Accordingly, I reject the claimant's claim for this item, and value it at nil dollars.

CLo2

837. At paragraph [975] to [977], the respondent identified that the claimant was claiming \$5852.18 for CLo2 for the additional 2nd bolt connection and that it was prepared to pay this amount.
838. I note that there was no material provided in the payment claim and the substantiation in **volume 5** regarding this item from the claimant. However, the respondent is prepared to pay this additional amount.
839. Accordingly, this additional amount has been added to the claimant's claim under this item.

CLo3

840. This item is a delay claim associated with tunnel closure on 18 July 2014 and the respondent essentially argued at paragraph [981] though to [991] of the response the following:
- (i) its instruction was properly classified as a direction to suspend works under clause 14.3(b) of the GCCC;
 - (ii) clause 14.3(f) of the GCCC required that there would be no claim arising under less the direction causes the claimant a delay, and if the claimant incurs additional costs it may claim a price adjustment, *subject to the terms of the contract*.
841. The respondent then argued that the claimant had failed to demonstrate an entitlement to an extension of time under clause 15.2, because it failed to satisfy all the conditions precedent. In addition, in so far as the delay costs were concerned, clause 14.4 required the conditions precedent to be satisfied before the claimant was entitled to any claim.
842. In the application in volume 5, folder 1, the claimant countered the payment schedule submissions on the basis that the direction constituted a variation which was a price adjustment under clause 17 (a), or alternatively a direction to suspend for which it was entitled to delay costs. Its further submissions were, "*CHK provides full and detailed particulars in Claim Documents CLo3*".
843. These particulars, did not deal with the issue relating to the conditions precedent that have been advanced by the respondent.
844. As I have identified the previously, however, unfortunate it is for the claimant (in circumstances where it was obviously delayed on 18 July 2014 and directed by the respondent that the tunnel was closed), the contract is very strict in relation to conditions precedent regarding the extent of the time, and although it foreshadowed a claim on 21 July 2014 for its delay cost, the claim only appears to have emerged on 23 April 2015, some 9 months later.
845. Accordingly, the claimant has failed to discharge its onus in relation to this delay claim, and it is valued at nil.

CLo4

846. This is another delay claim by the claimant for its delay costs, and again, despite advising of the delay and the idled resources in which it foreshadowed the making of a

claim on 6 November 2014, its valuation only emerged on 23 April 2015, some 5 months later.

847. In the application in volume 5, folder 1, the claimant countered the payment schedule submissions on the basis that the direction constituted a variation which was a price adjustment under clause 17 (a), or alternatively a direction to suspend for which it was entitled to delay costs. Its further submissions were, "*CHK provides full and detailed particulars in Claim Documents CLo4*".
848. These particulars, did not deal with the issue relating to the conditions precedent that have been advanced by the respondent.
849. Again, the claimant failed to satisfy the conditions precedent associated with this claim, such that I find it failed to discharge its onus in relation to it, and it is valued at nil.

CLo5

850. This claim is associated with the claimant's allegations that the respondent had failed to provide 100% of the services associated with the storage of materials and delivery of panels in accordance with a deed of variation dated 8 October 2014 amounting to \$158,500.
851. In the application in volume 5, folder 1, the claimant countered the payment schedule submissions on the basis that the claimant did not provide full value for the price adjustment. It then said, "*CHK provides full and detailed particulars in claim documents. CLo5.*"
852. These particulars, did not deal with submissions in relation to its legal entitlement to a deduction. It merely performed a calculation based on the number of panels not being delivered somehow gave it an entitlement to a refund.
853. The claimant argued that because not all panels had been delivered to site before the date of termination, it was entitled to a pro rata adjustment under the deed of variation based on a percentage of panels that had not yet been delivered.
854. I note the respondent's submissions that it fully complied with the terms of the variation order which was limited to the period 1 September 2014 to 15 January 2014, and that outside of those dates further costs were applicable.
855. Having regard to page 3 of the deed. I note the statement, "Any activity or element outside those listed will be subject to additional charges at cost."
856. Accordingly, I'm not satisfied that the claimant has discharged its onus in relation to this claim, and I value it at nil.

CLo6

857. I have already made a decision in relation to CLo6, that the claimant's failure to satisfy the conditions precedent meant that it was not entitled to any delay costs, and I value this claim at nil.

858.

CLo7

859. This claim relates to a direction by the respondent on 26 November 2014 to reduce the number of diesel powered forklifts within the tunnel because of air quality concerns.
860. I accept that it was directed by the respondent to do so.
861. The claimant made its claim on 23 April 2015, and it has been met with the same arguments in the payment schedule and response that the respondent has previously advanced in relation to the failure to satisfy the conditions precedent regarding EOT's, which then governs the entitlement to delay costs.
862. In the application **volume 5**, folder 1, in response to paragraph [582] of the payment schedule, the claimant said that it had complied in all respects with clause 15.2, and was entitled to an extension of time where the claimant has *to the extent it possibly can* complied with the EOT notification.

863. I have already found against the claimant on that point under CLo6 above, on the basis that the conditions precedent need to be strictly complied with.
864. The claimant also argued the respondent should have granted but refused to grant an extension of time. The difficulty with this submission is that as a matter of fact, no extension of time has been granted, and I have found under CLo6 above, that I am unable in this adjudication to grant an extension of time, because of the principle in *Hervey Bay* that I have already discussed at length.
865. Again, however difficult this is for the claimant, it has failed to satisfy the conditions precedent associated with this claim, despite having been adversely affected by the direction.
866. Accordingly, I'm not satisfied that the claimant has discharged its onus in relation to this claim, and I value it at nil.

CLo8

867. This is a further claim by the claimant for delay costs associated with missing DMP results.
868. Once again the volume 5, folder 1 the claimant argued that the direction was a variation, or alternatively a direction to suspend under clause 14, thereby entitling to delay costs.
869. However, the respondent's submissions in the respond reiterated the conditions precedent requirement, and also argued that the claimant had not been directed or permitted to work on that day.
870. I see no need to deal with the question of fact on that point, because as a matter of law the claimant failed to comply with conditions precedent and therefore has not discharged its onus in relation to this claim, and I value it at nil.
871. I have transferred all the variations and additional costs to Appendix A3 *Disputed variations and additions*.
872. The amount for the variations and additional costs to which the claimant is entitled, calculate to be \$106,921.61.
873. However, I need to deal at this stage, with the issue of retention monies because although that has been identified in item 3 of the payment claim as a deduction, the claimant is claiming the amount of \$366,023.20 retention and due to it after the contract was terminated.

Retention

874. In the payment schedule, the respondent's reason for not releasing the retention was its reference to its 26 March 2015 letter number 17210.
875. In this letter it identified a series of alleged breaches of contract, together with overpayments that it has made for works that was actually not supplied/completed by the claimant. In its penultimate paragraph, it relied upon clause 3.5(b) of the GCCC that, given its bona fide claims against the claimant, it was entitled to hold and have recourse to the security.
876. Furthermore, at paragraph [612] through to [622] of the payment schedule, the respondent argued that it was under no obligation to release or return security, and that its letter of termination, in which it reserved its rights in relation to claims against the claimant for its breaches of contract constituted *notice* to the claimant at termination.
877. In the application in **volume 5**, folder 1, the claimant took issue with the respondent, and made the following submissions which are important:
- (i) s17(3) of BCIPA, provided that a claimed amount may include any amount "*that is held under the construction contract by the respondent at that the claimant claims is due for release.*"

- (ii) The respondent has no bona fide claims against the claimant, and has denied the claimant's ability to complete the contract.
878. I was unable to find any response submissions in relation to this important point, in either section 6 – Valuation of contract works, sections 7 – Variations, additional works and other claims nor in section 8– Deductions, adjustments and set off from pages 218 onwards.
879. I therefore do not have the benefit of the respondent's arguments supporting its earlier submissions in relation to this important point.
880. Given the claimant has not provided me with case authority to assist in dealing with this thorny issue, I need to deal with it as a matter of principle because I'm obliged to value the construction work carried out in accordance with the contract.
881. I have yet to deal with the claims for breaches of contract and other deductions to which the respondent claims it is entitled on the basis of a bona fide claim, so for present purposes I am dealing with the 1st limb of the claimant's submissions, and that is the reference to s17(3) of BCIPA.
882. I find that there is a cash retention amount of \$366,023.20 currently being held by the respondent, as that is something about which the parties agree.
883. The respondent had made reference to the clause 3.5(b) of the GCCC, demonstrating that it is under no obligation to release security if it has a bona fide claim against the claimant.
884. At this point. I have not made any determination of the whether the respondent has any bona fides claims against the claimant. However, this appears to be the appropriate point to "grasp the nettle" in relation to the issue of *common law damages* that has been raised by the claimant in part 5 in volume 1 of the application.
885. At paragraph [5.2], the claimant identified that the respondent was seeking to impose in effect a claim for general damages and other, and I presume it omitted the word "deductions, because it was replying to the respondent's payment schedule spreadsheet headed other adjustments, deductions and claims. It argued that I was unable to apply such a claim because it is not within the jurisdiction of an adjudicator under BCIPA.
886. At paragraph [109] through to [1096] of the response, the respondent engaged with the claimant on this argument, and essentially pointed to clause 19.5 (c) & (d) and (e) of the GCCC which allowed deductions to any claim amount payable under clause 19.4 of the GCCC. Furthermore, at paragraph [1094], it made reference to clause 19.8(f) regarding its right of set off which provided:
- "Transcity may deduct from any payment claim submitted by the Contractor and from any sum otherwise due to the Contractor any amount which is claimed by Transcity against the Contractor under or in connection with the Contract or otherwise."*
887. I appreciate that this widely drawn clause allows the respondent significant rights of set off.
888. However, my function is not that of an arbitrator, because I am constrained by BCIPA, and in my view, I am unable to consider claims for damages made by the respondent in the adjudication. Furthermore, the respondent has not provided me with any authority to support its position, which if it existed, would then constrain me to follow such authority. In the absence of it, I have to deal with it as a matter of principle.
889. The respondent has already made reference to the case of *Coordinated Construction* as authority that an adjudicator cannot consider claims for damages by a payment, and I have accepted that argument. To my mind the corollary also applies, because the entire mechanism of valuation under s14 of BCIPA connotes the valuation by the contract price, other rates or prices stated in the contract, and any variation agreed to which the contract price is to be adjusted by a specific amount.
890. In all these instances the value is able to be determined under the contract, and there is a specific mechanism provided by the contract to allow this to occur. However, common

law damages involve other valuations outside the contract, which cannot be dealt with here.

891. I accept that in relation to *defective work*, an estimated cost of rectifying the defect is something to which I must have regard [s14(1)(b)(iv) of BCIPA]. However, in that circumstance, the respondent remains required to demonstrate its onus in relation to that estimate, and as I've done elsewhere in this decision, in relation to both parties, entitlement and substantiation of the amount is required.
892. However, in relation to defective work, in my view, it cannot extend to me, making a valuation of common law damages because an adjudicator is not seized with that power. Claims for damages requires evaluation and sifting through evidence, with parties cross-examining one another in relation to that evidence, and in my view, BCIPA is not an appropriate vehicle to be used to that end.
893. Accordingly, I find that I am unable to consider any claims by the respondent for damages, because although the contract makes provision for a wide set off, I am limited in my powers under BCIPA to apply the entire contract mechanism in a dispute between the parties. That dispute can take place elsewhere in reliance because of s100 of BCIPA.
894. Accordingly, any claims by the respondent for breach of contract are outside my power to consider, and therefore I cannot be in a position to say that it is a bona fide claim to which a respondent is entitled.
895. At this point, I consider it appropriate to leave the decision regarding retention in abeyance until I have considered the issues of bona fide claims made by the respondent, except for those damages claims, for which I am unable to give any consideration for the reasons I have outlined.
896. I will return to this issue later.

The agreed set off identified by the claimant in the payment claim of \$64,271.27.

897. The set off about which the claimant had accepted a certain deduction by the respondent were contained in a summary of setoffs in the payment claim.
898. The claimant took issue with 6 setoffs in its list, but items 2, 3, 4 and 5 all related to anchors and items 10 and 11 related to safe loading access platforms.
899. Essentially, the claimant was claiming additional amounts for set off amounts by the respondent that was more than to which it was entitled.

Anchors

900. The claimant has identified an amount of \$15,904.84 lower than the deductions claimed by the respondent.
901. I have already made a finding, in relation to claim AW11, about the circumstances surrounding the purchase of these bolts by the respondent in order to ensure that productivity by the nominated installer was not impeded in construction of the sub-frame assembly.
902. Given the urgency with which I find the purchase was made, I am unable to be convinced by the claimant that it has discharged its onus in relation to the quantum of this item.
903. Accordingly, in my view the set off an amount should remain, but this has no effect on the contractual amount claimed by the claimant.

Safe platforms difference \$17,850

904. The claimant differed from the respondent by the sum of \$17,850.
905. In so far as this item is concerned, the issue is that the respondent purchased these platforms on behalf of the claimant and set off this amount under the contract.

906. The claimant says that there has been a refusal by the respondent after termination to provide the platforms, which it claims as its property.
907. At termination, the respondent alleges that the platforms were available for collection but that the claimant and its nominated installer failed to do so.
908. I am unable to make a finding in relation to this issue, and given that the issue emerged after the contract was terminated, I am unable to find that the claimant has any entitlement under the contract, about which I am able to make a decision.
909. Accordingly, I'm satisfied that the current setoffs in relation to this item made by the respondent of \$17,850 remains. However, this does not increase or decrease the claimant's claim, because this set off item was essentially an additional claim made by the claimant for an over deduction by the respondent.

p. Deductions and set-offs including overpayments amounting

910. What is left to be considered are the deductions, adjustments and set offs claimed by the respondent in the payment schedule items 6 to 26, but 16, 17, 18, 19 and 22 were not used.

Item 6

911. This was a claim for survey set out in eastern Western connection amounting to a deduction of \$24,947.54.
912. I have already granted the deduction for this item in 3(k) and 4(k) in relation to this item which had already made reference to item 6, and so I do not value an additional deduction for this item, so there is no further deduction available.

Item 7

913. This was a claim for survey needed to complete the setting out and provide an accurate as-built amounting to a deduction of \$3860.
914. I have already granted the deduction for this item in 2(i) in relation to this item and so I do not value an additional deduction for this item, so there is no further deduction available.

Item 9.1

915. This was a claim for QA work carried out by the respondent which was estimated to be \$20,000.
916. The respondent says that this was an estimate for 2 weeks work, and yet in paragraph [618] it argued that it was a cost, which was provided in Appendix 1 and supported by the statutory declaration of Tim Brown.
917. Again, I make the same comment that Mr Brown has not specifically identified this item, nor has he sworn to the fact that this cost was incurred, so to my mind it remains only an estimate for which there is no substantiation which in my view is required for the respondent to discharge its onus.
918. Accordingly, I value this deduction as \$0.

Item 10

919. This deduction related to panels that had been installed that needed to be replaced due to non-conformance of the contract and amounted to a deduction of \$9960 on the basis that 30 panels needed to be replaced.
920. This line item provided an assessment of what the panel removal/replacement involved. In this case, however, there was some further identification of the damage to these panels because the respondent made specific reference to document 1 in Annexure Item 10 in Volume 9 of the material containing some photographs.

921. On balance, therefore, despite not having evidence of where these panels were located, I am satisfied that the respondent discharged its onus, and a deduction of \$9,960 is made.

Item 11

922. These costs relate to a claim for *liquidated damages* made by the respondent.

However, in item 37 in part E – Contract Particulars on page 12 identified as liquidated damages rate -*Common Law Damages to Apply*.

923. At paragraph 3 on page 7 in volume 10 in the reply to this item, the claimant argued that liquidated damages could not be used.

924. As I have already mentioned, I am not in a position to consider common law damages in adjudication, so whilst having such a clause in a contract preserves a respondent's rights to claim all its damages associated with delay, it is not a clause that is able to be considered by an adjudicator.

925. Accordingly, under BCIPA I have no power to consider such matters and value this deduction as \$0.

Item 12

926. This claim relates to works coordination and other assistance given to the claimant during the period 1 August 2014 to 31 August 2014.

927. The payment schedule identifies of these costs were deducted in accordance with clause 19.5(c)

928. The respondent stated that the deduction was set out in appendix 1 in the detailed spreadsheet, and was supported by the statutory declaration of Tim Brown. I have been unable to find anything in Tim Brown's statutory declaration, in relation to the costs associated with this work, apart from his reference to him being involved in putting together the payment schedule and the adjudication response.

929. The lack of particularisation by Mr Brown, who evidently was involved in the payment schedule and the adjudication response in not identifying on oath particulars of this claim regarding engineering support, a forklift operator moving equipment and supervision, support, together with his engineering support, suggests to me that this evidence from a key witness could not be given.

930. I have considered the submissions of the claimant in this regard and accept that no notification had been given by the respondent of these charges during the contract.

931. The respondent bears the onus of demonstrating its entitlement to this deduction, and I am not satisfied that it has discharged its onus so I value this deduction as \$0.

Item 13

932. This relates to an estimate of the value of disposal for dumped panels of \$3000 in accordance with clause 12.4 (a), 19.5(c) and (d) of the GCCC.

933. I note again that the respondent makes reference to Mr Tim Brown statutory declaration as supportive of the build-up of this amount, and I find nothing in his statutory declaration to this effect. In my view, it would have been a simple matter for him to have identified on oath that this sum of money was a reasonable estimate, so all that I'm left with is a one line entry in the payment schedule making an assertion about an estimate.

934. Accordingly, I find that the respondent has not discharged its onus in relation to this item, and I value it as nil.

Item 20

935. This relates to deduction for the bolt re-tightening of the support frame amounting to a deduction of \$54,400.

936. This is a line item in appendix 1, in which the respondent identified, "Provisioning for redoing this exercise equals 4 men x 4 weeks x 50 hours per week = \$60 K. It added a cost breakdown of 4 labourers for 4 weeks at \$68/.
937. I accept that there was uncertainty surrounding the anchor bolts by reference to Mr Brown's statutory declaration to the need for UQ to carry out testing of them, and the documents he provided in support of them.
938. However, again, I'm not satisfied that the respondent has discharged its onus in relation to substantiating this amount claimed. Mr Brown could have provided a specific paragraph in his statutory declaration to this effect and it is absent, so I'm left with a line item regarding "provisioning".
939. This does not establish that the work was done, nor that the "provisioning" for this item accurately reflects the work needs to be done.
940. Accordingly, I find that the respondent has not discharged its onus in relation to this item, and I value it at nil.

Item 21

941. This relates to the purchase cost of a calibrated torque wrench for testing the frame bolted assemblies amounting to a deduction of \$277.
942. The respondent has not substantiated this claim by provision of an invoice or a receipt, so I value this deduction as nil.

item 23

943. This item is no longer claimed as a deduction because the independent verifier has confirmed that the out of tolerance spacing is acceptable.
944. Accordingly, the assertion in the payment schedule that the respondent was required to rectify the defect, and its estimated costs no longer applicable. As a result this deduction is valued at \$0

item 26

945. This relates to the respondent's purchase cost of additional replacement panels in the sum of \$29,649.09.
946. Again the substantiation regarding this item was confined to the detailed spreadsheet which performed a calculation and the apparent confirmation by Mr Brown in his statutory declaration.
947. I have read Mr Brown statutory declaration, and apart from his reference to appendix 1 and the adjudication application, he makes no further specific mention about the cost of these additional replacement panels. Accordingly, the respondent has not discharged its onus in relation to this item, and I value the deduction at nil.

Conclusion on these Deductions and retention

948. I have found that at total of \$9,960 can be deducted by the respondent. As I have mentioned throughout, the onus was on the respondent to discharge its onus to substantiate the deductions, and it failed to do so. Furthermore, I was unable to allow common law damages under the guise of liquidated damages to be a deduction, because it outside an adjudicator's jurisdiction.
949. This means that the only bone fide claim I have found the respondent has against the claimant is \$9,960.
950. Given that this deduction has reduced the amount payable to the claimant, I decide that the claimant is entitled under s17(3)(b) because it has claimed that it is due for release, and in my view the claim for \$9,960, which has been accommodated by a reduction in the

amount payable to the claimant, means there is no longer a bone fide claim against which the security could be held.

951. Accordingly the retention amount of \$336,023.20 is payable to the claimant because it is entitled to the retention money.

952. I must deduct from the claim the work claimed by the claimant for the period 20 to 27 February 2015 because that is after the reference date.

953. I do not agree with the respondent's theoretical calculations and objections about the claimant's quantification of \$4,869.45 for the work that it actually did in this period, because the claimant carried out the work and knew how much it had done.

954. Elsewhere the respondent had complained about the claimant reducing its resources, so for it to apply a theoretical calculation in the face of actual work that was carried out.

955. Accordingly, I deduct \$4,869.45 for the work carried out after the reference date and this deduction is found Appendix A1.

q. GST

956. This item was identified separately in the payment claim, and remains part of the claim for which I need to make a calculation and this has been done in Appendix A1.

Conclusion and final reply comments

957. In order to be perfectly clear, apart from where I have made reference to the reply, because I have found new reasons, I have not considered the reply submissions as this would be contrary to BCIPA and a breach of natural justice to the respondent.

958. This means, for example I have not considered the joint statement of Allclad systems, nor the statutory declaration of Marcus Praetorius, as both are purported to respond to new reasons identified in Mr Brown's statutory declaration. Apart from his reference to calculations carried out both in the payment schedule and the response to which I've referred above, I do not find that Mr Brown provided new reasons within his statutory declaration.

959. I tabulate the amounts that are derived from my findings, which I transferred to the spreadsheets in Appendix 1, and then brought across those totals into the table headed "amounts in this adjudication."

960.

Amended Table of amounts in this adjudication

Contract Works	\$7,255,695.36
Less contract deductions	\$40,422
Less agreed set offs	\$64,271.27
Variations, additional works and allowable claims and agreed set-off	\$138,635.37
Other Deductions	\$9,960
Retention	\$0
Less 20-27 Feb 2015 work	4,869.45
Less amount paid to date	\$6,522,979.57
Subtotal	\$751,828.44
Add GST	\$75,182.84
Adjudicated amount	\$827,011.28

961. Accordingly, I find the amended **adjudicated amount is \$827,011.28 (including GST).**

XV. Due date for payment

962. s15 of BCIPA deals with the due date for payment under the contract. I am satisfied with the claimant's submissions (as there are no controverting submissions from the respondent on this point) that the contract governs the due date for payment.
963. The claimant submitted that Note 4 in the Part E Schedule 1 of the Contract Conditions provides payment within 30 days from the end of the month in which it was received, and the respondent made no controverting submissions.
964. I have already found that the payment claim is dated 22 May 2015, and I accept that the respondent received it on this date.
965. This means the due date for payment is 30 days after the 31 May 2015, which I calculate to be 30 June 2015, which accords with the claimant's submissions at paragraph [291].
966. Accordingly, the **due date for payment is 30 June 2015.**

XVI. Rate of interest

967. The contract provided an interest rate for late payments of the Bank Bill Rate plus 1% in Item 43 of the Part B: Contract Particulars
968. Annexure E defines the bank Bill Rate as a reference to Reuters Monitor System Page BBSY
969. I have searched the Internet today for <http://www.afma.com.au/data/BBSW> which identified for the mid rate as 2.165 for a 3 month period, which is rounded downwards to 2.16%.
970. I then add the 1%.
971. **I find the rate of interest is 3.16% interest payable on the adjudication amount.**

XVII. Adjudicator's fees

972. The default provision contained in s35(3) of BCIPA makes the parties liable for the my fees is in equal proportions, unless I decide otherwise.
973. I may decide otherwise having regard to s35A(2) and having regard to the adjudication as a whole, I decide that both parties share equally in the fees because:
- (i) A significant amount of time was spent of the respondent's threshold points dealing with jurisdiction which the respondent lost;
 - (ii) A significant amount of time was spent on the conditions precedent argument which the claimant lost;
 - (iii) Even though there were new reasons, they were not particularly significant overall;
 - (iv) Quantum was complicated by the volume of material, but both parties' material was of assistance.
974. Accordingly, there was no need to exercise my discretion such that each party is liable for 50% of the fees under 35(3) of BCIPA.

XVIII. Appendices - Spreadsheets to assist in determining quantum

Chris Lenz

Adjudicator


16 September 2015

A1 Amended Overall quantum summary

Item	Adjudicated amount	Calculation with material miscalculation of figures corrected
Contract Works	\$7,255,695.36	\$7,255,695.36
Less contract deductions	\$40,422	
Less agreed set offs		-\$40,422.00
Variations, additional works and allowable claims and agreed set-off		-\$64,271.27
Other Deductions	\$106,921.61	
Retention	\$9,960	\$138,635.37
Less 20-27 Feb work	\$336,023.20	-\$9,960.00
Less amount paid to date	4,869.45	Nil
Subtotal	\$6,522,979.57	-\$4,869.45
Add GST	\$1,120,409.15	-\$6,522,979.57
Adjudicated amount	\$12,040.92	\$751,828.44
	\$1,232,450.07	\$75,182.84
		\$827,011.28

A2 Disputed Contract amounts from payment schedule

Item	Description	PS	Adjudicated amount	
1 Design				
1(b)	Approval of AFC design	-\$ 5,730.00		\$0
1(j)	Supply of quality documentation	-\$ 4,260.00		\$0
2 Supply of panels – TBM tunnels				
2(a)	Supply and deliver to site typical architectural panels	-\$ 14,625.10		\$0
2(b)	S and D panel support structure – XP side of tunnel	-\$ 742.05	-\$	742.05
2(c)	S and D panel support structure – non XP side of tunnel	-\$ 9,790.20		-\$1,843
2(g)	S and D Nontypical with panels	-\$ 264.00	-\$	264.00
2(h)	S and D Opening returns including support structure	-\$ 100.80	-\$	100.80
2(i)	Installation –#1 set out and drill anchors	-\$ 5,757.02		-\$1,897.04
2(j)	Installation #2 – install subframe – 1st fix	-\$ 4,166.58	-\$	4,166.58
2(k)	Installation #3– level subframe – 2nd fix	-\$ 6,461.34	-\$	6,461.34
2(l)	Installation #4– VE panel	-\$ 247,826.03		\$0
2(m)	Support structure Extra over TBM tunnel non-XP side	-\$ 60,878.92		\$0
3 Supply of panels – Western connection				
3 (b)	S and D panel support structure – o – 500 mm off set	-\$ 29,474.37		\$0
3 (c)	S and D panel support structure – 500 – 1500mm off set	-\$ 23,370.72		\$0
3 (j)	S and D Opening returns including support structure	-\$ 705.60		\$0
3(k)	Installation –#1 set out and drill anchors	-\$ 17,851.13	-\$	17,851.13
4 Supply of panels – Eastern connection				
4(b)	S and D panel support structure – o – 500 mm off set	-\$ 6,261.33		\$0
4 (c)	S and D panel support structure – 500 – 1500mm off set	-\$ 10,414.80		\$0
4(j)	S and D Opening returns including support structure	-\$ 403.20		\$0
4(k)	Installation –#1 set out and drill anchors	-\$ 7,096.37	-\$	7,096.37
		-\$ 456,179.56		-\$40,422

A3 Amended Disputed variations additions from payment schedule

Item	Ref #	Description Variations	PC	PS	Paid	Adjudicated amount
1	V002	Silicone sealing to anchor Bolts	\$	53,616.83	\$ 27,245.04	\$ 13,018.88
						\$31,713.76.
		Additional works				
2	AW04	Resetting base brackets	\$	19,316.90	\$ 2,987.00	\$17,719
3	AW05	Supply and install additional top hat washers	\$	28,867.95	\$ -	\$0
4	AW06	Reinstall panels incorrectly installed by others	\$	4,505.76	\$ -	\$
5	AW08	Supply of additional VE panels	\$	59,255.20	\$ -	\$ 4,505.76
6	AW09	Additional survey work	\$	19,589.47	\$ 6,092.80	\$ 59,255.20
7	AW10	Additional design due to cable tray	\$	10,467.88	\$ -	\$ 19,589.47
8	AW11	Claim for additional stainless steel bolt	\$	8,381.85	\$ -	\$0
						\$0
		Claims				
	CL02	Additional bolt to base connection	\$	5,852.18	\$ 5,852.18	\$
9	CL03	Idling cost for late suspension	\$	3,193.34	\$ -	5,852.18
10	CL 04	Idling cost for DPM result	\$	34,634.50	\$ -	\$0
11	CL 05	Services for loading and delivery of containers	-\$	142,126.95	\$ -	\$0
12	CL 06	Prolongation cost	\$	895,003.60	\$ -	\$0
13	CL 07	Idling costs on 26 November 2014	\$	15,473.81	\$ -	\$0
14	CL 08	Idling cost on 15 December 2014	\$	26,535.60	\$ -	\$0
		Setoffs				
15		Claim for anchor Bolt over deduction	\$	15,404.84		\$0
16		Claim for Anchor Bolts additional supply	\$	5,646.11		\$0
17		Deduction by respondent for working platforms	\$	17,850.00		\$0
			\$	1,081,468.87	\$	106,921.61
		Material miscalculation corrected	\$		\$	138,635.37

A4 Respondent's other deductions in payment schedule

The item reference number is that in Appendix 1

Item	Description	PS	Adjudicated amount	Comments
1	Respondent's QA costs	-\$ 226,890.72	\$0	Already measured in A2 Item 2(l)
1.3	Touchup painting	-\$ 14,625.00	\$0	Already measured in A2
3	Insufficient angles	-\$ 10,500.00	\$0	Already measured in A2 Item 2(c)
3.1	Approval of AFC design	-\$ 5,790.00	\$0	Already measured in A2 - Item 1(b)
4	BQ items 3(b), 3(c), 4(b) and 4(c)	-\$ 37,568.00	\$0	Onus not discharged
4.1	Design of panel support structures	-\$ 12,460.00	\$0	Onus not discharged
6	Set out and drilling of anchor holes West & East	-\$ 24,947.54	\$)	Already measured in A2 Items 3(k) and 4(k)
7	Set out and drilling of anchor holes TBM	-\$ 3,860.00	\$0	Already measured in A2 Item 2(i)
9.1	Respondent's QA audit	-\$ 20,000.00	\$0	Onus not discharged

The Claimant's breaches of contract

10	Damaged panels	-\$ 9,960.00	-\$ 9,960.00	Onus discharged
11	Respondent's incurred costs regarding delay	-\$ 108,750.00	\$0	Outside jurisdiction
12	Respondent's incurred costs regarding support	-\$ 99,300.00	\$0	Outside jurisdiction
13	Value of disposal of damage panels	-\$ 3,000.00	\$0	Onus not discharged
14	Defect rectification costs			
15	Respondent's labour			
20	Tightening bolts of defective works	-\$ 54,400.00	\$0	Onus not discharged
21	Purchase of calibrated torque wrench	-\$ 277.00	\$0	Onus not discharged
23	Panel relocation	-\$ 33,200.00	\$0	Respondent withdrew claim
24	Incomplete QA/design documents			
26	Purchase cost of additional replacement panels	-\$ 29,649.09	\$0	Onus not discharged
		-\$ 695,177.35	-\$9,960	