

Adjudication Decision: 8797

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator : Chris Lenz (J622914)

Application Details

Claimant

Name : Apex Wiring Solutions Australia Pty Ltd
ACN : 156350524
Address : c/o Clearpoint Counsel, Level 3, 673 Bourke Street, MELBOURNE
VIC 3000

Respondent

Name : Lend Lease Building Pty Ltd
ACN : 000098162
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 November 2015
Amount : \$1,010,015.18 + GST
Nature of claim : Complex

Payment Schedule

Date : 20 November 2015
Amount : -\$795,819.60 Ex GST

s20A Notice Date : N/A

Application Detail

Application Date : 4 December 2015
Acceptance Date : 9 December 2015
Response Date : 13 January 2016

Claimants reply: : 26 February 2016

Extension of Time : 8 days because I asked for further submissions

Adjudicator's Decision

Jurisdiction : Yes
Adjudicated Amount : **\$258,268.14 (incl GST)**
Due Date for Payment : **31 December 2015**
Rate of Interest : **8.5%**

Claimant Fee Proportion (%) : **50%**
Respondent Fee Proportion (%) : **50%**
Decision Date : **31 March 2016**

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A. DECISION

I have made a decision under the *Building and Construction Industry Payments Act 2004* ("BCIPA"), 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 (the "claimant") was engaged by Lend Lease Building Pty Ltd (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. I had adjudicated an earlier dispute between the claimant and respondent and released the decision on 4 December 2015. In that earlier decision, I made 2 findings that impacted on this adjudication, viz.:
 - (i) The contract was not a lump sum contract, and was to be valued in accordance with schedule of rates;
 - (ii) I did not accept the rate for 4mm² wire cabling claimed by the claimant, as I found this rate did not form part of the contract, and I accepted the calculations for this item submitted by the respondent.
4. This adjudication essentially involves resolution of a dispute regarding the contract sum claimed by the applicant, from which the respondent made deductions.
5. One issue that loomed large in this adjudication, was the respondent's argument that the claimant's claim for 4mm² wire cabling had failed to take into account my earlier decision where I had accepted the respondent's lower rate for this work (the "*decided 4mm² rate*") than that claimed by the claimant in this adjudication.
6. The respondent, inter alia, argued that I was obliged under BCIPA, to use the *decided 4mm² rate* that I had accepted in the earlier decision, in this adjudication. The respondent also argued that the claimant was prevented from claiming any other rate because of issue estoppel.
7. The claimant alleged that the respondent had raised new reasons in the adjudication response, identified its right of reply under s24B of BCIPA. The claimant requested a further 15 business days for its *reply* under s24B(3) of BCIPA, and I granted this additional time.
8. The *reply* was delivered on 26 February 2016, and in response to its application, I sought submissions from the respondent about the reply and its validity (the "*respondent's reply*"), and gave the claimant a right of reply to those submissions.
9. The *respondent's reply* submissions were received on 4 March 2016 and those of the claimant on 9 March 2016.
10. I requested submissions from each of the parties about the valuation of the 4mm² rates using the claimant's and respondent's calculations, at which time I requested a spreadsheet version of the payment claim.
11. These submissions were provided on 16 March and 17 March 2016 respectively.

II. Application to the QBCC the and appointment of Adjudicator

12. The claimant applied to the Queensland Building and Construction Commission ("QBCC") on 4 December 2015 for adjudication. On 9 December 2015 the QBCC referred the adjudication application no. 8797 for me to determine.
13. I am a registered adjudicator under BCIPA with registration number J622914, and I accepted the appointment on 9 December 2015 when my agent wrote to the parties advising of my acceptance.

III. Material provided in the adjudication

14. I received a lever arch folder from the claimant and respondent respectively.
15. The claimant provided 2 affidavits of Simon Waldren ("SW") [denoted as SW 1 and SW 2 respectively] dated 5 October 2015 (provided in the previous adjudication), and 4 December 2015 respectively, to which were attached documents.
16. The respondent provided submissions, together with statutory declarations from Liam Forry ("LF") and Andy King ("AK") (with attachments), as well as copies of 3 cases in support of its submissions.
17. The claimant's **reply** contained affidavits of:
 - (i) James Michael Lewis dated 25 February 2016;
 - (ii) Peter Turnbull dated 25 February 2016;
 - (iii) Simon Waldren dated 26 February 2016 ("SW3").
18. The **respondent's reply** challenged that the application of the *decided 4mm² rate* was a new reason in the **reply**, but conceded that its oversupply argument was a new reason.

IV. Is it a Construction Contract within BCIPA?

19. In order for adjudication to proceed there must be a *construction contract* to which the payment claim relates. This contract was the subject of a previous adjudication decision, but I have to make a decision about whether it falls within BCIPA in this decision.
20. The claimant provided me with a copy of the contract [Exhibit SW1 in SW1] and at paragraph 4 of the response, the respondent agreed there was a contract, and at paragraph 6 that it was a *construction contract* within BCIPA.
21. Accordingly, I am 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 November 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 November 2015, the claimant served a payment claim for \$1,010,015.18 (excluding GST).

29. This amount exceeded \$750,000, which made it a complex payment claim in accordance with schedule 21 of the definition of *complex claim* in BCIPA, which was conceded by the respondent at paragraph 13 of the response.
30. I therefore find that it is a valid payment claim which can be adjudicated.

VII. Payment Schedule

31. On 20 November 2015, the respondent provided the payment schedule, with the scheduled amount of -\$795,819.60 excluding GST.
32. At paragraph 6 of SW2 Mr Waldren conceded that the schedule was issued on 20 November 2015, and he argued [at paragraph 8] that it was completely unreasonable, but he did not argue that it was invalid.
33. 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 20 November 2015.
34. Accordingly, I find that the payment schedule was served within time under BCIPA.
35. I'm satisfied therefore that the payment schedule complies with BCIPA and can be adjudicated.

VIII. The adjudication application and response

36. The approach that I have taken to deciding this matter is to give consideration to the adjudication application supporting the payment claim, for which the claimant bears the onus; and then consider the adjudication response, which made a number of concessions, before considering the *reply* and the subsequent submissions from both parties.
37. Turning to the adjudication application, I have summarised its essential points, whilst taking into consideration the adjudication response concessions.
38. Issues that emerge from what remained in dispute are dealt with progressively.

a. *Summary*

39. In the "Summary of Adjudication Application" from paragraphs 4 through to 13 of the application, the claimant argued that the respondent had certified and paid all of the claimant's payment claims using the claimant's material schedules and corresponding schedules of rates.
40. It added that the respondent had not contested the quality or quantity of goods supplied such that the claimant was contractually entitled to payments for goods ordered and delivered under the contract [Paragraph 6].
41. It argued that, given the previous decision that the contract was a re-measurable contract. [Paragraph 8], the respondent had no entitlement to negatively vary the contract sum based on breakdowns in the fee structure and procurement schedule. [Paragraph 10].
42. It argued that the schedule of rates should be used to value variations, and that given the respondent had valued and paid the claimant for the goods on this basis (and based on the claimant's valuation) for a prolonged period of time, it was unconscionable for the respondent to now dispute this valuation method. [Paragraph 11].
43. It added that the respondent had provided no evidence to support its valuation of negative variations, nor provided any evidence that these services had not been supplied or that they were unsatisfactory. [Paragraph 12].
44. It argued that it was entitled to have the payment claim of \$1,010,015.18 (excluding GST) be paid in full.
45. It is clear, however, that the amount claimed included the claimant's 4mm² rates it had claimed in the previous adjudication, and the valuation of this cabling is a matter of significant dispute between the parties.
46. I will consider this important issue when considering the *reply* and the *respondent's reply* submissions which will take place after these adjudication application and response submissions.

b. Detailed submissions on entitlement

47. The claimant essentially challenged the *interim assessment* argument on the basis that prior certification and paying of the payment claim led the claimant to believe that its method of failing the progress payment had been accepted by the respondent, and it would now be unconscionable for the respondent to retract such acceptance [Paragraph 18].
48. It also challenged the respondent's interpretation of clause 4.6 on the basis that the clause was not to be interpreted so that the respondent could change its mind 18 months after paying the claimant progressively for the work [Paragraph 19].
49. It argued that the respondent could not now reduce the amount payable on the basis of it either being a lump sum contract, or using a different valuation method [Paragraph 20].

c. Submissions on contract sum

50. These submissions reiterated the objection to the respondent's lump sum contract argument, and argued that the prior decision confirmed that it was a re-measurable schedule of rates contract [Paragraph 22].

d. Omission Variations

51. In the adjudication application there were number of the objections raised by the claimant to the payment schedule, [Paragraphs 23 through to 35].
52. The payment schedule had one line variations under the heading "Order Amendments/Variations that have not yet been agreed by the parties to the contract" which were deductions relating to:
 - (i) Omission of Level 2 modular wiring (\$1,261,903.28);
 - (ii) Omission of Lower Ground modular wiring (\$630,91.65);
 - (iii) Omission of BIM scope (\$36,000);
 - (iv) Omit 30 nr transportation provision from UK to Australian off-site storage facility (\$227,226.06);
 - (v) Omit labelling requirement to all modules (\$516,117.42);
 - (vi) Supplier's failure to provide fully co-ordinated modular wiring system TBC
 - (vii) These omissions totalled (\$2,672,198.41)
53. In the adjudication response, a number of these objections were conceded by the respondent [Paragraph 24], such that they are no longer in dispute.
54. These concessions were as follows:
 - (i) deleted scope which omitted modular wiring on the lower ground floor and level 2;
 - (ii) deletion of BIM scope;
 - (iii) the omission of 30 transportation provisions from the UK factory.
55. What emerged as still in dispute from the *payment schedule* were the following:
 - (i) Labelling requirements;
 - (ii) Supplier's failure to provide fully co-ordinated modular wiring system.
56. I now refer to each of these items individually, and then will consider the other reason identified in the response of *oversupply*. At paragraph 4 on page 11 of the **respondent reply** submissions dated 4 March 2016 it conceded that oversupply was a new reason, and I am therefore of the view I am entitled to have regard to Mr Waldren's affidavit SW3 regarding oversupply in paragraphs 15 through to 19. I did not consider any other part of this affidavit, as it was not properly part of the reply material, which I refer to elsewhere.
57. In considering the evidence regarding labelling and oversupply, I have to make a value judgment between contending affidavits and statutory declarations, in deciding which evidence is preferable.

Labelling (deduction of \$397,009.20)

58. The response reduced the amount to be deducted from \$516,117.42 to \$397,009.20 (both excluding GST) based on labelling non-conformance.
59. Despite reducing its earlier calculation for this item, this is a significant deduction, and in my view, the respondent bears the onus of demonstrating that the claimant breached the contract in this respect.

60. Whilst there is a statutory declaration from Mr Andy King, a Quantity Surveyor, providing a calculation for the costs of updating the labelling requirements, he made no finding that the labelling was deficient.
61. In fact, he specifically stated that he had not been provided with drawings and/or specifications, nor had he been given samples of the extender cables or labels.
62. Furthermore, he stated that he had relied upon the statutory declaration of Mr Forry – “prepared by Clayton Utz”.
63. Accordingly, I only need to consider Mr King’s statutory declaration, if the respondent demonstrates its entitlement to make this deduction for a non-conformance.
64. I need to look to Mr Forry for evidence of the non-conformance, and non-conformance with some particularity, given the seriousness of the alleged breach.
65. Mr Forry, at paragraphs 12, 14, 15, 21 and 26 asserted that the circuit reference had been omitted on the labels.
66. He has not identified his qualifications and expertise to provide evidence of non-conformance of circuit labelling, nor on his ability, experience or qualifications to carry out calculations involving assessments of engineering time. In addition, he did not state that he had personal knowledge of the labelling non-conformance.
67. He stated that he is a Commercial Manager, but his extent of involvement in the project is not clear from his declaration, apart from him requesting Mr Bentley, a project engineer, to undertake a stocktake of materials in October 2016, and attaching a letter not signed by Mr Forry, as evidence of *oversupply*, to which I will turn later.
68. The respondent’s submissions in the response, and particularly paragraphs [67] and [68], refer to the alleged deficiency in the labelling, but Mr Forry did not provide evidence in his declaration of this level of detail of the labelling deficiency.
69. At best, at paragraph 25, he stated that *each label on the module has not been delivered with the relevant circuit reference*, but he did not describe what that entailed, nor did he provide a label demonstrating this deficiency, to either Mr King or in the adjudication response.
70. In the payment schedule, the respondent had provided photographs of connectors, cables, etc, and in my view I can draw an inference that it could have also provided a photograph of a deficient label, if it wished me to make a finding about this important breach of contract.
71. In my view, it is not possible to rely on the respondent’s submissions on such an important point, without supporting evidence from Mr Forry.
72. Mr Waldren, the managing director of the claimant for the past 4 years affirmed that he had personal knowledge of the matters in SW2 provided in the application. At paragraph 19 he stated that all labelling, including the circuit reference conformed with the contract.
73. He also said [paragraph 21], that the labelling requirements had been discussed with the respondent in December 2014, and the claimant had received no communication that it was unsatisfactory; presumably until the payment schedule on 20 November 2015, which is nearly a year later.
74. Apart from disagreeing with Mr Waldren, Mr Forry did not controvert paragraph [21] about the discussions about labelling, nor did he engage as to why the complaint only emerged nearly a year later.
75. I do not agree with the respondent’s response submissions that the onus is on the claimant to provide evidence of its broad assertions of entitlement [Paragraph 60(d)]. In my view, the onus only shifts to the claimant, if the respondent has discharged its own onus of demonstrating entitlement to deduct based on the claimant’s breach.
76. At paragraph [70] of the response, the respondent argued that the claimant had not demonstrated it had complied with the contract requirements. However, that, with respect, fails to recognise Mr Waldren’s paragraph [19] in which he affirms that the circuit reference was provided in accordance with the contract.
77. I am not satisfied that the respondent has discharged its onus on such an important issue, particularly in light of the controverting evidence from Mr Waldren.
78. Accordingly, I am unable to find cogent evidence that the circuit reference labelling was missing, and I therefore reject this deduction of \$397,009.20.

Supplier's failure to provide a fully co-ordinated modular wiring system

79. The respondent identified the amount to be deducted as TBC. At paragraphs [34 and 35] the claimant took issue with this unknown deduction, and reserved its rights to provide further evidence, if the Respondent provided evidence to support this allegation.
80. The respondent provided no further evidence to support this unknown reduction, nor any further submissions. Accordingly, I reject this reason as being unsubstantiated.

Oversupply (deduction of \$126,045.28)

81. Mr Forry's statutory declaration dealt with the oversupply issue, by providing hearsay evidence that the stocktake demonstrated that materials had been oversupplied, and that Mr Bentley had written to the claimant about the oversupply ("oversupply letter") and that the claimant had taken back the oversupplied goods.
82. At paragraph 7, Mr Forry said he understood that the claimant had not disputed the oversupply letter.
83. This does not appear to be correct, because Mr Waldren provided a number of exhibits to his SW₃ affidavit [Exhibits SW6 to SW8] regarding email traffic with Mr Bentley about the alleged oversupply.
84. Mr Forry, at paragraph 11, refers to the claimant taking on the risk of over production of materials in previous payment schedules. These payment schedules, and payment schedule 18, in particular, are not in contest in this adjudication, and it is not appropriate, based on a bare assertion, to make a finding that the claimant had oversupplied materials.
85. Mr Waldren in SW₃ [Paragraph 19], affirmed that the excess stock was due *solely to the cancellation of goods for level 2*, and that the claimant had assisted the respondent in mitigating its loss by providing the goods elsewhere in the project.
86. The respondent's response paragraph [80], asserted that the claimant had supplied amounts in excess of what was required for the project, and which had not been requested by the respondent.
87. Mr Forry's evidence does not go that far. He merely extracted what Mr Bentley had said in his letter that a returns column identified what would not be required. Mr Waldren explained the communications he had with Mr Bentley, and that he did not agree that the claimant would provide credit for stock not accepted by the respondent.
88. In paragraph [83] of the response, the respondent asserted that to assist with the claimant's cashflow, the respondent agreed to pay for deliveries of materials to its offsite storage facility. There is no evidence provided by the respondent of this fact.
89. The claimant's *reply* identified that the respondent had failed to cancel the goods for level 2 until after the good had been manufactured, which is supported by Mr Waldren's paragraph [19] of SW₃.
90. The claimant's *reply* submitted that the claimant was entitled to payment of the goods that were supplied in accordance with clause 6.1.2 of the contract.
91. I prefer Mr Waldren's direct evidence of what occurred from his SW₃ affidavit, that the alleged oversupply was excess stock caused solely by the late cancellation of the level 2 goods, and that the claimant had not agreed to provide a credit for goods that it collected.
92. I can draw the inference that excess stock is a logical consequence of cancellation of orders for cabling, which appeared to be a significant decision, given that the respondent's payment schedule SCVO S12878 for the omitted items amounted to a value of \$1,892,854.93. Whilst the respondent no longer contested those deductions for level 2 and lower ground floor cabling in the response, I am entitled to consider what the respondent had asserted in the payment schedule to get an appreciation of the scope reduction.
93. Accordingly, I accept Mr Waldren's evidence which provided the plausible explanation for the excess stock, rather than the respondent's unsubstantiated submissions that the claimant was responsible for the oversupply.
94. In my view, the respondent was liable to pay for the goods that it had ordered in accordance with clause 6.1.2 of the contract.

95. Accordingly, I am not satisfied that the respondent is entitled to this deduction of \$126,045.28.

IX. The submissions in the *reply* and the *respondent's reply* submissions.

96. The claimant took issue with the adjudication response that there were 2 new reasons for non-payment of the payment claim, viz.:
- (i) the adoption of the prior decision rates for the 4mm² cabling;
 - (ii) the oversupply of materials.
97. The oversupply issue has already been dealt with above, which leaves the most contentious issue of the valuations of the 4mm² cabling.
98. The thrust of the claimant's submissions was that the respondent was estopped from claiming that the amended schedule of rates, which the respondent had accepted for quite some time, was no longer applicable.
99. At paragraph 11(b) of the *reply*, the claimant submitted that I made a valuation about the 4mm² cabling rates without seeking any further submissions from the claimant in relation to the reasonableness of those rates, and "appeared to arbitrarily apply rates referred to in the respondent's material."
100. Whilst at paragraph 29 of the *reply*, the claimant conceded that the power under s25(3)(b) of BCIPA for seeking further written submissions was discretionary, it argued that it would suffer significant detriment, if I applied the rates that had previously found to be applicable.
101. The claimant at paragraph 13 of the *reply*, referred to my paragraph 130 of the prior decision in which I stated that, had the claimant put forward an argument, supported by appropriate authority regarding the respondent being estopped from reducing the rates, it may have been able to demonstrate its entitlement.
102. It argued that I had left open the question of estoppel, and that the claimant ought not now be barred from raising an estoppel argument in this *reply*.
103. It went on to provide comprehensive submissions in relation to estoppel, particularly from paragraphs 18 through to 25 of the *reply*.
104. Unfortunately, with the greatest respect, the claimant failed to engage with the formidable submissions of the respondent in the response, regarding the valuation in the previous decision, to which I will turn below.
105. Before considering the respondent's submissions in some detail, and without seeking to defend my previous decision about the 4mm² cabling rate finding, it is important for the claimant to appreciate that it bore the onus of proving its entitlement in the previous adjudication, and I found that it failed to do so.
106. Had it made submissions about estoppel (as I'd previously indicated) the valuation may well have been different. However, it made no such submissions in the previous adjudication, which left me with the respondent's valuation of those 4mm² cabling rates supported by a quantity surveyor, which the claimant did not controvert.
107. With the greatest respect to the claimant, it is not incumbent upon an adjudicator to seek submissions from a claimant to enable it to bolster its case and demonstrate an entitlement that it had not previously established.
108. Accordingly, the issues that emerged from the response and the *reply*, were whether:
- (i) the claimant can now raise an estoppel against the respondent resiling from the amended rates, that it hitherto accepted;
 - (ii) I am bound to apply the *decided 4mm² rate* from the previous decision under s27 of BCIPA;
 - (iii) the claimant is prevented from claiming valuation under the Amended rates because of issue estoppel.
109. However, before considering these issues, I turn to my request for further submissions from the parties.

Request for further submissions

110. After the *reply* was delivered, on 1 March 2016, I asked for submissions from the respondent about whether the *reply* fell outside s24B of BCIPA regarding:
- (i) the new reasons alleged by the claimant;
 - (ii) going beyond what was permitted;
 - (iii) the inclusion of new material
111. I needed to be satisfied that the claimant had not traversed beyond what was permitted by BCIPA. The claimant provided 3 affidavits in its *reply*, and I decided that the respondent should be given the opportunity to engage with the *reply*, with the claimant then having the opportunity to provide its submissions in response.
112. These recent amendments to BCIPA regarding complex matters and the claimant's rights of reply (the "new amendments"); have to my mind meant that adjudicators need to be very careful to ensure that claimant's are not given a "free hit" to introduce fresh material and submissions, under the guise of ostensibly countering new reasons.
113. The respondent took objection to the extent of the *reply* which had alleged a *rate new reason* and an *oversupply reason* for non-payment and in summary:
- (i) It argued that the *rate new reason* was not a new reason for non-payment, but was a jurisdictional issue, which did not entitle the claimant to a right of *reply*;
 - (ii) Alternatively, if it was a new reason, then the *reply* was limited to the adoption by the respondent of the *decided 4mm² rate*, and was not permitted to go further;
 - (iii) It argued that the claimant had gone further in the *reply* by:
 - (a) Raising an estoppel argument;
 - (b) Making submissions about the prior decision;
 - (c) Seeking a merits review of the prior decision;
 - (d) Raising the labelling issue, which was not a new reason;
 - (e) Re-agitating whether the Amended Schedule formed part of the contract.
114. On 9 March 2016, the claimant responded to these submissions on summary as follows:
- (i) The limitation of the *rate new reason* to a jurisdictional issue was too narrow an interpretation of BCIPA;
 - (ii) The claimant is not confined to "principal" new reasons raised by the respondent, and it was allowed to cover all reasons raised in the response about the adoption of the rates used by the adjudicator in the prior decision;
 - (iii) It argued that the respondent had submitted that if I did not consider myself bound by the rates in the previous decision, then the respondent was relying on all the material it relied upon in the previous decision, to be incorporated by reference.
115. The submissions from both parties, highlights the complexity associated with the new amendments, with which adjudicators must now grapple.
116. I will consider the issues that emerge, including those raised in the response, in the following order:
- (i) Whether the *rate new reason* is jurisdictional only;
 - (ii) The width allowed to the claimant in the *reply* to the *rate new reason*;
 - (iii) Whether estoppel can now be considered;
 - (iv) Whether I am bound by the *decided 4mm² rate*:
 - (a) Under s27(2) of BCIPA; or
 - (b) By reason of issue estoppel.
- e. *Rates new reason – jurisdictional only?*
117. The respondent has a compelling argument that it is merely a jurisdictional issue, to which the claimant does not have a right of reply.
118. The fact that there is a previous decision made on the *decided 4mm² rate* is a matter of jurisdiction.
119. However, I agree with the claimant that the respondent, in the response also submitted, albeit as an alternative, that if I found that I was not bound by the prior decision, then the respondent incorporated its material provided in the previous adjudication by reference.

120. By having a “bet both ways”, in my view, the response meant that the *rates new reason* was not limited as a jurisdictional issue, because the claimant needed to counter the respondent’s alternative submission of the documents being incorporated by reference, with its *reply* submissions.

f. Width in reply to rates new reason

121. Again I agree with the claimant, that because of its alternative submission, the respondent by attempting to incorporate documents by reference, opened up the field within which the *reply* was able to traverse, and I am not satisfied that it was confined to merely the adoption of the *decided 4mm² rate* found in the prior decision.
122. However, I need to now consider whether this was wide enough to allow the claimant to raise arguments about estoppel, to which I now turn.

g. Can the claimant now raise estoppel?

123. I have already canvassed the claimant raising estoppel in the *reply*. It argued that I had left that matter open in the prior decision.
124. I have already explained that the claimant, in its previous adjudication, had failed to raise estoppel in order to demonstrate entitlement to the Amended rates, and I made a finding on the evidence before me in that adjudication.
125. s27(2) of BCIPA provides:

“The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.”

126. I agree with the respondent that s27(2) of BCIPA constrains me to apply the *decided 4mm² rate* found in the previous decision, unless the value of the work has changed.
127. In my view by attempting to raise an estoppel in this adjudication, does not demonstrate a change in the value of the work.
128. In its *reply*, the claimant made no attempt to counter the respondent’s argument about me being constrained by s27(2) of BCIPA, and I therefore accept the respondent’s submissions.
129. Accordingly, I am unable to consider the claimant’s estoppel arguments in the *reply*.
130. This means that I had no regard to the affidavits of James Michael Lewis and Peter Alan Turnbull both of 25 February 2016, and the SW3 affidavit of Mr Waldren, paragraphs 4 through to 14, which were provided in the *reply*.

h. s27(2) of BCIPA

131. I have already found that I am bound by s27(2) of BCIPA to use my prior decision on the rates.
132. If I am incorrect in that finding, I consider the alternative issue estoppel arguments raised by the respondent, for sake of completeness.

i. Issue estoppel

133. At paragraph 31 of the *reply*, the claimant argued that I need not feel bound to further address the reasonableness of the 4mm² cable rates because there had been *no determination between the competing positions and or evidence*.
134. I cannot agree with the claimant because in the last adjudication I had to make a determination between competing positions about:
- (i) whether the Amended Schedule formed part of the contract;
 - (ii) the value of the 4mm² cable rates,
- and I made a decision accordingly.
135. It appears that the claimant is seeking now to re-agitate these issues in this adjudication.

136. The claimant failed to engage with the authorities provided by the respondent on issue estoppel, to which I now turn.
137. The respondent referred to 2 cases in support of issue estoppel applying to this adjudication:
- (i) *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135;
 - (ii) *Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors* [2015] QSC 168.
138. The respondent pointed to relevant extracts from *Stowe*, and in my view I am constrained by this decision of the Supreme Court.
139. In my prior decision, as stated previously, I found that the claimant had not discharged its onus in relation to:
- (i) whether the Amended Schedule formed part of the contract;
 - (ii) the value of the 4mm² cable rates,
- and I made a decision on the rates based on the material provided by the respondent.
140. To my mind that falls precisely within what His Honour Applegarth J held at paragraph [35]:
- "The adjudicator's decision must be viewed in the context of the claim being adjudicated and the parties' contentions to the adjudicator, rather than in isolation. The decision to not accept a claimed amount in respect of an item may be for a variety of possible reasons. It may be due to a finding that no entitlement exists as a matter of construction of the contract and, accordingly, the claimant has not made out any legal entitlement to it (my underlining). The claimed amount might not be accepted on "the basis that (the adjudicator) had insufficient evidence to accept the claim" (my underlining). There may be other reasons. Where, however, an adjudicator rejects a claim for want of evidence, he or she has determined for the purposes of the adjudication that the claimed amount is not payable. Such a determination attracts the principles of issue estoppel. (my underlining)"*
141. The claimant had failed to raise an estoppel in the last adjudication that may have given it an entitlement to demonstrate that the Amended Schedule formed part of the contract. Accordingly, a finding was made on that issue, and in my view a claimant cannot now re-litigate that issue, because it breaches the principle of issue estoppel.
142. I therefore now turn to valuing the amount of the progress payment.

X. The amount of the progress payment

143. I refer to Annexures CGL 1 and CGL 1 of the decision, headed "*Valuation of claim*" and "*Materials calcs*" respectively for the derivation of the amount of the progress payment.
144. The parties are aware from my reasons above, that I have allowed none of the respondent's deductions, so the issue became a valuation of the 4mm² cable materials.
145. The parties did not provide me with submissions regarding the retention amounts which the respondent was withholding. The claimant merely claimed \$1,010,015.18 (excluding GST), as the difference between the value of works of \$ 7,638,775.12 and the amount previously certified of \$6,628,759.94.
146. The respondent, in its updated valuation [Appendix A] provided an amount of (\$288,197.59) excluding GST and (\$317,017.35) including GST, such that the adjudicated amount should be "nil", and as identified in paragraph [23] of its response. No reference was made by the respondent to retention in its response submissions.
147. Accordingly, I have not considered retention in this decision as it was not in issue.
148. Both parties were asked to provide me with their submissions on the payment claim with the Amended Schedule rates and the prior decision 4mm² rates in order to assist me in valuing the claim.
149. The respondent provided me with the more comprehensive spreadsheet in excel format which I have used in valuing the claim.
150. In doing so, I compared the parties' submissions on the Amended Schedule rates and the decided 4mm² rate used in the previous adjudication. Both parties agreed with one another regarding the Amended rates and the decided 4mm² rate except for the category power connectors 3c.

151. Having regard to the payment schedule, and the parties' submissions of 16 and 17 March 2016 respectively, I find that the claimant had incorrectly used the Amended rates for this category, instead of the *decided 4mm² rate*.
152. In creating the spreadsheet "*Materials calcs*", I separated the payment claim between the *Materials claim for non 4mm² cables* which was not in issue, and I totalled these amounts to **\$3,893,203.20**, and *4mm² cables at the previous decision rates*.
153. In the latter category I used the parties jointly agreed quantities and rates, except for the category *power connectors 3c*, where I found the respondent had correctly applied the *decided 4mm² rate*. This category amounted to **\$1,531,903.17**.
154. The total for all materials supplied/received was then calculated to be **\$5,425,106.37** which was then transferred to the spreadsheet "*Valuation of claims*".
155. This amount differed from the payment claim amount by \$775,225.96, which essentially was the reduction in value of the materials based on the *decided 4mm² rate*.
156. This differs from the respondent's valuation of \$775,163 (excluding GST) in paragraph 25(a)(i) of the response by \$62.96, which is not material to this dispute.
157. In the *Valuation of claims*, I added the amounts not in dispute (design through to duties) to the total for all materials supplied/received of **\$5,425,106.37** resulting in an amount of **\$6,569,768.37** for the value of the contract work, to which I added the agreed variations of **\$293,780.79**.
158. This totalled **\$6,863,549.16** from which I subtracted the amount previously certified of **\$6,628,759.94** resulting in an amount of **\$234,789.22** to which I then added GST resulting in an adjudicated amount of **\$258,268.14**.
159. Accordingly, I find the **adjudicated amount is \$258,268.14** (including GST).

XI. Due date for payment

160. 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.
161. 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 December 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.
162. Again 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.
163. Given that the claim was made on 1 November 2015, payment is then due on 31 December 2015, based on the contractual regime.
164. Accordingly, the **due date for payment is 31 December 2015**.

XII. Rate of interest

165. I am obliged by s26(1)(c) of BCIPA to find the interest rate.
166. I find that the contract does not provide an interest rate for late payments, and neither party addressed the issue of interest.
167. 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. '*
168. 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.

169. Again 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.

XIII. Adjudicator's fees

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

171. The claimant has not fully succeeded in its payment claim, but equally the respondent failed in demonstrating that it was entitled to its deductions, and that it raised new reasons.

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

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

173. The claimant failed to engage with the respondent on the matter of s27(2) of BCIPA and issue estoppel, but I had to spend quite a bit of time evaluating the respondent's deductions, which did not succeed.

174. Therefore, despite the claimant not fully succeeding in its payment claim, it was entitled to the value of the contract work adjusted for the *decided 4mm² rate*.

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

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

Chris Lenz

Adjudicator

31 March 2016

XIV. Appendices CGL1 and CGL2