

Adjudication Decision: 6826

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator : Chris Lenz (J622914)

Application Details

Claimant

Name : Apex Wiring Solutions Australia Pty Ltd
ACN : 156 350 524
Address : Clearpoint Counsel, Level 3, 673 Bourke Street, MELBOURNE VIC 3000

Respondent

Name : Lend Lease Building Pty Ltd
ACN : 000 098 162
Address : Level 4, 30 The Bond 30 Hickson Rd, SYDNEY NSW 2000

Project

Type : Hospital Building
Location : Sunshine Coast University Hospital, Kawana Way Birtinya QLD 4575

Payment Claim

Date : 1 September 2015
Amount : \$1,054,724.07 (exc GST)
Nature of claim : Complex

Payment Schedule

Date : 22 September 2015
Amount : \$423,528.09 (inc GST)
s20A Notice Date : (if applicable)

Application Detail

Application Date : 7 October 2015
Acceptance Date : 12 October 2015
Response Date :

Claimants reply: : 20 November 2015

Extension of Time :

Adjudicator's Decision

Jurisdiction : Yes
Adjudicated Amount : \$NIL.
Due Date for Payment : 31 October 2015
Rate of Interest : 8.5%

Claimant Fee Proportion (%) : 50%
Respondent Fee Proportion (%) : 50%
Decision Date : 2 December 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,
- as shown on the first page of this decision.

B. REASONS

I. Background

1. Apex Wiring Solutions Australia Pty Ltd (referred to in this adjudication as the "claimant") was engaged by Lend Lease Building Pty Ltd (referred to in this adjudication as the "respondent"), to provide engineering construction services for the supply of modular wiring for the Sunshine Coast University Hospital Project, Kawana Way, BIRTINYA QLD 4575 (the "work").
2. The work involved detailing from final design drawings, manufacturing, supply and delivery of the modular wiring/structured electrical wiring system.
3. This adjudication essentially involves resolution of a dispute regarding rates for 4mm² wiring components claimed by the applicant, which the respondent says were not agreed rates under the contract.

II. Application to the QBCC the and appointment of Adjudicator

4. The claimant applied to the Queensland Building and Construction Commission ("QBCC") on 7 October 2015 for adjudication. On 12 October 2015 the QBCC referred the adjudication application no. 6826 for me to determine.
5. I am a registered adjudicator under BCIPA with registration number J622914, and I accepted the appointment on 12 October 2015 when my agent wrote to the parties advising of my acceptance.

III. Material provided in the adjudication

6. I received a lever arch folder from the claimant and respondent respectively, both of which included the payment claim and payment schedule, as well as each providing a copy of the contract.
7. The claimant did not provide any separate submissions, except for what I could glean from the affidavits of Simon Waldron ("SW") and Peter Alan Turnbull (the "PAT") to which were attached documents.
8. The respondent provided submissions, together with statutory declarations from Peter Rudolph ("PR") and Andy King ("AK") (with attachments), as well as copies of 7 cases in support of the submissions.
9. The applicant claimed that the respondent had included new reasons in the adjudication response, and exercised its right of reply, and the reply was provided within the 15 day period allowed by the s24B(2) of BCIPA on 20 November 2015.
10. On 25 November 2015, the solicitors for the respondent wrote to me and invited me to ask them for submissions on the basis that it alleged that the claimant's reply went further than what was allowed under s24B(2) of BCIPA.
11. s25(3) of BCIPA provides that I may ask for further written submissions from either party, but then must give the other party an opportunity to comment on those submissions.
12. Given that it is incumbent upon me to make an assessment as to whether the claimant was entitled to reply, on the basis that the respondent had provided new reasons, I saw no need to ask the respondent for submissions, and have not done so.

IV. Is it a Construction Contract within BCIPA?

13. In order for adjudication to proceed there must be a *construction contract* to which the payment claim relates.
14. The claimant did not provide submissions on this point. Nevertheless, I am obliged as a matter of jurisdiction, to be satisfied that the contract fits within BCIPA.
15. Both parties provided me with copies of the contract [Exhibit PT1 in PAT, exhibit SW1 in SW, exhibit PR2 in PR].
16. I find that this is the contract, which I will need to interpret later, but for present purposes, I make reference to schedule 1, which describes the scope of the contract.
17. Schedule 2 of BCIPA defines a *construction contract* in the following terms:
"...means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or supply related goods and services to, another party."
18. *Construction work* is defined in s10 of BCIPA, and I am satisfied that the contract involved *power supply* under the s10(1)(c) of BCIPA.
19. I am satisfied that contract provided that the claimant's supply of electrical goods fell within the definition of *related goods and services* in s11(1)(a)(i) of BCIPA regarding goods, and the detailing and manufacturing fell within s11(1)(b)(i) and (ii) of the definition as being *the provision of labour to carry out construction work and design services relating to construction work*.
20. There are no controverting submissions from the respondent in the payment schedule denying that it is a *construction contract* under BCIPA.
21. I am therefore satisfied that it is *construction contract* under BCIPA, thereby attracting the right to the progress payment provisions under the Act.

V. Right to a progress payment

22. s12 of BCIPA provides that:
"From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."
23. Again, there are no specific submissions from the claimant about its rights to this progress claim. However, there are no controverting submissions in the payment schedule about whether this was a valid payment claim from a reference date.
24. One definition of *reference date* in schedule 2 of BCIPA, is a date stated in the contract on which a claim for a progress payment may be made.
25. Clause 4.2.1 of the contract (page 26) provided that the claimant could submit a payment claim each month on the day stated in the Appendix.
26. The Appendix (page 41) provided for a progress claim submission *the 1st day of the month*, which I find is a *reference date*.
27. This payment claim was made on 1 September 2015, so I find the payment claim satisfies s12 of BCIPA, such that I have jurisdiction to adjudicate the matter.

VI. Payment Claim

28. On 1 September 2015, the claimant served a payment claim for \$1,160,146.78 (including GST).
29. This amount exceeds \$750,000, which makes it a complex payment claim in accordance with schedule 21 of the definition of *complex claim* in BCIPA.
30. The payment schedule did not challenge the validity of the payment claim, and in paragraph 9 of the response submissions, the respondent said that it did not dispute that the payment claim was a valid one under s17 of BCIPA and was validly served under s17A of BCIPA.
31. I therefore find that it is a valid payment claim which can be adjudicated.

VII. Payment Schedule

32. On 21 September 2015, the respondent provided the payment schedule, with the scheduled amount of \$455,880.90 including GST.
33. At paragraph 13 of the affidavit of Simon Waldron ("SW [13]"), he said the schedule was received on 22 September 2015, but he made no objection to the content of it.
34. s18A(3)(b)(i) of BCIPA provides that the payment schedule can be given the within 15 business days after the *complex payment claim* is served, which I find was 1 September 2015.
35. Accordingly, I find that the payment schedule was served within time under BCIPA.
36. I'm satisfied therefore that the payment schedule complies with BCIPA and can be adjudicated.

VIII. The merits of the claimant's claim

37. The claimant says that there is no dispute about the quantity or quality of the goods and services provided by the claimant under the contract (SW [16]).
38. The respondent concedes that the difference between the parties is almost entirely due to differences in rates used to value the supply (on an interim basis) of the 4 mm² cabling (paragraph [5] of the adjudication response).
39. Accordingly, both parties agree that the essential contest is whether the rate claimed by the claimant for the 4 mm² extender and connection cabling ("cabling") can be used in this adjudication.
40. Whilst the dispute appears to be of narrow compass, it has actually been quite complex, because the claimant chose not to directly engage with all the respondent's submissions in the response about entitlement, and that the claimant had been paid in excess of the contract sum, both of which the claimant argued were new reasons for non-payment.
41. To some degree it appeared as if the claimant's and respondent's arguments were like "ships passing in the night", and this makes adjudication more difficult. Without being disrespectful, it appeared as if the claimant had chosen not to engage, perhaps on the basis that it genuinely believed that it had demonstrated its entitlement.
42. The approach that I have taken, therefore, is to consider the merits using a structured methodology to give consideration to the parties' positions as follows:
 - (i) the claimant's onus to demonstrate entitlement (without consideration of the adjudication response), and if the onus is discharged;
 - (ii) the respondent's onus to disprove entitlement ("the objections"), and if they are successful;
 - (iii) whether the claimant has demonstrated it can overcome the objections.
43. Whilst this methodology may appear somewhat artificial; when issues are not clearly contested, it assists in ensuring that both parties' contending positions are carefully considered.
44. It is important for the **claimant to appreciate at the outset, that it is obliged to demonstrate its entitlement**, and it has the onus of proving entitlement, in the face of the objections. Naturally, if it does not discharge its onus, the claimant must fail.

a. Claimant's entitlement

45. I have already made the comment that the claimant made no submissions in support of its payment claim, and this, with respect, is a dangerous strategy.
46. However, I have been able to glean from the affidavits of Simon Waldron ("SW") and Peter Alan Turnbull ("PAT") provided in the application, (with reference to the paragraph numbers in square brackets), that the claimant's position is that:
 - (i) the Contract Sum was an estimate only and not a lump sum (PAT [3]), (SW [37]);
 - (ii) nowhere in the contract does it refer to a *lump sum* (SW [9]);
 - (iii) the contract was intended to operate as a re-measurable contract, as no final design drawings were available at the commencement of the contract (PAT [4]), (SW [35], [36]);
 - (iv) it was not possible for the claimant to value a project or any part of it accurately without fully circuited design drawings (SW [23]); or

- (v) revision F of the schedule of rates given to the respondent in April 2014, provided the agreed rate for the 4 mm² cabling (PAT [5]), (SW [39]);
 - (vi) the claimant had issued a revised schedule of rates to the respondent, which included the same pricing for the 4 mm² cabling on 15 July 2015 (SW [40]);
 - (vii) the respondent had used the claimant's schedule of rates to value payment claims during the course of the contract (SW [7]);
 - (viii) the respondent, was now choosing to reduce the price of some of the components, retrospectively to the beginning of the contract (SW [12]);
 - (ix) the respondent had used the claimant's current pricing schedule for payment claims 1 through to 16 (SW [41] through to [48]);
 - (x) the claimant had entered into the contract with the respondent in good faith, and had achieved significant installation efficiencies compared to traditional wiring systems (SW [52]);
 - (xi) after accepting and making payment for the 4 mm² cabling based on the pricing schedule in its possession since April 2014, the respondent had unilaterally and retrospectively discounted the price of the 4 mm² cabling to that of 2.5 mm² cabling (SW [53]).
47. I have put the facts in context by having regard to:
- (i) exhibit PT2, which was an internal email dated 24th of May 2014 from Mark Buckle whom I find was the project director of the respondent, which described the contract as *re-measurable identical to the structural reo and concrete*. I find from this email that the claimant and respondent have had a long standing relationship in traditional and PPP Hospitals, since at least 2004, and that the claimant is an expert in providing modular wiring systems;
 - (ii) exhibit PT3 and SW6, which I find is the claimant's updated schedule of rates, including the 4 mm² cabling;
 - (iii) exhibit SW4, which I find was the claimant's bid document to the respondent dated 22 January 2014 for the modular wiring system, outlining the scope, assumptions and exclusions, which contained an estimate of \$7,881,419.71. I find that this is the contract sum in the contract [Appendix reference to the contract sum, page 39];
 - (iv) exhibit SW5, which I find was a *sub contractor commitment* (A2) last signed off by Stephen Green on 3 June 2014, in which it is clear that the claimant's bid was not competitive, as it was the only supplier for that type of system.

48. I am satisfied, **without yet having detailed regard to the payment schedule and adjudication response**, that the claimant has discharged its onus because:

- (i) there is no contest about the quality and quantum of goods and services supplied;
- (ii) the respondent had previously paid the claimant on the basis of the rates contained in exhibits PT3 and SW6;
- (iii) the contract appeared to be one that provided for re-measurement on a progressive basis.

b. The objections

49. The respondent has raised a number of objections to the claimant's entitlement. These are summarised as follows:

Payment schedule

- (i) Un-numbered page 4 of the payment schedule headed, "*Explanation sheet where Scheduled Amount is different from the Claimed Amount*"

Contract works item 3 – Bulk materials in Warana depot or supplied to site – "*Notwithstanding (sic) the fact that the supply agreement is a lump sum, LLB has assessed the this (sic) progress claim as a schedule of rates...*"

- (ii) *Assessment of rates – further information for the Payment Schedule for Payment Claim number 18* (page 1 – unnumbered page 9):

(a) Lump sum versus Schedule of Rates

- a. The Contract Sum is not an 'estimate' and can only be adjusted in accordance with the supply contract, subject to the requirements of clause 5, with respect to approved variations;
- b. notwithstanding the above, Lend Lease has agreed to assess this Payment Claim (number 18) on the basis of a Schedule of Rates (i.e. assessed quantity x rate)... does however not imply agreement that the Supply Agreement is a schedule of rates;

(b) Assessment of the Payment Claim

Lend Lease has not made any adjustment to the quantity of components claimed by Apex;

(c) Assessment of the rates

- a. assessment on the basis that it is similar to a Schedule of Rates Contract with rates obtained from:
 - a) the schedule of rates included within the supply agreement or;
 - b) assessed rates that had either been provided by Apex and which appear at this stage to be acceptable to Lend Lease for this assessment, or;
 - c) assessed rates that have been calculated by Lend Lease and the rates applied by Apex had not been substantiated, and appear excessive;

The respondent argued that (c) above was the appropriate mechanism and then provided a series of calculations based on 2.5 mm² cables using 1st principles and a price obtained separately from the industry, and these were contained within 5 Annexures, the last of which was a photograph of connectors, cables, et cetera.

The photographs were used to demonstrate that there was no difference between the 2.5 mm² and 4 mm² connectors.

(d) Summary

The respondent summarised that the rates were not covered by the supply agreement and needed to be agreed between the parties, and that the rates supplied by the claimant were not acceptable and were considered excessive.

Adjudication Response ("AR") [paragraph numbers referred to]

(iii) No amount was payable to the claimant because:

- (a) the contract was a lump sum contract. The claimant could not point to any provision of the contract supporting that it was a re-measure, and was relying upon the subjective intent of the parties before contract signature, and the parties' conduct thereafter, neither of which was sustainable in fact or law [AR4(a)];
- (b) the adjusted contract sum was \$6,259,024.40 [AR4(b)];
- (c) the respondent was entitled to retain \$406,404.80, as retention monies, such that the amount due to the claimant of \$5,252,619.60 excluding GST [AR4(c)];
- (d) the claimant had already been paid \$6,103,627.25 (excluding GST), such that it really been paid in excess of the lump sum, and was not entitled to any further payments [AR4(d)] the;

(iv) In the alternative:

- (a) the respondent was entitled to payment of \$423,522.10 (excluding GST) as set out in the payment schedule, and this amount had already been paid [AR5(a)];
- (b) the difference between the parties relates to the supply of 4 mm² cabling, and the respondent provided proof that its interim evaluation was reasonable, which was confirmed by the King report. It asserted that the claimant offered no basis or calculation to attempt to establish why its valuation was

- reasonable, nor had it provided any breakdown of its 4 mm² component rates [AR5(b)];
- (c) in the absence of supporting material from the claimant, the respondent's valuation amount of \$423,528.09 plus GST should be accepted as payable [AR5(c)];
- (d) the amount of \$423,528.09 plus GST had already been paid, so the adjudication amount should be \$nil;
- (e) the claimant was entitled no more than \$423,528.10 excluding GST, and it has recovered more than the entire lump sum contract sum, and it should not be paid the higher amount claimed by the claimant, and having already been paid \$423,528.09 plus GST, the adjudicated amount should be \$nil.
50. The lump sum contract argument was raised by the respondent in the payment schedule, and yet somewhat curiously, the respondent valued the claim as if it was a schedule of rates contract, for which it valued the claim as \$423,528.09 plus GST – i.e. a total amount of \$465,880.90.
51. Nevertheless, it maintained its argument that it was a lump sum contract in the adjudication response, and raised arguments, supported by authority, that the pre-contract subjective intent of the parties, and their post contract conduct could not be used to interpret the contract.
52. These are formidable obstacles for the claimant to overcome.
53. I am obliged to construe the contract, and in order to do so, it is necessary for me to consider the whole contract objectively.
54. Before carrying out this analysis, it is important to deal with the respondent's submissions at paragraphs [27] through to [29] of the response in which the respondent argued that the claimant had not demonstrated its entitlement.
55. It referred to the case of *Co-Ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Others* [2005] NSWCA 229 at [25]– [26] as authority that the claimant needed to demonstrate entitlement.
56. In my view, this case is distinguishable from the present because the Court of Appeal was considering the extent of identification of construction work or related goods and services in the payment claim.
57. In the adjudication response, at paragraph [9], the respondent did not dispute that the payment claim was a valid payment claim, so I'm not prepared to consider an objection based on *Climatech*, which in my view is an authority dealing with payment claims.

Lump sum

58. The respondent's argument that the contract is a lump sum contract is contained in AR paragraphs [30] to [32], and in particular, in paragraph [32], where the respondent makes reference to a number of references to "Contract Sum" in:
- (i) paragraph B of the Formal Instrument;
 - (ii) clause 1.1;
 - (iii) the Appendix;
 - (iv) clause 4.1;
 - (v) document headed "*LL – AWSA Supply Agreement Sunshine Coast University Hospital – MHB* attached to schedule 14, with AWSA contract value of \$7,881,419.71 (AUD).
59. In [AR32(f)] the respondent asserts that, "*All of the above makes is (sic) clear the Claimant is entitled to be paid \$7,881,419.71 as a lump sum for performing its obligations under the Supply Contract. This is clear and unambiguous.*"
60. Whilst these clauses certainly make reference to a Contract Sum, nowhere have I found that any of those clauses, or indeed any other in the contract, state that it is a *lump sum contract*. I also accept the respondent's submissions that the contract does not state that it is a *schedule rates contract* either.
61. It is necessary to review the contract to establish what the claimant had agreed to do for the respondent, and I have read the whole contract.

62. Schedule 1 describes the *scope of work* in some detail, by describing the activities that were required. Schedule 1 is divided as follows:
- (i) general description scope;
 - (ii) areas to be included;
 - (iii) design requirements;
 - (iv) related provisions;
 - (v) BIM scope. I find that this provision was anomalous because it refers to a Consultant providing three-dimensional modelling and object intelligence, referred to as Building Information Modelling. I therefore ignored this provision as it does not involve the claimant;
 - (vi) Supply scope items;
 - (vii) process 1 – design and establishment;
 - (viii) process 2 – production, manufacture and dispatch;
 - (ix) process 3 – Australia, delivery, storage and coordination;
 - (x) process 4 – training and management
63. I find that the modular wiring/structured electrical wiring system provided by the claimant, as described in the 3rd paragraph, was likely to substantially reduce on-site labour time and reduce overall trade costs.
64. A key ingredient, however, to the claimant's activities was to convert the building service design engineer's (Aurecon) design based on a traditional wiring system into a modular wiring system (page 57 of the contract).
65. In paragraph [37] of the adjudication response, the respondent stated that before I can have reference to pre-contract external material relied upon by the claimant, the claimant must identify an ambiguity (citing *Mt Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, paragraphs [46] to [48] (*Mt Bruce*), and it submitted that the claimant has failed to do so.
66. With respect, in my view, *Mt Bruce*, does not so strictly constrain me to only have regard to this material in the event of a demonstrated ambiguity. At paragraph [49] French CJ, Nettle and Gordon JJ, held:
- 'However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or object of the contract, whether it facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating."*
67. Exhibit SW4, was the claimant's bid document dated 22 January 2014, and I have used it to put the facts in context, and provide the genesis of the transaction. At paragraph 3.0 general notes on page 3 of the document, the claimant said that it could only make accurate take offs on receipt of fully circuited designs and quantified schedules of fixed equipment. I understand this, and find that it is critical for the claimant to have the electrical design, in order to provide its modular wiring design.
68. The claimant's affidavits, identified:
- (i) it was not possible for the claimant to value a project or any part of it accurately, without fully circuited design drawings (SW [23]); and
 - (ii) no final design drawings were available at the commencement of the contract (PAT [4]), (SW [35], [36]).
69. The respondent did not controvert that Aurecon's design was not finalised at the commencement of the contract. Accordingly, I find that the Aurecon's design was not finalised at contract commencement.
70. At paragraph [51] of *Mt Bruce*, the court held that, *'...a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience."*
71. The claimant **Process 1 – design and establishment** (page 59 of the contract), needed to receive and interpret the electrical design information, and there was a whole list of information that was required.

72. If that information was not available, to my mind it is inconceivable that the parties would have considered that the Contract Price was a lump sum, because the claimant would be pricing the work without having the design upon which its price depended.
73. Had that been the intention of the parties, in my view it would have been necessary for them to specifically state that it was a lump sum contract, and I found that no such statement existed in the contract.
74. I have already found that *Mt Bruce* does not prevent me from considering extraneous material relied upon by the claimant, because I am entitled to use it to put the matter in context. I have not used this material to interpret what is written in the contract. What it has done has put the **process 1 – design and establishment** in context, and the wording in the contract itself contemplated the design being available for this work to be carried out, and by logical extension, to have been able to be priced, when the contract was entered into.
75. The respondent at paragraph [36(b)] of the adjudication response submitted that the contract had an “entire contract.” provision. Paragraph C of the Formal Instrument is the provision which contractually excluded extraneous precontract material.
76. I accept that this clause “superseded all previous communications, whether oral or written” and demonstrated the entire, final and the concluded agreement between the parties.” However, my reference to extraneous material was not to introduce extraneous terms into the contract, but merely to put the matter in context, as allowed by *Mt Bruce*.
77. **Accordingly, I am not satisfied that it was a lump sum contract.**
78. However, I must now look to the contract for a mechanism for valuing the work carried out by the claimant.
79. Schedule 14 to the contract referred to a schedule of drawings. However, it also included the claimant’s *schedule of rates* (without the 4 mm² cabling), together with the claimant’s schedule headed “LL – AWSA Supply Agreement Sunshine Coast University Hospital MHB (the “additional schedule 14 documents”).
80. The claimant took issue in paragraph [8] through to [12] in its reply with the additional schedule 14 documents arguing that they did not form part of the contract.
81. I have not yet considered whether the claimant was entitled to make these submissions to reply to the alleged new reasons. However, I reject them in any event, because the claimant had provided sworn evidence, and attached these documents as part of schedule 14 of the contract documents through both Mr Turnbull and Mr Waldron. To my mind it is now not possible to resile from them forming part of the contract.
82. Accordingly, I’m satisfied that schedule 14 provides schedules of rates against which the claimant’s work could be priced.

Assessment of the rates

83. This is the important consideration in this adjudication because the parties agree that the 4mm² cabling rates is central to the dispute.
84. The claimant argued that these 4mm² cabling rates formed part of the contract as they had been provided in April 2014, and they had been accepted and paid by the respondent thereafter.
85. In contrast, the respondent stated that these rates were not in the schedule 14, and although they were used by it for interim valuations, the rates had never been agreed, and did not form part of the contract.
86. It is now necessary to revisit the respondent’s objections to the claimant’s assertions about the 4mm² cabling rates forming part of the contract, which it argued could only be on the basis of recourse to extraneous material that they formed part of the contract:
 - (i) Pre-contract to glean the party’s intentions;
 - (ii) Post contract conduct to demonstrate agreement with the 4mm² cabling rates.
87. The respondent provided case law to support its objections to either pre-contract or post contract conduct to which I now have regard.

Pre-contract material

88. For me to consider that these 4mm² cabling rates, which were not referred to anywhere in the contract, should form part of the contract, could occur if I had regard to precontract material, in order to discern the pre-contract intention of the parties. This is prevented by the authority of *Mt Bruce*.
89. I am obliged to determine the contract objectively. I find objectively that the contract works satisfactorily with the schedule of rates in schedule 14. The fact that this schedule excludes the 4 mm² cabling rates, whether it was a mistake or otherwise, does not make the contract unworkable.
90. Having regard to the pre-contract negotiations to introduce the 4 mm² cabling rates, would contravene High Court authority.
91. I am the further constrained by the entire contract clause, which specifically excludes such pre-contract communications.
92. Accordingly the claimant has failed to demonstrate that the 4mm² cabling rates form part of the contract from the outset.

Post contract conduct

93. Mr Waldron in his affidavit provides evidence that, for almost the entire contract duration so far, the respondent has paid the 4mm² cabling rates. Whilst they are not specific submissions made by the claimant, it is apparent the claimant is arguing that this conduct is evidence that these rates formed part of the contract.
94. At paragraph [49] of the response, the respondent stated that, "*Further, it is clear as a matter of law that the Claimant cannot rely on post contract material to help interpret the meaning of the Supply Contract.*" It cited cases in support of this submission.
95. These were *L Schuler AG v Wickman Machine Tools Sales Ltd* [1970] AC 235 (*Wickman*); *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (*James Miller*); and *Magill v National Australia Bank Ltd* [2001] NSWCA 221 (*Magill*), as well as *Sport Vision Australia Pty Ltd v Tallglen Pty Ltd* (1998) 44 NSWLR 103 at 116 (*Tallglen*).
96. This is a critically important issue for the claimant, so I need to consider each of these cases closely.

Wickman

97. This case dealt with a long-term agency in which Schuler purported to terminate the agreement on the basis of a breach of the condition.
98. Lord Reid at page 252 saw no reason to change the decision in *James Miller*, which dealt with "... *The consideration of actings subsequent to the making of the contract*" in which his Lordship held that there was, "*no substantial report in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning.*"
99. Lord Wilberforce (also citing *James Miller*) at page 261 held that, "*The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the party's intentions must be ascertained, on legal principles of construction, from the words that they have used. It is one in the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any which to the lay mind might at first sight seem to be proper to receive.*"

James Miller

100. Lord Reid at paragraph 603 held that, "*I must say that I have thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made.*"
101. Viscount Dilhorne at page 611 held that, "*I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel.*" (My underlining for further discussion below.

Magill

102. This was a strong NSW Court of Appeal, in which the court held that evidence of subsequent conduct as an aid to the construction of the contract was not admissible.

103. Ipp AJA held at [51] that the reasoning of Lord Reid in *James Miller* was unanswerable.

Tallglen

104. Bryson J at page 114 commenced his analysis of the law regarding later conduct of parties. Between paragraphs E and F on page 114, His Honour held, "*The English law on the subject is very clear: the later conduct and statements of parties on not admissible even to resolve an ambiguity in the meaning of the contract.*" His Honour then cited the judgement of Lord Reid in *James Miller* with approval, as well as the case of Wickman.

105. On page 116, His Honour held, "*In my respectful opinion the considerations stated by Lord Reid is of overwhelming and unanswerable importance. The contract cannot mean one thing if it is never acted on, and something else if it is. The meaning of the words used in a written agreement is the same, in my opinion, whether the parties did not ever do anything under it, or acted on it every day for many years, and cannot change if evidence of what they did under it becomes unavailable because the contract been forgotten, because everyone concerned is now dead.*"

106. Having regard to all the cases provided by the respondent, it is abundantly clear that the claimant is not entitled to refer to subsequent conduct as an aid to the construction of the contract.

107. In *James Miller*, Viscount Dilhorne held that the subsequent conduct of one party may give rise to an estoppel to which I will make reference below.

108. Accordingly, I find that the 4mm² cabling rates did not form part of the contract.

109. There is a variation mechanism within the contract under clause 5, which facilitated agreement for these 4mm² cabling rates, but there is no evidence from the claimant that this mechanism was followed.

110. I accept Mr Waldron's evidence that the respondent had valued the claimants 4 mm² cable work at the rates provided by the claimant in April 2014 for all the payment claims up to and including payment claim 16.

111. Thereafter, I find that the respondent had hardened its position, and retrospectively discounted the work associated with the 4 mm² cabling, by utilising the variation clause 5.5 (in circumstances where there been a failure to agree the valuation of a variation) to then provide its own valuation, which it argued was reasonable.

112. This occurred in payment schedule 18, and yet the claimant did not engage with the respondent in its application, about this vitally important issue.

113. In the adjudication response, the respondent then obtained a report from Andy King, a quantity surveyor, who independently determined the reasonable cost of the 4 mm² cabling, to within 10% of the respondent's \$244,322.03 plus GST assessment.

114. The claimant did not engage with the respondent on this valuation, nor did it provide any expert evidence to:

- (i) demonstrate an error in the respondent's payment schedule valuation, and
- (ii) support for its own 4 mm² cable.

115. I appreciate that if the 4 mm² cable rates had been agreed with the respondent, whether or not they were reasonable would be entirely irrelevant, because that would be the rate under the contract.

116. In attachment PR-8, Mr Waldron's 28 July 2015 email to Peter Rudolph, at paragraph 3, stated that it was not proposing an increase in cost for the 4 mm² cabling rate, which he said had always been the rate and which had been accepted by the respondent for over a year.

117. Mr Waldron added that the claimant could not accept a unilateral discount on goods ordered and supplied. However, he was unable to point to specific agreement of these rates, apart from the conduct of the respondent in previously paying at this rate, which is inadmissible.

118. Accordingly, I am satisfied that the respondent's objections are valid to preclude the claimant's entitlement, unless the claimant can overcome those objections.

c. The claimant's reply

119. The claimant argued that the respondent had provided 2 new reasons for non-payment that had not been included in the payment schedule, which were:

- (i) the claimant had no contractual entitlement to be paid the disputed amount; and
- (ii) the claimant had been paid in excess of the contract sum and was therefore entitled no further payment.

120. I have already considered the claimant's objections in paragraph [8] through to [12] in the reply to the two documents attached to schedule 14 of the supply contract, and rejected those submissions.

121. Insofar as further detailed submissions regarding *contractual entitlement*, paragraphs [13] through to [23] of the reply, the claimant failed to grasp the nettle regarding demonstrating that the 4 mm² cabling rate formed part of the contract in the face of the formidable objections from the respondent as a matter of law to the pre-contract and post contract prohibitions in the case law.

122. Insofar as further detailed submissions regarding *contract sum*, paragraphs [24] through to [33], again the claimant failed to meet the respondent's objections "head on" regarding the admissibility of pre-contract and post contract prohibitions in the case law referred to above.

123. As to the further detailed submissions regarding *variations*, paragraphs [34] through to [40], I have not had regard to them because in my view they were not answering any fresh reasons raised by the respondent.

124. I have also rejected the reply submissions in paragraphs [41] through to [52] because they deal with procedural matters which were not in answer to fresh reasons raised by the respondent.

d. Has the claimant overcome the objections?

125. Having regard to the entire history of the matter from the materials provided in the adjudication, the respondent appears to have only recently relied upon a strict interpretation of the parties' contractual positions to reduce the amount paid to the claimant, based on the argument that the 4 mm² cabling rates had not been agreed.

126. Whilst the claimant had concerns about the unilateral and retrospective discount of the 4 mm² cabling rates (SW [53]), with respect it has not assisted itself the paid by not engaging with the respondent's arguments in the payment schedule.

127. It is clear from the payment schedule that the respondent was arguing that it was a lump sum contract, and that the 4 mm² cabling rates had not been agreed, such that it used its own rates to determine what it considered was reasonable. It is entitled to do this under clause 5 of the contract.

128. The claimant failed to:

- (i) engage with the respondent's payment schedule about the respondent's valuation;
- (ii) provide any submissions, supported by authority, about how the 4 mm² cable rates could be construed as a contract rate;
- (iii) raise issues of estoppel preventing the respondent's conduct in unilaterally discounting a previously accepted 4 mm² cable rate.

129. Whilst this result will no doubt be disappointing for the claimant, it is important for the claimant to appreciate that an adjudicator is constrained by the:

- (i) construction contract;
- (ii) parties' submissions, and
- (iii) facts (including expert evidence) provided by the parties in the adjudication, to reach a properly reasoned decision.

130. In this instance, had the claimant put forward an argument, supported by appropriate authority, that the respondent was estopped from reducing these rates, it may have been able to demonstrate its entitlement.

131. However, no such arguments were raised, and I must decide based on the material before me.
132. Accordingly, I conclude that the respondent has succeeded in demonstrating that the claimant is not entitled to payment in accordance with the 4 mm² cabling rates.
133. I now turn to valuing the amount of the progress payment.

IX. The amount of the progress payment

134. I have already found that the contract was not a lump sum contract and that it was to be valued in accordance with the schedule of rates provided in schedule 14.
135. I am obliged under s26(1)(a) of BCIPA to decide the amount of the progress payment.
136. The respondent valued the claimant's claim in accordance with the schedule of rates by reference to its own calculations, which was supported by an independent quantity surveyor. These calculations yielded a figure of \$423,520.09 (excluding GST) at paragraph [81] of the response, which it had already provided in the payment schedule.
137. s13 of BCIPA provides that the amount of the progress payment is the amount calculated under the contract [s13(a)], or if the contract does not provide for the matter, then the amount is calculated on the basis of the value of the related goods and services supplied, which s14 of BCIPA then governs.
138. It is open for me to find that the respondent's calculation *was calculated under the contract* – clause 5.5 in particular, for which it derived independent support regarding the 4 mm² cable supply rate that it had calculated.
139. The claimant has provided no other mechanism for valuation, and did not challenge the respondent's payment schedule valuation, which means I am obliged to accept that of the respondent. Accordingly, the value of this payment claim is \$455,880.90 including GST.
140. Peter Rudolph's statutory declaration (PR [8]) stated that this amount had been paid.
141. Whilst it appears obvious that if a respondent has scheduled an amount, which I have found is the amount of the progress payment, then the adjudicated amount should be nil.
142. s13 of BCIPA facilitated an amount calculated under the contract, which \$455,880.90 including GST. I cannot find in BCIPA a recognition of the amount that has been scheduled, or indeed paid. However, s13 refers an amount of progress payment *to which a person is entitled*, such that if they have already been paid, they are not entitled to that amount.
143. Accordingly, I find the **adjudicated amount is \$NIL**

X. Due date for payment

144. s15 of BCIPA deals with the due date for payment under the contract, and I'm obliged by s26(1)(b) of BCIPA to decide on the due date for payment.
145. Neither party has provided me with any submissions regarding the due date of payment. However, in the adjudication application itself, the claimant stated that the due date for payment was 31 October 2015. This is consistent with the Appendix (page 41 of the contract) which makes reference to clause 4.3.3 of the contract and provides that payment is the later of:
- (i) the last day of the month following the month in which the progress claim was submitted, or
 - (ii) compliance by the supplier with a series of clauses.
146. I have no evidence as to whether the claimant complied with the series of clauses, so am content to accept the last day of the following month provision.
147. Given that the claim was made on 1 September 2015, payment is then due on 31 October 2015, based on the contractual regime.
148. Accordingly, the **due date for payment is 31 October 2015.**

XI. Rate of interest

149. I am obliged by s26(1)(c) of BCIPA to find the interest rate.

150. I find that the contract does not provide an interest rate for late payments.

151. S15(2) of BCIPA provides that:

'(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

(a) the rate prescribed under the Civil Proceedings Act 2011, section 59(3) for a money order debt;

(b) the rate specified under the contract. '

152. Section 59(3) of the Civil Proceedings Act 2011 provides:

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

153. I find that the Chief Justice's practice direction has the current rate of interest as 8.5%, and given that there is no rate identified in the contract,

I find the rate of interest is 8.5% interest payable on the adjudication amount.

XII. Adjudicator's fees

154. The default provision contained in s35(3) of BCIPA makes the parties liable for the fees in equal proportions, unless I decide otherwise.

155. The claimant has not succeeded in its payment claim, and it provided no detailed submissions in support of its application, nor did it engage with the respondent's valuation in the payment schedule.

156. Furthermore, it did not provide any submissions to demonstrate that pre-contract and post contract material were allowed to construe the contract, which was fundamental to demonstrate that the 4 mm² cable rates had been agreed in the contract.

157. This was the essential contest between the parties, and I have found that the claimant has failed to discharge its onus of its entitlement to work at the 4 mm² cable rates.

158. In considering the allocation of fees I have had regard to s35A of BCIPA, and considered the following matters in exercising my discretion:

- (i) the fact that the claimant was unsuccessful;
- (ii) the respondent's inclusion of additional reasons;
- (iii) another matter I considered relevant.

159. As to the additional reasons, I did not make a specific finding about whether additional reasons had been introduced, because in my view, the claimant's reply failed to engage on the critical issue of how it could have the 4 mm² cable rates form part of the contract as a matter of law.

160. However, to my mind, quite a bit of time was spent on the issue of the lump sum contract, which was a significant argument raised in the payment schedule, and the respondent failed to convince me that it was a lump sum contract, and I was satisfied that it was a contract valued by reference to the schedule of rates, which was what the claimant had argued.

161. Therefore, despite the claimant not succeeding in its payment claim, it had succeeded in demonstrating that it was a schedule of rates contract.

162. Accordingly, I do not consider that I should disturb the default provision that the parties share equally in the adjudicator's fees.

163. Accordingly, I decide that the claimant pay 50% of the fees and the respondent 50% of the fees.



Chris Lenz

Adjudicator

2 December 2015