

Adjudication Decision: 26006

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator : Chris Lenz (J622914)

Application Details

Claimant

Name : Asset Fire Security and Mechanical Services Pty Ltd
ACN/ABN : 93 102 462 715
Address : 45 Chetwynd Street, Loganholme QLD 4129

Respondent

Name : Planet Plumbing QLD Pty Ltd
ACN/ABN : 16 111 862 830
Address : 8, 45 Canberra Street, Hemmant QLD 4174,

Project

Type :
Location :

Payment Claim

Date : 31 March 2016
Amount : \$101,818.64 (inc GST)
Nature of claim : Standard

Payment Schedule

Date : 13 April 2016
Amount : (\$83,247.57 (inc GST))

s20A Notice Date : N/A

Application Detail

Application Date : 27 April 2016
Acceptance Date : 5 May 2016
Response Date : 17 May 2016

Claimants reply: : N/A

Extension of Time : N/A

Adjudicator's Decision

Jurisdiction : Yes
Adjudicated Amount : \$98,565.46 (including GST)
Due Date for Payment : 7 April 2016
Rate of Interest : 11.98%

Claimant Fee Proportion (%) : %
Respondent Fee Proportion (%) : 100%
Decision Date : 31 May 2016

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A. DECISION

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

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

B. REASONS

I. Background

1. Asset Fire Security and Mechanical Services Pty Ltd (referred to in this adjudication as the "claimant") was engaged by Planet Plumbing QLD Pty Ltd (referred to in this adjudication as the "respondent"), to provide fire sprinkler services for the Orion Shopping Centre Project, 1 Main Street, Springfield Central, Queensland 4300 (the "work").
2. The work involved the supply of labour, materials, plant and supervision for the sprinklers.
3. The claimant was licensed to carry out the work with QBCC license number 1046793.
4. There was no formal contract executed by the parties.
5. The claimant commenced work on 11 September 2015 and the last work was done on 3 February 2016.
6. The payment claim for \$101,818.64 (Payment claim 16) was served on the respondent on 31 March 2016.
7. A payment schedule for (\$83,247.57 (inc GST)) dated 12 April 2016 was received by the claimant on 13 April 2016 by email.
8. The adjudication application was made on 27 April 2016 and I was appointed as the adjudicator and advised the parties of my acceptance on 5 May 2016.
9. The adjudication response was received on 17 May 2016.

II. Material provided in the adjudication

10. I received 2 lever arch folders in the adjudication application, which included the payment claim and payment schedule.
11. I received 1 lever arch folder in the adjudication response.

III. Is it a Construction Contract within BCIPA, and if so, what are its terms?

12. There must be a *construction contract* to which the payment claim relates, in order for it to fall within jurisdiction to allow the dispute to be adjudicated.
13. In addition, the terms of the contract are in contest, and a finding on its terms has a bearing on whether or not there is a *valid reference date* to which the payment claim relates.
14. Accordingly, I have considered the contract on 2 bases:
 - (i) **Firstly**, is it a *construction contract* to which the payment claim relates, to allow it to be adjudicated? and if so
 - (ii) **Secondly**, what are its terms, so that a determination of the *reference date* can be made, as the respondent argued in the payment schedule and adjudication response, that there was no valid reference date for this payment claim?

a. Construction contract under BCIPA

15. Both parties agree that there was an agreement for the carrying out of fire sprinkler work at the Orion Shopping Centre.
16. 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."

17. Is fire sprinkler work within the meaning of *construction work*? s10 of BCIPA, includes s10(1)(c) "...water supply, fire protection..." so I am satisfied that it is *construction work* as defined in s10(1)(c) of BCIPA.
18. Furthermore, the labour and supervision for the fire sprinkler work falls within s11(1)(b)(i) of BCIPA as being *the provision of labour to carry out construction work*.
19. I am therefore satisfied that it is an *agreement* for carrying out or supplying services for a *construction contract* under BCIPA, thereby attracting the right to the progress payment provisions under the Act.

b. Terms of the contract

20. The contending submissions regarding this important point have been analysed in some detail because the outcome of the analysis may determine my jurisdiction to decide the dispute.
21. There is no contest that the respondent's Purchase Order 40628151 attaching "*Terms and Conditions of Purchase*" was sent to the claimant at 3.17 pm on 11 September 2015 by email, and I find that this occurred.
22. The email stated that it was for *first week of sprinkler fitter labour hire*.
23. Essentially the contest between the parties is whether the Terms and conditions (T&C's) attached to the Purchase Order form part of the contract.

Claimant's submissions

Adjudication application

24. The claimant in its submissions referred to a series of communications (paragraphs 41 through to 66) to demonstrate the background to the contract. In these submissions, it argued that it never consented to the T&C's [paragraph 51].
25. The claimant argued that there were two stages to the agreement, which essentially involved rates and payment terms.
26. The first agreement (stage I) occurred on 10 and 11 September 2015, which formed the basis of payment claims 1 through to 4 [paragraph 43].
27. The second agreement (stage II) occurred on 13 and 14 October 2015, which formed the basis of payment claims 5 through to 16 [paragraph 44].
28. It then made further submissions on this issue (paragraphs 69 through to 85) in which essentially it argued that the negotiations for the first stage had been concluded on 10 September 2015 and the second stage on 13 and 14 October 2015.
29. The claimant attached all the supporting emails dealing with stages I and II of the agreement which I accept as evidence of the communication between the parties (as the respondent did not deny the existence of these emails).
30. I draw a number of inferences about the parties' objective intentions from these emails after considering them in context.
31. I find that the claimant submissions about the T&C's not forming part of the contract, and its assertions as to when the two stages of the agreement were concluded and what rates and payment terms had been agreed, are plausible.
32. The respondent did not provide submissions to controvert the two stages of the contract, and I have decided to now consider the respondent's submissions about the T&Cs in order to further analyse and resolve this issue, which will require me to further consider those of the claimant side by side with those of the respondent.

Respondent's submissions

33. The respondent asserts that the T&C's do form part of the contract, and this requires the respondent to discharge the evidentiary onus on this point.
34. Its submissions in support are contained in the following paragraphs as follows:

Payment schedule

- (i) **A. No reference date**, first paragraph on page 2 of the schedule, and at the foot of that page the respondent submitted;
- (ii) *"The contract consists of the Purchase Order Number 40628151 from Planet to Asset Ltd accepted orally by Asset" ("Contract").*
- (iii) It continues on page 3 to the reference date submissions with case authorities, to which I will turn later.

Adjudication response paragraphs

- (iv) #20 stating "The works were to be undertaken in accordance with the schedule of rates and in accordance with the terms attached thereto, ostensibly supported by paragraph 33 of Anthony Alafaci's statutory declaration;
 - (v) #22 stating "The Purchase Order clearly incorporated standard terms and conditions."
 - (vi) #23 stating that "Asset further submits it would not have entered into a contract of this magnitude absent of there being any terms and conditions governing the conduct of the parties". The respondent fails to identify where the claimant had made these submissions, and I find no such submission from the claimant;
 - (vii) #24 stating "At no time subsequent to the commencement of work by Asset was there any negotiation regarding any alternative terms of agreement or any amendment to or reject of the terms of the agreed Purchase Order."
35. The respondent's **evidence** in support of the T&C's forming part of a contract is contained in Paragraphs 32 and 33 of Anthony Alafaci's Statutory Declaration which declared as follows:
- (i) #32 "During meetings with Brian Davies it was my understanding that the 'Terms and Conditions of Purchase' order would make up the terms and conditions governing each payment claim."
 - (ii) #33 "I confirm that no further purchase orders were issued. Given that both Planet and Asset are experienced in the construction industry, and that labour hire agreement was for a minimum of \$100,000, it is absurd for Asset to now claim no documented terms or conditions applied to the work ordered. If Asset had an issue with the terms and conditions, they should have brought this up immediately."
36. Mr Davies's statutory declaration of the *claimant* says nothing about his *understanding* whether the T&C's made up of the terms and conditions governed each payment claim. However, even if it was provided, it would not have helped me decide this important issue.
37. Mr Davies's subjective understanding or intention regarding the T&Cs, as well as that of Mr Alafaci is irrelevant.
38. My obligation is to make an assessment of the parties' intentions ascertained *objectively*, and I'm entitled to draw inferences from the evidence provided in the adjudication.
39. Mr Alafaci's declaration that it was absurd for the claimant to now argue that there were no documented terms or conditions applicable to the contract, is not something to which I can give any weight, because that is essentially a submission, rather than admissible evidence that can assist me in deciding the issue objectively.
40. There is no evidence that the claimant had *only now claimed that the T&C's did not apply*, as it appears that the declaration is suggesting a recent invention of the claimant.
41. I cannot give any weight to his statement that the parties' experience in the construction industry requires me to find that T&C's formed part of the contract.
42. In addition, Mr Alafaci's statement that the claimant ought to have brought up any concerns regarding the T&Cs immediately presupposes that they were intended to form part of the contract, and that needs to be demonstrated by the respondent on the evidence.
43. I find that there was only ever one T&C in the only order that was issued by the respondent on 11 September 2015. This is supported by paragraph 79 of the claimant's submissions and paragraph 33 of Mr Alafaci's declaration.
44. Both parties concede that a meeting was held on 10 September 2015 between Mr Davies, Mr Alafaci and Mr Craig Robinson at the Orion shopping centre to discuss the claimant's involvement in the project and I make a finding that it took place (the "meeting").

Stage I of the contract

45. I find that the claimant's 10 September 2015 1:47 PM email identified in paragraph 47 of the claimant's submissions was sent to the respondent after the meeting, and attached a costing spreadsheet reflecting the current EBA rates. This is not controverted by the respondent's submissions, and in fact in paragraph 12 of Mr Alafaci's statutory declaration he attaches the same email.
46. I'm satisfied that this email identified the rates together with the payment terms of seven days from issue of invoice, with a request for an *official order number* so that the claimant could raise a job number in its system.
47. At paragraph 48 of the claimant's submissions it then attaches an email from the respondent dated 10 September 2015 at 2.05 PM in which Mr Alafaci *confirms a conversation that the claimant would supply labour at \$115 per hour for a fitter*, and stated "On this basis please proceed on site at Orion commencing tomorrow... An official order number will be sent tomorrow."
48. Mr Alafaci's statutory declaration does not deny the existence of this email, and, it is open to draw the inference from paragraph 21 of the declaration that agreement was reached, even though he states "*..and were forced to agree to the inflated rates under duress*" to which I will refer further below.
49. Accordingly, I am satisfied that at 2.05 PM on 10 September 2015, the respondent accepted the claimant's offer for labour to assist it at \$105 per hour for a sprinkler fitter (and associated overtime rates) with payment terms of seven days from date of invoice (the "acceptance").
50. In addition, at 2.42 pm on 10 September 2015, the claimant thanked the respondent for the prompt reply but wished to confirm that the \$105 per hour was for normal time, and overtime rates were extra, and requested the respondent's agreement.
51. This agreement came through by email about an hour later with the words, "*Agreed. A PO will be sent every week based on an average men x no of hours. 1st po will be sent tomorrow.*" (The "*follow up clarification email*").
52. This email to my mind merely provided clarification about the overtime, which had already been identified in the 1.47pm email offer.
53. Nowhere in the acceptance, nor in the *follow up clarification email*, do I find that there was a reference to T&C's, which would have qualified the acceptance, and Mr Alafaci did not say that his acceptance was subject to the T&C's. All that the respondent said (in both the 2.05PM email and the 3.58PM email) was that it would forward an order number the next day, which I find is in response to the claimant's request to provide one.
54. In my view the parties had concluded a contract at 2.05pm, or at the very latest at 3.58PM on that day as there was unequivocal acceptance by the respondent of the claimant's offer as identified in paragraph 75 of the claimant's submissions, which referred to the High Court case of *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, as authority.
55. In that same paragraph 75 of the claimant's submissions, the claimant referred to the requirements of consideration and intention to create legal relations with supporting authority.
56. The claimant did not specifically identify the consideration and intention to create legal relations in its submissions, but the respondent did not controvert those submissions, and it is open for me to draw the inference that both these elements were satisfied:
- (i) in circumstances where the respondent agreed to pay the claimant \$105 per hour for a sprinkler fitter (consideration);
 - (ii) in a commercial contract with parties dealing at arms-length (intention to create legal relations).
57. Accordingly, I find that an agreement was reached in the afternoon of 10 September 2015 for the provision of sprinkler fitter labour for the stage I period.
58. Nevertheless, I need to further consider the respondent's submissions, for which it bears the onus, to ensure that this issue is fully examined. I find that at 3:17 PM on 11 September

- 2015, the respondent sent a purchase order "for the first week of sprinkler fitter labour hire", and to it was attached the T&Cs.
59. If the agreement had already been concluded the previous day, as submitted by the claimant, the order number and T&C's could not alter what had already been agreed.
 60. The respondent does not directly take issue with the submission of the claimant as to the timing of the agreement, which causes it some difficulty, because the respondent does not positively assert when the contract was entered into.
 61. I find that in response to the purchase order the claimant raised objections in its email of 11 September 2015 at 3:27 PM (within 10 minutes) in which it said "*Thank you for your order number, unfortunately it does not reflect our offer and agreed terms with Craig and Anthony.*"
 62. In its submissions at paragraphs 28 and 29 of the response, the respondent seeks to explain that the claimant had failed to dispute the attached T&Cs, such that they formed part of the contract [paragraph 30 of the response].
 63. The respondent did not provide a legal analysis of how I could find that the promised delivery of the order number (with the T&C's attached), the day after it had accepted the claimant's offer without qualification or reference to the T&C's, was an *offer* that was subsequently *accepted* by the claimant. It provided no submissions on that point.
 64. In the circumstances, even if it had provided such submissions, I cannot agree with the respondent, because the words used by the claimant were "*our offer and agreed terms*". Whilst it appears as if the claimant was referring to items in the purchase order itself, rather than the T&Cs, it appears clear to me that the claimant's email was not unequivocal acceptance of the purchase order which is required by *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.
 65. I do not need to make a finding on this issue, but had the respondent (in response to the claimant's invitation of amending the order number in the 3.27PM email) actually amended the purchase order with the T&Cs attached, it may have had an argument that a contract was concluded at that time. However, as a matter of fact the respondent provided no further purchase order, such that the point is moot.
 66. Whilst further considering Mr Alafaci's statutory declaration, I find from that the 7:38 PM email on 11 September 2015 that Mr Alafaci had directed Craig Robinson that only he (and Mr Alafaci) could sign timesheets at the end of the week (my emphasis) and not sign them on the spot. I will return to this finding later.

Stage II of the contract

67. The claimant submitted (at paragraph 57 of the application) that on 13 and 14 October 2015 the parties investigated the possibility of renegotiating the previously agreed rates.
68. At paragraph 58 of the application the claimant referred to its email dated 14 October 2015 at 10:18 AM, which was the first of the negotiation leading to stage II.
69. The evidence suggests that the respondent was prepared to allow the claimant to basically take over its further fire sprinkler obligations under the project which I find, as it is not controverted by the respondent. This puts the balance of the project in context.
70. The claimant's email at 10:18 AM, inferred that the respondent required the claimant to "...take a large portion if not all of the existing work remaining on the project."
71. Through the series of emails on 14 October 2015 which dealt with:
 - (i) revised hourly rates [10.18AM];
 - (ii) subject to the qualification that the time and a half rate (suggested by the respondent) be \$115 an hour (4:44 PM NSW time);
 - (iii) with the proviso that the respondent agreed to tranches of payments identified in the claimant's email [7.10pm (Queensland time)];
 Mr Alafaci in the email of 6.05 PM (NSW time), agreed to the offer made at 10:18 AM on 14 October 2015, (the "stage II acceptance").
72. This is confirmed by an email from Mr Alafaci to Alan Fonesca, the CFO of the respondent, at 6:10 PM (NSW time) which forwarded that stage II acceptance to the respondent's CFO.

73. The revised time and a half rate appears to be a significant concession by the claimant from its previous entitlement of \$123.89 (from the spreadsheet attached to the 10 September 2015 1:47 PM email from the claimant).
74. The respondent did not directly engage with the claimant's submissions about stage II, as it chose to rely upon its submissions that the T&Cs form part of the contract, apart from [at paragraph 34 of its response] submitting that there was an agreed reduction in overtime rates on 14 October 2015.
75. I am satisfied that a stage II agreement was made in which there was a reduction in overtime rates, but also an increased scope of work that the claimant was to take over substantially, if not all, of the balance of the work on the project; whereas previously it was only assisting the respondent with the project work.
76. In addition, in the 10.18AM email, the claimant said *"I believe I have captured everything is discussed by phone last night and this morning, could you please respond in the affirmative to this email so we have a record of our discussion and agreement."*
77. To my mind, this was the critical stage where the respondent ought to have insisted that its T&Cs now form part of the agreement, because it was essentially "subcontracting the balance of the project", rather than simply hiring additional labour to support its own crew [confirmed by Mr Alafaci in paragraph 35 of his declaration]. There is no evidence that it did so, and there are no submissions to that effect.
78. I am satisfied therefore that the further work carried out by the claimant was under the terms identified in stage II, which included reference to the previous work executed and billed under the "previous arrangement" remaining unchanged, and that the payment terms remained seven days from issue of invoice. The respondent agreed at 6.05 PM (NSW) time on that date, thereby concluding those negotiations resulting in the stage II agreement.
79. **Accordingly, I find that an agreement was reached in the early evening of 14 October 2015 for the provision of sprinkler fitter labour for an expanded scope of work for the stage II period.**

IV. Review of some of Alafaci's assertions apart from the terms of the contract

Alleged duress/claimant in danger of walking off the project

80. I need to consider the allegations in Mr Alafaci's declaration because they are submissions duly made and have a bearing on the factual matrix to provide context for the project.
81. Referring to paragraph 21 of Mr Alafaci's declaration, he asserts that there had been discussions between the parties regarding a sprinkler fitter cost rate of approximately \$65 per hour, which was later changed to \$105 per hour. He asserted that he was forced to agree to this inflated rate under duress, due to project delays and the shopping centre opening on 6 October 2015.
82. He referred to a telephone conversation he had with Brian Davies after he received an email on 10 September 2015 at 1:47 PM from Mr Davies, which attached a spreadsheet of labour rates reflecting the EBA. Mr Alafaci asserts that in this conversation regarding the variance, Mr Davies threatened not to assist the respondent.
83. This reference to \$65 an hour in Mr Alafaci's declaration is the only reference in all of the material to such a rate. There is a reference in paragraph 6 of the payment schedule to a verbally agreed rate of \$73, being cost plus 17.5%, and to the cost rate of \$62.31, but this is made in the context of explaining that the \$105 per hour was an all-in labour rate.
84. It appears to me that the introduction of \$65 per hour in the declaration is to suggest that the rates had been inflated, such that the respondent was under duress, and furthermore there was a risk that the claimant would not assist the respondent.
85. I find that the email from Mr Davies at 1:47 PM had qualified his earlier rates shown to Mr Alafaci and Mr Craig Robinson on a laptop because he said (and I accept) that those rates were out of date and that the current rates had reflected the EBA to which the claimant was subject. The spreadsheet which I find was attached stated *"Asset Fire's sprinkler fitter labour is governed by their EBA."* This is consistent with what Mr Davies had said in the email.

86. I am satisfied that the increase in rates was as a result of the EBA, such that I draw no adverse inference about the claimant's conduct in claiming \$105/hr.
87. I make no finding about the alleged discussions at \$65 an hour for sprinkler fitters.
88. Although it has no bearing on the issues in dispute, but provides a factual matrix about the circumstances surrounding the negotiations, there appears to be a significant degree of mistrust that Mr Alafaci had for Mr Davies, because his email to Craig Robinson on 11 September 2015 at 7:38 PM apart from the redacting states as follows:
*"I told you...
This has trouble written all over it...
Tell Kel and Bow not to sign anything with respect to timesheets. They are not authorised. Only you and I can sign them at the end of the week. Do not sign them on the spot. You need to take them away and double check them with a fine tooth comb...
tomorrow you will need to ring Janine from Brisbane fire or find someone else as a backup plan because the bastard may walk off the job and we will be screwed."*
89. I draw an inference that the respondent was under significant pressure on the project, and at the time of the meeting, it had to obtain additional sprinkler fitter resources in order to complete the work by 6 October 2015. This may have been unpalatable for the respondent, and Mr Alafaci may well have been concerned that the claimant would not provide the resources to assist, if the rates were not agreed.
90. However, I do not draw the inference, which appears to be invited by Mr Alafaci, that the claimant was prepared at any minute to not deliver its obligations under the contract. It appears from the evidence that the contrary is true, that the claimant in fact delivered the labour as requested by the respondent, and further agreed to basically closeout the project on the respondent's behalf in stage II.
91. I have had to carefully consider Mr Alafaci's declaration, but make a no finding about any alleged duress suffered by the respondent in agreeing to the claimant's rates, nor do I make any finding that the claimant was likely to not fulfil its obligations under the contract.
92. Mr Alafaci also expresses concerns about Mr Craig Robinson's performance and veracity, with which I will now deal, because Mr Robinson has provided a statutory declaration in support of the claimant's position in certain respects.

Craig Robinson

93. Mr Alafaci's statutory declaration makes a series of assertions about Mr Craig Robinson's performance and veracity. Adjudicators have a difficulty in having to consider the veracity of a witness, as they have no way of testing the parties' evidence.
94. I am not prepared to consider hearsay evidence in Mr Alafaci's declaration about Mr Robinson's veracity [paragraph 72 and 73], as that would not be appropriate.
95. As to paragraph 72 regarding his own knowledge of Mr Robinson, there is an assertion *that Craig was not always telling the truth and he would tell you what you wanted to hear*. I cannot see how an adjudicator could make any realistic finding about such evidence as it is too vague, and I reject it.
96. At paragraph 74 he provides an opinion of the doubtful veracity of Mr Robinson attesting to hours claim by the claimant when he was not present on the project. Nowhere have I seen evidence of a contractual requirement that the respondent's delegate be present for the entire period of the claimant's claim, so I'm not prepared to accept this somehow detracts from Mr Robinson's veracity.
97. The fact that Mr Robinson was terminated by the respondent for alleged poor performance issues on 24 November 2015, does not cause me to have any concerns about Mr Robinson's veracity as to what he said in his statutory declaration.

Payments on account

98. In paragraph 34 of Mr Alafaci's declaration he says that payments were made on account, which relied upon clause 5.2 of the T&C's. This is an assertion, rather than evidence, of an agreement that payments were on account.

99. Given that I have found the T&C's do not form part of the contract, I reject this assertion.

Time sheets and representatives

100. Mr Alafaci refers to daily signing of time sheets in paragraph 12 of his declaration, which was allegedly confirmed by the claimant in its email that same day.
101. I find that the offer for stage I in the claimant's 1.47 PM email of 10 September 2015 contained the following:
"Asset will produce weekly time sheets that will be countersigned by your representative and ours."
102. I see no reference to daily time sheets or the need to have *authorised* representatives in the stage I period.
103. Furthermore, Mr Alafaci, in paragraph 15 of his statutory declaration, attaches an email to Mr Robinson on 11 September 2015 at 7.38PM, which I had referred to earlier, where he said that time sheets should be signed *at the end of the week* and not be signed on the spot, but needed to be taken away and double checked with a fine tooth comb.
104. Accordingly, Mr Alafaci's evidence is contradictory about the need for daily signing of time sheets.
105. **However, I note that at paragraph 158 of its application that the claimant agreed that the time sheets or shift reports be signed daily by both parties, despite an agreement for reports to be provided weekly?**
106. Accordingly, whatever inconsistency I find in Mr Alafaci's declaration, I find from the claimant's concession that time sheets or shift reports were to be signed daily by both parties.
107. In this same 7.38PM email Mr Alafaci refers to the respondent's signatories being Mr Robinson and himself, but nowhere is there evidence from him or anyone else that the claimant was advised by the respondent as to the identity of these signatories.
108. He says at paragraph 13, that the respondent did not delegate authority for Mr Lawless to sign daily shift reports, and paragraph 14 regarding Mr Hocking not having authority, but he does not say that the claimant was advised of this lack of authority.
109. I infer from their duties, that both men were on site daily.
110. He declares in paragraph 19 that Mr Robinson was the only authorised representative for signatures from 21 September to 24 November 2015, but makes no mention of who was the signatory from 10 September 2015 to 21 September 2015, when work was being carried out by the claimant.
111. He also declared that Greg Dwight was the only authorised signatory from 25 November 2015 to 3 February 2016, as on-site representative. He said that Mr Wright was State manager in paragraph 27.
112. It is not clear to me how a State Manager, whom I infer is unlikely to be on the project on a daily basis, would be the appropriate person to sign time sheets on a daily basis.
113. Nevertheless, on 28 November 2015, in an email at 5.33pm, after the stage II agreement had been operating for about 5 weeks, the claimant agreed *in the mean time* to have Gregory sign off on daily shift reports, as Craig Robinson had done previously.

Timesheet issues on the project

114. I find it extraordinary that in paragraph 26 of Mr Alafaci's statutory declaration he said that the respondent was aware of inconsistencies in the submitted shift reports on 11 September 2015. This was the day that the claimant had started significant work on the project and appears inconsistent with the *payment claim summary* (attached behind payment claim 16) which identified that the first six payment claims had been paid in full up to the claim date of 23 October 2015.
115. There is no suggestion from any other evidence that the shift reports of 11 September 2015 were incorrect.
116. In fact, the shift report dated 10 September 2015 which is in payment claim number one, whilst signed by Kell on 16 September 2015, had only been signed by Brett Stewart of the claimant on 11 September 2015.

117. Furthermore, the shift report dated 11 September 2015 was again signed by Kell on 16 September 2015, and had only been signed by Brett Stewart on 12 September 2015, the day after Mr Alafaci had expressed concerns about inconsistencies.
118. How it is that Mr Alafaci could make such a statement, is unclear. I can only infer from the surrounding circumstances that he was particularly cost sensitive and under significant pressure from having to engage the claimant to assist the respondent in completing the project. Nevertheless, he did not terminate the claimant's services and in fact increased the claimant's scope on 14 October 2015.
119. Referring back to the *payment claim summary*, it is from payment claim 7 dated 31 October 2015 that the respondent did not pay the claimant's claim in full, and from payment claim number 8 dated 6 November 2015, the evidence is that no further payments were made by the respondent which is not been controverted by the respondent.
120. In paragraph 27 of his declaration, he refers to an email to Mr Craig Robinson and Mr Greg Wright on 23 November 2015 at 4:30 PM and the need to *check and confirm all Asset Fire invoices as their total cost was ridiculous*. He makes reference to that *if we haven't signed all the labour timesheets how do we know that Asset isn't taking the 'p...' with the hours worked and charged????*.
121. It appears therefore that since late October 2015, the respondent had concerns about the costs that it was being charged for the claimant's work and a payment claim dispute was brewing.
122. Any further analysis of Mr Alafaci's statutory declaration (if required) will take place under each particular payment claim.
123. I will also give further consideration as to the contractual effect of the daily time sheet signature by both parties' representatives, under the heading *Merits of the Claimant's claim* below.

V. Right to a progress payment

124. At paragraph 87 of the application, the claimant referred this to section 12 of BCIPA, which 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."
125. In paragraphs 88 through to 99 the claimant makes reference to section 17 of BCIPA and analyses the meaning of *reference date* identified in schedule 2 of BCIPA and makes submissions to controvert those of the respondent regarding the issue of the non-existence of a *reference date* to which I now turn as I need to be satisfied that the claimant submitted its payment claim *from a reference date*.
126. Before doing so, however, I considered it more appropriate to briefly consider the contents of the payment claim and the payment schedules before delving into a deeper analysis about the *reference date*.

VI. Payment Claim

127. I am satisfied from paragraphs 21 through to 22 of the adjudication application, which is not controverted by the respondent that on 31 March 2016, the claimant served a payment claim relating to the work that it carried out, which I find was sent by email (with evidence of read receipts from Mr Fonesca and Mr Smart) as well as being personally served on Mr Cameron Smart (evidenced by his signature).
128. The respondent raised a jurisdictional objection as to the identification of the works in the payment claim (as required by s17(2)(a) of BCIPA), which I will need to consider in some detail.
129. The claimed amount was **\$101,818.64 including GST** identified in the payment claim, so **I'm satisfied that the payment claim has identified an amount as is required by section 17(2)(b) of BCIPA.**

130. The payment claim contained the endorsement that, "*This payment claim is made under the Building and Construction Industry Payments Act 2004 (QLD)*", **so I am satisfied that the payment claim was endorsed as is required by section 17(2)(c) of BCIPA.**
131. Turning back to the requirements of s17(2)(a) of BCIPA, I will first make reference to the payment schedule to analyse precisely the objections and then consider this issue separately after consideration of the important *reference date* issue.
132. The reason for doing so is that if there is no *reference date*, then there is no jurisdiction to proceed further.

VII. Payment Schedule

133. On 13 April 2016 the respondent provided the claimant with a payment schedule dated 12 April 2016 comprising 26 pages by email on 13 April 2016.
134. It referred to the payment claim and specified its assessment of \$-83,247.57 including GST. I find that it was made within 9 business days of receipt of the payment claim.
135. I am therefore satisfied therefore that the payment schedule complies with section 18(2) of BCIPA which can be adjudicated.
136. The payment schedule identified two jurisdictional issues¹ as reasons for withholding payment as follows:
- (i) on page 2 that there was no *reference date* because the purchase order number 40628151 provided at clause 5.1 that each progress claim would claim for the value of goods and services supplied to the 25th day of the previous month, such that it was the date on which a claim for progress payment should be made under BCIPA;
 - (ii) on page 3 that there had been a failure to identify the construction work.
137. I will first consider the jurisdictional issue of *reference date*, and if I find there is a valid *reference date*, then will consider whether the identification of the construction work was sufficient.

VIII. Reference date

138. As identified in paragraph 86 through to 99 of the claimant's submissions, and under paragraph A of the payment schedule on page 2, as well as paragraphs 37 through to 51 of the response, the issue of the *reference date* was keenly contested.
139. A *reference date* is defined under schedule 2 of BCIPA as follows:
- "(a) a date stated in, or worked out under, the contract as the date on which a claim for progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied under the contract; or
- (b) if the contract does not provide for the matter –
- (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each later named month."
140. I have already found that the T&Cs did not apply to this contract, such that clause 5.1 did not bind the parties. Accordingly, I reject paragraphs 40 through to 44 of the response because clause 5.1 does not apply.
141. It is therefore necessary to look to see if the contract provided a *reference date*. At paragraph 92 of the application, the claimant says that the agreement does not contain any specified date on which a claim for progress payment may be made. Accordingly, it argues that the *reference date* is the last date of the month in which work was carried out. It says it last carried out work on 3 February 2016, such that the *reference date* was 29 February 2016.
142. At paragraph 45 of the response, the respondent also says that the *reference date* should be determined in accordance with schedule 2 of BCIPA as being the last day of the month, and essentially agrees with it being 29 February 2016.

¹ There is actually a third issue which is considered under the heading *Jurisdictional Issues* below

143. However, the parties then diverge about whether that *reference date* had been used up by the claimant.
144. Turning firstly to the respondent's objection commencing at paragraph 47 of the response, it argued that the claimant had last undertaken building work on 3 February 2016.
145. At paragraph 48 of the response it then said that the claimant had issued a valid progress claim 14 under the contract dated 14 dated 12 February 2016. It then argued:
"As the last reference date was prior to the service of the of the previous payment claim, the previous payment claim was made pursuant to the reference date and therefore the purported payment claim is invalid. As no further construction work was undertaken or related goods or services supplied, Asset has no further reference dates available."
146. It then added at paragraph 49 of the response:
"As a result, it is submitted that payment claim 16 was never made pursuant to a valid reference date. Asset therefore effectively "burnt up" its last available reference date when it submitted its most recent valid progress claim under the contract, being progress claim 14 dated 12 February 2016."
147. It then added at paragraph 50 of the response, that the claimant had not sought at any time to withdraw any prior payment claim issued by it and therefore it had no valid reference date.
148. These submissions failed to take into account the submissions made in the application at paragraphs 94 and 95, that progress claim 14 was made *before* the reference date of 29th February 2016, and therefore could not be a valid payment claim under BCIPA for that reference date, because it was void or invalid².
149. It argued that that payment claim could only have been made from the reference date of 31 January 2016 about which I do not need to have to make a finding about that in this adjudication.
150. I agree with the claimant that any progress claim made pursuant to the contract, or under BCIPA, if made before a *reference date* is void or invalid for the purposes of BCIPA, such that I find that progress claim 14 was not a valid payment claim under BCIPA.
151. This means that the *reference date* of 29 February 2016 was still available, and to my mind only payment claims made on or after that date could be considered valid payment claims from that reference date, in order to satisfy s12 of BCIPA.
152. I find that the payment claim dated 31 March 2016 is the only valid payment claim in evidence, which was made after the *reference date* of 29 February 2016, and I find therefore that it is a valid payment claim because this *reference date* had not been *burnt up*.
153. Accordingly, I find that the respondent's objections to the validity of a reference date not made out, and **I have jurisdiction to proceed to consider whether the construction work was sufficiently identified under section 17(2)(a) of BCIPA.**

IX. Further analysis about the identification of the work described in the payment claim

154. There are significant objections raised by the respondent as to the insufficiency of identification of the construction work in the payment claim from:
- (i) paragraph **B Failure to Identify Construction Work** on page 3 through to the third paragraph on page 4 of the payment schedule;
 - (ii) paragraphs 6 through to 18 of the response.
155. In the penultimate and ultimate paragraphs on page 3 of the payment schedule, the respondent argued that, *"The Day Labour Shift Reports and schedules appended to the Tax Invoices, which form part of the Purported Payment Claim, fail to identify the construction work or related goods and services to which it relates but rather state vague terms such as: 'Install Valve Set Pipework' and 'Fitoff Flexis and Modify Pipework'"*
156. On page 4 it then continues its objections in the first two paragraphs as follows:
"Asset's Purported Payment Claim does not state the actual work undertaken, apportion hours spent to each task (which are asserted to be occurring at various locations), the people undertaking each task and where they were purported to be undertaking work, allowances for

² Citing *FK Gardner & Sons Ltd v Dimin Pty Ltd* [2006] QSC 243 at [32] – [34]

breaks or any other details which would enable Planet to determine if the amount claimed is reasonable.

Planet therefore considers that there is insufficient identification of the construction work or related goods and services to which Asset claims for payment relates to preventing Planet to objectively understand the basis of Asset's claim and reasonably assess the amount claimed in Progress Claims 1 to 15 (inclusive) and therefore the Purported Payment Claim."

157. It concluded that it was therefore not a valid payment claim for the purposes of BCIPA.

158. The adjudication response picked up this theme from paragraphs 6 through to 18 and provided case authority in support of its submissions. At paragraph 8, the respondent highlighted an extract from paragraph [76] of *Multiplex Construction Pty Ltd v Luikens and Anor* [2003] NSWSC regarding payment schedules, *"Nevertheless, precision and particularity must be required to agree reasonably sufficient to apprise the parties of the real issues in the dispute."*

159. At paragraph 9 it referred to the case of *Isis Projects v Clarence Street* [2004] NSWSC 714 where Justice Mason held that these comments were equally applicable to payment claims. Although the respondent did not identify the relevant paragraph, in reviewing the case I have found this statement in paragraph [36] of *Isis*.

160. Mason J in *Isis* (a case on which the respondent relies) provided a very useful guide to the level of particularity required for payment claims. I refer to paragraphs 37 through to 40 and extract [37] and [38] below because in my view they are entirely applicable to this case:

"[37] In principle, I think, the requirement in s 13(2)(a) [the NSW equivalent of s 17(2)(a)] (my comment) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

- (1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;*
- (2) That reference is supplemented by a single line item description of the work;*
- (3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;*
- (4) There is a summary that pulls all the details together and states the amount claimed.*

[38] Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion."

161. His Honour then continued and reviewed the respondent's evidence about the alleged inadequacy of the payment claim, when on 11 previous occasions the respondent had had no difficulty with the payment claim, and rejected the respondent's evidence.

162. The application in this adjudication contains all 15 previous payment claims, and there is no evidence from Mr Alafaci, or Mr Smart or Mr Fonesca about objections to these previous claims, and that appears to be precisely why the claimant stated in paragraph 120 of the application that:

"It is inconceivable that the Respondent, having prior knowledge of the work being undertaken by the Claimant by way of email correspondence and previous progress claims submitted would be unable to identify the work and services completed by the Claimant."

163. The respondent also relies upon Hodgson JA's discussion in *Nepean Engineering Pty Ltd v Total Process Services (in Liq)* (2005) 64 NSWLR where His Honour was referring to typographical omissions or other artificial errors discovered after a full investigation of the facts and circumstances.

164. The claimant also referred to *Nepean* at paragraphs 110 and 111 of the application which had been endorsed in the Queensland Court of Appeal's case of *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd* (2000) 27 BCL 280 and I extract portions of *Buckley* at paragraphs [35] to [37] which held:
- "[35]... that to be valid a claim must be reasonably comprehensible to the other party, and express the degree of identification required in terms of whether in all the circumstances, the material in the payment claim was sufficient to convey to the recipient just what was the work for which payment was claimed..*
- [36] ... of the minimum necessary to satisfy the identification requirements of the payment claim 'purport in a reasonable way to identify the work' there must be 'sufficient specificity in the payment claim for its recipient actually to be other to identify a 'payment claim' for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any."*
165. Earlier at paragraph 110 of the application, the claimant extracted paragraph [36] of Hodgson JA's judgement in *Nepean* which is particularly instructive and stated:
- "[36] That is, I do not think a payment claim can be treated as a nullity for failure to comply with s13(2)(a) of the Act [the NSW equivalent of s17(2)(a)](my comment), unless the failure is patent on its face; and this will not be the case if the claim reports in a reasonable way to identify the particular work in respect of which the claim is made."*
166. At paragraph 16 of the response, the respondent said that the payment claim did not successfully identify:
- (a) the actual work undertaken;
 - (b) the apportionment of hours spent on each task (which are asserted to be occurring at various locations);
 - (c) the people undertaking each task and where they were purport to be undertaking work;
 - (d) allowance for meal breaks or any other details which would enable planet to determine if the amount claimed is reasonable.
167. I cannot agree with the respondent's submissions, having looked at the 15 payment claims attached to payment claim 16 that is in dispute in this adjudication because each payment claim:
- (i) has a summary page (that pulls all the details together);
 - (ii) followed by a summary of all workers who carried out work and their hours, and the location where work was carried out with a task description;
 - (iii) day labour shift reports; and, if applicable
 - (iv) materials invoices.
168. In my view, this is the level of detail contemplated by Mason J in *Isis* as being sufficient information for a payment claim, and also falls within the description of Hodgson JA in *Nepean*.
169. Mr Alafaci identified significant complaints about the claimant in his statutory declaration, but nowhere does he say that he was not able to understand the detail in the payment claims. His complaints centred around the mechanism of the signing of the daily reports and his difficulties with the costs claimed, but not the description work itself.
170. This is not surprising because in his statutory declaration [paragraph 38] he asserted that the claimant's workers attended with the respondent's personnel because it made commercial sense for the claimant to augment the respondent's tradesman to execute the work tasks. I therefore find that the respondent knew precisely what the claimant was doing, and its complaint is regarding the costs of the work, not the lack of clarity about what that work entailed.
171. Accordingly, I find that there is sufficient identification in the payment claim and therefore reject the respondent's submissions in this regard.

X. Jurisdictional issues

172. For completeness I refer to the 2 jurisdictional issues raised by the respondent in the payment schedule, and adjudication response about the invalidity of the payment claim due to lack of identification and the fact that there was no valid reference date.
173. I have already dealt with both those issues in the analysis above and have found that neither of the jurisdictional issues raised by the respondent are made out.
174. However, there was a third objection on page 4 of the payment schedule regarding the claimant's failure to provide a subcontractor's statement in accordance with the terms of the contract.
175. The respondent argued that clause 5.1 required the claimant provide a written statement identifying details of the claim as well as worker's compensation, payroll tax and remuneration.
176. Given that I have found that clause 5.1 does not apply to the agreement, I reject these submissions because they are contingent on clause 5.1 applying to the agreement.
177. Given that I have found that the contractual foundation of the written statement jurisdictional objection falls away, there was no need for me to seek support from the claimant's submissions from paragraphs 122 through to 141 of the application, which I found provided compelling case authority to reject the respondent's claim in any event.
178. **Accordingly, I find that I have jurisdiction to adjudicate the matter.**

XI. The merits of the claimant's claim

179. I am obliged by section 26(2) of BCIPA that requires me to have regard to:
- (i) the provisions of BCIPA, and where relevant the provisions of part 4A of the *Queensland Building and Construction Commission Act*;
 - (ii) the provisions of the construction contract;
 - (iii) the payment claim, together with all submissions, including relevant documentation properly made by the claimant support of the claim;
 - (iv) the payment schedule, together with all submissions including relevant documentation properly made by the respondent in support of the schedule; and
 - (v) the results of any inspection carried out by me.
180. I did not carry out any inspection.
181. I have reviewed each of the payment claims which make up payment claim 16, and I consider that they provide sufficient information for me to consider each payment claim and value them. In my view, this meant that the onus then shifted to the respondent, and I was required to carefully consider the respondent's objections.
182. I considered it best to review each particular payment claim because that is how the parties have set up their contest. I have created a spreadsheet in Annexure CGL-1 to carry out the adjudication calculations.
183. However, before doing so there are a number of important overall contractual issues raised by the respondent that need to be considered before the calculations for each specific payment claim are carried out.

c. Other overall contractual issues raised by the respondent

184. There are also some specific contractual issues raised in a particular payment claim which are considered under that particular payment claim heading.
185. On page 5 of the payment schedule the respondent said that the rate of \$105 per hour for a fitter for normal hours worked was an all-inclusive rate as identified by clause 4.1 of the contract.
186. It also added that the claimant was not entitled to claim for moneys for hours on site during which work was not undertaken through no fault of the respondent.
187. The overall contractual issues are now listed below, for which I have inserted their paragraph references in the payment schedule and adjudication response for the parties' assistance, included:
- (i) payment on account [paragraphs 35 and 36 and 132 of the adjudication response, and paragraph 34 of Mr Alafaci's statutory declaration]?

- (ii) Not party to any EBA [paragraphs 58 and 59 of the adjudication response]
- (iii) Discrepancy over hours charged where claims for hours in excess of respondent's employee hours [paragraphs 65 to 67 of the response];
- (iv) dockets do not contain sufficient details, including total hours worked, nor start or finish times [paragraph 21, 28, 44, 52, 60, 75, 83, 102, 113, hundred and 20, 130, 146, 155, 164 of the payment schedule but is not maintained in the adjudication response];
- (v) meal breaks not payable [paragraph 7, 12, 27, 33, 39, 45, 49, 50, 58, 67, 73, 80, 84, 88, 96, 100, 107, 111, 116, 118, 24, 128, 144, 151, 154, and paragraphs 68 through to 73 of the adjudication response]?
- (vi) verification of day dockets [page 4 of the payment schedule and paragraphs 94 to 97 of the adjudication response]
- (vii) signed timesheet - a condition precedent payment [paragraphs 108, 17, 139, 183, 199, 215, 232, 255, 264, 272, 284, 299, 308, 321, 347, and 358 of the response]?

Payment on account

188. It is evident this objection only arose in the adjudication response, as I could find nothing in the payment schedule dealing with this issue.
189. It was arguably a *new reason* which is prohibited by section 24(4) of BCIPA because this is a standard payment claim.
190. In *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors* [2011] QSC 293, Daubney J held at [25] that spreadsheets not provided in the payment schedule, but provided in the response, were not new reasons for withholding payment, but 'explanatory' reasons only.
191. However, I did not need to decide whether it was a new reason, because I have rejected Mr Alafaci's assertion, because it referred to clause 5.2 of the contract as support for the payment on account proposition, which I found did not form part of the contract.
192. I therefore find that there was no agreement that payments were made on account, and I reject the respondent's submissions.

Not party to any EBA

193. Whilst this submission had not been raised in the payment schedule, I find the specific contractual basis for claiming the meal allowances of \$15.09 for labour from payment claim number 5 onwards was not identified in the payment claims, nor in Payment claim 16 (the subject of adjudication).
194. I find that the EBA submission first arose in the paragraph 235 of the application, and the EBA was attached at tab x of the application.
195. The respondent took issue with the claimant now referring to this EBA, and submitted that it was not relevant to the adjudication and should be ignored.
196. I agree with the respondent because the claimant had not alleged that the EBA formed part of the agreement in either stage I or stage II, and I made no finding that the EBA was part of the contract.
197. Accordingly, I find that the EBA did not form part of the contract.
198. However, this does close the issue regarding the meal allowances because at paragraph 236, the claimant referred to its negotiations with Mr Alafaci on 14 October 2015.
199. The claimant's Mr Davies in its email at 10.18AM on that date referred specifically, "*Meal allowances if required will now only be charged at cost and shown separately on our weekly account.*"
200. I have found that there was stage II acceptance by Mr Alafaci at 6.05 PM on that date, and that includes acceptance of the meal allowances.
201. I am not prepared to accept Mr Alafaci's assertions, in paragraph 59 of his statutory declaration, that the *agreement was to the revised hourly rates for the supervisor, as requested by us, not meal allowances*. This is inconsistent with the evidence.
202. The 10.18AM email's 1st paragraph provides as follows:
"As discussed today by phone, please see our revised rates based on your labour requirements going forward. We have made this offer based on taking a large portion, if not all of the

existing work remaining on the project. Meal allowances if required now will only be charged at cost and shown separately on our weekly account."

203. I find that as part of that email, was the email from Jennifer Walker to Brian Davies, and she made reference to "Please note that meal allowances as incurred will be on charged to the customer at cost." This was made after her comment "I have reviewed the rates and if we are guaranteed volume on the job we can offer the kinds the below discounted rates at our sell prices.
204. I find that the details were contained within the email because Mr Alafaci claimed that they had been no attachment about the revised rates, and Mr Davies, at 5:15 PM (Queensland time) said. *"Mate, scroll down the email, I simply forwarded on the charges made by Jennifer, I did this over the phone with her to act quickly for you"*
205. At 4:44 PM (NSW time), Mr Alafaci replied, *"Sorry I didn't notice it. Brian, can we make 105%, time and a half rate \$115?"*
206. Accordingly, I'm satisfied that the rates, together with the meal allowances had been brought to Mr Alafaci's attention, and he accepted them.
207. Accordingly, I accept the claimant's submission that the meal allowances formed part of a stage II agreement.
208. I do not have to make any finding about whether or not, Mr Robinson agreed to these rates, nor whether he had authority to do so, because I have already found that meal allowances form part of the agreement.
209. This will be reflected in the calculations below.

Discrepancy over hours charged

210. The respondent has significant objections in each payment claim to the hours charged.
211. However, this objection by the respondent focuses on paragraphs 65 to 67 of the response, which provided that the claimant's hours could not exceed the hours of the respondent, because the claimant's and respondent's employees worked in gangs³.
212. I am not prepared to consider this objection because it appeared to me to be a *new reason* for non payment which is prohibited by section 24(4) of BCIPA.
213. In any event, even if I was minded to consider this objection (which I am not), neither Mr Alafaci nor Mr Pratter attached the respondent's time sheets for any comparison to be made between the times of both gangs.

Meal breaks not payable

214. This is an overarching objection raised by the respondent covering virtually every payment claim.
215. In my view if the dockets have been signed by the respondent's representative, they have verified the actual hours worked by the claimant, as Mr Robinson confirmed in his statutory declaration, and there is no entitlement to deduct 30 minutes. This pattern was set with Mr Robinson, so I see no reason why the timesheets would suddenly after 24 November 2015 reflect the time including meal breaks.
216. Where the timesheets have not been signed I have more closely reviewed them under each payment claim below.

Insufficient details in the dockets

217. This is also a wide-ranging objection raised by the respondent covering virtually every payment claim.
218. Again in my view if the dockets have been signed by the respondent's representative, they reflect that there are sufficient details in the dockets, as Mr Robinson confirmed in his statutory declaration,
219. This pattern was set with Mr Robinson, so I see no reason why the timesheets suddenly did not provide sufficient information.
220. Nevertheless, in particular payment claims I consider the matter more closely.

³ Supported by Mr Alafaci's statutory declaration paragraphs 35 to 41 and Mr Steve Pratter's paragraphs 7 and 8
Chris Lenz

Verification of day docket

221. The payment schedule on page 4 dealt with the claimant's lack of entitlement to payment in the event of unsigned daily dockets.
222. The claimant had engaged with the respondent on this issue, whilst conceding the need for daily dockets to be signed by both parties in paragraph 158 of the application, it was not prepared to concede that it was not entitled to payment if it was unable to find the respondent's representative on a particular day.
223. At paragraph 302 of the application, when conceding that the shift reports for 24 & 25 November 2015 had not been signed, because it was not possible to locate Mr Robinson, so that they were later emailed to the respondent on 1 December 2015. In that submission the claimant submitted, "... and the respondent's failure to have an authorised representative on site on 25 November 2015 should not be a reason to not allow payment of the shift report."
224. In paragraph 305 of the application, the claimant refuted the respondent's argument that the shift report for 24 November 2015 was not executed by the respondent's representative because a signature was obtained.
225. Again, at paragraph 336 of the application regarding the unsigned shift reports for 17, 18 and 21 December 2015, the claimant repeated its assertion that the respondent's failure to have an authorised representative on site on those days should not be a reason to not allow payment of the shift report.
226. The same submission was made in paragraph 348 of the application regarding shift reports from 1 February through to 3 February 2016.
227. I'm satisfied from the claimant's submissions and the statutory declarations in support of those submissions that the times identified in the unsigned daily timesheets (subject to any further calculations below) were correct.
228. I'm also satisfied from the submissions with the supporting statutory declarations that on the day where the reports were unsigned, there was no representative from the respondent available to sign the documents.
229. I am also satisfied that all unsigned documents were sent to the respondent for approval but they have not been signed.

Authorised respondent's representative

230. The one other issue that I need to confront is that of the *authorised representative* because the payment schedule is peppered with references to the authorised representative of the respondent having to sign. The respondent has provided evidence that only Mr Robinson, Mr Alafaci and latterly Mr Greg Dwight had authority to sign on behalf of the respondent.
231. Nowhere has the respondent demonstrated that it had advised the claimant that other respondent personnel who were on the project on a daily basis had no authority to sign on its behalf.
232. Given that the respondent is asserting lack of authorisation, it is my view that it bears the evidentiary onus to demonstrate the people who it advised the claimant were authorised to sign the documents.
233. In my view it is only on 28 November 2015, when the claimant acknowledged an email from the respondent about the identity of Mr Dwight, that the claimant could have been aware as to the identity of a particular representative.
234. Nevertheless, I have already drawn the inference that the State manager would be unlikely to be on the project on a daily basis, and the respondent has provided no evidence from Mr Dwight as to his daily movements during the period 25 November 2015 to 3 February 2016, and his ability to assess and sign these reports.
235. What the respondent, with respect, fails to appreciate is that it was also under a contractual obligation to ensure that the documents were signed on a daily basis. The fact that the evidence from Mr Alafaci, corroborated by Mr Robinson's email to Mr Alafaci on the 23 November 2015 was that the respondent had not been signing them on a daily basis until the claimant threatened to leave the project.

236. It is open for me to draw an adverse inference, about the respondent's conduct regarding the signing of these documents, by not having a representative on site at all times, and even after having obtained the documents to review them at leisure, failed to do so.
237. To my mind, if the respondent had any difficulties with a particular timesheet, it could have provided those comments when signing the timesheets, so that the claimant could have been apprised of the objections at the time, and not some 3 to 6 months later in a payment schedule and adjudication response.
238. The respondent was obliged under the contract to sign the documents on a daily basis, and by not doing so, and then arguing the claimant was not entitled to any payment whatsoever for work on that day, leads me to a reasonable inference that the respondent was not going to pay the claimant. This is supported by the payment claim summary which identified that, from payment claim number 8 dated 6 November 2015, the respondent has not paid the claimant anything further.
239. In any event, I am satisfied from the statutory declaration of Mr Robinson (made on oath) that Mr Lawless was authorised to provide for the period 10 September to 20 September 2015, and that he was entitled to from 21 September 2015 to 24 November 2015. There is nothing to suggest that Mr Robinson should not be believed about this evidence.
240. In his email to Mr Alafaci on 23 November 2015, Mr Robinson explained why Mr Lawless had signed the documents, and he confirmed that most of the days he was present during this period in any event.
241. I can draw an inference that between 11 September 2015, when he received the email from Mr Alafaci about those authorised to sign, and his email to Mr Alafaci on 23 November 2015 that as a matter of practicality, the daily signing of timesheets must have become a significant issue for the claimant to threaten to walk off the project.
242. I note the response from Mr Alafaci to Mr Robinson's email was, "So have all the timesheets been signed by a planet rep?" The words used were not an authorised representative, which if Mr Alafaci's evidence was to be accepted, could only have been Mr Robinson at that time, so he should have said, "...signed by you?". I therefore draw the inference that there were other people who could sign.
243. Therefore, I'm not satisfied that the documents signed by Mr Kel Lawless, Mr Craig Robinson (when he was not on the site for the full period of the claimant's work) and Mr Hocking, detracts from the fact that the documents had been signed by a respondent's representative, as required by the contract.
244. In circumstances where there is a signature from a person employed by the respondent, I am prepared to accept the amounts claimed because Mr Robinson said that he was satisfied with the contents of each shift report, and that they recorded the hours worked.
245. In his statutory declaration at paragraph 10, Mr Robinson then said that he had recently discovered (presumably in April 2016) that the respondent was deducting 30 minutes off each shift report, some 6 months after the work was done.
246. He made the comment about the shortness of the breaks taken by the claimant's personnel, and is not possible for me to make any evaluation as to how much, if any breaks were taken by the claimant's personnel. I can only act on the evidence that the documents were signed, and therefore accurately reflected the hours worked, for those documents that had been signed.
247. I now turn to the argument that the signed timesheets were a condition precedent to payment.

Signed timesheets – a condition precedent to payment?

248. In paragraphs 108, 117, 139 of the response, the respondent's objection *it was that a condition precedent to payment of progress claims is the verification of submitted shift reports by an authorised representative*.
249. The wording changed slightly in paragraphs 117, 139 of the response, which provided, *it was a condition precedent to a valid claim for payment under the Contract that daily*

- timesheets were to be signed and countersigned by authorised representatives from both parties.*
250. In paragraph 139, the words authorised representatives were put in bold and underlined, which was then repeated for the rest of the following paragraphs, 183, 199, 215, 232, 255, 264, 272, 284, 299, 308, 321, 347, and 358 of the response.
251. Whilst the verification of day dockets had earlier been the subject of the submissions 94 through to 97 of the response, the respondent makes a rather large leap to then say that a signed timesheet was a **condition precedent to payment**.
252. It provided no legal arguments, supported by authority to substantiate this submission, or define what was meant by the term *condition precedent*.
253. Neither party has referred me to any authority regarding the law surrounding conditions precedent. I can understand why the claimant has not done so, because the particular words *conditions precedent* had not been used in the payment schedule, but only in the adjudication response.
254. The agreement between the parties was that both parties were to sign the sheets and I've found that the claimant had carried out its obligations to do so.
255. In the face of the facts, the respondent now invites me to find that it was a condition precedent to payment that the respondent sign the timesheets, in circumstances where:
- (i) there was no representative on the day to do so, and
 - (ii) despite being sent these timesheets by the claimant it failed to do so later,
 - (iii) when there was evidence from Mr Alafaci that he wanted time to closely scrutinise each time sheet.
256. The law surrounding conditions precedent in contracts is complex as can be found in the case of *Perri v Cooloongatta Investments Pty Ltd* (1982) 149 CLR 537.
257. The judgement in that case of this issue was most comprehensively discussed by Mason J who held in the paragraphs below.
- "17. Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract.*
- 20. The conclusion to be drawn then is that the clause expresses a condition which is precedent to the appellants' duty to perform the contract, non-fulfilment of which entitles them to terminate the contract, rather than as a condition precedent to the formation of the contract*
- 25. The expression of a provision in the form of a condition precedent endows it with the character of essentiality."*
258. If one applied the definition of *conditions precedent to performance* identified in *Perri*, it would appear that the failure by the claimant to have the respondent sign the timesheets was breach of a condition entitling the respondent to terminate the contract.
259. There is no evidence that the unsigned timesheets caused the respondent to take steps to terminate the project.
260. In fact, the reverse appears true. In paragraph 112 of the response, the respondent extracted emails between Mr Alafaci and Mr Robinson, where Mr Robinson's email on 23 November at 18.21 provided:
- "Hi Anthony, up until recently, most of the days that were claimed I was on site, it is only that Kel decided to sign them. Originally you and I discussed that we were not going to sign them until after you had reviewed them, however, when Asset threatened to stop work, if they were not signed, it was at some point after this that you and I discussed and it was decided that I would sign them and this can be reflected in the dates with my signature."*
261. This email confirms Mr Alafaci's earlier email to Mr Robinson on the 11 September 2015 to not sign the documents on a daily basis, and demonstrates that the claimant would walk off the job (i.e. terminate the contract) if they were not signed on a daily basis.
262. In circumstances where the unsigned timesheets were:
- (i) through no fault of the claimant had not been signed by the respondent;

- (ii) had been sent to the respondent for signature, in circumstances where that was precisely what the respondent required, i.e. time to review them;
 - (iii) not signed or challenged by the respondent, after having been received;
 - (iv) such that the failure (although I make no finding about this) could have constituted a breach of contract by the respondent; and
 - (v) without any authority from the respondent to explain why I should find that the daily and timesheets were a condition precedent to payment,
- I am not prepared to find that such a condition precedent existed.

XII. Valuation

263. Accordingly, any objection to particular timesheets details will be considered under each payment claim below, but I'm not prepared to find that an unsigned timesheet meant that the claimant was not entitled to be paid because a signed timesheet was not a condition precedent to payment.
264. I will now turn to each payment claim to carry out the valuation of the payment claim in which the claimant needs to demonstrate entitlement under the construction contract to be paid a sum of money for the related goods and services undertaken to be supplied under a construction contract.
265. I have to consider the residual objections from the respondent in carrying out this analysis in order to value the claim.
266. Then insofar as determining the amount of the progress payment, s13(a) of BCIPA requires me to find the amount calculated under the contract.
267. I find there is no mechanism under the contract for an amount to be calculated, which means that s13(b) of BCIPA is enlivened for me to determine the value of the related goods and services, which means I need to have regard to s14 of BCIPA.
268. s14 of BCIPA considers *valuation* of the work and services is concerned as follows:
- (a) s14(2)(a) of BCIPA under the terms of the **contract**; or
 - (b) s14(2)(b) if it does not do so, that it is possible to value the services having regard to:
 - (i) the contract price for the goods and services; and
 - (ii) other rates or prices stated in the contract; and
 - (iii) any variation agreed to by the parties;
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect.
 - (b) s14(3) of BCIPA, as the respondent correctly identifies in the response, provides that only materials and components that become the property of the party or other person for whom the construction work is being carried out can be valued.
269. However, this last provision only deals with circumstances where the contract does not provide for the materials and components.
270. I now turn to valuation and there is a need for the parties to have regard to Annexure CGL 1, which has extracted all the relevant payment claim information as well as that of the respondent's payment schedule, and verified the validity of the data provided to me.
271. I have then performed some preliminary calculations to determine the difference between the payment claim and payment schedule for each claim (excluding GST), and then made some final calculations to determine the adjudicated amount.
272. My spreadsheet accords with most of the numbers identified in tab 1 of the adjudication response, and where they differ, I am satisfied with my calculation, because it comes from the payment schedule data, and I have made a comment under each payment claim to explain that difference (if any).

Payment Claim 1 (PC \$99,160.90 PS \$83,468.02 BUT AR \$84,252.97)

273. The difference between the payment claim and the payment schedule is \$15,692.88, rather than \$14,907.93 if one considers the adjudication response total.

274. The Labour claim difference is \$14,300.70, which primarily relates to not been prepared to pay for 17 September 2015, which was an amount of \$11,123.88, because it was unsigned.
275. For the reasons identified above, I reject that deduction because the timesheet had been signed and I'm not prepared to allow the 30 minute deduction for meal breaks because the documents had been signed for the hours worked.
276. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$85,481.08 for labour.
277. The respondent says that there is no entitlement to claim for materials not integrated into the works [paragraph 8 of the payment schedule, and paragraphs 124 through to 130 of the adjudication response].
278. I do not agree with the respondent that the contract rate of \$105 an hour included personal protection equipment (PPE) and various tools. Mr Davies at paragraph 10 and 11 and 14 attested to the hourly rate is not including site-specific tools and PPE equipment.
279. This was corroborated by Mr Robinson, who I find was present at the meeting, and this was conceded by Mr Alafaci, in his paragraph 9 of his statutory declaration because he said, *"I told Brian at the time that he was to charge for all incidentals including plant and materials which Asset needed for the project."*
280. To this extent, I'm not prepared to accept Mr Alafaci's statement in paragraphs 42 that there was the qualification about only materials "integrated into the works" because it seeks support from clause 4.1, which specifically excludes PPE and incidentals, and I have rejected that the T&Cs formed part of the contract.
281. I've had to weigh up 2 witnesses attesting to the hourly rate not including site-specific tools and PPE equipment, against one witness who said that the discussion about the rates specifically agreed that it provides only for materials incorporated, which conveniently dovetailed with clause 4.1. There is no evidence that clause 4.1 was discussed when the contract was formed on 10 September 2015, so I prefer the claimant's witnesses evidence.
282. Accordingly, I accept the materials claim of \$13,679.82 in full.
283. Those figures are carried to Annexure CGL 1.

Payment Claim 2 (PC \$48,815.28 and P. S. \$38,040.69)

284. The difference between the payment claim and the payment schedule is \$10,774.59, if one takes into account the credit note of \$8, 886.73. It appears as if the respondent has failed to take into account this deduction in its payment schedule calculations.
285. In any event, for the reasons identified above, I reject that deduction of \$10,774.59 because the timesheet had been signed and I'm not prepared to allow the 30 minute deduction for meal breaks because the documents had been signed for the hours worked.
286. At paragraph 185 of the application, the claimant attaches the two-day labour shift reports, which appears to be the same signature.
287. The respondent argues that the signature is different from the signature of Mr Lawless on 18 September 2015 [paragraph 144 of the response], but it does not adduce any handwriting expert evidence to demonstrate that it is a different signature. It bears the onus, and I cannot make a finding that it is a different signature. To my mind the respondent could have provided a statutory declaration of Mr Lawless to clarify this issue, and failed to do so.
288. At paragraph 148 of the response, the respondent refers to shift reports dated 21 September 2015 and 22 September 2015, and signed by Mr Craig Robinson, which it denies. I am not satisfied that these were not signed by Mr Robinson, because he attests to signing them in paragraph 13 of his statutory declaration, for which you provided screen captures.
289. I am not prepared to consider whether or not Mr Robinson was on site for the whole period, because Mr Alafaci was prepared to signing documents (see his 11 September 2015 email to Mr Robinson) as he would not have been on site during the whole period either.
290. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$46,620.38 for labour, and \$2194.94 materials as there is no contest about the materials supplied.

291. However, the credit note must also be applied, and I have done so in annexure CGL 1

Payment Claim 3 (PC \$21,736.81 and PS \$20,987.60)

292. The difference between the payment claim and the payment schedule is \$749.21.
293. I find the Labour dockets were all signed as attested to by Mr Robinson, so I accept the full Labour amount of \$18,282.98, and as indicated above, am not prepared to deduct the meal allowance because the timesheets reflects the total hours worked.
294. The respondent at paragraph 170 of the response indicated that the D & R Fire pipe invoice number 51422 for \$1761.70 (ex GST) was rejected because insufficient details were provided.
295. Furthermore, at paragraph 177, it argued that Brendan Lewis' statutory declaration failed to specify whether pipe had been used in the project.
296. I am not satisfied of that objection because the tax invoice identified for Orion job MC 5262 for pipe fabrication, because Mr Lewis at paragraph 7 specifically reviewed the pipe invoice and confirmed they had been used and incorporated into the works.
297. In any event at paragraph 179 the respondent concedes the additional payment is due.
298. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$18,282.98 for labour, and \$3453.83 materials.
299. Those figures are carried to Annexure CGL 1

Payment Claim 4 (PC \$30,979.66 and PS \$25,501.28)

300. The difference between the payment claim and the payment schedule is \$5478.97.
301. The respondent at paragraph 191 of the response, said that Mr Robinson had not signed the 4 October 2015 Docket, which I have rejected, because he has attested to having done so at paragraph 14 of his statutory declaration.
302. At paragraph 192 of the response, the respondent says that the day dockets did not include sufficient details of the work, but I reject this because Mr Robinson has signed them.
303. I apply the same reasoning to the objection in paragraph 194 of the response, which added the complaint regarding the start and finish hours not being recorded and the Labour details being insufficient. Mr Robinson signed them.
304. Given that I have found the Labour dockets were all signed as attested to by Mr Robinson, I accept the full Labour amount of \$12,555.88, and as indicated above, I am not prepared to deduct the meal allowance because the timesheets reflect the total hours worked.
305. The respondent does not object to the material costs of \$18,425.37.
306. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$12,555.88 for labour, and \$18,423.78 for materials.
307. Those figures are carried to Annexure CGL 1.

Payment Claim 5 (PC \$21,047.05 and PS \$20,082.29)

308. The difference between the payment claim and the payment schedule is \$964.76.
309. The respondent at paragraph 200 of the response, make deductions for meal breaks of 30 minutes, and provided further submissions in paragraphs 201 through to 208 of the response regarding meal allowance is not being allowable.
310. I have already made a finding that meal allowances could be charged, because they form part of stage II of the contract, so I reject these submissions
311. I find the Labour dockets were all signed as the respondent does not take issue with that.
312. Accordingly, I accept the full Labour amount of \$19,480 plus \$211.26 for meals, and as indicated above, I am not prepared to deduct the time for meal allowance because the timesheets reflect the total hours worked.
313. The respondent does not object to the material costs of \$1355.79.

314. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$19,480 for labour, together with \$211.26 for meals and \$1355.79 for materials.
315. Those figures are carried to Annexure CGL 1

Payment Claim 6 (PC \$68,814.41 and PS \$65,140.25 and AR \$65,696.43)

316. The difference between the payment claim and the payment schedule is \$3674.16.
317. The respondent at paragraphs 216 and 221 and 222 of the response, make deductions for meal breaks of 30 minutes, and provided further submissions in paragraphs 201 through to 208 of the response regarding meal allowance is not being allowable.
318. I have already made a finding that meal allowances could be charged, because they form part of stage II of the contract, so I reject these submissions
319. I find the Labour dockets were all signed as again the respondent does not take issue with that. Mr Robinson had previously attested to the fact that all documents he signed were for the full amount of hours worked.
320. At paragraph 223 of the response, the respondent says that the day dockets did not include sufficient details of the work, including the start and finish hours, but I reject this because they were signed.
321. I apply the same reasoning to the objection in paragraph 194 of the response, which added the complaint regarding the start and finish hours not being recorded and the Labour details being insufficient. The respondent conceded that the documents were signed by an authorised representative, and that is adequate in my view to demonstrate that the details were sufficient.
322. I'm not prepared to accept the submissions at paragraph 224 of the response that the respondent had fabricated its own shift reports after the fact. There simply no evidence of fabrication, which is a serious allegation. Mr Lewis in paragraph 12 of his statutory declaration attests to the fact that Mr Robinson had signed the reports.
323. If it was the case that the claimant was trying to rely upon its updated report to demonstrate entitlement, I would agree with the respondent, because the claimant had to demonstrate entitlement in the payment claim. Once the respondent's representative had signed, to my mind entitlement occurred.
324. Accordingly, I accept the full Labour amount of \$57,840 plus \$679.05 for meals, and as indicated above, I am not prepared to deduct the time for meal allowance because the timesheets reflects the total hours worked.
325. At paragraph 61 of the payment schedule, the respondent said that the claimant had no claim for materials totalling \$592.61 as they had not been incorporated into the construction works. I do not understand where this amount has come from and I agree with the claimant's paragraph 260 application submissions that this deduction should be rejected, because there is no such amount stated. It may be that paragraph 226 of the response was a concession in this regard, but it was not entirely clear.
326. In paragraphs 219 through to 220, the respondent argued that the material invoices did not provide sufficient details. Nevertheless, the respondent at paragraphs 227 and 228 of the response accepted the material costs from D&R fire pipe, but excluded the Bunnings' invoice of \$31.01, which relates to PPE equipment.
327. I have already found that the claimant is entitled to claim for this equipment in the contract, and therefore am satisfied that the entire material costs of \$10,295.36 is payable.
328. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$57,840 labour, together with \$679.05 for meals and \$10,295.36 for materials.
329. Those figures are carried to Annexure CGL 1

Payment Claim 7 (PC \$76,092.37 and PS \$9639.83)

330. The difference between the payment claim and the payment schedule is \$66,452.54.
331. At paragraph 233 of the response the respondent acknowledges that the day docket dated 21 October 2015 was signed, which was an adjustment from payment claim 6.

332. At paragraph 234 of the response the respondent alleged that the claimant had erroneously added 20 hours, and that Mr Mackay's hours were not included on the 21 October 2015-day docket.
333. It argued at paragraph 235, that I should give little weight to Mr Robinson's statutory declaration, but I have not agreed with that submission earlier. However, I do not find he says anything about this docket, but I note his signature on the 22 October and 26 October 2015 shift reports.
334. Accordingly, I am not prepared to accept the respondent's objections because the document was signed.
335. The respondent at paragraphs 238 and 247 of the response, make deductions for meal breaks of 30 minutes. I have already found that any documents signed by Mr Robinson confirm the total hours worked, so that meal break deductions should not occur.
336. The respondent provided further submissions in paragraphs 248 of the response regarding meal allowance not being allowable.
337. I have already made a finding that meal allowances could be charged, because they form part of stage II of the contract, so I reject these submissions
338. At paragraph 245 of the response the respondent argued that the day dockets were not executed by its authorised representative, such that the claimant had no entitlement. At paragraph 16 of his statutory declaration, Mr Robinson attests to having signed the shift reports from 24 October 2015 through to 31 October 2015, so I cannot accept the respondent's submissions.
339. I find the Labour dockets were all signed by Mr Robinson. I understand that Mr Mackay's dayshift report of 22nd and 26th of October had not been transferred, nor claimed in the time sheet, however, the fact is that it was signed by Mr Robinson, as asserted in paragraph 283 of the application as having been combined into one shift report, and explains the anomaly, so I'm not prepared to accept that there is anything untoward in this claim.
340. Accordingly, I accept the full Labour amount of \$66,885 plus \$845.04 for meals.
341. The respondent does not object to the material costs of \$8362.33.
342. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$66,885 plus \$845.04 for meals and \$8362.33 for materials.
343. Those figures are carried to Annexure CGL

Payment Claim 8 (PC \$16,023.71 and PS \$14,705.13)

344. The difference between the payment claim and the payment schedule \$1318.58.
345. The respondent at paragraph 79 of the payment schedule acknowledged that the timesheets were signed. Accordingly, despite its attempts to deduct for meal breaks and meal allowances, as identified previously above, those deductions not allowable.
346. At paragraph 258 of the response, the respondent argued that the day dockets for 4 November 2015 have been amended, which looks correct. However, at paragraph 290 of the application, the claimant said that the changes had been initialled by Mr Robinson, and I find that there is a set of initials next to the changes. In response, the respondent did not deny that these were the initials of Mr Robinson, so I'm satisfied that the amendments had been approved.
347. Accordingly, I accept the full Labour amount is \$13,685 plus \$181.08 for meals.
348. The respondent does not object to the material costs of \$2157.63
349. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$13,685 plus \$181.08 for meals and \$2157.63 for materials.
350. Those figures are carried to Annexure CGL

Payment Claim 9 (PC \$23,526.40 and PS \$22,965.14)

351. The difference between the payment claim and the payment schedule is \$561.26.

352. The respondent at paragraph 87 of the payment schedule acknowledged that the timesheets were signed. Accordingly, despite its attempts to deduct for meal breaks and meal allowances, as identified previously above, those deductions not allowable.
353. As previously, I find the Labour dockets were all signed by Mr Robinson, and again the respondent does not take issue with that. He had previously attested to the fact that he signed the documents for the full amount of hours worked.
354. Accordingly, I accept the full Labour amount of \$19,943.68 plus \$211.26 for meals.
355. The respondent does not object to the material costs of \$3371.46.
356. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$19,943.68 plus \$211.26 for meals and \$3371.46 for materials.
357. Those figures are carried to Annexure CGL

Payment Claim 10 (PC \$5020.99 and PS \$2813.49)

358. The difference between the payment claim and the payment schedule is \$2207.50.
359. The respondent at paragraph 93 of the payment schedule acknowledged that the timesheet dated 24 November 2015 was signed, but takes issue with the fact that 25 November 2015 timesheet was not signed. Accordingly, as identified previously, I do not allow the respondent to deduct for meal breaks and meal allowances.
360. Given that I've found that an unsigned timesheet is not a condition precedent payment, I reject paragraph 95 all of the respondent's payment schedule, and that of 273 of the response.
361. At paragraph 274 of the response the respondent said that Mr Greg Dwight was the authorised representative on 25 November 2015, in response to the allegation that Mr Robinson was unavailable to sign the shift report. However, as indicated in that statutory declaration at paragraph 19 of Mr Alafaci, this advice was only provided to the claimant on 28 November 2015.
362. I have already found that the respondent cannot rely upon its own not signing of the timesheets, despite them having been given to the respondent on one December 2015, to deny the claimant's entitlement to payment. I agree with the submission at paragraph 302 of the application, which is supported by Mr Brendan Lewis's statutory declaration that they were sent and the degree of importance on the email was high.
363. Somewhat surprisingly, at paragraph 277 of the response the respondent asserted that the claimant was not entitled to claim for the day dockets dated 24 November 2015, as it not been executed, and yet Mr Robinson signed it. That submission must be rejected, because that is inconsistent with paragraph 93 of the payment schedule, which had acknowledged that it had been signed.
364. As to the unsigned timesheet of 25 November 2015, there is no need to make any deduction for meal breaks in any event, because the claimant's employees had only worked 8 hours each that day. However, I'm prepared to accept that they did work that day, and have rejected the condition precedent argument.
365. Accordingly, I accept the full Labour amount of \$4780.
366. The respondent does not object to the material costs of \$240.99.
367. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$4780 for labour, together with \$240.99 for materials.
368. Those figures are carried to Annexure CGL

Payment Claim 11 (PC \$11,526.61 and PS \$8281.16)

369. The difference between the payment claim and the payment schedule is \$3245.45.
370. The respondent at paragraphs 104 of the payment schedule acknowledges that 4 dockets had been executed by its representative, but not for 1 December 2015. At paragraph 286 of the response, the respondent echoed that the 1 December 2015 docket had not been submitted by the claimant.

371. It appears as if this is conceded by the claimant, because at paragraph 314 of the application, it identified that the 2 hours charged for Brendan Lewis was added to the shift report of 2 December 2015, and the 2 hours. Originally written next to his name had been changed to 4 hours, which I find was signed by Mr Hocking. I do not find a day docket dated 1 December 2015 in the payment claim.
372. I find the Labour dockets submitted in the payment claim were all signed by the respondent's representative. For the reasons identified above, I'm not prepared to allow any of the deductions, because the documents were signed
373. Accordingly, I accept the full Labour amount of \$10,970 plus \$75.45 for meals.
374. The respondent does not object to the material costs of \$481.16.
375. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$10,970 plus \$75.45 for meals and \$481.16 for materials.
376. Those figures are carried to Annexure CGL

Payment Claim 12 (PC \$8977.23 and PS \$8535)

377. The difference between the payment claim and the payment schedule is \$442.23.
378. The respondent at paragraph 115 of the payment schedule acknowledged that the documents had been signed by an authorised representative. Accordingly, I'm not satisfied it is entitled to make deductions for meal breaks of 30 minutes and meal allowance as previously found above.
379. I find the Labour dockets were all signed by Mr Hocking, the respondent now acknowledges as an authorised representative, such that I reject these submissions that there were insufficient details provided.
380. Accordingly, I accept the full Labour amount of \$8931.96 and \$45.27 for meals.
381. Those figures are carried to Annexure CGL

Payment Claim 13 (PC \$8368.90 and PS \$48.72)

382. The difference between the payment claim and the payment schedule is \$8320.18.
383. The respondent at paragraph 123 of the payment schedule, which was echoed in paragraph 309 of the response, submitted that none of the dockets had been signed, and were therefore invalid.
384. I have already made a finding that unsigned dockets are not a condition precedent to payment, and that I am satisfied from paragraph 336 of the adjudication application that several attempts were made to locate Mr Hocking or another representative.
385. I am satisfied that those reports were provided to the respondent, because Pauline Sleator forwarded an email with the reports on to Cameron Smart on 25 February 2016.
386. I am satisfied from the statutory declaration of Mr Adrian Reeves that the contents of those reports are true and accurate, and the fact that they were not signed by the respondent does not make them invalid, provided I am satisfied that they accurately reflect the work carried out that day.
387. Although the respondent takes issue with them not being signed and argues at paragraph 317 of the response that validation by an authorised representative who was aware of the hours worked and was unable to make an informed assessment of the validity of the shift report, I am satisfied that there was nobody on site from the respondent to do so.
388. I have previously found that deduction for meal breaks could not be made if the timesheets reflected the hours worked, and on Thursday 17 December and Monday, 21 December 2015, the employees worked 8 hours or less. For Friday, 18 December 2015 2 employees worked 10 hours, but in the circumstances, I am not prepared to deduct 30 minutes for meals, because I'm not satisfied with they did not work 10 hours on that day. At this late stage in the project, I'm satisfied that the claimant's timesheets accurately reflected the time actually worked.

389. I have already made a finding that meal allowances could be charged, because they form part of stage II of the contract, so I reject these submissions
390. Accordingly, I accept the full Labour amount of \$8290 plus \$30.18 for meals.
391. The respondent does not object to the material costs of \$48.72.
392. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$8290 plus \$30.18 for meals and \$48.72 for materials.
393. Those figures are carried to Annexure CGL-1.

Payment Claim 14 (PC \$6462.19 and PS \$502.09)

394. The difference between the payment claim and the payment schedule is \$5960.10.
395. The respondent at paragraph 133 of the payment schedule, which was echoed in paragraph 322 of the response, submitted that none of the dockets (dated 1 February, 2 February and 3 February 2016) had been signed, and were therefore invalid.
396. I have already made a finding that unsigned dockets are not a condition precedent to payment, and that I am satisfied from paragraph 348 of the adjudication application that several unsatisfactory attempts were made to locate Mr McReady or another representative.
397. I am satisfied that those reports were provided to the respondent, because Pauline Sleator forwarded an email with the reports on to Cameron Smart on 25 February 2016.
398. I am satisfied from the statutory declaration of Mr Adrian Reeves that the contents of those reports are true and accurate, and the fact that they were not signed by the respondent does not make them invalid, provided I am satisfied that they accurately reflect the work carried out that day.
399. The respondent argued in paragraphs 136 to 140 of the payment schedule and 327 to 336 of the response that the work done on 1 December 2016 was for rectification of the claimant's defective work. I do not accept that submission because it does not substantiate its assertions.
400. There is no evidence that the contract required the claimant to carry out design work, or check the design by others. The claimant was assisting the respondent with the work, and I have found that the T&C's do not form part of the contract, so it is not bound by the clause regarding defects.
401. I accept Mr Lewis explanation in his statutory declaration, at paragraph 19, where he said they were not the claimant's defects, and that the extra sprinklers were a result of an error of the designers Floth [paragraph 20].
402. The day sheets were for various activities as follows:
- (i) 1 February 2016 was for night shift to install additional sprinklers;
 - (ii) 2 February 2016 for stand down, which was actually found in the 1 December 2016 docket;
 - (iii) 3 February 2016 for day shift for removal and installation of *esuctions*.
403. Taking each day's claim in turn:
- (i) 1 February 2016. Based on Mr Reeves' statutory declaration, I am satisfied that this work was done, and that the time and a third rate of \$107.21 appears reasonable, but the time and a third rate for the Advanced sprinkler of \$122.36 is above the time and a half rate of \$115 that was agreed on 14 October 2015. I accept \$857.68 for tradesman's night work, but the Advanced sprinkler of 9.5 hours is restricted to \$115/hr resulting in an amount of \$1092.50. I calculate the total for that day as \$1950.18;
 - (ii) 2 February 2016. I am not satisfied that the contract included the EBA. I understand the claimant's submissions at 349 to 351 and its reference to the 10 September email. I appreciate that the attachment included the September 2015 rates, which appeared to be an extract for rates on the John Holland's tunnelling project.

This extract (on the John Holland project) referred to an extract of the EBA, but I am not satisfied that the EBA was attached to the email to Mr Alafaci. At Tab OO, the claimant did not attach the EBA extract.

I have already found that the EBA was not part of the contract, so the claimant is not entitled to stand down of 16 hours, so the claim for \$840 plus \$920 for that day is rejected.

- (iii) 3 February 2016. Based on Mr Reeves' statutory declaration, I am satisfied that this work was done and that the rates were those agreed. I accept this amount of \$2180.00.
- 404. The respondent accepts the materials cost of \$502.09.
- 405. Accordingly, in so far as this payment claim is concerned, the claimant is entitled to its full claim of \$4130.18 and \$502.09 for materials.
- 406. Those figures are carried to Annexure CGL 1

Payment Claim 15 (\$1127.50 and PS \$0)

- 407. The difference between the payment claim and the payment schedule is \$1127.50.
- 408. The respondent at paragraph 150 of the payment schedule, which was echoed in paragraph 348 of the response, submitted that the docket (dated 21 December 2015) had not been signed, and was therefore invalid.
- 409. I have already made a finding that unsigned dockets are not a condition precedent to payment. However, this docket is an amendment to an earlier under-claim and I could find no evidence from the claimant attesting to the correct figure, so I do not find that it has substantiated this claim.
- 410. No figure for this claim is carried to Annexure CGL 1

Callouts #1, 2 & 3 (\$1670, \$693, \$693)

- 411. In the adjudication response, I note that these amounts have been admitted, however, it appears as if the CL2 and 3 amounts conceded had included GST in the assessment to which GST was then added.
- 412. The correct figures are carried to Annexure CGL 1

Payment Claim 16

- 413. This claim is essentially a sum of all previous claims, and I refer to Annexure CGL 1 for the calculations and the adjudicated amount, which includes GST.

XIII. The amount of the progress payment

- 414. Accordingly, I find the **adjudicated amount is \$98,565.46 (including GST).**

XIV. Due date for payment

- 415. s15 of BCIPA deals with the due date for payment under the contract. I am satisfied that the contract will govern the time for payment.
- 416. I am satisfied that the agreement was for payment 7 days after submission of the invoice. The payment claim was made on 31 March 2016, so I agree with the claimant that the payment was due 7 days later.
- 417. Accordingly, the **due date for payment is 7 April 2016.**

XV. Rate of interest

- 418. The claimant argues that the penalty rate of interest is applicable [paragraph 393 of the application], and that the contract makes no provision for interest. The respondent made no submission about interest, so I assume that it does not disagree with the default interest rate being applicable
- 419. S15(3) of BCIPA provides that:
"For a construction contract to which the Queensland Building and Construction Commission Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section."

420. I agree that s67P provides a rate of 10% plus the 90-day Reserve bank bill rate. I searched the Reserve bank website www.rba.gov.au/statistics/tables/xls/foid.xls and found I then add the 10% identified previously.
421. **I find the rate of interest is 11.98% interest payable on the adjudication amount.**

XVI. Adjudicator's fees

422. The default provision contained in s35(3) of BCIPA makes the parties are liable for the adjudicator's fees is in equal proportions, unless I decide otherwise.
423. The claimant has succeeded in its payment claim, and I have found that from at least 6 November 2016 the respondent has paid nothing further to the claimant.
424. The respondent raised 3 jurisdictional objections, all of which were rejected by me.
425. The respondent did not sign timesheets, which were given to it, despite being contractually obliged to do so, and then relied upon the non signature by it to argue that it was a condition precedent to payment that the timesheets were signed by it.
426. It provided no submissions supported by authority to enable me to make a finding of the existence of a condition precedent, and the claimant argued that it tried to find the respondent's representative on site to sign them, but they were not available.
427. I found that there was no such condition precedent.
428. This meant the claimant was put to the expense of having to have the matter adjudicated.
429. Accordingly, I exercise my discretion in this case to find that the respondent is liable to pay 100% of my fees under s35(3) of BCIPA.

Chris Lenz

Adjudicator



31 May 2016

C. ANNEXURE – CGL₁

Adjudicated amount calculations

CLAIMAINT				Lab	RESPONDENT		ADJUDICATION		
PC : Date	Labour	Meals	Materials	Total	plus GST	hrs	Schedule	Diff	GST added below
1 18-Sep-15	\$85,481.08		\$13,679.82	\$99,160.90	\$109,076.99	695	\$83,468.02	\$15,692.88	\$ 99,160.90
2 25-Sep-15	\$46,620.38		\$2,194.90	\$48,815.28	\$53,696.81	442	\$27,243.56	\$21,571.72	\$ 48,815.28
3 2-Oct-15	\$18,282.98		Credit note	-\$8,886.73	-\$9,775.40	-96			-\$ 8,886.73
4 9-Oct-15	\$12,555.88		\$3,453.83	\$21,736.81	\$23,910.49	160	\$20,987.60	\$749.21	\$ 21,736.81
5 16-Oct-15	\$19,480		\$18,423.78	\$30,979.66	\$34,077.63	99	\$25,500.69	\$5,478.97	\$ 30,979.66
6 23-Oct-15	\$57,840	\$211.26	\$1,355.79	\$21,047.05	\$23,151.76	180	\$20,082.29	\$964.76	\$ 21,047.05
7 31-Oct-15	\$66,885	\$679.05	\$10,295	\$68,814.41	\$75,695.85	510	\$65,140.25	\$3,674.16	\$ 68,814.41
8 6-Nov-15	\$13,685	\$845.04	\$8,362.33	\$76,092.37	\$83,701.61	578	\$9,639.83	\$66,452.54	\$ 76,092.37
9 13-Nov-15	\$19,943.68	\$181.08	\$2,157.63	\$16,023.71	\$17,626.08	125	\$14,705.13	\$1,318.58	\$ 16,023.71
C1 23-Nov-15	\$1,670.00	\$211.26	\$3,371.46	\$23,526.40	\$25,879.04	176	\$22,965.14	\$561.26	\$ 23,526.40
C2 23-Nov-15	\$630.00			\$1,670.00	\$1,837.00	14	\$1,670.00	\$ -	\$ 1,670.00
C3 23-Nov-15	\$630.00			\$630.00	\$693.00	6	\$ 630.00	\$ -	\$ 630.00
10 27-Nov-15	\$4,780			\$630.00	\$693.00	6	\$ 630.00	\$ -	\$ 630.00
11 4-Dec-15	\$10,970	\$75.45	\$240.99	\$5,020.99	\$5,523.09	44	\$2,813.49	\$2,207.50	\$ 5,020.99
12 11-Dec-15	\$8,931.96	\$45.27	\$481.16	\$11,526.61	\$12,679.27	99.5	\$8,281.16	\$3,245.45	\$ 11,526.61
13 21-Dec-15	\$8,290	\$30.18		\$8,977.23	\$9,874.95	83.5	\$8,535	\$442.23	\$ 8,977.23
14 12-Feb-16	\$5,960.10		\$48.72	\$8,368.90	\$9,205.79	76	\$48.72	\$8,320.18	\$ 8,368.90
15 25-Feb-16	\$1,127.50		\$502.09	\$6,462.19	\$7,108.41	53.5	\$502.09	\$5,960.10	\$ 4,632.27
				\$1,127.50	\$1,240.25	10.5	\$ -		
				\$441,723.28	\$485,895.61	3262	\$312,842.97	\$136,639.54	
less paid to date				\$349,160.90			TOTAL	\$	438,765.86
16 31-Mar-16				\$92,562.38	\$101,818.62		Less paid	\$	349,160.90
							AMOUNT	\$	89,604.96
							Adj amount	Plus GST	\$ 98,565.46

less paid to date