Adjudication Decision: 42912

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator	:	Chris Lenz (J622914)
Application Details		
Claimant		
Name	:	Cymbal Kitchen and Joinery
ABN	:	86 052 257 280
Address	:	2/73 Lawrence Drive, Nerang QLD 4211
Respondent		
Name	:	Oasis Construction (Aust)
ABN	:	97 736 468 623
Address	:	11/27 South Pine Road, Brendale QLD 4500
Project		
Type	:	Display unit for high-rise development
Location	:	8 River Terrace, Kangaroo Point QLD 4169
Payment Claim		
Date	:	26 May 2016
Amount	:	$66,796.54 (inc GST)
Nature of claim	:	Standard
Payment Schedule		
Date	:	6 June 2016
Amount	:	$ 0
s20A Notice Date	:	30 May 2016
Application Detail		
Application Date	:	20 June 2016
Acceptance Date	:	23 June 2016
Response Date	:	6 July 2016
Claimants reply:	:	(if applicable)
Extension of Time	:	3 days

Adjudicator's Decision

Jurisdiction	:	Yes/No
Adjudicated Amount	:	$42,817.29 including GST
Due Date for Payment	:	26 May 2016
Rate of Interest	:	11.9%
Claimant Fee Proportion (%)	:	0%
Respondent Fee Proportion (%)	:	100%
Decision Date	:	25 July 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. Cymbal Enterprises Pty Ltd trading as Cymbal Kitchen and Joinery (referred to in this adjudication as the "claimant") was engaged by MAW Group (Aust) Pty Ltd trading as Oasis Construction (Aust) (referred to in this adjudication as the "respondent"), to provide cabinet making supply and installation at the Banyan Tree Residences, at 8 River Terrace, KANGAROO POINT Q 4169 (the "work").
2. The work involved cabinet making, supply and installation into a display suite at the Banyan Tree Residences.
3. The claimant issued payment claim number 3 on 19 April 2016 for $66,796.53 including GST, to which it claimed it did not receive a response. Accordingly, it served a notice under s20A(2) of the *Building and Construction Industry Payments Act 2004* ("BCIPA") on 30 May 2016 and received the respondent's payment schedule on 6 June 2016 identifying a scheduled amount of $0.
4. The claimant made an adjudication application on 20 June 2016 to the QBCC, which referred the matter to me.
5. My agent sent the parties my letter of acceptance of the adjudication application on 23 June 2016 by email and by express post.
6. On 27 June 2016 and 5 July 2016 my agent received emails from the claimant attaching email correspondence between the claimant and respondent which I ignored as they were not requested by me and were not submissions properly made.
7. On 6 July 2016 the respondent contacted my agent requesting the physical address to which the adjudication response should be sent and whether there was a facility for an electronic submission. It stated that the adjudication response would be hand delivered later on Wednesday 6 July 2016.
8. My agent replied with the address and an upload link using Hightail.
9. In reply to my agent, the respondent acknowledged the address, and stated its understanding that electronic submission was also seen as the correct method of delivery for the response.
10. My agent did not reply to this email.
11. No physical copy of the adjudication response was delivered on 6 July 2016.
12. At 9.32pm on 6 July 2016, my agent was sent an email stating the response had been submitted via the Hightail link.
13. On Thursday morning on 7 July 2016, in response to the respondent's 6 July 2016 email, I accessed the Hightail link to download a number of adjudication response documents, which were hand delivered in hard copy at approximately 3pm on Thursday 7 July 2016.
14. On 7 July 2016 the claimant submitted that the application was delivered late and could not be considered by me.

15. I assessed that this was a submission going to jurisdiction, to which I was obliged to have regard, and I sought submissions about service from the parties to which I refer in more detail below.
16. At that time, I requested an extension of time of three days from the parties in order to consider this very important issue, and this was granted.

II. Material provided in the adjudication

17. I received 1 lever arch folder in the adjudication application, which included the payment claim and payment schedule.
18. The adjudication response received on 7 July 2016 comprised 4 lever arch folders.

III. Service of the adjudication response

19. This is a critical issue for the parties, because it dealt with my jurisdiction to consider the 4 lever arch folders in the adjudication response, and/or its electronic equivalent.
20. The reason why this was important, is that on 7 July 2016 the claimant submitted that the adjudication response was delivered late, and therefore could not be considered in the adjudication.
21. Accordingly, before considering in detail what was contained in the material, I am obliged to consider this issue as a preliminary point.
22. The payment claim amount of $66,796.53 including GST means that it is not a *complex payment claim* as defined by Schedule 2 because it is under $750,000.

Date required for adjudication response

23. s24A(2) of BCIPA provides that the adjudication response is required **within** the later of the following:
    (a) 10 business days after receiving a copy of the adjudication application;
    (b) 7 business days after receiving notice of the adjudicator's acceptance of the adjudication application.
24. Although the adjudication application identified that the claimant served the adjudication application on the respondent on 20 June 2016, the respondent submitted that it received the application on 22 June 2016, and provided a Fastway Couriers tracking number LA003015667I to demonstrate this fact.
25. My agent emailed the parties on 23 June 2016 with my attached acceptance of the adjudication, and posted the letter by express post, which was delivered on 24 June 2016 according to the tracking number. I find that 24 June 2016 was the date the respondent received the physical letter.
26. Therefore, I find that s24A(2)(a) governs the timing of the adjudication response, and that **within** 10 business days after 22 June 2016, required the adjudication response to be delivered on or before **6 July 2016.**

Uploading of adjudication response onto Hightail on 6 July 2016

27. On 6 July 2016 at 9:32 PM, an email from the respondent was sent to my agent confirming that the adjudication response had been submitted via the Hightail link, and that a hard copy would be delivered the next day (i.e. 7 July 2016).
28. At that time the office was closed and the email was only accessed on 7 July 2016.
29. On the morning of 7 July 2016 I accessed the hightail documents containing the adjudication response.
30. On 7 July 2016, at approximately 3 PM, the hard copy of the adjudication response from the respondent was delivered to my office at approximately 3 PM.
31. Shortly before that, an email from the claimant to my agent was sent containing jurisdictional submissions objecting to the late delivery of the adjudication response ("the jurisdictional submissions").

32. On 8 July 2016, after having reviewed the claimant's submissions, I found they went to jurisdiction. These submissions argued that:
(i) the adjudication response had to be delivered to the adjudicator by 6 July 2016;
(ii) the adjudication response had been uploaded to Hightail at 9:30 PM on 6 July 2016;
(iii) until the documents had been downloaded from the Hightail site, it submitted they had not been served;
(iv) in support of this submission it provided a copy of the case of *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd and Anor* [2014] QSC 32 ("*Basetec*"). In these submissions it extracted paragraphs [37] and [38] to demonstrate that unless the adjudicator had that downloaded the file from the Hightail server on 6 July 2016, the response was not a properly made submission;
(v) by reference to the series of emails between the respondent and my agent on 6 July 2016, where my agent in response to the respondent's request, provided a physical address for the delivery of the adjudication response together with a Hightail link;
(vi) the respondent had said at 9:47 AM on 6 July 2016 in an email to my agent that a hard copy of the response would be provided on 6 July 2016;
(vii) it added that it was not for the adjudicator's agent to lead it through the process.

33. I requested that the parties provide me with submissions regarding the delivery of the adjudication response.

34. To the respondent I requested that it provide submissions as to:
(a) whether it served the adjudication response within the time required by BCIPA;
(b) in circumstances where:
a. the respondent's email advising of the uploading of the Hightail documents were sent at 9:30 PM on 6 July 2016;
b. no physical copy of the adjudication response was delivered to the adjudicator's agent on 6 July 2016;
c. the adjudication response in the hightail files was open by the adjudicator on the morning of 7 July 2016.

35. To the claimant I requested that it provide submissions in response.

36. Both parties complied with the request within the time allowed and I summarise the contending submissions below.

<u>Respondent's submissions (which also responded to the claimant's earlier jurisdictional submissions)</u>

37. The respondent referred to a series of unsolicited submissions issued by the claimant after the adjudication application.

38. It is submitted that it appeared as if I had read and considered each of the unsolicited submissions from the claimant, which it argued should not have been considered by me.

39. *At this point it is appropriate to note that at paragraph 6 under the heading of "Background" above, I referred to the claimant's earlier submissions and stated that I had no regard to them because they were not submissions properly made. However, I had considered the jurisdictional submissions.*

40. The respondent sought to distinguish *Basetec* on the basis that it involved a materially different set of facts, on the basis that in that case there'd been no discussion between the parties as to what was an acceptable method for submission of the adjudication application.

41. The respondent submitted that in this case, the series of emails between the respondent and my agent, in which my agent at 9:58 AM on 6 July 2006 identified the physical address for delivery of the hard copy and also said "Please send the electronic submission via hightail, using the following link:..."

42. At paragraph 16 of the submissions, the claimant said that my agent had stated that a submission could be properly submitted by following the link provided in the email, and that my agent had provided the link.

43. It added that in reliance upon my agent's statement, it submitted its response to the link created by my agent.
44. It then made reference to s11(2)(b) of the *Electronic Transactions (Queensland) Act 2001* ("ETA") and extracted the relevant provisions.
45. At paragraph 19 of the submissions, it argued that it was entitled to rely upon the instructions provided by my agent, and that by uploading it to the Hightail link, it had submitted its adjudication response by the relevant time is required by BCIPA.
46. At paragraph 20, it argued that by analogy it was akin to my agent stating that a response could be submitted by fax and then turning off the fax machine.
47. At paragraph 21 it submitted that my agent had stated to the respondent that it response could be submitted in a certain way and in reliance upon that statement it did so.
48. Attached to the submissions was a Statutory Declaration of Mark Stankiewicz to which were attached a series of emails between him and my agent.
49. At paragraph 6 of his statutory declaration he makes reference to his email to my agent on 6 July 2016 at 10:11 AM – "*Response back to the adjudicator confirming our understanding of the electronic submission.*"
50. At paragraph 22 it submitted that if I disallowed the adjudication response on the basis that it was made out of time, I would be denying the respondent procedural fairness, and it would have no alternative but to seek a review on the basis of denial of natural justice.

Claimant's submissions

51. At paragraph 3 of its submissions the claimant argued that I am unable to consider submissions made by the respondent which were out of time, and that to decide on what material to which I may have regard, I needed to do so before embarking upon the actual decision.
52. It argued that its earlier jurisdictional submission about the late adjudication response could never have been envisaged at the time of the payment claim or the adjudication application.
53. It argued that its jurisdictional submissions could not be ignored and cited the authority of *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales & Ors* ("*John Holland*") and a later NSW Case of *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, paragraphs [69] – [70].
54. *At this point it is appropriate to note that I accept that I am required to consider the jurisdictional submissions because they deal with my jurisdiction as to the extent of the material to which I may have regard, and I'm satisfied that John Holland supports this proposition.*
55. The claimant took issue with the respondent's submissions, and in particular those dealing with the argument that my agent had stated that a submission could properly be submitted by following the link provided an email.

My analysis

56. In the Statutory Declaration of Mark Stankiewicz and the attachments, it was Mr Stankiewicz's email of 6 July 2016 at 9:47 AM to my agent that contained confirmation of hand delivery of the adjudication response at my address later that day. This email also contained his enquiry, "*In addition to the delivery of a hardcopy do you have a facility that will allow for an electronic submission? The response file size is expected to be between 600 MB and 1 GB*".
57. I find that it was in response to this email that my agent responded at 9:58 AM on the same day with a reference to a Hightail link. I cannot accept that this constituted a statement by my agent *that a submission could properly be submitted by following the link provided an email.* I find that it was in response to Mr Stankiewicz's email request and that it is not possible to draw such an inference.
58. In addition, my agent did not respond to the 6 July 2016 email of 10:11 AM stating, "*Oasis understands that this electronic submission option is also seen as the correct method for delivery of the response in accordance with the Act.*"

59. I find that a lack of response from my agent is entirely proper in the circumstances, because an adjudicator must not descend into the arena to advise the parties about any aspect of adjudication, and in particular the procedural aspects, because it is for the parties to comply with BCIPA.
60. In any event, I find that my agent had been put on notice that the hard copy of the adjudication response would be delivered later that day.
61. Whilst I do not have to make a finding on this point because it did not accord with the facts, had the email from the respondent about the uploading of the adjudication response to Hightail occurred during business hours, the document would have been downloaded on 6 July 2016.
62. There is no evidence from the respondent that it advised my agent that the uploading of the adjudication response was not going to be possible during business hours, nor is there a request that the document be downloaded after business hours.
63. In fact, there was no evidence of any request from the respondent for the office to remain open to take delivery of the hard copy which had been promised earlier, or for some arrangement to be made for delivery to take place on 6 July 2016.
64. I am constrained by the decision of Mr Justice McMurdo in *Basetec*, and in particular paragraph [28] in which His Honour held:
"In the present case, s11 of the ETA did not authorise the service of the adjudication application, inclusive of a material within the Dropbox, for two reasons. The first is that the present applicant had not agreed to be electronically served. The second is that the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in the words communicated "by guided or un-guided electromagnetic energy". Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website."
65. I accept the claimant's submissions at paragraph 12 and find that Hightail and Dropbox as both being *cloud-based document systems* such that the decision in *Basetec* is binding on me.
66. I downloaded the Hightail documents on 7 July 2016, because they had not been sent to during business hours on 6 July 2016, and no request had been made for them to be accessed after hours, which was also when the hardcopy adjudication response was delivered to my office.
67. Why the respondent did not deliver the hardcopy to my office on 6 July 2016, or make such a request to do so after hours, or download the hightail link after hours remains a mystery to me, but that is a matter entirely within the control of the respondent.
68. Whilst the respondent has not gone so far directly in its submissions, the circumstances that it has outlined, and its submissions, point to a suggestion that:
    (i) an adjudicator's agent is obliged to respond to a respondent's email about its understanding about acceptable service;
    (ii) in circumstances where there is no suggestion that the adjudication response would be delivered after hours on that day; and
    (iii) without the agent being advised of a late delivery of the adjudication response nor a request to upload electronic documents after hours;
    (iv) that it was incumbent upon the adjudicator's agent to keep the office open up until midnight in the expectation of delivery of the hardcopy of the adjudication response, and/or to monitor all emails after hours, up until midnight, and to download any Hightail files that were sent before midnight on the date that the response was required to be delivered.
69. I cannot accept this is reasonable, and I find the adjudication response was served on 7 July 2016, which is outside the time prescribed by section 24A(2) of BCIPA. However difficult that is for the respondent, I have no discretion to waive the strict requirements of BCIPA.

70. Whilst it is an unsatisfactory outcome for the respondent, who had no doubt spent some time compiling 4 lever arch folders of material, the service of the documents was entirely its responsibility and within its control.
71. This means I am unable to have regard to the adjudication response, and am constrained to consider the payment claim and payment schedule and submissions properly made in support of both those key documents, as required by s26(2) of BCIPA.

IV. Is it a Construction Contract within BCIPA?

72. It is necessary for there to be a *construction contract* to which the payment claim relates, so I need to find that the sub contract agreement falls within this definition.
73. The payment claim makes reference to kitchen and joinery, and the payment schedule concedes that although the claimant did not execute a sub contract agreement, that a sub contract agreement for joinery works for a display suite was entered into. For present purposes the terms of this contract do not need to be considered.
74. 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."
75. I need to consider whether the work carried out fell within the meaning of *construction work* under s10 of BCIPA. I am satisfied that *installation* of cabinets for a display unit falls within the construction of a building under s10(1)(a) of BCIPA. In addition, the *supply* of the cabinets falls within s11(1)(a)(i) of BCIPA as goods forming part of the building, as part of *related goods and services in relation to construction work.*
76. In addition, in the payment schedule the respondent does not argue that the subcontract was not a *construction contract* under BCIPA.
77. I am therefore satisfied that sub contract falls within the definition of *construction contract* under BCIPA, thereby attracting the right to the progress payment provisions under the Act.

V. Right to a progress payment and reference date

78. s12 of BCIPA provides that:
"From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."
79. A *reference date* under BCIPA is found under Schedule 2 to be a date worked out under the contract, or if the contract does not provide for one, then it is the last day of each month.
80. In the payment schedule, the respondent has identified the *reference date* as 25 April 2016, and at paragraph 3.3 of the schedule it says, *"In the alternative the Claimant is entitled to make a claim for these variations, the Claimant cannot be paid for these variations in this progress claim period, due to the fact that the information has not been provided prior to this claims reference date."*
81. There appears to be a typographical error in this statement, but it appears as if the respondent is asserting lack of information being provided to it before this claim, rather than complaining that the payment claim is invalid because it has been made before the reference date of 25 April 2016.
82. At paragraph 3.4 of the schedule the respondent says, *"In addition to the fact that the Claimant has not submitted a compliant Progress Claim the Respondent has exercised its right under the Contract and provides the following assessment of variations, refer to section 4 below."* I presume what the respondent is attempting to do is deny the claimant's entitlement to the variations in the progress claim, but in any event providing submissions against any entitlement for those variations.
83. The tenor of the objections in paragraph 3 of the payment schedule seem to be focusing in on the failure by the claimant to adhere to the requirements of the AS 2545 contract regarding variations, and that they fall outside the period identified in the contract.

84. There appears therefore to be no submissions in the payment schedule that the payment claim has been made before the reference date, although as I said is not entirely clear from the words used, as identified above.
85. Accordingly, as a matter of prudence as it goes to jurisdiction, I need to make a finding about the reference date applicable to this claim, which I find was made on 19 April 2016.
86. If the reference date is 25 April 2016, then this payment claim has been made too early.
87. This is a jurisdictional point, so that despite me being unable to have regard to the adjudication response, which may have squarely raised this issue, the claimant has provided submissions on this point, and I need to examine them to make a finding.
88. Having regard to paragraph [48] of the claimant's submissions, the claimant indicates its disagreement with the 25 April 2016 *reference date*, and refers to an email of Mr Liew of the respondent of 20 April 2016 to the claimant (Annexure E15), in which Mr Liew conceded that the claimant had not submitted a progress claim in March, such that the payment claim number 3 was submitted in the correct reference period. I find that this is a concession made by the respondent, after it received the payment claim on 19 April 2016.
89. Whilst the claimant denied that it had contracted on the AS 2545 amended terms identified by the respondent, at paragraph [43] it conceded that a reference date arises on the 25th of each month, and that payment was 25 business days from the issue of the payment claim.
90. I find from the concession made by Mr Liew of the respondent that no March claim had been made by the claimant, that the *reference date* for this claim was 25 March 2016.
91. Accordingly, I am satisfied that the claimant falls within the definition of section 12 and that it submitted a payment claim *from a reference date*.
92. I therefore have jurisdiction to adjudicate the matter.

VI. Payment Claim

93. As I have mentioned previously on 19 April 2016 the claimant provided the respondent with its payment claim, which I found under tab B of the claimant's submissions.
94. The payment claim comprised a table, presumably a spreadsheet, which identified the project as Banyan Tree display, 8 River Terrace, Kangaroo Point, with the following details:
    (i) Under section A - Original Contract with a sum of $75,000 by reference to 17 items. Item number 17 refers to a discount offered on the original quote 9 November 2015 of $3161.78;
    (ii) Under section B –Variations it made reference to "as per attached sheets and plans" and identified 14 variations as line items totalling an amount of $36,979.60;
    (iii) Under the Summary Section it totalled the Original Contracted Works plus the Total Variations to which it added GST, and then subtracted payment that had been made on 11 April 2016 of $56,293.03, resulting in a Balance to Date of $66,796.53;
95. Further documents in the payment claim consisted of three pages of detail regarding the variations claimed, in which it outlined the breakdown.
96. Thereafter in the payment claim 43 pages of time sheets were attached which make reference to "Banyan Tree".
97. The payment schedule did not take issue with the payment claim in so far as section 17(2) issues were concerned.
98. I am therefore satisfied having regard to the items identified above, and having regard to the work identified in the payment claim **that it sufficiently identified the work required by s17(2)(a) of BCIPA.**
99. The claimed amount was $66,796.53 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.**
100. The payment claim contained the endorsement that, *"This is a payment claim under section 17 of the Building and Construction Industries Payment Act (QLD) 2004 and relies on and incorporate by reference here, all documents and correspondence of any type that are passed between us."*

101. Accordingly, **I am satisfied that the payment claim was endorsed as is required by section 17(2)(c) of BCIPA.**

VII. Payment Schedule

102. In response to a s20A notice dated 30 May 2016 from the claimant (the "notice"), on 6 June 2016, the respondent provided the claimant with a payment schedule comprising six pages.

103. It referred to the payment claim served on 19 April 2016 and specified the schedule amount of $0 and I find that it was made within 5 business days of receipt of the notice.

104. I am satisfied from the concession made by the claimant that that the due date for payment was 26 May 2016; because at paragraph [43] of its submissions, it conceded that payment terms were 25 business days from the issue of the payment claim.

105. The s20A notice had to be provided within 20 business days after the due date for payment. I am satisfied that it was issued on 30 May 2016, which was 2 business days after the due date for payment of 25 May 2016, which is within the 20 business days as required by s20A(3)(a) of BCIPA.

106. I'm satisfied therefore that notice complied with s20A(3)(a) of BCIPA and the payment schedule complied with section 18(2) of BCIPA.

107. Therefore, I'm satisfied that the payment claim can be adjudicated.

VIII. The construction contract

108. I am now obliged to make a decision as to the construction contract and its terms, whilst being mindful that it may just be an "arrangement" between the parties, which still falls within BCIPA's definition of *construction contract*.

109. It is evident that there is a significant contest between the parties in relation to this issue, and the point of departure of the contest is the payment schedule. The payment claim did not deal with the contract terms, so I will consider the respondent's position from its payment schedule and then the adjudication application submissions in order to ascertain objectively what the parties had agreed.

Respondent's submissions in the payment schedule

110. At page 1 of the payment schedule, and paragraph 1 in particular, the respondent, whilst conceding that the claimant had not executed the subcontract agreement [paragraph 1.1], alleged that the parties had entered into a sub contract agreement because:

(i) the claimant had accepted the Respondent's Contract Conditions – amended AS 2545 as noted in the pre-award check list which had been confirmed by the claimant;

(ii) a letter of intent dated 11 November 2015 had been issued to the claimant noting the agreed subcontract sum of $75,000 plus GST, which was issued to the claimant together with a sample of the subcontract agreement which the respondent intended to enter into with the claimant. It submitted that the claimant had not raised any objections or concerned about the sample subcontract agreement;

(iii) a sub contract agreement was issued to the claimant on 30 November 2015 with a cover letter in which it identified that it is noted that it was deemed the terms and conditions as outlined in the attached sub contract agreement were accepted on commencement of the works unless notification was received prior. It argued that the claimant did not raise any concerns or objections regarding the subcontract agreement.

111. I do not have the benefit of the adjudication response submissions to support the payment schedule, for the reasons identified above, so I will consider each one of these factors in light of the material before me, including the claimant's submissions.

112. Whilst I am not critical of the claimant in relation to this issue, it would have been helpful to have had legal submissions regarding the claimant's arguments about entry into the contract, and the terms that the parties had agreed, which would have assisted in narrowing the issues.

113. When considering the issue of contract formation, one normally approaches the task by considering whether there had been an agreement in terms of *consensus ad idem*: [Cremean,

Witting and Sharkey: *Brooking on Building Contracts* 5 edition (2014) LEXIS-NEXIS Butterworths Australia, paragraph 1.1] (*"Brooking"*).

114. Ordinarily this requires an analysis of *offer* and *acceptance*, and the requisite *consideration* moving from the promisee for a binding contract to be concluded: [Seddon and Ellinghaus: *Cheshire and Fifoot's Law of Contract* 9th edition Australian edition (2008) LEXIS-NEXIS Butterworths, paragraph 4.6] (*"Cheshire and Fifoot"*)

115. I will need to have regard to these and other texts from time to time in order to complete this analysis.

Claimant's acceptance of the contract conditions noted on the PreAward checklist

116. Whilst it is not clear from the payment schedule which PreAward checklist to which the respondent was referring, there are a series of emails in Annexures 2, 3 and 4 in the claimant's material which referred to:

(i) the PreAward checklist (Friday, 6 November 2015 at 3 PM) [Annexure 2];
(ii) the PreAward checklist Revision A (Tuesday, 10 November 2015 at 12.51 PM) [Annexure 3];
(iii) the PreAward checklist Revision Final (Tuesday, 10 November 2015 at 2.49 PM) [Annexure 4].

117. Given that the final email contains the only PreAward checklist in the material I will draw the logical inference that this is the document to which the respondent is referring.

118. This PreAward checklist makes reference to:

a. *date of quotation*, but does not include that date in it;
b. refers to a tender amount of $75,000;
(iii) a scope of works comprising 24 numbered items CW 01 to CW 24;
(iv) references to "Glass Splashback", "Mirror" and "Miscellaneous";
(v) Schedule of Rates;
(vi) agendas/clarification;
(vii) alternatives and/or cost savings;
(viii) general items, with the second line item "acceptance of Oasis contract conditions – amended AS2545 and in the right-hand column "Yes";
(ix) leadtime items;
(x) Project hold points/required client approvals;
(xi) tender checklist;
(xii) fixed day labour rates with rates for ordinary time, time and a half and double time;
(xiii) personnel;
(xiv) original quotation;
(xv) discount;
(xvi) final contract value $75,000.

119. I cannot see from the email that the *Oasis contract conditions – amended AS2545* were attached to it. In fact the contrary is asserted by the claimant in submission paragraph [27] in which it said, *"At that stage it had not been provided with a copy of oasis amended AS2545 document."*

120. Accordingly, I am not satisfied that the claimant had notice of the terms and conditions when this PreAward checklist was provided.

121. In the text by Julian Bailey: *Construction Law*, In Forma Law (2011) [*"Bailey"*], volume 1, paragraph 2.28, the author says:

> *"It is necessary for the formation of a contract that essential terms are agreed such that they are capable of description or articulation with a reasonable degree of certainty: 'Thorby v Goldberg (1964) 112 CLR 597 at 606-607."*

122. I therefore find that the claimant had not accepted the *Oasis contract conditions – amended AS2545* on 10 November 2015 because it had no notice of them.

Letter of intent dated 11 November 2015

123. I find this document in Annexure 7 of the claimant's material which served as confirmation that the claimant had been approved to proceed with the works set out in the drawings and

specifications for $75,000 (excluding GST). The letter identified that the standard terms and conditions accompanied the letter, and I find this document at Annexure 9, which appears to be a word document with macros into which the contract details needed to be introduced.

124. In the letter the respondent stated in the second paragraph, *"A formal contract will be issued in due course."*

125. The respondent argued that the claimant had not raised any objections or concerns about the sample subcontract agreement, such that I assume by inference, it argues that the claimant could be bound to those terms.

126. I am not prepared to make such a finding because essentially the sample contract was blank (apart from the Australian Standard Sub Contract Conditions) and I saw no invitation in the letter that there was an expectation that the claimant needed to raise these concerns, in default of which a contract would be concluded.

127. To my mind the fact that nothing had been filled in, suggests that any reasonable person would have had a whole lot of concerns about there being absolutely no detail relating to their particular agreement, such that if there was an expectation that these concerns had to be raised at that time, then any reasonable claimant would have done so. I find that there was no expectation that they would be required to do so.

128. Furthermore, the statement that *A formal contract would be issued in due course*, to my mind falls within the third limb of *Masters v Cameron* (1954) 91 CLR 353, in which the parties intended to postpone the creation of contractual relations until a formal contract was drawn up and executed.

129. The electronic extract of this case refers at paragraph [9] to page 360 of the CLR, where the High Court held (and I have separated each limb for ease of reading):

> *"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of the negotiation shall be dealt with by a formal contract, the case may belong to any of three cases.*
>
> *It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise, but not different in effect.*
>
> *Or, secondly, it may be the case in which the parties have completely agreed upon all terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.*
>
> *Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."*

130. I appreciate that there is a statutory declaration from Karen Tessarolo in which she said that the 11 November letter with the draft contract was not received until 18 November 2015 and without any controverting evidence, I accept this fact.

131. Accordingly, as 18 November 2015, I find that because the respondent said that a formal contract would be issued in due course, there was no contract on the *Oasis contract conditions – amended AS2545* ("the respondent's contract").

30 November 2015 issue of contract documents

132. I find this letter at Annexure 10 of the claimant's material.

133. I note that at paragraph 6.1 of the payment schedule, the respondent conceded that the claimant did not execute the subcontract agreement.

134. I note that Karen Tessarolo swears that the letter dated 30 November 2015 was only received on 9 December 2015, and I accept this evidence without any controverting evidence from the respondent. It is further confirmed by an email dated 3 December 2015 [Attachment 10, second page] from the respondent, in which the claimant was alerted to the fact that the contract would be posted overnight.

135. The letter attaches the subcontract agreement and requests that it be signed and returned with attachments requested. The penultimate paragraph stated, *"It is deemed that the terms and conditions as outlined in the attached sub contract agreement are accepted on commencement of the works unless notification is received prior."* I call this the "deeming provision" of the respondent's contract.
136. This is essentially the submission in paragraph 1.2.3 of the payment schedule, and I presume the respondent argues that once this letter was sent, the deeming provision was activated, such that once the claimant had commenced work it would be deemed to have agreed to the respondent's contract, unless the respondent had received prior notification from the claimant.
137. In the payment schedule, the respondent makes no reference to any notification being made prior to commencement by the claimant.
138. However, the email in annexure 12 from the claimant to the respondent which was dated 16 March 2016 stated at paragraph 1, *"Original signed contract – as you know and we have frequently reminded your company, Cymbal have never signed the documents sent to us on 11 November 2015 as it does not represent the bargain between us..."*
139. At paragraph [32] of the claimant's submissions it argued that the document was never executed as it did not reflect the bargain between the parties.
140. Furthermore, at paragraph [34(b)], it submitted that by 30 November 2015, the claimant had already been working on the project for 16 days and that the respondent could not post-date a condition. Without any controverting submissions, I am satisfied that work did commence in mid – November 2015.
141. I note that Trent Claydon's statutory declaration at paragraph [4] said that due to delays on site they were not given access to undertake installation until the beginning of January 2016. However, I infer that the significant amount of fabrication work would have had to have taken place previously for installation to have commenced on that date, so I'm satisfied that work had commenced in mid-November 2015.
142. At paragraph [37] the claimant submitted that it had continually raised the issue of the contract with the respondent's Mr Liew, and I am therefore satisfied that the deeming provision could not have been activated (even if it was binding, about which I do not need to make a finding), given that I can infer from the facts that the claimant had not agreed to the respondent's contract and had advised the respondent accordingly.
143. I refer to the statutory declaration of Trent Claydon, and he has made a declaration at paragraph 7 that, *"The work on site was completed on 25 February 2016."* I'm satisfied from this declaration without anything controverted by the respondent, that this is the case.
144. This means that as at 16 March 2016, some three weeks after the works are complete, the claimant had still not agreed to the terms of the respondent's contract.
145. Accordingly, I reject the respondent's payment schedule submissions that the claimant had agreed to the respondent's contract.

Claimant's submissions about the contract

146. Essentially the claimant argued, at paragraph [26] of its submissions, that as at 10 November 2015 the parties had reached agreement. It said that the preparation of a formal contract document was a formality to follow.
147. Although it has not made legal submissions on this point, it appears that the effect of this submission is that it falls within the first limb of *Masters v Cameron* (1954) 91 CLR 353 which provides that the parties may intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage.
148. As at this date, and by reference to submission paragraph [18], which I accept without controverting submissions from the respondent to which I can have regard, I find that the offer made by the claimant on 6 November 2015 containing its quotation, had been made as found in annexure 1.
149. There is then evidence of some negotiations as identified in paragraphs [18] through to [21] of the claimant's submissions, which according to the claimant culminated in an

agreement on 10 November 2015. As at that date the PreAward checklist – revision final had been provided.

150. As to the *"Acceptance of Oasis contract conditions – amended AS2545 and in the right-hand column "Yes"* in the checklist, the claimant argues at [26] is that the parties had to agree the Oasis standard conditions, not that it agreed with them.

151. The question becomes whether the *Oasis contract conditions – amended AS2545* are essential for a contract to be formed, or whether a contract without reference to them could have been concluded, as asserted by the claimant on 10 November 2015.

152. The parties had agreed the scope of works, the price which was discounted off the 6 November 2015 offer, together with the original quotation and a whole series of other items identified in the checklist which quite sensibly governed the project. These included all 24 numbered items required by the project which were identified in some detail together with the schedule of rates, fixed day labour rates et cetera.

153. On the claimant's view, the contract had been concluded on 10 November 2015, such that the respondent's contract terms could not unilaterally alter the terms of the agreement already reached on 10 November 2015, as identified in paragraph [34] of its submissions.

My analysis

154. By inference, and having regard to these submissions, and the contents of the respondent's PreAward checklist, it is open to consider that a contract had been concluded on 10 November 2015 for the following reasons:

a. the reference to the *Oasis contract conditions – amended AS2545*, was only one line item, and the respondent did not attach them to the PreAward checklist;
b. works had already commenced in mid-November 2015, and the respondent had not still not provided the *Oasis contract conditions – amended AS2545;*
c. it was not until 9 December 2015 that the claimant had a copy of the *Oasis contract conditions – amended AS2545*, with which the claimant said it disagreed;
d. despite requesting that the contract be executed, the respondent allowed the works to be completed without the *Oasis contract conditions – amended AS2545* being signed;
e. the essential ingredients in order for the work to be completed were evident in the PreAward checklist, such that objectively a contract could have been concluded.

155. At paragraph [2.11] of *Bailey*, the learned author said *"An essential term is one which must be agreed, failing which no contract comes into existence. There are two senses in which a term of the contract may be 'essential.'"*

156. Following on at paragraph [2.12] the author said:

a. *"First, a term is essential with the parties regarded agreement upon it is of such importance that they did not contemplate themselves being legally bound unless the term was agreed. A term may be "essential", in this sense, even if the contract under negotiation could operate adequately if the term in question were not agreed or included..."*
b. *Secondly, a term may be essential in the sense that if it is not agreed by the parties, the agreement will be incomplete. In construction and engineering contracts, the principal matter that must be agreed upon is the contractor's scope of works* **(my underlining)**. *It is often said that the contract price (or basis of remuneration) must also be agreed.....If parties agree on matters that are essential to make the agreement sufficiently complete so is to be workable in practice, the fact that they have not agreed on matters of economic or other significance will you usually not preclude the conclusion that a contract was agreed, unless it is evident that the parties required agreement on those matters before they would be bound."*

157. Given that the scope of works, and the contract price and schedule of rates and day labour rates, and reference to the drawings had been agreed, suggests that a contract was concluded on 10 November 2015 based on the PreAward checklist, the original quotation and the drawings to which it referred.

158. However, this requires consideration of the elements of **offer, acceptance** and **consideration.** Traditionally, a quotation by a contractor is considered an offer capable of acceptance, such that the 6 November 2016 11:48am email attaching the quotation could be considered the **claimant's offer**.

159. The respondent at 3pm on 6 November 2015 [Annexure 2 of the claimant's material] sent an email back saying, "*I am beginning the paperwork to get you guys signed up for this project.*"

160. *Cheshire and Fifoot* paragraph 3.22, page 114 provides that, "*Acceptance is a communication to the offeror of an unqualified assent to both the terms of the offer and to the implied invitation in every offer that the offeree commit himself or herself to the contract.*"

161. The respondent's email could not be considered unequivocal acceptance of the offer, particularly since the respondent attached the PreAward checklist with the scope of works and general contract items [2nd paragraph of the email].

162. Accordingly, it is open to find that this was a **counter offer** by the respondent capable of acceptance by the claimant.

163. Annexure 4 of the claimant's material contains an email from the respondent to the claimant on 10 November 2015 at 2:49pm, which refers to discussions with the claimant about the scope of works, and attaches the final scope of works.

164. I am able to draw the inference that whatever phone discussions were held, it appears as if the claimant had not unequivocally accepted the respondent's counter-offer, because a final scope of works was issued by the respondent, with the email heading "Revision Final". This contained the final PreAward checklist.

165. Accordingly, I draw the inference that this was a further **counter offer** made by the respondent.

166. Annexure 5 of the claimant's material contained an email from the claimant, to the respondent on 10 November 2015 at 5:18pm stating, "*Hi Adam As per telephone conversation between you and George today. George agreed to proceed with the Pre-Award checklist – Revision Final. Please prepare the agreement. And confirm the time and location for the meeting with the Architect on Thursday*"

167. In my view, the contract had been concluded at this time by unequivocal **acceptance** by the claimant of the PreAward checklist offered by the respondent. I have already considered that the claimant did not have notice of the *Oasis contract conditions – amended AS2545*, but in my view they were not essential terms for the conclusion of the contract, but was a desire to formalise the concluded agreement later, as per the first limb of *Masters v Cameron*.

168. It is evident that the claimant did not agree with what the respondent had introduced into the *Oasis contract conditions – amended AS2545* at a later stage (9 December 2015), which it argued did not formalise the concluded agreement. However, that does not detract from my finding that a concluded agreement was possible.

169. I find that the claimant's quotation (with its reference to drawings) to which the PreAward checklist makes reference, and all other matters identified in the checklist referred to in paragraph 118 above, contained the essential terms on which the parties had reached agreement.

170. **Consideration** to my mind was then provided by the claimant being prepared to meet with the architect on Thursday (presumably 12 November 2015) and commence work in mid-November 2015, which I had found took place.

171. **Accordingly, a contract was concluded at 5:18pm on 10 November 2015.**

172. I now turn to the merits of the claimant's claim. In this regard, a useful approach is to consider 4 elements of a claim that are analysed to determine whether a claim is made out and they are:

a. The **story** surrounding the claim – i.e. the background explanation to the circumstances of the claim;
b. That there is **entitlement** to make the claim – often by reference to a term of a contract providing that entitlement;
c. **Substantiation** of the claim – provision of evidence of supporting facts demonstrating that entitlement and the quantum;

d. **Quantum** – the supporting calculations or plausible explanation of the amounts claimed.

IX. The merits of the claimant's claim

173. It is useful for the parties to be aware that I am obliged by section 26(2) of BCIPA to only have regard to:
   (a) the provisions of BCIPA, and where relevant the provisions of part 4A of the *Queensland Building and Construction Commission Act;*
   (b) the provisions of the construction contract;
   (c) the payment claim, together with all submissions, including relevant documentation properly made by the claimant support of the claim;
   (d) the payment schedule, together with all submissions including relevant documentation properly made by the respondent in support of the schedule; and
   (e) the results of any inspection carried out by me.

174. Unfortunately for the respondent, I am unable to consider its adjudication response for the reasons identified under the heading "Service of the adjudication response" above. These submissions, which would have been the s26(2)(d) *submissions, including relevant documentation properly made by the respondent in support of the schedule.*

General observations regarding valuation

175. I need to firstly consider the story, entitlement and substantiation, collectively considered "*contractual entitlement*" before dealing with the issue of valuation. However, with respect, the claimant appears to argue that I am obliged to follow its valuation, in cases where the respondent has valued the claim as nil, as identified in the payment schedule, and that the respondent was unable to change that valuation in the adjudication response.

176. For example, throughout the claimant's submissions, at paragraphs 203,214, 235, 251, 274, 283, the claimant submitted, "*As the Respondent does not supply an alternative to Nil, and cannot do so by virtue of s24(4) of the Act, then the only alternative is Cymbal's valuation. With respect the Adjudicator has no alternative. Cymbal says in the absence of a contractual mechanism for valuation, Cymbal's valuation complies with s14(1)(b) of the Act.*"

177. With great respect, I do not agree with the claimant that I have no alternative, but to accept the claimant's valuation. I do not understand that to be the law, and that proposition by the claimant could lead an adjudicator into jurisdictional error: [Brereton J paragraph [86] in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13].

178. I am at a disadvantage in not being able to have regard to the adjudication response, which may have had submissions and calculations that would assist valuation under s14. However, that does not mean that I am constrained to accept the claimant's valuation.

179. In the case of *SSC Plenty Road v Construction Engineering (Aust) & Anor* [2015] VSC 631, at paragraph [77] Vickery J held by reference to Hodgson JA in New South Wales in *Coordinated Construction Co Pty Ltd v JM Hargraves (NSW) Pty Ltd* ['s 2005] NSWCA 228 that:

> *"The adjudicator's duty is to come to have view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may vary readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, <u>the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits</u>,* **(my underlining)** *which as a minimum would involve determining whether the construction work identified in the payment claim has been carried out, and what is its value."*

180. At paragraph [81] Vickery J went on to find:

> *"The absence of relevant material from the respondent, or the presentation material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim. As a minimum, the adjudicator is obliged to determine whether the construction work identified in the payment claim has been carried out, and what is its value. The adjudicator is obliged to make these findings on the evidence before him or her."*

181. In addition, in the Queensland case *of Unifor Australia Pty Ltd v Katrd Pty Ltd ATF Morshan Unit Trust T/As Beyond Completion Projects* [2012] QSC 252, Daubney J held that an adjudicator's decision was void because the adjudicator was required to assess the amount of the payment claim under s26 of BCIPA and regulated by s14 of BCIPA, and he had not done so.

182. In this case, at paragraph [31], His Honour referred to the adjudicator accepting that the claimant's claim represented a "reasonable figure" of the additional costs incurred by the claimant, which was in no way referable to the contract between the parties, or to any agreed variation for an adjustment by a specific amount.

183. At paragraph [32], His Honour said that the adjudicator had no regard to the provisions of BCIPA in performing the valuation, and that his approach was rather akin to making an assessment on a *quantum merit*, on the basis that this would avoid an unjust result. His Honour held that such an approach was incorrect and he set aside the adjudicator's decision.

184. Accordingly, I am obliged, having regard to the payment claim and the payment schedule and all of the evidence, and assisted by the claimant's submissions, after being satisfied that the claimant has demonstrated its entitlement, to make a *valuation* of the construction work carried out and the related goods and services supplied under s14 of BCIPA.

185. The reason why valuation under s14 is required is because the variations fall within s13(b) of BCIPA, as the contract does not provide for their valuation. However, s13(a) of BCIPA applies to the original contract claim items, to which I refer below.

186. I make reference to the claimant's submission that its valuation complies with s14(1)(b) of BCIPA. At this stage I merely list the requirements of s14(1)(b) which provides:

> *"s14(1)(b) if the contract does not provide for the matter, having regard to—*
>
> *(i) the contract price for the work: and*
>
> *(ii) any other rates or prices stated in the contract; and*
>
> *(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and*
>
> *(iv) if any of the work is defective, the estimated cost of rectifying the defect."*

187. I will now progressively consider each head of claim firstly under the heading of contractual entitlement and then make a valuation of that claim on a progressive basis. Each valuation item is then taken to table A below. For completeness, table A also includes the item number, description and the payment claim and payment schedule amounts for cross-reference purposes.

Contractual entitlement

188. As I said, I need to establish for each head of claim, that the claimant has demonstrated *contractual entitlement* under the construction contract to be paid a sum of money for construction work and for related goods and services undertaken to be supplied under a construction contract. Thereafter, a valuation of that claim is made and the amount valued is then referred to the table A under the heading, "*The amount of the progress payment.*"

189. Accordingly, although there is no adjudication response which I may consider, this adjudication will not be simply a "rubber stamp" for the adjudication application, and after this contractual entitlement is established, the consideration of the value is made having regard to all submissions, particularly those provided in the payment schedule.

190. BCIPA requires an adjudicator have regard to the provisions of the contract in order to be satisfied of the *contractual entitlement* to the claim, and, if so then to value the payment claim. The analysis that now takes place considers the original contract claim items, the variations and the respondent's deductions from the point of view of entitlement.

191. At paragraph [101] of the claimant's submissions, the claimant provided a very useful summary of the items in dispute, and I have utilised this format for table A under the heading "*The amounts of the progress payment*" below.

192. However, I noted some errors in the item number notification in that table, compared to the payment claim numbering, which appears to have been prompted by the payment schedule revised numbering causing the error, and I have corrected in my table A below.

193. Unfortunately, the payment schedule did not always follow the layout and numbering in the payment claim, which made correlating the items in dispute a little bit difficult because the item numbers in the payment claim did not reflect the CW numbers, and they did not always agree with the respondent's numbering.

194. I adjusted the layout of the table slightly for the original scope contract items by inserting a row in which the undisputed item amount was entered, which I calculated from both the payment claim and the payment schedule resulting in a figure of $50,789.23. On the next row below that, I then subtracted the discount amount of $3161.78, in order to correctly calculate the differences between the payment claim in the payment schedule. I then provided the adjudicated amount for those items, and at the same for the variation claims and the deductions.

a. *Contract items*

195. The original contract works amounted to $75,000 plus GST and the payment schedule amount is $72,360.86.

196. By reference to items 1, 2, 7 and 7 in table A below, the payment schedule reduced the claim amounts by a particular percentage on the basis that the work was defective and made reference to an attached defects list. There was no defects list attached to the payment schedule provided in the adjudication material.

197. However, at paragraph [124] of the claimant's submissions, the claimant makes reference to a defects list and attaches it at Annexure 26.

198. In paragraphs [125] through to [131] of the claimant's submissions explained that only those items marked in yellow *might require some work*, which it argued were very minor. It invited me at paragraph [130] to take a "dim view of the respondent's behaviour". That is not a function of an adjudicator, and I have no regard for that submission.

199. I am unable to make any finding of precisely what within the specific items is defective, because there are no further submissions from the respondent to which I may have regard. I cannot make a finding that these items were defective.

200. More particularly, in s14 of BCIPA in valuing the work I can have regard for the estimated cost of rectifying defective work, but there is no specific value that the respondent attributes to the particular defects, apart from deducting a percentage from the claimant's claim. Even if I had found defect, I could not regard a percentage deduction as sufficiently clear to be an estimate, about which I can have some confidence.

201. Accordingly, I allow 100% payable for those items which is supported by the claimant's Trent Claydon's statutory declaration paragraph [8] where he said that there were no substantive defects apart from some tightening of screws to realign one cupboard door, and there is no controverting evidence to which I may have regard.

202. The one item that required some further analysis was item number 15, CW 07, in which the claimant conceded that a deduction needed to be make for the installation costs

which were no longer required. At paragraph [216] of its submissions, under variation number 3 the claimant reiterated its concession.

203. At paragraph [182] of its submissions, the claimant valued the deduction at $104 for the installation component for this item, but otherwise argued (at paragraph [183]) that it was entitled to payment for its original scope for the cabinet manufacture.

204. I am satisfied from the claimant's submissions that it had already manufactured this item, despite the payment schedule stating that "works were deleted prior to fabrication, because" I have nothing further to substantiate this statement for which the respondent bears the onus.

205. The value of the original contract items for this work is in accordance with the contract such that it can be valued at *the amount calculated under the contract* in accordance with s13(a) of BCIPA

206. Accordingly, I find that the full amount of $75,000 (plus GST) is payable for the original contract work.

b. *Variations*

207. The analysis for variations has been done very carefully because these involve changes to what the parties had agreed in the contract, and valuation needs to occur under s14 of BCIPA, for the reasons already explained. It is necessary to firstly determine that there was a change entitling the claimant to a variation, and then to make an assessment about its quantum. As I have said previously, I cannot merely accept the claimant's claim.

208. The claimant's numbering in its submissions regarding its variation claims did not always accord with that identified in the payment claim, but I understood the variation to which it related, and I have used the numbering in the payment claim for consistency.

209. Close scrutiny of the payment schedule is made to determine the respondent's objections to the claimed variation, and any amounts identified in it with the reasons for valuing it at that amount.

210. If the payment schedule makes the comment, "*Subcontractor to provide cost breakdown and justification for this proposed variation or subcontractor to justify,*" I do not find that this is a rejection of contractual entitlement. I have identified the objections in the table below in an abbreviated format.

211. In those cases, given this is an adversarial process, and the payment schedule could take issue with entitlement, as it has done for other items, subject to any particular items referred to by me below, I am satisfied that the claimant has established contractual entitlement.

212. Nevertheless, in all cases, the claimant still needs to satisfy me that the quantum, is in accordance with s14, or I will determine a value as prescribed by that section.

Variation 1 - CW01 - Reception

213. This relates to a change in the reception in accordance with the respondent's instructions, after the respondent received a direction from the architect to remove the curves in the reception desk, and use Laminex black natural finish 460.

214. I am satisfied from the claimant's submissions [187] through to [204], together with the documents contained in Annexure 29 that there was a change to the reception desk which was different from that in the contract.

215. The payment schedule stated that there was a change of timber veneer and the curve was deleted and required the claimant to provide credit for the original timber veneer, and for the deletion of the curve.

216. I am not prepared to accept such an assertion in circumstances where the reception desk had already been constructed, about which the respondent must have been aware from the emails between the parties.

217. Although the scope of works in the PreAward checklist provided for the Laminex black 460 natural finish, it is evident from the email of the respondent of 8 January 2016 that it had then requested that a Hi-Mac product be used for the veneer, and then this was then changed back to the original Laminex. I'm satisfied that this is a variation.

218. In the payment claim, the claimant provided details of the time taken to affect the change of being 20 man hours at $40 an hour. I understand that the Laminex was provided free of charge, so there are no material costs.

219. I'm satisfied, without controverting evidence from the respondent that 20 man hours to effect this change was reasonable. I find that the ordinary time labour rate of $40 an hour had been agreed in the PreAward checklist. This is a rate stated in the contract in compliance with S14(1)(b)(ii) of BCIPA for the labour component of the work. I note that the claimant abandoned its claim for profit of 10%, which it had provided in its claim.

220. Therefore, I value the amount of $800 for this variation and added in table A below.

Variation 2 - CW-06 – Storage cabinet

221. This variation involves the remanufacture of a storage cabinet to suit a data cabinet and fuse board amounting to $6981.39.

222. The payment schedule stated that the claimant should have carried out a site measurement prior to manufacturing this cabinet and rejected the claim.

223. At Annexure 30 the claimant provided a facsimile confirming that it had sent its working drawings for the cabinet to the respondent on 7 December 2015 for approval.

224. In response to the payment schedule, in paragraphs [205] through to [215] the claimant explained that it had already manufactured the cabinet and attached a photograph confirming that this had occurred.

225. I find that this cabinet had been constructed and was item 4 in the original contract being the BOII storage, item number CW 06 which had a contract sum from the quotation of $7063.39 (which I have already found formed part of the contract) for the five door cabinet including mirrors.

226. I am satisfied therefore that the claimant had carried out a site measure in accordance with its obligations and had constructed the cabinet and was then required to change it to allow for data cabinets behind the two right-hand doors.

227. I note that the dimensions of the new cupboard altered from an equal 692.8 mm wide door originally to 688.6 mm for 4 cupboards and then 719.6 mm for the right-hand cupboard.

228. I'm satisfied this is a variation on that having already constructed the cabinet it was required to make another one to different dimensions.

229. I'm satisfied that the original price agreed for this cabinet of $7063.39 is appropriate to price this variation because it remained a storage cupboard with mirrors.

230. I note that the claimant at paragraph [212] said that it deducted the installation element from the original contract amount for this item, which according to the payment claim was $282 (which represents seven hours of labour which appears reasonable). To this amount the claimant then added $200 for the extra strip of mirror to the cabinet.

231. Unfortunately, the claimant had not provided the area of this strip mirror in its calculations. However, the tax invoice from Patterson Glass dated 26 February 2016 made reference to a 4 mm grey silver, 1 at 2204x130 mirror, with a handwritten notation next to it of CW-06, which I take to mean the mirror referred to. I calculate this area at 0.29 m^2

232. There is an agreed rate in the quotation for item CW 06 for 4mm mirrors of $200 per square metre PC item.

233. I am therefore only able to value this mirror at $57.30 because it is a rate agreed under the contract, and the tax invoice referred to above combined CW-6, CW 14 and CW 15 altogether, so just not possible to determine the cost paid by the claimant for this mirror.

234. I therefore value this variation at $7063.39 (which was a price in the contract) less $282 (installation) plus $57.30.

235. Therefore, I value the amount of this variation at $6838.69 and it is added in table A below.

Variation 3 – CW-7 - PWD

236. This variation was withdrawn as identified in paragraph [216] is of the claimant's submissions.

Variation 4 - CW – 11- Study cabinets

237. This variation relates to a claim to supply stainless steel brackets to the study cabinets which, according to the payment claim were originally to be supplied by others.

238. In the payment schedule the respondent rejected the variation on the basis that the steel bracket was in the claimant's scope of works.

239. I have had a look at the quotation and the PreAward checklist and I am not satisfied that the brackets were to be supplied by others.

240. Accordingly, given the claimant bears the onus, I reject this claim.

Variation 5 -CW -12 – Laundry cabinet

241. This variation relates to remaking a laundry cabinet with different materials which had to be supplied, and design carried out to effect the changes.

242. The payment schedule merely required the claimant provide cost breakdowns and justification, so it did not variation in principle, and it had a breakdown given to it in the payment claim which included an entry "white board to carcass not free of charge" of $20 a square metre. The payment schedule did not dispute this rate, so I find that by inference the parties must have agreed this rate, otherwise the respondent was in the position to have disputed it.

243. Annexure 33 provides a series of mark-ups on drawing A–97007 and an email from the architect together with some additional mark-ups of the laundry.

244. I'm satisfied that additional shop drawings were required for the changes outlined in the architect's email of 9 February 2016 and that remake work was required from what had been originally designed, in that the overhead corner cabinet and the corner cabinet needed to be changed, and the latter had a fixed panel removed and replaced by bi-fold doors.

245. I refer to the claimant's submissions in paragraphs [229] through to [236] and its payment claim breakdown.

246. I'm satisfied that the remake labour work at $40 an hour (the agreed contract rate) equated to slightly over 14 hours of work which is feasible for this retrofitting work and I accept this amount. In addition, the rebating of the door handles of one hour's labour at $40 an hour is also acceptable.

247. However, there are no agreed contract rates for the white board carcass of $20 per square metre, however, I have found that it was incumbent upon the respondent to challenge this rate if it disagreed with it and it did not do so I have therefore found it must've accepted this rate.

248. I note that the profit margin of 10% had not been agreed in the contract. However, I note in the payment schedule that for its deductions (referred to below), the respondent was using 10% for builder's administration.

249. In addition, the respondent had not challenged this amount in the payment schedule, so I'm satisfied that the parties had agreed to such an adjustment in accordance with s14(1)(b)(iii). I therefore accept 10% mark-up was agreed by the parties.

250. Accordingly, I value this claim in accordance with the agreed rates as $1501.80 and it is added to table A below.

Variation 6 – CW 14 & 15 - Kitchen cabinets

251. This variation relates to alterations to the kitchen cabinet and island bench cabinet made by the architect.

252. In the payment schedule the respondent stated that the claimant was to provide a cost breakdown and justification for the proposed variation, so it did not the variation in principle.

253. In particular, I find that the respondent had the comprehensive cost breakdown provided to it in the payment claim, which included reference to:
(i) the original quote for the Pallisander Santos veneer of $5,239.58;
(ii) the original stone top quote of $1,396.60;
(iii) a whole lot of labour items to allow for the changes amounting to $2,430;
(iv) an amount for the original quote drawings of $300;
(v) an allowance to cut down a 2 PAC panel of $352 material cost;
(vi) transport of marble from Sydney of $1415.00;
(vii) profit margin of 10%.

254. To my mind, and by inference from the surrounding circumstances, the payment schedule's valuation of zero dollars based on the need for the claimant to provide a cost breakdown and justification for the proposed variation suggests that not only did it agree that a variation was available to the claimant in principle, but that it was seeking justification by way of substantiation (i.e. evidence to support the claim), rather than any complaints about the costs identified in the cost breakdown. Had it any complaints about the costs identified in the payment claim, in the circumstances, to my mind it was incumbent upon the respondent at that time to challenge these costs on the basis that they were not agreed.

255. In the adjudication application submissions paragraphs [237] through to [252] the claimant outlined the history behind the significant changes affected to the kitchen by the architect in addition it substantiated its claim by reference to a whole series of plans and emails in Annexure 34.

256. I have closely examined the series of emails and agree with the claimant's submissions that a significant series of changes were made to the kitchen and the bench cabinet by the architect, which in fact prompted the respondent's project manager to say in a 15 January 2016 email, "Classic last-minute change from the architect".

257. I note the claimant's complaint in paragraph [is 245] of the respondent that the respondent expected these changes to be at the claimant's cost, but to my mind is no justification in the circumstances of the contract for the claimant to absorb these costs.

258. I have found that the claimant had provided a quotation based on drawings provided to it, and those drawings were then changed on several occasions by the architect, which entitled the claimant to a variation for the additional work and material costs involved in effecting the change.

259. In Annexure 41, the claimant provides substantiation in relation to the additional costs for the Walnut Crown veneer from Regency stone in invoices dated 8 February 2016 and 15 March 2016, together with the transport costs of the marble from Sydney, and the dowel costs substantiating its claim in the payment claim.

260. Given that the payment claim variation was extremely detailed, and I have inferred that the respondent must have agreed with the rates contained within the variation claim, or it would have challenged them at that time, and it substantiated the cost by reference to invoices, I find that the valuation of this claim is in accordance with the rates and prices agreed in the contract, and allow it in full under s14(1)(b) of BCIPA.

261. Accordingly, I value this claim at $10,154.02 and it is added to the table A below.

Variation 7 – CW 18 & 19 – Master bedroom robe

262. This variation relates to the addition of a timber finger pull not shown on the original drawings.

263. In the payment schedule again the respondent stated that the claimant was to provide a cost breakdown and justification for the proposed variation, so it did not the variation in principle.

264. Given that there was in fact a comprehensive cost breakdown in the payment claim, and that I've found previously where the respondent does not take issue with the costs and rates identified in such a claim, I infer that it agrees with those rates, and that it merely required substantiation of the claim.

265. At paragraphs [267] through to [276] and Annexure 36, the claimant provides an explanation and substantial substantiation of its claim.

266. In particular, in the email from the architect dated 9 February 2016, it made reference to the hinges to accommodate a finger pull, and then it proposed an alternative in the event the claimant advised that it could not work.

267. Accordingly, I am satisfied that it is additional work over and above what had been contracted for, and given that the respondent had not taken issue with the details provided in the payment claim for this variation, I infer that it agreed with the costs and rates identified in it together with the labour hours which were multiplied by the agreed contract rate of $40 per hour.

268. Therefore, I value this claim in accordance with the agreed rates at $1055.42 and it is added to table A below.

Variation 8 – CW 19A – Second bedroom robe

269. This variation relates to changes to hinges and timber finger pulls and again in the payment schedule the respondent stated that the claimant was to provide a cost breakdown and justification for the proposed variation, so it did not the variation in principle.

270. I find that the payment claim identified this variation in comprehensive detail outlining the hours' labour that apply to this variation together with additional door hinges, and the respondent took no issue with these costs in the payment schedule.

271. In paragraphs [277] through to [284] of the claimant's submissions it explained the circumstances surrounding this claim and made reference to Annexure 36 for further substantiation.

272. In these submissions together with the substantiating documents, the claimant has demonstrated that the change hinges and finger pulls were different from what it contracted to provide, and the email from the architect on 9 February 2016 explains the change.

273. Again, I am satisfied that it is additional work over and above what had been contracted for, and given that the respondent had not taken issue with the details provided in the payment claim for this variation, I infer that it agreed with the costs and rates identified in it together with the labour hours which were multiplied by the agreed contract rate of $40 per hour.

274. Therefore, I value this claim at $689.70 and it is added to table A below.

Variation 9 – CW 17 – TV cabinet

275. This variation relates to additional work for the TV cabinet. The payment schedule response is different in that the respondent said "This proposed variation is rejected. TV cabinet remains as per original. No changes".

276. Accordingly, I can draw no inference that there had been acceptance by the respondent for the detailed breakdown in the payment claim for this variation.

277. The claimant in paragraphs [253] through to [266] provided its submissions in response to the payment schedule and it attached substantiating documents in Annexure 35, and in particular the email from the architect on 9 December 2015 indicating that the TV cabinet details were to follow.

278. However, on 21 January 2016 the respondent instructed the claimant that the TV cabinet was to remain at 1600 mm long (which was the original dimension).

279. Having considered the submissions and the supporting documents, I'm satisfied that the details of the TV cabinet changed on several occasions and then reverted back to the original dimension. This may be why the respondent said that the TV cabinet remained as per the original.

280. However, this ignores the changes that had occurred in the interim and the fact that the claimant had to cut and recut material to comply with those changes as identified in

paragraph [256] of the submissions. I therefore accept the labour component of this variation comprising eight hours at the agreed contract rate of $40 an hour.

281. However, I am unable to accept the other items identified in the variation claim because I cannot find that they are agreed rates under the contract, and contrary to some of the other payment schedule comments, in this particular case I cannot draw the inference that the respondent had agreed with those costs.

282. Accordingly, I value this claim at $320 labour, together with an agreed profit margin of 10% amounting to $352 and it is added to table A below.

Variation 10 – CW 21 – Master ensuite

283. This variation relates to changes to the en-suite cabinet made by the Architect after the contract was completed. The claimant's payment claim provided a detailed breakdown on the costs associated with the claim, and the work activities needed to carry out the variation. The reason for non-payment in the payment schedule is that the sink was changed prior to the shop drawing, and that the claimant did not build it as per "documents". However, the payment schedule did not take issue with the activities and costs claimed.

284. In paragraphs [285] through to [297] the claimant identified its variation in further comprehensive detail, and made reference to Annexure 36 for substantiation.

285. The respondent argued that the sink was changed prior to the shop drawing. As the claimant pointed out in paragraph [293], on 12 February 2016 at 12:15 PM the respondent referred to *revised shop drawings* which reflected changes to the under mount sink.

286. Later that day at 2 PM there was a further request from the respondent to move the left-hand bowl closer to the wall centreline to which a sketch was added. Accordingly, I find that a number of changes were made after the original shop drawings, so the basis of the respondent's objection is rejected.

287. Based on the claimant's submissions, and the failure by the respondent to satisfactorily directly engage on that point, I find that the cabinet had already been made by the time these variations were ordered by the respondent.

288. It is unclear what the respondent means by not building as per "documents", as there is no explanation as to what documents they are referring to. Given that the configuration of the bowl under the sink was changed on several occasions, it certainly would not have been built in accordance with the original documents, but that was because they had varied.

289. As to the quantification of the variation, I note that the claimant provided substantiation in Annexure 41 for the Regency's Stone stone top with two invoices dated 8 February 2016 and 1 March 2016 for $1577.50 on each occasion for the vanity cost. From this amount, the claimant quite properly deducted its PC amount (which had been identified in its quotation for CW 21, which I found a part of the contract documents) of $1,228.

290. Furthermore, I'm satisfied that the joinery had to be remade, and that the costs claimed by the claimant for the additional work, including the eight hours labour to recess the unit into the wall (at the contract agreed rate of $40 per hour) together with the 10% profit margin (which I had earlier found had been agreed) were not controverted by the respondent in the payment schedule.

291. Accordingly, I value this claim at $6,467.19 and it is added to table A below.

Variation 11 – CW 23 – Second bathroom vanity and Powder room shaving cabinet

292. This claim relates to the second bedroom vanity and the powder room shaving cabinet changes and again in the payment schedule the respondent stated that the claimant was to provide a cost breakdown and justification for the proposed variation, so it did not the variation in principle. However, the respondent added that the claimant had not built it as per the documentation, but it is not clear what is meant by that term.

293. At paragraphs [298] through to [306] of the submissions, the claimant provides further detail regarding this variation, and provide substantiation in Annexure 37. It explains that the original contract drawings A 97009 and the original list of finishes showed a solid timber benchtop. This is supported by the quotation which refers to Veneer Luca Rustic prefinished board.

294. The notation on the drawing A 97009 provided in Annexure 37 made reference to "stone", and the respondent did not take issue (in its payment schedule) with the details of the variation claim in the payment claim, which referred to rebating the shaving cabinet to provide for tiling depth of 5 mm and the installation of marble.

295. Furthermore, the respondent did not take issue with the quantification of this variation and, as I have found previously with some the previous variations where the respondent does not engage about the work carried out and its costs, it appeared as if the objection by the respondent was based on lack of clarity about the entitlement for the variation, and not quantum.

296. I am satisfied that the claimant has explained that the top was changed from timber veneer (for which it had priced it under the contract) to stone, and therefore it is demonstrated its entitlement, and the respondent failed to challenge the basis of the quantum.

297. Accordingly, I value this claim at $1034 and it is added to table A below

Variation 12 – Carcass whiteboard not free of charge from Laminex

298. This claim relates to a variation for material which it was to receive free of charge from Laminex, but for which it had to pay. In the payment schedule the respondent said that the variation had not been submitted in accordance with the contract and it was awaiting information about the variation.

299. It appears that the respondent's objection was that the variation claim had been made in the payment claim and not previously, such that this was not in accordance with the contract. However, the respondent did not explain in what sense the claim was not in accordance with the contract, and it did not take issue with the quantum outlined in the payment claim.

300. The respondent relies upon its assertion in paragraph 4.2 .12 of the payment schedule that it had provided to emails to the claimant on 5 and 7 December 2016 noting that the Laminex was free of charge. Clearly these dates are incorrect, as December 2016 has not yet been reached, so I find that the respondent is referring to 2015. However, it does not provide copies of those emails to which I can have regard.

301. At paragraphs [316] is through to [324] the claimant provided its submissions in reply and it makes reference to the PreAward checklist in which the Laminex was to be provided free of charge, and I am satisfied that this is correct.

302. Again, the respondent did not take issue with the quantification of this variation and, as I have found previously with some the previous variations where the respondent does not engage about the work carried out and its costs, it appeared as if the objection by the respondent was based on lack of clarity about the entitlement for the variation.

303. I am unable to review what was stated in the 5 and 7 December 2015 emails, but I just am satisfied from the claimant's submissions that it was charged for those materials, because this is not controverted by the respondent.

304. Accordingly, I value this claim at $593.12 and it is added to table A below.

Variation 13 – Laminex Nua Alaskan not free of charge

305. This claim relates to another variation for material which it was to receive free of charge from Laminex, but for which it had to pay. In the payment schedule the respondent said that the variation had not been submitted in accordance with the contract and it was awaiting information about the variation.

306. Again, it is appears that the respondent's objection was that the variation claim had been made in the payment claim and not previously, such that this was not in accordance with the contract. However, the respondent did not explain in what sense the claim was not in accordance with the contract, and it did not take issue with the quantum outlined in the payment claim.

307. The respondent relies upon its assertion in paragraph 4.2 .13 December 2015 of the payment schedule that it had provided to emails to the claimant on 5 and 7 December 2016 noting that the Laminex was free of charge. Clearly the latter date is incorrect, as December 2016 has not yet been reached, so I find that the respondent is referring to 2015. However, again it does not provide copies of those emails to which I can have regard.

308. At paragraphs [325] fs through to [327] the claimant provided its submissions in reply and reiterated its submissions for the previous variation. In this case it provided substantiation by reference to an invoice 6546882 from Laminex.

309. Again, the respondent did not take issue with the quantification of this variation and, again, it appeared as if the objection by the respondent was based on lack of clarity about the entitlement for the variation.

310. I am unable to review what was stated in the 5 and 7 December 2015 emails, but I am satisfied from the claimant's submissions that it was charged for those materials, because this is not controverted by the respondent.

311. In addition, although it was almost illegible I noted a figure of $921.70 at the bottom of that Laminex invoice to which I note the claimant added 10% (which I'd earlier found was an agreed rate for either profit or builder's margin) amounting to $1013.87.

312. Accordingly, I value this claim at $1013.87 and it is added to table A below.

Variation 14 – Working drawings

313. This claim relates to the need to undertake new and repeat shop drawings to meet the Architect's massive amount of changes. The payment schedule merely said that shop drawings were part of the claimant's scope of work, but added that those shop drawings provided by the claimant were insufficient and made reference to its deduction of $2240 plus GST for its costs in engaging the architect to complete some drawings.

314. At paragraphs [307] through to [315] of the claimant's submissions, the claimant provided further explanation regarding its claim. In particular, at paragraph [313] it took issue with the respondent's deduction for allegedly inadequate drawings and stated that s14(2)(b)(iv) of BCIPA only allowed deductions for goods and not for services.

315. I agree with the claimant that a deduction for this allegedly defective work cannot be considered by me, because working drawings fall within services, not goods.

316. I am satisfied that there were significant changes effected by the architect during the course of the project which would have required variations to the shop drawings.

317. Nevertheless, the claimant bears the onus of demonstrating its entitlement to this amount, and contrary to the other claims, the claimant has been content to rely upon an assertion that there are a massive amount of changes and although the actual hours spent on changing shop drawings for the cabinetry were well in excess of what been claim, it argued that over a period of four months, one hour for drafting shop drawings for every 12 hours of work on the project was being claimed.

318. No further substantiation is given, and whilst I appreciate that it is a difficult task to demonstrate a causal connection between each shop drawing change and the consequential cost, to my mind this claim falls within the definition of an "global claim" which is defined by *Bailey* at paragraph 6 – 080 on page 968 as, "*...a claim where the 'causal connection between the matters complained of and their consequences, whether in terms of time or money, not fully spelt out.'*"

319. The difficulty with the *global claim* in this context is that I am expected to find that the estimated 1 hour of shop drawing time per 12 hours of actual work is all attributable to the Architect' s changes (the "formula"). There is no mechanism under the contract for

accepting this formula as correct, and the parties have not agreed to the rates and prices of $60 an hour for drafting changes.

320. Had the claimant provided the actual times, which it said had been spent on the tasks, I would have been able to consider those hours, and at least been able to apply $40 per hour (which was an agreed contract rate) to value the claim under s14(2)(b) of BCIPA.

321. However, I cannot do so on the basis of the formula as this would not fall within the ambit of s14(2)(b) of BCIPA.

322. Accordingly, I reject this claim.

X. The merits of the respondent's deductions

A. Supply of stone

323. The payment schedule stated that the respondent had procured some alternative stone to a kitchen bench. At paragraph 4.3.1 it explained in more detail the basis of the claim that the stone procured by the claimant was not fit for its purpose.

324. Having regard to paragraphs [329] through to [334] of the claimant's submissions, it essentially identified that the stone which was specified by the architect, was ordered by the claimant, and when it was delivered it was completely unsatisfactory, for which it had provided no warranty.

325. The claimant argued that the respondent had provided no evidence that the claimant was responsible for the products specified by the architect, and it could not do so in the adjudication response, because this would deny the claimant natural justice and in any event the respondent provided no invoice supporting any quantum.

326. Given that there is no invoice supporting the quantum for this amount, and the respondent has not demonstrated that the claimant was responsible for the particular stone for the benches, I am not satisfied the respondent has demonstrated its onus, and I reject this deduction.

B. Deduction of bath plinths

327. The payment schedule identified that the plinths were deleted and a calculation was performed identifying a deduction of $1980.22. At paragraph 4.3.2 of the payment schedule it further provided a calculation based on the difference between the combined cost of CW 22 and CW 21, from which it then deducted CW 21 resulting in a deduction of $1980.22.

328. At paragraphs [335] through to [339] of the claimant's submissions, the claimant asserts that its quotation had not allowed for plinths, such that a deduction was not justified. However, it conceded that the PreAward checklist scope identified the plinths, and this is evident from CW 22.

329. The difficulty for the respondent is the claimant's objection in paragraph [339] of the claimant's submissions that CW 22 was not an item in its quotation. That is correct having regard to item 13 in the quotation with the cross-reference CW 21 and item 14 in the quotation with reference CW 24.

330. Given that there is no amount identified for CW 22, it is unclear how the respondent can assert that the total cost for CW 21 and CW 22 was $9440.71. Unless an amount can be calculated in accordance with the contract under s13(a) of BCIPA which cannot occur because CW 22 was not priced, I am then required to value under s14, and I cannot find any other rates or prices stated in the contract or any variation agreed by which this deduction can be valued.

331. Accordingly, I cannot accept the calculation provided by the respondent to justify the deduction, even if may otherwise have been entitled to do so, and I reject this deduction.

C. Deduction for model plinths

332. The respondent stated that model plinths were deleted which were part of the claimant's contract. It valued the deletion at five man hours at $65 an hour for a deduction of $325.

333. The claimant's submissions make no objection to such a deduction, and therefore I accept that it was justified on the basis that the claimant was required to do this work. I would therefore value this deduction at $325.

D. Deduction for shop drawings

334. In the payment schedule the respondent argued that the claimant had failed to provide adequate shop drawings such that it had to engage an architect on the claimant's behalf to complete those drawings.

335. At paragraphs [340] through to [345]'s of the claimant's submissions it stated that there was no advice to the claimant of any deficiency in the standard of its drawings, and that it had provided a significant number of additional drawings to cater for the changes made by the architect, for which it had made a variation claim.

336. It added that the respondent's allegation was not supported by any evidence, and no invoices in support of the deduction had been provided.

337. I agree with the claimant in this regard because there are no invoices provided in support, and it is not clear to me where the claimant's shop drawings were deficient, as there are no supporting submissions.

338. Accordingly, I reject this deduction.

E. Deduction for delays

339. The payment schedule identified that there were 12 days' delay to the project and it applied a rate of $2800 per day, presumably as liquidated damages.

340. At paragraph 4.3.5 the respondent argued that the claimant was solely responsible for the delay to the project. At paragraph 9 of the payment schedule it makes reference to the claimant having works substantially complete by 15 December 2015, it appears as if this assertion is based on the *Oasis contract conditions – amended AS2545*.

341. The respondent argued that liquidated damages had been enforced on the project in paragraph 9.4 of the payment schedule, but nowhere does it identify where the figure of $2800 per day had been agreed.

342. At paragraph 10 of Part A of Annexure 11 in the claimant's documents, there is reference to $1000 per day exclusive of the respondent's costs, but it does not explain where it obtained the figure of $2800 per day

343. In paragraphs [346] through to [353] the claimant in its submissions provided a series of arguments, the principal argument being that there was no contract term allowing for delay damages.

344. Given that I have found that the contract did not include the *Oasis contract conditions – amended AS2545*, there is no justification for any liquidated damages because the parties had not agreed to it.

345. Accordingly, I reject this deduction.

F. Deduction for retentions

346. The payment schedule identified in paragraph 7.1 that retention was being held in accordance with item 3 of the *Oasis contract conditions – amended AS2545*.

347. Given that I've already found that the *Oasis contract conditions – amended AS2545* do not form part of the contract, I find the respondent has no justification for withholding retention and I reject this deduction.

XI. The amount of the progress payment

348. I have brought all the amounts across from my previous analysis of the merits of the claim under the heading above into table A.

349. Having performed the calculations of the total contract amount, together with the variations and any legitimate deductions, I have calculated the total amount payable under the contract including GST.

350. From this amount I have then deducted what the claimant had conceded had already been paid in the past progress payments, together with an amount of $16,581.97 (including GST) which it conceded at paragraph [100] of its submissions had been paid by the respondent, and this was substantiated by Annexure 23.

Table A

Item #	Description	Payment Claim	Payment schedule	Adjudicated amount
		Original scope		
1	Kitchen – display suite DWG A – 97005 [CW 14]	$16122.79	$14,510.51 (90%)	$16,122.79
2	Island bench DWG A -97005 [CW 15]	$3080.98	$2772.88 (90%)	$3080.98
7	Laundry DWG A -97007 [CW 12]	$5354.98	$3748.49 (70%)	$5354.98
9	Powder room DWG A -97007 [CW 20]	$899.58	$539.75 (60%)	$899.58
10	2nd bedroom ensuite DWG A -97009 [CW 23]	$778.42	$0 (0%)	$778.42
15	7th bedroom ensuite DWG A -97009 [CW 07]	$1135.80	$0 (0%) Var 3	$1031.80
	Other items not in dispute	**$50,789.23**	**$50,789.23**	**$50,789.23**
17	Discount offered on the original quote	**($3161.78)**	**($3161.78)**	**($3161.78)**
	TOTAL	**$75,000**	**$72,360.86**	**$75,000**
		VARIATIONS		
1	Reception change on 21/1/16	$800	$0 pending further info	$800
2	Storage cabinet remanufacture	$6981.39	$0 should have carried out site measure	$6838.69
4	Study cabinet variation	$286	$0 steel brackets in scope of works	$0
5	Laundry cabinet revised 9/2/16	$1501.80	$0 provide cost breakdown and	$1501.80

			justify	
6	Revised kitchen cabinet and kitchen island 2/10/15 & 9/2/16	$10,154.02	$0 provide cost breakdown and justify	$10,154.02
7	Revised Master B robe 9/2/16	$1055.42	$0 provide cost breakdown and justify	$1055.42
8	Revised 2nd bed robe 9/2/16	$689.70	$0 provide cost breakdown and justify	$689.70
9	TV cabinet revision 9/2/16	$682.51	$0 no changes	$352
10	Revised Master ensuite 9/2/16	$6467.19	$0 sink change prior to shop drawing, not built as per documents	$6467.19
11	Rev 2nd bedroom vanity 9/2/16	$1034	$0 justify – not built as per document	$1034
12	Carcass whiteboard not FOC from Laminex	$593.12	$0 variation not in accordance with contract and awaiting information	$593.12
13	Laminex FOC denied for Nua Alaskan	$1013.87	$0 variation not in accordance with contract and awaiting information	$1013.87
14	Working drawings	$4800	$0 shop drawings part of scope of works	$0
	TOTAL			$30,499.81
		DEDUCTIONS		
A	Procurement of alternative stone		$-1465	No deduction
B	Deletion of bath plinths CW 22		$-1980.22	No deduction
C	Installation of model plinths		$-325	$-325
D	Cost for architect to complete shop drawings		$-2464	No deduction
E	Delays caused to the project		$-33,600	No deduction
F	Retentions		$-3252.66	No deduction

TOTALS	$-325
Original contract sum	$75,000
Variations	$30,499.81
Deductions	-$325
Subtotal	$105,174.81
GST	$10,517.48
Total CONTRACT VALUE	$115,692.29
Less previously paid to date	$56,293.03
Less further payment by respondent (see paragraph [100] of claimant's submissions	$16,581.97
Total adjudicated amount	**$42,817.29**

351. Accordingly, I find the **adjudicated amount is $42,817.29 (including GST).**

XII. Due date for payment

352. s15 of BCIPA deals with the due date for payment under the contract.

353. At paragraph [364] and [365(c)] of the claimant's submissions, it argued that the due date for payment of a claim made on 19 April 2016 was 26 May 2016. This was based on the claimant's concession that payment was payable 25 business days after the payment claim.

354. I have found that the payment claim was made on 19 April 2016, and that with the Anzac Day and 2 May 2016 public holidays, 25 business days is indeed 26 May 2016.

355. There are no controverting submissions from the respondent in the payment schedule in relation to this issue, and I am therefore satisfied that the contractual regime applies.

356. Accordingly, the **due date for payment is 26 May 2016.**

XIII. Rate of interest

357. The claimant argued (at paragraph [363] and [365(b)] that this work fell within work identified under the *Queensland Building and Construction Commission Act*, such that the penalty rate of interest under that Act applies.

358. There are no controverting submissions from the respondent in the payment schedule in relation to this issue.

359. S15(2) and (3) of BCIPA provides that:

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

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

(b) the rate specified under the contract.

(3) For a construction contract to which 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.'

360. The claimant has not provided the wording of s67P of the *Queensland Building and Construction Commission Act 1991* (the QBCC Act), and I do so below.

> ***"67P Late progress payments***
>
> *(1) This section applies if—*
>
> *(a) the contracting party for a building contract is required to pay an amount (the progress amount) to the contracted party for the building contract; and*
>
> *(b) the progress amount is payable as the whole or a part of a progress payment; and*
>
> *(c) the time (the payment time) by which the progress amount is required to be paid has passed, and the progress amount, or a part of the progress amount, has not been paid.*
>
> *(2) For the period for which the progress amount, or the part of the progress amount, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, for each day the amount is unpaid.*
>
> *(3) In this section— penalty rate means—*
>
> *(a) the rate made up of the sum of the following—*
>
> *(i) 10% a year;*
>
> *(ii) the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills; or*
>
> *(b) if the building contract provides for a higher rate of interest than the rate worked out under paragraph (a)—the higher rate."*

361. There are no submissions about a contract interest rate, and I have not found any interest rate identified in the contract, so I find that s67P(3)(a) of the QBCC Act applies.

362. Having regard to the Reserve Bank of Australia website for 90-day bank bills, I find that the rate for the latest entry of 22 July 2016 at 1.90%

363. **I find the rate of interest is 11.90 % interest payable on the adjudication amount.**

XIV. Adjudicator's fees

364. The default provision contained in in s35(3) of BCIPA makes the parties liable to pay my fees is in equal proportions, unless I decide otherwise.

365. The claimant has succeeded for the most part in its payment claim, and I was unable to consider the adjudication response, because I found it had been delivered late, and I had no discretion to consider it under BCIPA.

366. Quite a bit of time was spent in analysing whether I could have regard to the adjudication response which added to the cost of the adjudication, which would have been avoided by the respondent providing the document within time.

367. Giving consideration to the matters outlined in s35A of BCIPA, I consider the following factors under that section as follows:

(a) the claimant essentially succeeded;

(b) whilst the claimant submitted in various paragraphs of its submissions that I take a dim view of the respondent's conduct, I was not prepared to do so, so I make no finding under this subsection;
(c) again I make no finding about whether the respondent had a reasonable prospect of success, because I could not have regard to its adjudication response;
(d) I make no finding about whether the respondent acted unreasonably up to the adjudication;
(e) I make no finding as to whether the respondent acted unreasonably in the conduct of the adjudication;
(f) however, the respondent's reasons for not making a progress payment not been accepted, apart from its objection to the *working drawings claim* and I found against the respondent in relation to all but one of its deductions;
(g) I make no finding about whether there were additional reasons provided by the respondent because I had no regard to the adjudication response;
(h) the adjudication application was not withdrawn;
(i) I had spent quite a bit of time dealing with the service of the adjudication response, to which I had made reference above. In addition, I had to spend quite a bit of time researching the law in relation to the creation of a contract, because neither party had provided me with legal submissions to assist. In addition, the contract formation was critical in this adjudication;
(j) in the respondent's submissions to my request for submissions regarding the service of the adjudication response, the respondent stated that if I disallowed the adjudication response, I would be denying the respondent procedural fairness and that it would be left with no alternative than to seek a review on the basis of denial of natural justice. I always carefully analyse the merits of the parties' positions in every adjudication, but in response to this submission, I took extra time to ensure that each aspect of the payment schedule which had a bearing on the claimant's claim work was closely analysed to guarantee natural justice, and this naturally took more time.

368. The claimant sufficiently explained its payment claim, and provided me with sufficient substantiating material to be satisfied of its validity, and the respondent's reasons for non-payment in the payment schedule were in most cases not accepted.

369. This meant the claimant was put to the expense of having to have the matter adjudicated, and in the circumstances, I exercise my discretion in this case to find that the respondent is liable to pay 100% of my fees under s35(3) of the Act.

Chris Lenz

Adjudicator

25 July 2016