Adjudication Decision: 270599

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator	:	Chris Lenz (J622914)

Application Details

Claimant		
Name	:	Conbro Pty Ltd Pty Ltd trading as Moreton Bay Civil Contractors
ACN/ABN	:	ABN 19 010 508 326
Address	:	5 Duntroon Street BRENDALE QLD 4503
Respondent		
Name	:	Grove Investment Group Pty Ltd
ACN/ABN	:	ABN 87 097 146 702
Address	:	5 Mega Rise PAKENHAM VIC 3810
Project		
Type	:	Civil Construction Works
Location	:	27 – 33 Boundary Road NARANGBA QLD 4504
Payment Claim		
Date	:	13 June 2017
Amount	:	$866,666.91 (inc GST)
Nature of claim	:	Complex
Payment Schedule		
Date	:	26 June 2017
Amount	:	$-54,115.04 (inc GST)
s20A Notice Date	:	
Application Detail		
Application Date	:	10 July 2017
Acceptance Date	:	14 July 2017
Response Date	:	3 August 2017
Claimants reply:	:	
Extension of Time	:	Not applicable

Adjudicator's Decision

Jurisdiction	:	Yes/No
Adjudicated Amount	:	$205,619.16 (including GST)
Due Date for Payment	:	27 June 2017
Rate of Interest	:	5.5%
Claimant Fee Proportion (%)	:	50%
Respondent Fee Proportion (%)	:	50%
Decision Date	:	23 August 2017

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A. DECISION

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

- the amount of a progress payment be made by the respondent to the claimant is the adjudicated amount,
- the date upon which the payment claim is due,
- the rate of interest at the rate of interest, and
- the parties are liable to pay the adjudication fees in the proportions,

as shown on the first page of this decision.

B. REASONS

I. Background

1. **Conbro Pty Ltd** trading as **Moreton Bay Civil Contractors** (referred to in this adjudication as the "claimant") was alleged by the claimant to have been engaged by **Grove Investment Group Pty Ltd** (referred to in this adjudication as the "respondent"), to carry out civil construction works for the respondent's development project at 27 – 33 Boundary Road NARANGBA (the "work").
2. The work included clearing and grubbing and compacting subgrade, constructing stormwater drainage, constructing sewer and water reticulation, providing electrical and communication conduits, and constructing roadworks, kerb and channel, footpaths and driveway crossings.
3. The original contract value was $2,179,166.88 including GST with an original date for practical completion within 13 weeks of the contract start date of 25 September 2014.
4. The payment claim comprised 14 variations totalling $866,666.91 (including GST).
5. The payment schedule dated 26 June 2017 identified three jurisdictional issues demonstrating that the claimant had no entitlement as follows:
   (i) the claim was made outside the timeframes provided by BCIPA;
   (ii) a final certificate had been issued on 7 February 2017 which meant there was no entitlement to any further claim;
   (iii) only the claimant had carried out the work was entitled to make claim, and not its solicitor.
6. In the payment schedule, the respondent also identified other detailed reasons for the schedule amount being less than the claimed amount.
7. The claimant lodged an adjudication application with the QBCC on 10 July 2017 (the "application") for the payment claim amount, and served the application on the respondent with evidence demonstrating that it was delivered at 11:18 AM on Wednesday, 12 July 2017.
8. On 3 August 2017, the respondent provided me with a copy of the adjudication response (the "response"), which it stated in its submissions was also provided to the claimant.

II. Material provided in the adjudication

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

III. Jurisdictional issues

11. There were 3 jurisdictional issues raised by the respondent in the payment schedule, to which I turn firstly.
12. I note that at paragraph 79 of the response submissions, the respondent no longer relied upon its jurisdictional objection about the claimant's solicitors serving the payment claim.

13. This leaves the two jurisdictional objections about the *timing of the payment claim* and the issue of the *final certificate* to which I now turn.
14. By way of comment, and respectfully not by way of criticism of either party's legal representatives, it was unusual that the 2-remaining important jurisdictional points dealt with by the parties contained no supporting authorities for either party's strongly held positions.
15. This therefore required me to consider resolving these issues as a matter of principle, and where necessary, to research the law to establish what the authorities stated, if anything, about a particular issue.

A. Timing of the payment claim

16. The point of departure in this analysis is the payment claim and the respondent's payment schedule which raises this jurisdictional issue. It is useful to firstly expand upon the facts identified in these two key documents before canvassing the more substantive submissions in the adjudication application and response.

Payment claim

17. Page 2 of the payment claim identified that the work was last carried out on 16 December 2016, as identified in item K of the claim details.
18. Paragraphs 4 and 5 identified the construction work by reference to schedule A, which is summarised as "*Civil Construction works as per the terms of engagement specified in the letter of engagement dated 25 September 2014 for the development of 27 – 33 Boundary Road, Nerang by QLD 4504*".
19. Paragraph 6 of the payment claim referred to the value of the construction works as identified in schedule B, and item 14 referred to, "*Additional water reticulation based on drawings approved on 11 December 2014; a request from Grove for a quotation on 11 December 2014; and MBCC response of 19 December 2014*".
20. In paragraph 7 of the payment claim, the claimant expressly identified that the reference date for the construction work was 16 December 2016, as identified in item M of the claim details.
21. In paragraph 8 of the payment claim, the claimant further expanded upon this issue by identifying that the payment claim was served within the period of six months after the construction work to which the claim related was last carried out, in accordance with section 17A(2)(b) of BCIPA.
22. The claimant had therefore made a progress claim under BCIPA, not a final payment claim which is governed by s17A(3) of BCIPA. It ostensibly made this claim within six months after the construction work to which the claim relates were last supplied.

Payment schedule

23. The payment schedule engaged with this issue in paragraphs 1 through to 16 of the payment schedule.
24. There were a whole series of objections made by the respondent regarding the payment claim, some of which have now been overtaken by the submissions in the adjudication response, but which included:
    (i) no work under the contract had been performed in the six months prior to the claim being made;
    (ii) the claim was not made within any of the timeframes permitted under BCIPA;
    (iii) the claim was not a valid claim to the purposes of BCIPA;
    (iv) the claim was on its face a claim for final payment;
    (v) the claimant had not sought to rely upon s17A(3) of BCIPA, which even if it did now, it was out of time;
    (vi) there was no contract entitlement make any claim so long after the expiry of the defects liability period, let alone after a valid final certificate had been issued;
    (vii) all construction work and related goods and services under the contract had been carried out prior to 24 September 2016;

(viii) further, or alternatively, work or services were last supplied in October 2016
(ix) it asserted that the claimant had carried out work on an adjoining site, for which it was alleging related to this project.

25. Apart from dealing with the merits of the claim, the payment schedule also identified 2 other jurisdictional issues which will be dealt with later in the decision.

Adjudication application

26. The claimant dealt with the jurisdictional challenges identified in the payment schedule regarding *timing* in paragraphs 22 through to 33 of the application.
27. In paragraph 23, the claimant refuted the payment schedule submissions that the end of the defects liability period was 24 September 2016 or 16 October 2016. It explained that the Unity Water works were not taken off maintenance until 16 December 2016.
28. The claimant submitted that it was required to take an active role (rather than a passive role) regarding the "on maintenance" servicing requirements of the local authorities.

Adjudication response

29. The adjudication response dealt with the claimant's contentions in paragraphs 35 through to 53 of the adjudication response.
30. At paragraph 42 it provided a detailed response to each of the adjudication application paragraph submissions. Essentially, the respondent argued that it is not clear what was meant by "local authority requirements", and there was no obligation on the claimant to attend an *off-maintenance* inspection, except to the extent specified in the contract with the respondent.
31. It conceded that the Bill of quantities (Part H, 5 testing) required attendance for earthworks, subgrade and pavements inspections, but that otherwise a voluntary attendance by the claimant at an *off- maintenance* inspection conducted by Unity water was not work under the contract, nor construction work to which BCIPA applied.
32. It conceded that Mr Van der Meer was present on 16 December 2016 at the Unity Water *off-maintenance* inspection, but there was no contractual obligation on him to attend.
33. It also **expressly denied** on page 7 of the response (in the row referring to paragraph 27 of the application) that any work was carried out after 13 December 2016 and in support relied upon the declaration of Nathan Rose and the affidavit of Peter Anthony Gigli.
34. Nevertheless, earlier in paragraph 40 of the response, the respondent accepted that the *determinative issue as to "whether a claim can be made" was when works were last undertaken under the Contract*.
35. In summary, the thrust of the respondent's objections up to paragraph 43 of its submissions boil down to the following:
    (i) the lack of clarity about what was meant by "local authority works";
    (ii) no obligation on the claimant to attend *off-maintenance* inspections, except where specified in the contract;
    (iii) it's express denial that any work was carried out by the claimant after 13 December 2016.
36. It identified at paragraph 46, that the nub of the issue was whether the claimant's voluntary attendance on 16 December 2016 amounted to construction work under the contract and BCIPA.
37. However, the respondent carefully submitted, from paragraphs 43 through to 53, that I was unable to "join the dots," because of insufficiency of evidence, to make a finding that works took place sometime between 13 December and 16 December 2016.
38. Furthermore, at paragraph 50, it argued that the claimant had invoiced for the balance of its retention on 14 December 2016, which indicated that it believed all works had been completed and all defects liability periods had ended.
39. In addition, it identified a series of 5 facts of inconsistent conduct by the claimant in:
    (i) claiming the whole of the contract sum (excluding retention) on 7 October 2015;
    (ii) it never claimed for the "considerable works undertaken in the on-maintenance period";

(iii) the December 2016 works were for examining a sewer line for off maintenance works under a different contract;
(iv) the claimant had not provided any record of these works, nor had claimed them in the payment claim; and
(v) had claimed the balances retention moneys two days before the 16 December 2016 inspection.

40. The respondent argued that the application had made the distinction between construction work and "a period of liability that is normally the province of a defects liability period" and that the application only asserted a liability obligation in the period between 13 and 16 December 2016.

My analysis and decision on the timing of the payment claim

41. After scrutiny of the contending submissions and the facts, which included the statutory declarations and affidavits I find that:
(i) the respondent's submission about the lack of clarity of the "local authority works" failed to recognise that the claimant, as a matter of common sense, could only be referring to the Moreton Bay Regional Council and Unity Water, with whom both the claimant and respondent had dealings during the project;
(ii) in this context, the "local authority works" narrowed down to Unity Water's *off-maintenance* inspection on 16 December 2016, which confirmed the end of that component of the defects liability period by letter. In the Moreton Bay Regional Council's Off-Maintenance Letter dated 12 December 2016, it stated that Unity Water o*ff-maintenance* would be issued under a separate letter. This Unity Water letter was issued on 16 December 2016. Both documents were provided by the claimant;
(iii) whilst the respondent expressly denied that work was carried out between 13 December 2016 and 16 December 2016, there was nothing in the affidavit of **Mr Grove** dealing with this issue. In addition, in the statutory declaration of **Mr Rose**, at paragraph 38 he conceded that the claimant's attendances included the *off-maintenance* inspections. At paragraphs 38 and 39, he essentially referred to the "best of his knowledge" of no other work being done, apart from that which he identified. At paragraph 8, he said that he was on site at least 4 days a week during *performance of the works*. Given that the maintenance period often does not require ongoing works, it is safe to infer that, during this maintenance period, it is unlikely that he was on site at least 4 days a week, as he did not say that he was. I am not satisfied that his evidence demonstrates that no work was done by the claimant;
(iv) in addition, the respondent admits in its factual material, [paragraph 38(a) of Mr Rose's declaration], that the claimant attended *off-maintenance* inspections. Furthermore, at page 10 of the response submissions, it conceded that Mr Van Der Meer was present on 16 December 2016 at the Unity Water *off-maintenance* inspection.
(v) Mr Van Der Meer attests to his attendance on 16 December 2016, in paragraph 22 of his statutory declaration, in which he said that at that meeting he proved to Unity Water's satisfaction that the works were as designed and approved;
(vi) in my view, the respondent has failed to convince me that the claimant was under no contractual obligation to attend the *off-maintenance* inspection for this work. On the contrary, on page 35 of the contract (in the Annexure which was attached to the supplementary conditions of agreement), at Item 8 **Mandatory Milestones,** Milestone 14 referred to a description of Off Maintenance. The list of milestones identified discrete activities, and often their completion, and to my mind this connotes the claimant's contractual obligation to comply with these milestones. I therefore find that the *off-maintenance* inspection for this work formed part of the claimant's contractual obligations, because a claimant needed to satisfy the off-maintenance requirements;
(vii) it is, with respect, too much of an artificial distinction for a respondent to argue that the claimant's attendance at an *off-maintenance* inspection, with which both the

claimant and the respondent had a significant interest in ensuring that the local authority works were complete, was somehow voluntary and not a contractual requirement;

(viii) Mr Van Der Meer satisfactorily explained that at this inspection, he convinced Unity Water that the works had been completed as per the design and were satisfactory;

(ix) the payment claim, at paragraph 4, referred to the *construction works* (as defined in sections 10 and 11 of BCIPA), and I find that the *off-maintenance* inspections meeting was an *operation that was an integral part for completing* the works for Unity Water as contemplated by s10(e), which was for water supply, which is *construction work* as defined by s10(c) of BCIPA;

(x) insofar as the 5 facts demonstrating alleged inconsistent conduct is concerned, I find no persuasive submissions from the respondent that BCIPA requires:

(a) claims for considerable works in the on-maintenance period had to be made for the claimant to be entitled to make this claim. Nowhere do I find this is a statutory requirement, and the respondent has not anywhere pointed to this being one;

(b) that it was incumbent upon the claimant to provide a record of the works and make a claim for them in this payment claim. Nowhere do I find this is a statutory requirement, and the respondent has not anywhere pointed to this being one;

(c) that its earlier claim for the whole of the contract sum on 7 October 2015 (apart from retention moneys) disqualified it from this claim. Again, nowhere do I find this is a statutory requirement, and the respondent has not anywhere pointed to this being one;

(d) that its claim for the balance of the retention moneys two days before this inspection, disqualified it from making this claim. Again, nowhere do I find this is a statutory requirement, and the respondent has not anywhere pointed to this being one;

(e) that works in early December 2016 related to a separate project, and therefore disqualified it from this claim. In this regard, I have already found that on 16 December 2016, on this project, an off-maintenance meeting was held and *construction work* was carried out, so that whether other work was done on another project on around this time, has no bearing on this finding.

(xi) To my mind the governing provision regarding timing to make a claim in this context, is the activity of carrying out construction work, not whether claims have already been made, or whether there is an entitlement to payment for that particular construction work. The respondent has failed to point to any provision supporting this, and I therefore reject the submissions.

42. Accordingly, I am satisfied that this attendance at the *off-maintenance* inspection on 16 December 2016 was *construction work*, and that it was within the period of six months before the payment claim was made, therefore satisfying s17A(2)(b) of BCIPA.
43. The jurisdictional objection by the respondent therefore fails on this point, and I proceed to consider the next jurisdictional objection.

B. The effect of the final certificate

44. The next jurisdictional objection essentially dealt with the respondent's assertions that the fact that the Final Certificate had been issued, meant that the claimant had no entitlement to make a claim under the construction contract.
45. This objection has been very carefully argued by the respondent and required close consideration, and it was important to consider how this issue arose.
46. The payment claim did not deal with this issue as it first emerged in the payment schedule.

Payment schedule

47. Paragraphs 17 through to 26 of the payment schedule essentially identified that the final certificate:

(i) was issued on 7 February 2017;
(ii) stated that certified amount had been paid;
(iii) whilst it was issued after the time strictly required by the contract;
(iv) was nonetheless still effective to trigger all the consequences of a validly issued final certificate;
(v) was evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise…….. that any necessary affect had been given to all the terms of the Contract requiring additions or deductions to be made to the Contract sum;
(vi) was conclusive evidence of the amounts payable under the contract;
(vii) was effective, such that even if there was an entitlement to make a payment claim under BCIPA, such claim must be valued in accordance with the terms of the contract, including clause 42.8.

48. The respondent added that existence of the final certificate meant that there was no entitlement to make any further claim and the claim was barred.
49. Furthermore, it argued that the effect of the contractual provisions limiting entitlements for the purposes of BCIPA, had been dealt with in numerous decisions under BCIPA, and that a term limiting entitlement under a contract was enforceable unless it breached the provisions of BCIPA. However, no decisions were provided to support this submission.
50. These were powerful submissions, and the claimant in the application submissions between paragraphs 34 through to 43 sought to overcome the respondent's arguments. These are now summarised for analysis.

Adjudication application

51. The claimant commenced its attack on the submissions by referring to the respondent omitting the first part of the second paragraph of clause 42.8 of the contract (the "proviso"), which stated said:
"Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature…"
52. The claimant referred to, and attached the Notice of Dispute ("NOD") dated 21 January 2015 and added that the NOD and framed the dispute in this application.
53. It argued that the NOD was not time-limited, and enabled it to submit the adjudication claim and take court action.
54. Furthermore, the claimant asserted that it had a right under BCIPA to serve a payment claim within 6 months of last undertaking works under the contract.
55. It argued that the respondent's position, if correct, placed the contract above BCIPA, with the effect that it modified the claimant's rights under BCIPA.
56. The claimant then argued that s99(2)(b) of BCIPA rendered such a provision of the contract void.
57. The claimant rejected the validity of the Final Certificate, particularly when the superintendent had not act honestly in fairly in valuing the Works and time, and the claimant retained its rights under the NOD.
58. The claimant concluded that if clause 42.8 of the contract had the effect of preventing further claims under BCIPA, it was void under s99(2) BCIPA.
59. In the adjudication response between paragraphs 54 to 78, the respondent further clarified and explained its position, to which I now give consideration.

Response submissions

<u>Rights under the Act</u>

60. The respondent firstly engaged with the claimant's arguments about s99(2)(b) of BCIPA rendering a contractual provision void, if it purported to annul, exclude or modify the operation of BCIPA. It argued that:
(i) the procedure for the issue of the Final Certificate set out in clauses 42.7 and 42.8 in fact mirrored the rights under BCIPA;

(ii) the period of 28 days after the end of the defects liability period to lodge a final payment claim aligned precisely with s17A(3)(b) of BCIPA, and the respondent provided support for its arguments by reference to the Parliamentary report (the "report") on the 2014 BCIPA amendment bill, as well as an extract from the report;

(iii) the respondent gleaned from the discussions surrounding the 2014 amendment bill that:
   (a) the reduction of a claim from 12 months after work had been performed to 6 months, provided an incentive for a claimant to get its house in order; and
   (b) promoted diligent contract management and bookkeeping practices; and
   (c) encouraged early conflict resolution;

(iv) to allow the claimant to proceed with its claim under BCIPA in circumstances of:
   (a) being more than 18 months after it last carried out construction work;
   (b) At least five months and 28 days, after the end of the last defects liability period;
   (c) six months after it made its final claim for the balance of retention moneys; and
   (d) being well outside the time permitted under the contract,

the respondent argued would undermine the objects of BCIPA and undo the intentions of Parliament under the 2014 amendment bill.

Effect of the NOD

61. The respondent then went on to consider the effect of the NOD on overcoming any finality that the Final Certificate may otherwise have had and identified two issues that arose:
   (i) firstly, the NOD could only preserve rights sought to be preserved by the NOD;
   (ii) secondly, even though all relevant steps had been taken under the contract in relation to the NOD, except for the reference of the dispute to a binding resolution procedure;
   (iii) the claimant could not *preserve its contractual rights more than two years later*, given the dispute procedures under the contract were envisaged to be notified and resolved in a timely way, such that to rely upon a notice issued years later would undermine that purpose.

Conclusions

62. The respondent concluded about the claimant's entitlement to make the claim as follows:
   (i) S17A(3) of BCIPA applied to this payment claim;
   (ii) there was no one entitlement to make a claim under the contract, and none was alleged;
   (iii) the claim was made much later than 28 days after the end of the last defects liability period;
   (iv) no construction work or related goods and services had been carried out or supplied under the contract from at least 13 December 2016 onward;
   (v) the claim was made outside the time under s17A of BCIPA and was not a valid claim;
   (vi) alternatively, any claims were barred by the issue of the final certificate;
   (vii) alternatively, all claims other than variation claims 1, 11 and 14 were barred by the issue of the Final Certificate.

My analysis on the effect of the Final Certificate

63. The respondent's submissions have been closely considered.
64. My analysis worked backwards from the response submissions toward the payment schedule. I have considered these under the headings I used for the response submissions (where relevant), viz., "Rights under the Act, Effect of the NOD, and Conclusions, to make it easier to follow.

Rights under the Act

65. The respondent emphasised the 2014 amendment bill to support the proposition that this claim should not be permitted under BCIPA given that it was made by the claimant so late ("*belated claim*"), because it was made in fact:
    (i) over 18 months after the last construction work was carried out;
    (ii) at least five months and 28 days after the end of the last defects liability period;
    (iii) six months after it made its final claim for the balance of retention moneys; and
    (iv) well outside the time permitted under the contract.
66. As mentioned previously, neither party provided case authority to support their submissions, and in this instance, the lack of authority supporting the respondent's proposition of the *belated claim* is problematic.
67. In my view, it is incumbent upon the respondent to demonstrate that the *belated claim* is unsustainable because it has challenged its validity. The claimant has already successfully demonstrated that the claim has been validly made under BCIPA's s17A(2)(b) because I have made this finding in the claimant's favour.
68. Before discussing the onus of proof in more detail, it is important that I make factual findings about some of the respondent's assertions, because in my respectful view they are incorrect or misconceived.
69. The claimant's claim in this adjudication I find was not more than 18 months after it last carried out construction work. I have found that it last carried out construction work on the 16 December 2016, so that the payment claim was within six months of that date.
70. Even though the claimant has made this claim six months after it had made the final claim for the balance of retention moneys, I have already found earlier that this does not disqualify this claim from proceeding, because there was no cogent submission from the respondent suggesting that this was a prerequisite for and entitlement to make this claim.
71. I accept that this BCIPA payment claim was well outside the time permitted under the contract for a final claim to be made, which under clause 42.7 the contract required it to be made within 28 days of the end of the defects liability period. However, the respondent needs to demonstrate that this somehow infects this payment claim to which I now have regard.
72. In my view, in a BCIPA dispute, as in any dispute, it is incumbent upon the party contending for a position, to discharge an onus, which may be legal and evidentiary, or merely evidentiary.
73. In this matter, the claimant always bears the legal onus of demonstrating its entitlement to its claim, and if it also demonstrates its evidentiary onus, then this evidentiary onus shifts to the respondent.
74. However, in my view in cases of a jurisdictional objection made by the respondent, it bears a legal and evidentiary onus to demonstrate that the claimant is not entitled to make the *belated claim*.
75. The respondent is now requiring me to make a finding that the *belated claim* falls foul of:
    (i) the Objects of BCIPA;
    (ii) the intention of Parliament expressed in the 2014 amendment bill.
76. Turning firstly to the Objects of BCIPA, to which the respondent makes no further reference, I find nothing in s7 **Object of Act** to constrain the timeframe within which a claim can be made, and the respondent has failed to point to anything suggesting this constraint exists.
77. The respondent then invited me to find that the *belated claim*, if allowed by me, would undo the intention of Parliament. However, it provided me with no statutory interpretation guidance to support its submission nor any case authorities to assist me.
78. The difficulty with the respondent's submission is that it made no reference to the specific provision within BCIPA to which I was required to have regard, in considering the intention of Parliament in interpreting the provision.
79. It merely made the generalised submission in paragraph 62, that to permit the claimant to proceed with the claim would undermine the objects of the Act and considerably undo the intention of Parliament expressed in the 2014 amendment bill.

80. With the greatest respect, such an approach is unsatisfactory to an adjudicator who is vested with the responsibility of ensuring that they have jurisdiction to adjudicate a matter.
81. Nevertheless, I am obliged to construe BCIPA, because the respondent has made a jurisdictional submission about the *belated claim* about which I must decide.

Common law

82. Pearce and Geddes' common law approach to statutory interpretation is divided into:
    (i) the "*literal* approach";
    (ii) the "*purposive* approach."[1]
83. The Authors state that the statutory provisions have not entirely superseded the common law position regarding statutory interpretation[2], so I have firstly considered the common law approach, before considering Queensland's *Acts Interpretation Act 1954* ("AIA").
84. The literal approach requires me to determine the intention of Parliament from the examination of the language used in the statute as a whole. In doing so, one gives the meaning of the language in the ordinary and natural sense.
85. As I've said, the respondent has not pointed to a part of the statute to which I needed to have regard. However, in fairness, it had been making references to s17A(3) in its submissions under this jurisdiction objection.
86. Even if I went as far as *inferring as a matter of logic*, that the respondent was requiring me to interpret s17A of BCIPA in this context, about which it made no submissions; if this resulted in me possibly making an adverse finding against the claimant on this point, I would be required to seek submissions from the claimant before doing so, as a matter of natural justice.
87. If I were to consider s17A of BCIPA, hypothetically, as the provision for present purposes, for which statutory interpretation was required:
    (i) The *literal* meaning of this provision provides for various time limits within which a claim could be made, and within each list, the later time limit governs the claimant's rights to make a claim. To my mind there is only one meaning conveyed by the statutory requirements, and that is to only look at the latest time.
    (ii) Using the *purposive* approach, which has its origins in the 'mischief rule', the authors suggest that one needs to determine the purpose of the statute as a whole, and then consider whether the interpretation of the words in the particular provision, was consistent with that purpose[3];
        (a) Having regard to the whole tenor of BCIPA, and without any further assistance from the respondent on this issue, to my mind the purpose of BCIPA is to facilitate payment to a claimant;
        (b) It is legislation that supplements a party's rights under a construction contract for payment, by providing additional progress payment rights. If the contract attempts to limit the BCIPA rights, such contractual provisions are in danger of being rendered void;
        (c) Accordingly, a complaint that the claim was made well outside the time permitted under the contract, does not resonate with BCIPA, because it prescribes its own time limits, each of which, in my view, need to be construed independently to determine the latest time period allowable to make a claim.
    (iii) Accordingly, there is nothing in the application of the *purposive* approach that suggests that s17A time limits themselves, do not achieve the purpose of BCIPA.

[1] Pearce DC and RS Geddes: Statutory Interpretation in Australia (2006), 6th edition, LEXIS-NEXIS Australia, pages 25 – 29
[2] Ibid p25
[3] Ibid, para [2.5], pages 27 & 28

Statute

88. Turning then to the statute; s14A of the AIA, requires the interpretation of the provision of BCIPA that will best achieve the purpose of BCIPA. It appears to be like the *purposive* approach, about which I have already made a finding.
89. Nevertheless, the respondent's submissions had the flavour of a mischief that it identified which the 2014 amendment bill was set to cure. At paragraph 59, the respondent argued that by reducing 12 months to 6 months after work had been performed to claim:
    (i) allowed the claimant to get its house in order, and
    (ii) promoted diligent contract management and bookkeeping practices, and
    (iii) encouraged early conflict resolution.
90. Naturally, BCIPA itself does not demonstrate this mischief, so in that regard it would be necessary to have regard to something outside the Act.
91. s14B(1) of the AIA allows me to have regard to extrinsic material to assist in the interpretation of a provision:
    (i) if it is ambiguous or obscure;
    (ii) if the ordinary meaning of it leads to a result that is manifestly absurd or unreasonable;
    (iii) or to confirm the interpretation conveyed by the ordinary meaning.
92. To my mind there is nothing in s17A of BCIPA which suggests that its meaning is ambiguous or obscure regarding the time limits identified therein, nor is an absurd meaning evident from the plain reading of it.
93. It provides that a claim can be served within the **later** of alternative periods which differ, depending on whether one refers to s17A(2) of s17A(3) of BCIPA.
94. To my mind the claimant merely needs to fit within the latest period identified in that section for a claim to be considered. Nowhere is there a further qualification regarding time limits.
95. In this case, it is evident that as a matter of fact, the payment claim was nearly 6 months after the last defects liability period, but that does not disqualify the claim, given the provision relating to 6 months after the last construction work being the governing provision.
96. The list of periods in s17A of BCIPA are not somehow integrated to one another to qualify any other time period. For example, regarding the end of a defects liability period in s17A(3)(b), nowhere does it say in s17A(3)(c) that the six-month completion of construction period is limited by the 28 days after the end of the last defects liability period. In fact, the opposite is true, as one must have regard to the LATER time limit.
97. To my mind, therefore, the meaning of s17A of BCIPA is quite clear, and assists facilitating the purpose of the claimant getting paid, such that there is no need to have recourse to extrinsic materials identified in s14B of the AIA.
98. Even if it was necessary to do so, all the respondent did was provide in its submissions, reference to an extract of a parliamentary committee report at paragraph 60 of the response, and did not demonstrate that this fell within the definition of *extrinsic material* to which I could have regard.
99. Accordingly, I reject the respondent's submissions under the Rights under the Act preventing the claimant's claim from being considered by me. I therefore do not need to seek submissions from the claimant on this point as a matter of natural justice.

Effect of the NOD

100. Between paragraphs 63 and 65 of the response, the respondent argued that the claimant had argued that its NOD overcame the finality that the Final Certificate may otherwise have had, but that the NOD only preserved rights sought to preserved by the notice.
101. In my view, the claimant did not go that far in in the application. It merely provided the extract of first paragraph to clause 42.8 (the "proviso") (which the respondent had omitted to refer to) to overcome the respondent's submission that the final certificate precluded any entitlement to make a further claim, such that the claim was barred.

102. It is the respondent that is seeking to constrain this claim, if I allow it to proceed, to remain within the confines of the issues identified in the NOD. It provided no authority in support of this proposition.
103. Nowhere in the payment schedule did the respondent argue, that if a claim could be considered, that the existence of the NOD meant that only variation claims 1, 11 and 14 could be considered under BCIPA. This is the effect of the response submissions 63 through to 66, and paragraph 78.
104. The respondent has therefore suggested that variation claims 2 and 3 cannot be considered in this adjudication. At first blush, this may constitute a new reason for withholding payment, which is allowed under s24(5) of BCIPA; but which triggers the claimant's right of reply and additional time for the adjudication to take place. I considered that aspect later in the decision.
105. For present purposes, my focus (which does not accord with the respondent's heading "Effect of Notice of Dispute"), is the effect of the Final Certificate on the claim. I am focusing in on that aspect, rather than the somewhat wider proposition that the NOD, if effective, limited the BCIPA claim.
106. The reason for doing so is that that was the contest set up in the payment schedule and the adjudication application. As I've said, it appears as if the adjudication response has gone wider, about which I give consideration later, as to whether this is a fresh reason entitling the claimant to a right of reply.
107. Insofar as the effect of the Final Certificate is concerned, I am satisfied that the first part of the second paragraph of clause 42.8 (the "proviso"), which was not referred to by the respondent, may qualify any ostensible finality attached to the Final Certificate as identified in clause 42.8.
108. I am obliged to consider the meaning of clause 42.8 with the proviso, and in interpreting this clause I have been guided by Brooking[4] , because neither party had provided me with any authority, and I am obliged to give the words their natural and ordinary meaning.
109. To my mind, using the ordinary meaning of the clause, the proviso operates to prevent the Final Certificate having the finality asserted by the respondent. The operative paragraph commences with the words, "Unless either party…. serves a notice of dispute under Clause 47".
110. I need to be satisfied that the claimant provided a NOD under clause 47 for the proviso to be activated. Behind the tab headed "Dispute", the claimant provided a document headed Notice of Dispute under clause 47.1 of the contract, dated 21 January 2015.
111. I find this fits within the wording of the proviso such that as a matter of logic, the Final Certificate cannot be final, because the proviso defeats that finality from becoming operative.
112. Accordingly, the Final Certificate cannot be used as evidence "in any proceedings of whatsoever nature", to prevent this BCIPA claim from proceeding. I accept that a BCIPA claim would fall within a *proceedings of whatsoever nature*, but the difficulty for the respondent is that the clause does not engage, because the proviso is operative.

<u>NOD confines the BCIPA claim</u>

113. I now turn to the wider proposition put forward by the respondent that, if I was to consider the claim, that the NOD confined the BCIPA claim to consideration of variations 1, 11 and 14 only.
114. As I have mentioned, given that this is a complex claim, s24(5) of BCIPA entitles the respondent to raise new reasons, so I am obliged to consider them. Having adjudicated many matters, I considered that it was more appropriate to evaluate the merits of the respondent's arguments, before seeking submissions from the claimant about this issue, as a matter of just natural justice.

[4] Cremean, Damien J, Michael H Whitten and Michael F Sharkey: *Brooking on Building Contracts*, 5th edition (2014), LEXIS-NEXIS Butterworths, paragraph 2.5, pages 15 and 16

115. The reason for adopting this approach was that I saw no utility in prolonging the adjudication, by seeking submissions from the claimant, if I rejected the respondent's arguments.
116. On 9 August 2017, I received unsolicited submissions from the claimant's solicitors advising, inter-alia, that the claimant saw no new reasons and would therefore not be seeking to make a reply under s24B(2) of BCIPA.
117. At paragraph 26 of the payment schedule, the respondent argued that the Final Certificate was effective, and that even if a claim could be adjudicated, that claim must be valued in accordance with the provisions under clause 42.8.
118. I have already rejected that the Final Certificate prevents this claim from being adjudicated, because of the proviso to clause 42.8, meaning it was not final.
119. However, this brings me back to paragraph 65 of the respondent's submissions that the NOD can only preserve rights sought to be preserved by the NOD. That may well be the case in relation to the contractual regime, because the NOD confines the contractual issues in dispute.
120. This is an adjudication, and the respondent must demonstrate that the dispute resolution regime under the contract has an impact upon BCIPA, and in fact confines the extent to which claims under BCIPA can be considered. The respondent has provided no authority in support of such a proposition.
121. It has a legitimate complaint that the contractual dispute has not been resolved over two years later, and that the contractual purpose of a dispute clause is to resolve disputes in a timely way.
122. I understand that I am obliged under s26(2)(b) of BCIPA to consider the provisions of the construction contract from which the application arose. The respondent has identified the significant time within which the dispute regime has been active, but there is nothing in the dispute clause of the contract (clause 47) that limits the time within which the dispute may be resolved.
123. However, I have been provided with no authorities on this point at all, and certainly none which compels me to consider that the slow progress of the dispute resolution regime under the contract, somehow prevents, constrains, or limits a claimant from exercising its rights under BCIPA.
124. To my mind, the lack of any authority provided by the respondent about this issue means I am unable to consider its submission that the BCIPA claim is narrowed down to variations 1, 11 and 14. This narrower dispute, is a creature of the contractual dispute regime, not of BCIPA.
125. The failure of the respondent's argument that the Final Certificate was a bar to any further BCIPA claims, and its inability to provide any authority to suggest that the NOD constrains this BCIPA claim, to my mind means that there is no impediment for the claimant to have its entire claim considered under BCIPA.
126. Accordingly, I see no reason to seek submissions from the claimant on this point, given that the respondent has failed to convince me of its merits.
127. I now turn to the respondent's conclusions in the response.

<u>Conclusions</u>

128. As a matter of prudence, I now consider the "catchall" conclusions provided by the respondent on page 14 of the response
129. The respondent argued that s17A(3) of BCIPA applied to this payment claim. Although the claimant made its claim under s17A(2) of BCIPA, the time limits in s17A(3) have not been exceeded, as in both sections the claimant can make a claim within six months of the last construction work having been carried out, and I have found this was complied with.
130. Given that it is evident that it is the final claim, there have been no submissions from the respondent that by the claimant incorrectly referring to s17A(2) of BCIPA, when the claim was in fact a final claim, that it contravened BCIPA.
131. I am satisfied that this claim falls within the limits of s17A(3) of BCIPA anyway.

132. The respondent's assertion that there was no entitlement to make a claim under the contract, and that none was alleged, does not take the matter anywhere, because this is a claim under BCIPA, and I have already found that the contract provisions do not in any way confine the BCIPA claim.
133. The respondent's argument the claim was made much later than 28 days after the end of the last defects liability period has already been dealt with, because I found there is nothing within the time limits identified in s17A(3) that links the defects liability timeframe to the last construction work timeframe, and provides a limit on the former timeframe that could not be exceeded.
134. The respondent's argument that no construction work or related goods and services had been carried out or supplied under the contract from at least 13 December 2016 onward has failed, because I found as a matter of fact that construction work was carried out on 16 December 2016.
135. The respondent's submission that claim was made outside the time under s17A of BCIPA and was not a valid claim has already been rejected for the reasons outlined above.
136. The respondent's submission that in the alternative, any claims were barred by the issue of the Final Certificate has already been rejected for the reasons outlined above.
137. Finally, the respondent's submission that in the alternative all claims other than variation claims 1, 11 and 14 were barred by the issue of the Final Certificate has also been rejected for the reasons outlined above.
138. Accordingly, I find that the jurisdictional objections raised by the respondent are rejected and I therefore proceeded to adjudicate the merits of the claim.
139. I start by considering the entitlement of the claimant to a progress payment under BCIPA.

IV. Right to a progress payment

140. The respondent has already made jurisdictional challenges about the claimant's entitlement to make the claim that have not succeeded, but I must nevertheless be satisfied of the claimant's entitlement under BCIPA to proceed further.
141. s12 of BCIPA is the point of departure; and provides that:
   (i) from each *reference date*;
   (ii) under a *construction contract*;
   (iii) a claimant is entitled to a *progress payment*;
   (iv) if they have undertaken to:
      (a) carry out *construction work*;
      (b) or *supply related goods and services* under the contract.
142. Considering each element in turn.

Reference date

143. A *reference date* is defined under schedule 2 of BCIPA as follows:
   "(a) a date stated in, or worked out under, the contract as the date on which a claim for progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied under the contract; or
   (b)if the contract does not provide for the matter –
      (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
      (ii) the last day of each later named month."
144. Clause 42.1 refers to payment clams and states that, "*At the times for payment claims stated in the Annexure…"*
145. The Annexure to Agreement starts on page 27, and it states, "*Times for payment claims: As per the planned Cash Flow Schedule*".
146. The Offer – Schedule 2, on page 7 of the Contract under the heading "*Planned Cash Flow Schedule*" had payment numbers 1 through to 3 with equal amounts of payments but no date or milestone identified for the making of a payment claim.

147. Accordingly, I find that the contract does not provide for the determination of a reference date, which means a reference date would normally be the last day of each month, as provided by BCIPA.
148. However, I note that the claimant in the payment claim stated that the reference date was 16 December 2016, which was within the period of six months after the construction work to which the claim related was last carried out.
149. I have found that the last construction work was carried out at the *off-maintenance* inspection on 16 December 2016, and it is therefore open to find, particularly given the respondent has made no controverting submissions, that this is the reference date.
150. I find therefore that the *reference date* was 16 December 2016.

Construction contract

151. I have already made a finding that the *off-maintenance* inspection regarding the water reticulation, fell within the definition of construction work or related goods and services associated with construction work under BCIPA.
152. Nevertheless, as a matter of prudence it is important to ensure that this contract is a *construction contract* under BCIPA for the carrying out of *construction work*.
153. 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."*

154. I find that the contract documents provided by the claimant behind a TAB headed "Contract", and not controverted by the respondent, included:
   (i) the claimant's tender offer of 22 August 2014;
   (ii) the respondent's letter of acceptance dated 25 September 2014, which referenced 8 other documents; including
   (iii) the General Conditions of Contract AS2124– 1992.
155. Without looking further (at this stage) at the Formal Instrument of Agreement which was executed on 1 October 2014, to which further documents were added, it is evident that the contract documents encapsulated the construction of earthworks, stormwater drainage, sewerage, water reticulation and services conduits.
156. I find these activities fall within the definition of *construction work* in s10(b)(c) and (e) of BCIPA.
157. Accordingly, I'm satisfied that it comprised a contract for the carrying out of construction work, which means that it falls within the definition of *construction contract* under BCIPA listed above.
158. This claim involved 14 variations associated with the construction activities listed above, so I am satisfied that the claimant has the entitlement to a progress payment as provided by s12 of BCIPA.

V. Payment Claim

159. I appreciate that the respondent argued that the claimant had no entitlement to make a payment claim. However, it did not argue that the payment claim dated 13 June 2017 provided by the claimant, did not satisfy s17 of BCIPA. Nevertheless, it is important that I am satisfied that the claim falls within BCIPA.
160. I note that it had the following characteristics:
   (i) it identified the construction work or related goods and services to which the progress payment related;
   (ii) it stated the amount of the progress payment of $866,666.91 (including GST's);
   (iii) and stated that it was made under BCIPA;
   (iv) and it was addressed to the respondent who, according to the contract, is liable to make payment.
161. Accordingly, I am satisfied that it complies with the requirements of s17 of BCIPA.
162. I note that the payment claim alleged that the *due date for payment* for it was 11 July 2017.

VI. Payment Schedule

163. On 26 June 2017, the respondent provided the claimant with a payment schedule comprising 95 pages.

164. It referred to the payment claim and valued the claim at $0.00, although in the reasons the calculation for the claim resulted in a figure of $-54,115.04. I find that it was served within 9 business days of receipt of the payment claim.

165. I am therefore satisfied therefore that the payment schedule complies with section 18(2) of BCIPA which can be adjudicated.

166. The payment schedule identified three jurisdictional issues as reasons for withholding payment, which I have already considered, as well as other reasons which are considered below.

VII. Adjudication application

167. The claimant lodged its application with the QBCC on 10 July 2017.

168. I find that this is on the 10th business day after receipt of the payment schedule and is therefore within the time prescribed under s21(3)(c)(i).

VIII. Adjudication response

169. The adjudication response was sent to my agent electronically on 2 August 2017, and she downloaded the documents at approximately 4:20 PM on to August 2017.

170. The claimant had submitted with supporting documentation that the adjudication application was served on the respondent on 12 July 2017, and I find this is the governing time limit within which a response was due.

171. By my calculation, the respondent was obliged to provide its adjudication response to me on or before 2 August 2017, and it complied with that timeframe because my agent downloaded the documents on that day.

172. My agent received a hard copy of the adjudication response on 3 August 2017.

173. I received unsolicited submissions by email from both the claimant and the respondent regarding service of the adjudication response. From the contents of the emails it was apparent that the claimant received the adjudication response no later than 3 August 2017, and probably on 2 August 2017 which therefore satisfies s 24A(8) of BCIPA.

174. Accordingly, all the time limits for this adjudication have been satisfied, and I am able to proceed with the adjudication.

IX. The contract

175. I have already made brief reference to the contract documentation, so as to be satisfied that the agreement between the parties falls within the definition of *construction contract* under BCIPA.

176. I have also considered the Annexure to the contract to determine the *reference date* for a payment claim, as this had a bearing on whether adjudication could proceed.

177. However, it is now important to consider the contract in more detail in order for me to consider the merits of the:

(i) claimant's claim in the payment claim and the application; and

(ii) the respondent's payment schedule and response.

178. I note that the claimant, at paragraphs 5 and 6 of the application, identified the extent of the contract and conceded that it was "further formalised in an Instrument of Agreement executed on 1 October 2014".

179. The respondent, somewhat curiously, in paragraph 3 of the response submissions, stated that "on or about 21 August 2014 the claimant and the respondent entered into a contract for the claimant to undertake development works." This may be a typographical error because at paragraph 8(b) of its submissions it stated that there was little dispute regarding the formation of the contract identified at paragraphs 5 and 5 of the application.

180. Therefore I am satisfied that the contract was formalised by the Formal Instrument of Agreement dated 1 October 2014, to which a whole host of documents had been attached. It also made reference to the Letter of Acceptance dated 25 September 2014, to which other documents were also attached.

181. I find that it all these documents referred to in the Formal Instrument of Agreement and the Letter of Acceptance constituted the contract. At present there is no need to list each document.
182. The respondent alleged (at paragraph 32 of the payment schedule) that the claimant was responsible to design the retaining wall to be submitted to the local authority. The General Conditions of Contract AS2124 – 1992 ("GCCC") do not contemplate that the claimant carry out design.
183. However, it is evident that in the Letter of Acceptance, at the fifth dot point, the letter provided that it was necessary for the claimant to be responsible for, "*Submission of a retaining wall design for submission to MBRC by a RPEQ in accordance with item # 21 and # 27 of the MBRC Operational Works Permit dated 23 September 2014.*"
184. At paragraph 202 of the application, the claimant conceded that the retaining wall was a design and construct component of the project.
185. Accordingly, I am satisfied that the claimant was responsible for the design of the retaining wall and I make this finding. I did not glean from the contract that there were any further design obligations of the claimant.
186. One particular document in the contract to which consistent reference is made in this decision is the GCCC, and both parties have relied upon particular clauses within it.

X. The merits of the claimant's claim

187. I am obliged by section 26(2) of BCIPA to only have regard to:
   (i) the provisions of BCIPA, and where relevant the provisions of part 4A of the *Queensland Building and Construction Commission Act;*
   (ii) the provisions of the construction contract;
   (iii) the payment claim, together with all submissions, including relevant documentation properly made by the claimant in support of the claim;
   (iv) the payment schedule, together with all submissions including relevant documentation properly made by the respondent in support of the schedule; and
   (v) the results of any inspection carried out by me.
188. I did not carry out any inspection.
189. I considered it best to review each *variation* separately, after generally considering latent conditions, because that is how the parties have engaged with another in this dispute. I have created a spreadsheet in Annexure LM-1 to carry out the adjudication calculations.
190. The respondent had also claimed *liquidated damages* for late completion, which I have considered under a separate heading.

Early commentary in the respondent's response

191. The respondent's response made some general commentary about the following issues:
   (i) lack of substantiation of written documents, together with lack of records;
   (ii) parochialism and inaccuracies ("parochialism complaint");
   (iii) allegations about the Superintendent's lack of performance, independence and understanding ("Superintendent's conduct").
192. Insofar as the parochialism complaint and the Superintendent's conduct generally is concerned, they are not matters that can be adjudicated, apart from the superintendent's power to issue of extensions of time, which forms part of the liquidated damages issues argued by the parties. Other than that, neither are they directly relevant to the valuation of this payment claim, so I have not considered them any further.
193. However, the alleged lack of substantiation of written documents or lack of records, are submissions that are directly relevant to the entitlement of a claimant to payment, and I considered those issues in valuing the variations.

The approach taken to consider the variation claims and liquidated damages reduction

194. It is important to reiterate that, in my view, and particularly when dealing with complex claims, that it is incumbent upon a proponent of a position to discharge both

their legal and evidentiary onus regarding that position, which if satisfied, then shifts the evidentiary onus to the other party for them to provide controverting evidence in denial.

195. In considering the elements of a claim, whether it is for variations (in the case of the claimant), or for liquidated damages (in the case of the respondent), a useful touchstone is for a proponent to provide, or for the adjudicator to be able to glean, the following four elements:

(i) a cogent *story* explaining the circumstances surrounding the claim;
(ii) an entitlement to make the claim;
(iii) evidence substantiating the claim;
(iv) the quantum of the claim is clearly articulated.

196. Insofar as element (iv) is concerned, the proponent should provide some guidance or reference to quantities and rates (that had been agreed by the parties, or if the contract allowed, for reasonable rates which are clearly demonstrated on the evidence), to enable an adjudicator, if necessary, to value a claim under s14 of BCIPA.

197. Whilst adjudication is not an arbitration or court proceedings, it is most unfortunate that anecdotal evidence suggests that parties (and particularly claimants) expect that an adjudicator will do the job for them in finding for a proponent based on some anecdotal principle of "pay now, argue later," and that overpayments (if any) can be cured later in other proceedings.

198. I accept that it is a less rigorous dispute resolution regime than arbitration or court proceedings, but this does not mean that the four elements identified above can simply be ignored.

199. If a claimant chooses, or is unable to, provide cogent submissions and supporting evidence of the four elements, and relies upon the adjudicator to glean from all the material, that all four elements have been demonstrated, there is a risk that an adjudicator will have difficulty in doing so. Alternatively, an adjudicator may take a strict view that, "*They who assert must prove*."

200. Adjudicators are constrained to decide within the confines of s26(2) of BCIPA, and whilst the entire decision-making process is rapid; and because of time constraints; can yield a less than perfect result, this is not to say that it is a shortcut to a claim for money, for which there is no demonstrable entitlement.

201. If an adjudicator allows a claim in such circumstances, they not only fail themselves, the parties and the process by doing so, but are subject to correction under the administrative review proceedings in Court. Therefore, there is no advantage to anyone to expect that an adjudicator would conduct themselves in this way.

202. This is not to say that an adjudicator cannot draw inferences from facts, which are often scanty, and to conduct research into the law where the parties have not provided assistance, to reach a reasonable decision in difficult fast-moving circumstances, about which reasonable minds may differ. However, there is a line (which can be *wavy* depending on the circumstances of the case), which cannot be crossed.

203. The reason for this discourse is for the parties to appreciate, why in this decision, I have been very careful to ensure that line has not been crossed.

Claimant's variations

204. The claimant identified that 4 of the variations were due to or resulting from *latent conditions*. Neither party provided me with any case authorities regarding latent conditions under clause 12 of AS2124-1992, or one of its predecessors.

205. The claimant overall relied upon clause 12 to suggest as follows that:

(i) it demonstrated that the physical conditions on site differed materially from the physical conditions that were anticipated at the time of tender;
(ii) it provided notice of the latent condition to the superintendent;
(iii) this notice was provided before any work was carried out on the latent conditions;
(iv) the superintendent made no request for a statement in writing specifying he needed the details identified in clause 12.2;
(v) it did not require approval from the superintendent before proceeding with the work:

(vi) having established the existence of and notice of the latent condition, the claimant then said it was entitled to extra costs pursuant to clause 12.3, which were to be valued under clause 40.5.

206. The two latent conditions asserted by the claimant were:

(i) **variation 1,** which involved the *removal of additional topsoil from Lot 4* to ensure that additional unsuitable topsoil encountered on site (amounting to 2850 m^3) was removed before placement of fill, so that the earthworks would comply with the level 1 structural fill requirements prescribed in AS3798. **Variation 3** then dealt with the claimant having to *import* an additional 2850 m^3 of fill to replace the unsuitable topsoil material;

(ii) **variation 2,** which involved the *removal of unsuitable material under the retaining wall foundations* and replacing with suitable imported material. Whilst **variation 11** referred to the latent conditions, the actual claim itself focused on the additional amount of retaining wall of 2200 m^2 and the additional costs incurred in constructing this wall, which the claimant said could not have been anticipated due to the sub-soil latent condition. Essentially, as identified in paragraph 211 of the application, this claim represented a *variation* to the works.

207. Given that variation claims involving or associated with latent conditions (numbers 1, 2, 3 and 11) amounted to $543,691.50 (excluding GST), it was important that latent conditions needed close consideration.

208. Therefore, before descending into the detail associated with each variation claim, I broadly considered the elements of clause 12 to provide the framework for the analysis under each variation claim.

209. Whilst I will consider the response submissions in more detail under each variation, it is evident that the respondent took issue (particularly in the response submissions) about the existence of the latent conditions.

XI. Latent conditions

210. Clause 12 of AS2124–1992 deals with latent conditions, and is divided broadly into the following paragraphs:

(i) clause 12.1 providing a definition of a latent condition;

(ii) clause 12.2 dealing with the notification requirements of a latent condition;

(iii) clause 12.3 providing the claimant's entitlement to an extension of time and cost for a latent condition;

(iv) clause 12.4 excluding the value of additional work carried out to overcome a latent condition, which was incurred more than 28 days before notification.

211. For the claimant to succeed under a latent condition claim, I need to be satisfied that:

(i) a latent condition has been established;

(ii) notice of the claim was given to the superintendent;

(iii) the claimant is entitled to an extension of time and costs to deal with the latent conditions claim.

212. I turn firstly to the meaning of a latent condition.

213. Neither the claimant nor respondent provided me with any case authority regarding the interpretation of, and the criteria required, to establish clause 12 latent conditions.

214. I considered it important to conduct my own research regarding this issue, because it was not clear to me whether the claimant had to provide evidence of what it had precisely done (subjective evidence), or whether an objective evaluation of the circumstances was required (objective evidence).

Meaning of latent condition

215. It is appropriate to set out clause 12.1 in full which provides:

"12.1 Definition

Latent Conditions are –

(a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which

should reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had –

(i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and

(ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and

(iii) inspected the Site and its surroundings; and

(b) any other conditions which the Contract specifies to be Latent Conditions."

216. In both instances of the latent conditions claims, the claimant asserts that the genesis of those claims was the existence of unsuitable material.

217. That of course, is not the test of whether something is a latent condition. It is necessary from the wording in clause 12.1 for it to be established that:

(i) the physical conditions differed materially from the physical conditions which could reasonably have been anticipated at the time of tender;

(ii) the claimant had examined all information made available in writing by the respondent for the purpose of tendering;

(iii) the claimant examined all information relevant to the risks and made reasonable enquiries; and

(iv) the claimant inspected the site and its surroundings.

218. The claimant has not proffered any direct evidence of:

(i) what it had examined;

(ii) what reasonable enquiries it made;

(iii) whether it inspected the site and its surroundings.

219. The claimant, however, provided some evidence of the physical conditions encountered on the project which could not have been foreseen from the documents provided at tender time.

220. The claimant proffered evidence from **Mr Richards** that:

(i) the prevailing site conditions could not have been established from the geotechnical information provided to the claimant at tender stage (the "Geotech");

(ii) the resulting foundation was well below the surface levels identified in the respondent's preliminary design and drawings based on the Geotech;

(iii) the removal of additional topsoil and replacement on all lots and the need for replacement foundations on Lot 4 were latent conditions that could not have been identified from the Geotech;

(iv) the retaining wall designed by Reinmac Pty Ltd (the claimant's designer) was significantly different from anything that could have been anticipated from the design information provided at tender time, and was because of the subsoil conditions found on site.

221. **Mr Van Der Meer** in his statutory declaration provided no evidence supporting the existence of the latent condition and any notice thereof, apart from:

(i) a reference in paragraph 13, where he said "Anthony had also, by this stage, rejected every variation we submitted for the latent conditions we found on the site.... I therefore advise my staff that we would not do any works in relation to latent conditions until we had fully agreed variation costs, in particular strip and fill works on Lot 6, 3, 2 and 1"; and

(ii) a reference in paragraph 18 where he said, "In the time it took for the superintendent to assess and approve the latent condition costs on lots 6, 3, 2 and 1, works on those areas could not proceed, including the retaining wall".

222. **Mr Mansell** in his statutory declaration at:

(i) paragraph 8, in which he referred to Mr Richards ordering a further 300 mm of topsoil to be removed, and engaging a second geotechnical consultant Ryan and Associates to confirm that the material had to be removed in order to comply with the level 1 testing requirements. He said that the results were immediately passed onto BG Civil, who concurred with the results;

(ii) paragraph 13, in which he said that to avoid potential delays he proceeded to continue with the stripping operations and backfilling with good quality fill, on the basis that the superintendent was aware of the situation and, as a latent condition, there were under no contractual obligation to stop work and wait for instructions;

(iii) paragraph 20, in which he said that the unsuitable ground conditions underneath the retaining wall could not have been foreseen from the tender documents.

223. The claimant must demonstrate its entitlement to a claim for latent conditions, and I have already found that it provided no evidence of what it had examined, what reasonable enquiries it had made regarding the physical conditions on site and whether in fact it had inspected the site.

224. The respondent provided cogent submissions demonstrating that:

(i) there was no latent condition [subparagraphs 109 through to 122] of the response;

(ii) there was no notice given of the latent condition [subparagraphs 91 through to 100 of the response];

(iii) even if notice was given on 27 November 2014, this was more than 28 days after the work had been completed, and was therefore time-barred under clause 12.4 [subparagraphs 102 through to 108 of the response].

225. To understand the extent of analysis and findings required in cases of latent conditions, I considered 2 Queensland Supreme Court cases, and one Victorian Supreme Court decision regarding the operation of and applicability of clause 12 in AS 2124 contracts.

226. Each case was closely analysed to glean the principles to apply in this case, and I saw no need to seek submissions from the parties about these principles, because they arise directly out of the dispute identified by the parties, and are contained in cases about which the parties ought to have been aware.

227. The earliest case was *Z & T Constructions Pty Ltd v the Council of the City of Logan*, an unreported case before Thomas J in the Queensland Supreme Court on 10 November 1986 (number 201 of 1986).

228. This decision involved a case stated from an arbitrator under the *Arbitration Act 1973*, which, inter-alia, considered whether a contractor' s letter satisfied the requirements of written notice under clause 12.2 of AS2124 – 1978. Whilst the clause differed slightly from the version of AS2124 in this adjudication, the difference in wording is not material to the overall applicability of the findings of that case.

229. His Honour found, starting at the bottom of page 8 that:

"There has to be a written notice "thereof", that is to say of the encountering of certain conditions and of the contract as "consideration" or opinion or view that they differ materially from those ascertainable by him. The notice is obviously designed to put the supervisor on specific notice so that he can promptly investigate the merits of extras or variations that might eventuate from the previously unknown conditions on site... One difficulty with the letter of 8 October, 1981 is that the actual conditions are not specified beyond "problems we have experienced in controlling groundwater between M.H 1 – 2.... Whichever way the letter is read, it is in my view incapable of and amounting to a notice which satisfied the requirements of clause 12.2. It may have given the supervisor a general awareness of the type of problem that was being encountered, but the clause requires something more than this."

230. The next case was *JW Armstrong Constructions Pty Ltd v the Council of the Shire of Cook*, an unreported case of White J in the Queensland Supreme Court of 25 February 1994 (number 222 of 1993).

231. This was an appeal and cross-appeal regarding an award under the *Commercial Arbitration Act 1990*. Her Honour had many questions which, inter-alia, included:

(i) were any of the notices given in compliance with clause 12 of AS2124 – 1986?

(ii) If the answer is "yes", was such notice given forthwith in compliance with clause 12.2;

(iii) if the answer to the either of the above questions was "no", if all the other requirements of clause 12 had been satisfied, was the contractor entitled to a

valuation under clause 40.2 of the extra costs incurred by it and, if so, was any limitation to the entitlement which flowed from the application of clause 12.4;

(iv) assuming the requirements of clause 12 are otherwise satisfied, on the proper construction of clause 12 and clause 40.2, are the costs capable of being regarded as having been caused by the latent condition?

232. The wording of AS2124 – 1986 in that case is identical to AS2124 – 1992 in this adjudication.

233. As to the first question, Her Honour, at page 10, held:

"In any event, it is essential that there be notice "thereof" given to the superintendent, that is, notice of "latent conditions" or of "physical conditions on the site or its surroundings which differ materially from the physical conditions which could have been reasonably anticipated…" It is the contractor's notice and the superintendent should not be required to hazard if it may be a notice under clause 12, see Z & T Constructions Pty Ltd…"

234. And at the bottom of page 12:

"The extent of the latent condition would be a matter of considerable concern to the superintendent."

235. Her Honour found as a matter of fact that one letter constituted a notice.

236. Insofar as the question of whether the notice had been given "forthwith", Her Honour at page 16 recognised that the arbitrator was confronted with a dilemma, because there was no evidence before the arbitrator supporting the conclusion that a notice was given forthwith. Her Honour said that:

"He was, however, obliged to answer the question and, to the extent that the onus of showing that the notices (or any of them) were given forthwith lay with Armstrong, that onus was not able to be discharged on the agreed facts. The conclusion must be that the arbitrator ought to have found that the notices were not given forthwith."

237. As to the third question, Her Honour agreed that clause 12.4 limited recovery pursuant to clause 12.3 to a period of 28 days prior to the giving of the notice required in clause 12.2 and that notice was one to be given forthwith.

238. As to the fourth question, Her Honour heard argument about the scheme of the contract and the risk of performance lay with the contractor, save in particular circumstances, clearly set out in the contract. Her Honour held at the bottom of page 22 that:

"There is, in my view, no general principle of interpretation which would locate the risk away from where it fell and on their proper construction of clause 12.3 and 40.2 specifically do not do so.

Accordingly, in my view, the arbitrator ought to have answered that the latent condition did not cause the costs or part thereof referred to in para 15 of the agreed statement of facts such that they should be valued under clause 40.2."

239. The third case, from the Supreme Court in Victoria was *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409, a decision of Justice Pagone.

240. This case dealt with AS2124 – 1992 and involved court proceedings of 37 days with 23 witnesses and extensive evidence in which the contractor claimed for $6,971,587.04 latent conditions. There was also a contest about liquidated damages of $672,000.

241. His Honour found that the defendant was required to pay $2,549,850.89 for latent conditions and was not entitled to deduct the $670,000 liquidated damages.

242. At paragraph [12] His Honour considered a letter dated 2 August 2002 which stated that the extent of earthworks required in a particular area differed materially from that anticipated at tender, and the latent condition was described as that the extent of excavation required to expose natural surface in "this area" had been shown to be significantly lower than the levels anticipated at the time of tender "based on all information available to the contractor".

243. At paragraph [15] after referring to the notification provisions in clause 12.2, His Honour stated:

"It is clear from this provision that the obligation to notify is not, and ought not be seen as, a mere formality. The requirement for notification serves important functions, one of which is to enable the superintendent to evaluate the latent conditions being claimed."

244. At paragraph [18], His Honour held that:
"*The latent condition claimed was that the material surface level was below the level which had been anticipated and it was only capable of exact determination by excavation and survey; that is, that it was in the very nature what was being notified that its extent was unknown and hidden until excavated and revealed.*"

245. At paragraph [20], His Honour held that, "*Written notification of the latent condition is a material precondition to entitlement under latent conditions provisions of the contract*."

246. At paragraph [24], His Honour held:
"The conditions upon which clause 12.1 operates are to be determined objectively; that is, that what should reasonably have been anticipated by the contractor at the time of tender is to be determined by an objective assessment of the facts rather than by what the particular contractor may have done or not have done: see Glenorchy City Council v Tacon Civil Construction. The enquiry occasioned by clause 12.1 requires a determination of questions of fact: namely, what conditions had been encountered, whether they were physical conditions, whether they differed materially from those ascertainable, and what could have reasonably been anticipated: see Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation; Hawker Noyes Pty Ltd v New South Wales Egg Corporation. It is not surprising that the parties would make the operation of the latent condition dependent upon objective circumstances rather than the actual particular knowledge or lack of knowledge of the contractor. The effect of the latent condition clause is to shift to the principal the economic burden of a risk which had been contractually assumed by the contractor. It is fundamental to the shifting of that risk that the occasion for the shift be, as much as possible, beyond the control of fault of the parties but be determined by, and be dependent on, objective criteria and measures. In that way, the parties agreed to change which of them will bear the economic burden of a risk, and agree to make that change by reference to a neutral standard or measure which depends upon independently verifiable facts beyond the reasonable diligence or control of the party that would otherwise be relieved of the burden."

247. At paragraph [32], His Honour held:
"The test to determine what BMD should reasonably have anticipated is to be judged by what a competent and suitably qualified contractor would expect to encounter by way of physical conditions in the execution of the works: Ryde City Council v Transfield Pty Ltd."

248. As mentioned above, the dilemma I faced was whether the Courts required subjective evidence of the elements in clause 12.1, or whether an objective analysis was sufficient.

249. If subjective evidence was required, then the claimant must fail because:
(i) only **Mr Mansell** referred to the tender documents provided to them (and I presume he is referring to the Geotech), and that the conditions under the retaining wall could not have been foreseen (which relates to variation 11);
(ii) he made no reference to the Geotech regarding variation 1 and 3;
(iii) **Mr Van Der Meer** only commenced to refer to latent conditions in paragraph 13 of his statutory declaration, which according to its context, was after 12 November 2014, and this was more in relation to the retaining wall works (variation 11).

250. Whilst it is for the claimant to make out its case, in circumstances of claims exceeding $0.5million, albeit in a fast-moving adjudication, and recognising that an adjudicator is not required to cure the deficiencies in any party's case, if objective evidence was sufficient, as Pagone J held at paragraph 24 of *BMD*, then further investigation may be warranted.

251. Having regard to the above cases, and the facts provided by the claimant, clause 12.2 provides that:

(i) if the claimant becomes aware of the latent condition;
(ii) it must give written notice thereof; to the superintendent.

252. If one considers the circumstances of this case objectively, it appears that the ground conditions encountered differed from those provided at tender time. The best evidence of this is provided by Mr Richards, who was the geotechnical consultant engaged by the claimant to independently certify the earthworks be conducted in accordance with AS3798.

253. This is faintly corroborated by Mr Mansell at paragraph 20 in which he said, "*None of the above could be foreseen from the tender documents we were provided. Despite this obvious latent condition, superintendent refused to pay any additional costs or allow any time for these works to be completed*."

254. I am not satisfied that this is sufficient evidence to fall within the meaning of latent condition as required by the elements of clause 12.1. However, even if I were to find that the unsuitable topsoil needed to be removed, such that it could fall within a latent condition, the question of notice needs to be considered.

255. I am unable to find any evidence of the claimant providing a notice to the superintendent identifying the latent conditions to satisfy the "thereof" nexus between the latent condition and the notice.

256. At best, Mr Mansell at paragraph 8 of his statutory declaration, refers to notification provided to BG Civil (who I find were engineers engaged on behalf of the respondent), which was corroborated by Ryan and Associates, about the need for removal of unsuitable material to satisfy level I certification.

257. It is only Mr Richards, who at paragraph 10 of his statutory declaration, stated that he had forwarded correspondence to BG Civil on 2 October 2014. He was engaged by the claimant to provide level 1 certification service, and there is no evidence he was the claimant's agent.

258. The notice needs to demonstrate the existence of the latent condition, by satisfying the elements in clause 12.1. Accordingly, it is not possible to consider a latent condition in the abstract because Pagone J, at paragraph 20 of *BMD*, said that, "*Written notification of a latent condition is a material precondition to entitlement under the latent condition provisions of the contract*."

259. This means that the notice itself must demonstrate the existence of the latent condition about which the claimant is making a claim. In *Z&T Constructions Pty Ltd*, His Honour, at page 9, held that a letter, stating that the actual conditions encountered were not specified beyond "problems we have experienced in controlling groundwater between M.H. 1-2 could not satisfy the requirements of a notice under clause 12.2.

260. His Honour added that, "*It may have given the supervisor a general awareness of the type of problem that was being encountered, but the clause requires something more than this*."

261. Furthermore, the notice needed to be provided forthwith to the superintendent. There is no evidence of any such notice being given by the claimant in October 2014, and whatever notices may have been given by Mr Richards, they were given to BG Civil, and not the superintendent.

262. The reason why the superintendent needs this notice is to allow him to promptly investigate the merits of extras or variations of might eventuate from the previously unknown conditions on the site [*Z&T Constructions* Thomas J, at page 9].

263. The claimant provided evidence of the superintendent providing approval for variations regarding additional topsoil on lots 1, 2, 3 and 6, and that until the superintendent approved the variations, the claimant did not carry out works in these areas.

264. This may have some bearing on the issue of extensions of time, and although the claimant has made a general observation about the respondent being in breach of contract because of the *superintendent's conduct*, about which I make no finding, the claimant did not link this conduct to the claimant's ostensible inability to provide notice.

265. Given that the claimant has not taken the issue of superintendent' s subsequent approvals of variations as evidence of an estoppel, this evidence provided by Mr Van Der Meer does not assist the claimant regarding the notice provisions.

266. Given that the claimant has not made submissions about any ostensible waiver or estoppel to overcome the formal requirements of clause 12.2, unfortunately for the claimant I find that it has:

(i) failed to demonstrate that the unsuitable material in Lot 4 constituted a latent condition by falling within the elements of clause 12.1;
(ii) failed to provide notice outlining the latent condition;
(iii) and failed to demonstrate that the notice was provided to the superintendent.

267. This finding applies to the unsuitable topsoil material in Lot 4 (variation 1) as also impacts on the foundation of the retaining wall (variation 2), which is discussed further.

268. Nevertheless, I considered each variation claim separately in more detail to ensure that "no stone was left unturned".

XII. Variations

269. In paragraph 18 of the application submissions, the claimant usefully provided a table regarding each claimed variation, together with the payment schedule reasons for non-payment.

270. It is apparent from that table that variation numbers 4, 5, 6, 7, 9, 10, 12 and 13 were not disputed by the respondent, so their agreed value has been inserted in to my calculation spreadsheet (attachment "LM1") without further analysis.

271. Several of the pervading themes in the payment schedule reasons for non-payment were:

(i) no directions to carry out work;
(ii) claims made well after claim works had been covered up;
(iii) no notice provided at the time the works were allegedly carried out;
(iv) no records provided to substantiate claim quantity or reason for works.

Adjudication application outline of argument submissions

272. In paragraph 19 of the application, the claimant provided its outline of argument before it descended into more detailed submissions regarding each variation.

273. These submissions involved the claimant asserting that the respondent had:

(i) not applied the terms of the contract that were applicable when the subsoil conditions substantially differ to those that were represented in the contract documents (the "differing subsoil conditions");
(ii) disingenuously denied receiving notices of latent conditions that were given at the time when events first became apparent (the "latent conditions notice denial");
(iii) failed to grant extensions of time for variations directed by the respondent, when the contract requires the superintendent to act fairly and reasonably (the "EOT denial");
(iv) failed to issue variations when new drawings, showing substantial changes to the scope, are issued (the "variation denial");
(v) improperly refused legitimate variation, in circumstances where the contract required the superintendent to act fairly and reasonably (the "improper refusal"); and
(vi) breached the contract by failing to ensure that:
    (a) a suitably qualified superintendent is appointed; and
    (b) the superintendent act honestly and fairly and arrives at a reasonable measure or value of work, quantities or time (the "breaches of contract").

274. The claimant provided no case authorities in support of the submissions.

275. The adjudication response did not deal directly with paragraph 19 of the application, but it is evident from the contents of the response that it took issue with the submissions.

276. I have already said that the superintendent's conduct is not something about which I can make any finding, except regarding extensions of time. It does not fall within the requirements of s26(2) of BCIPA. This means that the alleged *improper refusal* is not something about which I can make any finding.

277. Furthermore, it is important to engage with the issue regarding alleged breaches of contract by the respondent. It is important for the claimant to appreciate that the function

of an adjudicator is to value a payment claim for *construction work* that the claimant has carried out.

278. Whilst I appreciate that s26(2)(b) of BCIPA requires me to consider, "*the provisions of the construction contract from which the application arose*", in my view this does not extend to considerations of breach of contract. As I said, the claimant provided no case authority to support the submissions, but I have had to deal with them.

279. As a matter of principle, the esteemed construction Law author, Julian Bailey stated, "*The primary consequence of a party committing a breach of contract is that it becomes liable to pay damages to the innocent party*."[5]

280. This then raises the issue as to whether *damages for breach of contract* can be characterised under the umbrella of "*an amount for construction work carried out or for related goods and services supplied*." I searched for case authority dealing with this issue.

281. In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors* [2005] NSWCA 228, at paragraphs [41] – [42], Hodgson JA said:

"In my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work."

282. Furthermore, in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116, Barrett J held, at paragraph [34] under the equivalent definition of 'progress payment' under section 4 of the NSW Act, that:

"…can only have that character if it is "for" work done or, where some element of advance payment has been agreed, "for" work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the "progress payment" concept is founded."

283. Accordingly, it clearly emerges from these two cases, that unless the contract makes provision for the valuation of damages for breach of contract, they otherwise do not fall within an amount for work done.

284. I find therefore that I am unable to consider issues regarding breach of contract in this adjudication, because the consequential remedy of a breach of damages is *not an amount due for construction work.*

285. I will consider the issues arising out of the submissions of differing subsoil conditions, the latent conditions denial, the EOT denial and the variation denial further in the analysis below.

286. The reason why these issues may remain alive, is that as an adjudicator, I am obliged to value the progress claim and therefore need to make factual findings about:

(i) the differing subsoil conditions;
(ii) the latent condition;
(iii) the EOT's;
(iv) the variations.

287. Consideration of these issues and their findings will take place under the variations claim below.

288. I will now turn to each variation claim to determine:

(i) whether the claimant has:
    (a) demonstrated entitlement to the claim;
    (b) provided sufficient substantiation;

[5] Bailey, Julian: *Construction Law*, informa law, Volume 2 (2011), paragraph 9.03, page 653

(ii) for me to value the claim.

289. I felt it necessary to go into some detail about the contending submissions made by each party in the 4 key documents, (the payment claim, payment schedule, adjudication application and adjudication response), because sometimes the parties did not engage directly with one another, and the submissions were somewhat complex, such that it was necessary to ensure that there were no issues missed.

Variation 1 - additional topsoil removal lot 4 - $24,225

290. This claim did not start out as a latent condition claim, which means my above analysis about latent conditions cannot be the point of departure for consideration of this variation.

291. It was therefore important to start with payment claim, and then the payment schedule, and then go through the adjudication application and the adjudication response to ensure that "no stone is left unturned".

292. If there was a residual basis for this claim, apart from the later latent conditions claim identified in the adjudication application, then this needed consideration.

Payment claim

293. On page 7 of the payment claim under variation number 1, the description of the variation was as follows:

> *"Under direction from Soil Tech removed 400 mm topsoil from Lot 4 (9500 m^2 x .3) = 2850 m^3 over and above nominal 100 mm strip. Material removed from site. Strip to stockpile – 2850 m^3 x $4.50 = $12,825 and load for disposal – 2850 m^3 x $4.00 = s 11,400. Value claimed $24,225.*

Payment schedule

294. The reasons for non-payment identified in the payment schedule were as follows:

(i) Soil Tech has no authorisation to issue directions on behalf of Grove;

(ii) no directions to carry out works issued on behalf of Grove;

(iii) claim made well after claim works had been covered up;

(iv) no notice provided at time works were allegedly carried out;

(v) no records provided to substantiate claim quantities or reason for works.

295. Accordingly, it appeared as if the payment schedule answered the claim as a variation, which, although the claimant did not identify it, must be made pursuant to clause 40 of the contract.

Adjudication application

296. The submissions regarding this variation commenced at paragraph 58 through to 118.

297. In meeting the payment schedule objections commencing at paragraph 58, it was only at paragraph 67(b) of the application that the issue of latent conditions first emerged.

298. It then emerged consistently from paragraphs 84 onwards, to overcome the respondent's objection to there being no direction for the variation.

299. At paragraph 92 of the application, the claimant conceded that no direction was issued by the respondent or the superintendent about the latent condition, *"…and the claimant's right to payment is not effected."*

300. This submission is a two-edged sword, because:

(i) The claimant conceded that no direction was issued, which in my view therefore defeats any claim for entitlement under the variation clause, given the requirement of a direction from the superintendent under clause 40.1;

(ii) However, if the notice of a latent condition had been given, as submitted in paragraph 85, then the claimant is correct that its rights to payment were unaffected by the lack of a direction.

301. The claimant refers in paragraph 86 of the application, to an admission by the respondent that the respondent had received notice that the ground conditions were unsuitable, and further correspondence between Ron Richards and the respondent's engineer.

302. Therefore, in my view, the claimant had "nailed its colours to the mast" in the application, that this claim was founded on it being a latent condition because there was no evidence of a direction from the superintendent.

303. Unfortunately for the claimant, I have already found from general analysis of the law regarding latent conditions, that:
   (i) the claimant failed to demonstrate that the unsuitable topsoil was a latent condition;
   (ii) failed to demonstrate that it provided a notice to the superintendent in relation to this latent condition.
304. As to the issue of lack of notice, Mr Gigli in his affidavit at paragraph 16 who said that, "At this time I had received no correspondence from Conbro and no indication that any additional costs would be claimed." This confirms that no notice under clause 12.2 was given.
305. I appreciate that Mr Richards ordered the removal of this topsoil, because it was unsuitable for the level I certification of earthworks, and it was necessary for the topsoil to be removed, and replaced with suitable material.
306. Furthermore, the facts surrounding this removal and replacement is corroborated in Mr Rose's statutory declaration from paragraphs 12 through to 24. I therefore find that this material was removed and replaced.
307. However, the claimant has sought to use the *latent conditions* clause as a vehicle to get paid. It appears to have taken this approach to overcome the contractual requirements for a direction under the variation clause 40, because there was no evidence of a direction from the superintendent about this material.
308. Whatever its motivation for invoking clause 12, it has failed to satisfy the elements of the clause to fall within it, which means it cannot rely upon clause 12.3 for an extension of time and payment associated with this work.
309. No doubt this is most unfortunate for the claimant, because it is evident that it was contractually obliged to remove this material under direction of Mr Richards, and import other material to satisfy its contractual obligations regard the level I certification. I have no doubt that it incurred costs in doing so for which it is claimed under variation number 1 and number 3.
310. However, it was incumbent upon the claimant to follow the contractual mechanism to ensure that it had an entitlement to payment, and its use of the latent conditions clause as the vehicle to achieve this objective was inappropriate, because its submissions and supporting facts that I have found, did not support an entitlement under clause 12.
311. Nevertheless, Mr Gigli in his affidavit, explained at great length his reasons for not accepting the variation 1 claim. A lot of his concerns related to the fact that he had not been provided information about the claim or any supporting documentation regarding it, and that none of the information was provided to him at the time the topsoil was removed.
312. His principal objection related to not being satisfied that the work was actually carried out, not that this work was not required.
313. I will make further reference to Mr Gigli's affidavit below.
314. I still need to address the other application submissions, in case there is something that has been overlooked, and I turn firstly to the submissions under the heading "*Claim After Works Covered Up*".
315. These submissions from paragraphs 93 through to 101 are premised on the basis, as submitted at paragraphs 95 and 96 that *there is no contractual requirement for works to be held up following the identification of a latent condition and that the respondent's engineer was invited to inspect the works before works were covered up.*
316. Given that I have found that there were no latent conditions under the contract, these submissions cannot assist the claimant.
317. Paragraphs 102 and 103 under the heading of, "*No Notice*", cannot succeed because I have found that no notice was given.
318. As to the paragraphs 104 through to 118 under the heading, "*No Records Provided*", the submissions do not assist claimant because they are premised upon the existence of a latent condition.
319. For example, at paragraph 107, the claimant said that, "*There is no contractual requirement for any specific level of records to be provided. The superintendent had rights under the contract to request for further details under clause 12.2, but never exercised that right".*

320. It explained that it did not claim the full amount that was excavated, and that it applied contractual rates and had mitigated the additional costs that could have been incurred in paragraphs 109 through to 113. This deals with the issue of quantum which cannot assist the claimant if it has not demonstrated entitlement.
321. From paragraphs 114 through to 118, the claimant submitted that identical conditions were identified on lots 1, 2, 3 and 6, the same rates were used and accepted and paid for by the respondent.
322. It submitted, at paragraph 118, that the same latent condition was paid for in the rest of the site, such that the respondent's submission that this condition did not occur on Lot 4 was most disingenuous.
323. In the response submissions from paragraph 143 to 150, the respondent engaged with the approval for the removal of topsoil and other lots and said they had occurred several months after these works in question.
324. The difficulty I have with the claimant's submissions is that, as I mentioned elsewhere, the claimant did not argue any waiver or estoppel to overcome the contractual requirements in clause 12.
325. It appears as if there may be evidence that identical conditions on the other lots were paid for as a latent condition, but the claimant did not provide me with any evidence about this important fact.
326. I appreciate that at paragraph 143 of the response, the respondent conceded that the superintendent approved topsoil removal and those lots by email on 15 January 2015, so that it is open to find that such approval was given. This is supported by paragraph 55 of Mr Gigli affidavit in which he said that information provided in support of the claim removal of additional topsoil on other lots allowed him to approve that claim.
327. However, it is for the claimant to provide submissions regarding waiver or estoppel, which is what is being hinted at in submissions 114 through to 118. At paragraph 146 of the response the respondent said, "No suggestion of any or estoppel or waiver can arise, even though these allegations are not made, given the timing of these approvals."
328. As I've mentioned earlier, the claimant bears the legal and evidentiary onus of proving its case, and in the important circumstances of potential waiver or estoppel, it has the obligation to make those submissions.
329. It cannot expect the adjudicator to somehow make findings about such issues, because it is not something that the claimant has contended. For an adjudicator to consider waiver or estoppel, without any submissions from the claimant, would be a breach of natural justice, unless the respondent be afforded the opportunity to provide submissions in response.
330. Furthermore, in these circumstances, for an adjudicator to embark on such an enquiry is inappropriate, because in my view this would be "crossing the line" that I referred to above, and would be taking steps to cure the deficiencies in the claimant's case.
331. Nevertheless, Mr Gigli at paragraphs 59 through to 61 of his affidavit provided that the maximum value of the claim that he could justify would be $6,560. However, he said he could only do this if he could justify the claims of the additional topsoil was stripped were true, which he did not accept.
332. It appeared to me that the respondent was making a *qualified* admission about the existence of a variation and its valuation, subject to a finding that the work was carried out.
333. I have found that this additional topsoil had been stripped because it is inconceivable that, based on Mr Richards direction to ensure that level 1 testing was satisfied, the claimant did not remove the additional topsoil.
334. At paragraph 9 of Mr Richards' statutory declaration he said that the claimant had stripped the topsoil from Lot 4, and earlier at paragraph 5, he said that the depth of unsuitable topsoil was far greater than the contractual allowance of 100 mm.
335. Given that I have made a finding that the additional topsoil was removed, that removed Mr Gigli's concerns about whether this work took place. This allowed me to then find that the superintendent, if satisfied about the removal of topsoil, could value the claim at $6,560.

336. Clause 40.1 deals with variations to the work, and provides that the superintendent may direct the contractor to (a) increase…. any part of the work, or (c) change the levels… of any part of the work, or (d) execute additional work.

337. I find that additional work was carried out by the removal of extra unsuitable topsoil to satisfy level 1 certification. I'm satisfied that Mr Gigli made an admission that this was a variation, subject to being satisfied that the work had been carried out. I am satisfied that the work was carried out.

338. This falls within a variation claim under clause 40, not as a latent condition, and a reasonable valuation has been made by the superintendent in accordance with clause 40.5(c)

339. Accordingly**, I value this variation at $6,560** and this is transferred to annexure LM1.

Variation 2 - unsuitable material under retaining wall lot 4 - $32,704

340. This variation relates to a claim for the removal of the unsuitable material under the foundation of the retaining wall on Lot 4.

341. I followed the same approach looking at the payment claim and payment schedule firstly, and then follow-up with the adjudication application and response.

Payment claim

342. Variation number two on page 7 of the payment claim stated:
"Unsuitable material encountered under foundation of retaining wall location on Lot 4. Instructed to excavate a firm stiff clay approximately 1.4 metres, length 160 m, wide 8 m equals 179 2 m^3. Excavation of unsuitable material – 179 2 m^3 x $8.25 = $14,784 and imported material for replacement – 179 2 m^3 x $10 = $17,920.
Value claimed $32,704."

Payment schedule

343. In the table under paragraph 30, the respondent provided several reasons for non-payment as follows:

(i) no directions to carry out works issued on behalf of Grove. No notice provided at time works were allegedly carried out;
(ii) first iteration of claim 11. Repeat of same claim;
(iii) claim for latent condition allegedly found above founding depth of wall. Excavation required in any event;
(iv) no records provided to substantiate claim quantities or reason for works.

344. The respondent provided further reasons in paragraphs 31 through to 46 of the payment schedule relating to the variation claims 2 and 11.

345. Insofar as variation 2 was concerned, paragraphs 34 - 37 dealt with variation number 2 directly, but in paragraphs 41 through to 45, the respondent said that the claimant had previously made a claim regarding this issue in which the claimant asserted that it encountered a latent condition.

346. Although some of these submissions related to the retaining wall construction (which is variation 11), it is presumed that the latent conditions claim could only have been relevant to the unsuitable material. In this sense therefore, these submissions also deal with variation 2.

347. At paragraph 35, the schedule stated that the excavation work undertaken was required by the design which the claimant had obtained. At paragraph 36, it said that the excavation work was necessary and that the design prepared by the claimant required the construction of the wall footing where the excavation took place. At paragraph 37, it added that no additional works were performed.

348. I also needed to consider the schedule submissions about the retaining wall under this variation, because both the respondent and claimant have dealt with these issues here. Any findings made about the retaining wall itself would then be applicable to variation 11.

Adjudication application

349. The claimant made submissions from paragraphs 119 through to 162 to counter those of the respondent in the payment schedule and which needed consideration in some detail.

350. In paragraphs 121 through to 126, the claimant explained that the original tender drawings showed a terraced retaining wall in 1.5 m high increments, which were stepped 0.75 m back at terrace and 2 versions of the C404 drawing was provided. It then referred to the Geotech, and the three closest bore logs from Lot 4, confirming that the claimant could submit a price for a relatively simple retaining wall in its tender.

351. Under the heading "*Post award changes and actual site conditions*" from paragraphs 127 through to 141, the claimant then explained that "For construction drawings" were issued by the respondent, changing the retaining wall to either be a standard core filled block work or cut faced rock wall, and it was no longer terraced.

352. The claimant then dealt with the superintendent's rejections and its notice of dispute in paragraphs 142 through to 144.

353. It then listed the reasons given in the payment schedule in paragraph 145 which it then individually rejected from paragraphs 146 through to 162 as follows:

(i) as to the *no direction and no notice reason*, at paragraph 147, the claimant repeated and relied upon its variation 1 submissions regarding notices, discussions with BG Civil on the failure of the superintendent to give any directions;

(ii) as to the *first iteration of claim number 11*, the claimant said this was meaningless because claim number 11 dealt with the retaining wall itself, whereas this claim was for the foundations for the wall at Lot 4;

(iii) insofar as the claim for *latent conditions* had been identified being above the depth of the wall, the claimant dealt with this between paragraphs 149 through to 153;

(iv) insofar as the *no records reason* was concerned, the claimant dealt with in paragraphs 154 through to 157;

(v) insofar as the *excavation required because of the design*, this was dealt with in paragraphs 158 through to 160;

(vi) regarding the *no materials replaced reason*, the claimant said that:

(a) the respondent had not understood that the foundations needed replacement in an 8m wide strip; and that

(b) the respondent had not understood that the foundations had to be remediated in a single operation to provide the necessary support; and then

(c) re-excavated where the wall was to be placed.

354. Before considering the adjudication response, I thought it necessary to consider some of these submissions by the claimant in some detail, because this claim has become extremely complex, and in my view the claimant needs to discharge its legal and evidentiary onus, before having regard to the adjudication response.

355. I note that the respondent stated that the adjudication response was necessarily lengthy to identify the relevant facts, so in my view, consideration of the merits of the application first was designed to simplify matters and determine the key issues. Occasionally, however, I referred to the adjudication response for reasons of clarity.

356. Before considering the submissions to counter those of the payment schedule, it is evident from the payment claim that the initial basis of this claim was for unsuitable material – not for a latent condition.

357. The latent condition was raised as one of the reasons in the payment schedule, and appeared to grow in importance thereafter.

358. Accordingly, I will firstly consider this claim as a variation, because most of the payment schedule reasons make no reference to latent conditions.

359. It appeared as if the claimant developed more sophisticated arguments, as it dealt with each payment schedule reason for rejection. I thought it helpful to consider each of the claimant's arguments against the payment schedule in reverse order because it would progressively draw in other issues, and I discuss each under a separate heading.

No materials replaced reason

360. This appeared to be the nub of the claimant's argument, because the claimant argued that:

(i) the foundations needed replacement in an 8m wide strip;
(ii) to ensure that the foundations of the wall had the necessary support;
(iii) and had to be remediated in a single operation; and then
(iv) re-excavated where the wall was to be placed.

361. The requirement for unsuitable material to be excavated in an 8m wide strip appears to have emanated from Mr Richards who was carrying out the level I certification, and this can be found in paragraph 12 of his statutory declaration. It appeared from his evidence that there was a need to ensure the foundation was well below the saturated seepage level, and excavation was required into the stiff clay below.

362. He deposed the fact that BG Civil agreed with this approach and provided a drawing identifying the area under the wall on all of the lots.

363. Insofar as BG Civil drawings are concerned, drawing numbers C403 and C404 were provided by the claimant behind the tab headed "WALL". A copy of C405 was not provided there, but I was able to see a rather difficult to read copy on page 40 of the attachments to Mr Gigli's affidavit, which provided "retaining wall sections" – sheet 2.

364. I find that C404 revision A which was dated 31 July 2014 must have been one of the drawings upon which the claimant had tendered. It did not have the generalised notes which were evident on C403 and C405 about retaining walls design, so I cannot agree with paragraph 169 of the adjudication response, in which the respondent said that on <u>each of the drawings</u> there was a note.

365. Nevertheless, this note on two of the drawings which I find were also provided at tender time, as identified in paragraph 169 of the response, stated that retaining walls were:

(i) indicative only;
(ii) that the current design showed standard core filled block work;
(iii) with the final design and finish of retaining walls being subject to a design and construct contract; and that
(iv) the design required RPEQ certification and Council approval prior to construction.

366. I have already found that the claimant was subject to design and construct obligations in relation to the retaining wall, because this was specifically identified in the letter of acceptance.

367. The claimant had design and construct obligations regarding the retaining wall, and I find that it provided the superintendent with the retaining wall designed carried out by Rienmac Pty Ltd on 17 November 2014, as evidenced in pages 9 through to 11 of Mr Gigli's affidavit.

368. The chronological sequence of events appeared to be vitally important to resolve this claim, and the respondent was at pains to direct me to the timing of the claim in paragraph 213 of the response.

369. BG Civil's drawing C404 revision 1, which was dated 13 October 2014, referred to a 6m wide crosshatched rectangle under a single retaining wall with the note "Geotech requires additional 500 – 800 mm of unsuitable material to be removed for footing to be founded into firm ground below.

370. I therefore cannot agree with Mr Richards that BG Civil agreed with the 8m wide strip, because the drawings only show 6m.

371. Although the notation in the drawing referred to above does not make mention of the timing of this activity, I can infer that the requirements of removal of this unsuitable material was for the single retaining wall foundation.

372. It is uncontroversial that the entire retaining wall layout had been changed by the issue of this drawing. C404A, the tender drawing, had a series of retaining walls no greater than 1.5 m high, which were terraced back 0.75 m, as the wall went higher.

373. As I said this drawing did not have the retaining wall notes on it, but the other two drawings (C403 and C405) noted that the "current design show standard core filled block work".

374. Accordingly, I am satisfied that the new retaining wall details provided by BG Civil, had single retaining walls varying in height from 5.92m high through to 1.36m high, rather than the terraced arrangement with a series of 1.5 m core-filled block walls.

375. Given that the retaining wall component of the contract subjected the claimant to design and construct obligations, the fact that a single retaining wall was then required should not have troubled the parties, as this was contemplated in the contract.

376. To my mind, such a change is dealt with quite simply under the variation mechanism in the contract with the claimant submitting that there was a change in the character, quality, levels, lines, positions and dimensions of parts of the work, falling within clause 40.1(b) and 40.1(c) of the contract.

377. The difficulty emerged regarding not only the timing of this design, but more importantly in this context, the timing of removal of unsuitable material for the future retaining wall.

378. Even though the ingredients of the changed retaining wall fell within clause 40.1, the claimant could not vary the work except as directed by the superintendent or approved in writing under clause 40, and the issue of direction will be discussed below.

379. For present purposes, the claimant needed to explain why the removal of the unsuitable material needed to be remediated in a single operation, with a necessity thereafter to re-excavate later where the wall was to be placed.

380. I understand the logic that the level 1 certifier had directed that a fairly wide strip of unsuitable material needed to be removed, but if the claimant chose to carry out this work in early October 2014 (because it was removing unsuitable material elsewhere), quite some time before it provided the retaining wall design, it needed approval to do so. This brings me to the question of notice and a direction from the superintendent, which is the respondents *no direction and no notice* argument.

No direction and no notice

381. Arguably, the issue of the BG Civil drawings on or about 13 October 2014 could fall within the definition of a direction by the superintendent because a superintendent's direction is defined in clause 23 to include an *authorisation, notice, or requirement.*

382. In my view, the provision of the drawing C404Rev1 by the superintendent to the claimant (which I infer occurred according to the facts) could fall within this definition as a *notice*, and it could be a *requirement* to comply with the new retaining wall layout.

383. However, it could also be argued that this drawing merely alerted the claimant to the need for a revised retaining wall design, for which the claimant was responsible. As a person who was responsible for the design and construction of the retaining wall, once the type and height was designed, then the issue of the subsoil conditions could have been addressed and claimed in an orderly fashion under the contract.

384. The claimant did not provide submissions about either possibility, but chose to repeat and rely upon its submissions under variation 1 regarding notices given, the discussions of BG Civil, and the failure of the superintendent to give directions. Accordingly, the claimant does not argue that the superintendent gave a direction about the removal of this material, which therefore precludes any possibility of it being classified as a variation, unless I as an adjudicator classify it as such.

385. Mr Gigli's evidence is that Mr Richards' liaison with Reinmac and any bore logs required, were never provided to him [paragraph 77.4] of his statutory declaration, and he said that he could not understand how Mr Richards could claim that the material needed to be removed without any retaining wall design having been done [paragraph 77.1].

386. Mr Gigli had earlier said that although BG Civil had raised the issue about the retaining wall foundations, there was no design provided at that time [paragraph 64 and 65 of his statutory declaration], and that he could have assessed any additional costs once the wall design was complete, and it was clear what differences were required if the foundations were inadequate [paragraph 66 of his statutory declaration]. That I find is a reasonable approach to have taken for the unsuitable material.

387. To my mind this is significant, because for the claimant to excavate *unsuitable* material in early October 2014 without the superintendent's approval, ostensibly to improve the foundation for a retaining wall, which at that time (early October 2014) had not been changed from the terraced core block filled retaining wall as depicted on C404E, and which had not been designed, appears illogical.

388. This was, however, partially explained by Mr Mansell in paragraph 13, where he said, "*To avoid potential delays, we proceeded, on the basis that the superintendent was aware of the situation and, as a latent condition, we were under no contractual obligation to stop work and wait for instructions*." The difficulty with this is that he needed to follow the contractual regime.

389. However, this brings me to the issue of latent conditions, which does not require a direction from the superintendent, providing adequate notice of the latent condition had been given to the superintendent, and it was clear that the prevailing soil conditions were different from that expected at tender time.

390. That appeared to be the thrust of the claimant's argument in paragraph 147 of the submissions by stating that it repeated its submissions made under variation 1.

391. The difficulty for the claimant is that I have already found above that no latent condition was established, and no notice was given.

392. Again, the claimant no doubt carried out this work in accordance with the instructions provided by Mr Richards, but failed to follow the contractual mechanism to ensure that it would be paid for this work.

393. The steps that the claimant alleges it took:

(i) the removal of unsuitable material and replacement fill underneath the future retaining wall;
(ii) to provide a suitable foundation for a retaining wall, and
(iii) then the later excavation of the retaining wall;
(iv) to ensure that it had an adequate foundation

may have been a sensible construction operation whilst it had machinery on site (which I infer from the facts), but it needed approval to get paid for this work.

394. Even if I could find that it was imperative for the claimant to have done so, in early October 2014, thereby overcoming the entitlement hurdle, which it has not satisfactorily explained; the claimant has not satisfactorily substantiated its claim with records. I cannot accept its argument in paragraphs 155 and 156 of the application, that it had not been directed by the superintendent to do so.

395. It is for a claimant to substantiate its claim, particularly in an adjudication, where the adjudicator comes to the dispute with fresh eyes.

396. There was no need to canvass the lengthy submissions from the respondent on the variation, because I have found against the claimant.

397. I conclude that it had no entitlement to claim for this variation because ultimately it relied upon the latent conditions clause which it failed to adhere to, no doubt to overcome the lack of direction from the superintendent.

398. **I value this variation as $0.00** and transfer it to LM1.

Variation 3 - import fill lot 4 - $37,762.50

399. This variation was linked to variation 1, because it was the claim for the importation and replacement of material removed under variation 1, which had become a claim for a latent condition.

400. In the payment claim the claimant identified the identical amount of 2850 m^3 (that it had excavated under variation 1) and multiplied this by a rate of $13.25 per cubic metre.

401. This rate was from the Bill of quantities part C item 3(c) "Filling from imported material".

402. It is necessary to consider the payment schedule, adjudication application, and the adjudication response, to investigate whether the claimant had demonstrated its entitlement.

Payment schedule

403. In the payment schedule, the respondent identified the following reasons for non-payment:

(i) *no directions* to carry out works issued on behalf of Grove;
(ii) claim made well after claim *works* had been *covered up*;
(iii) *no notice* provided at time works were allegedly carried out;

(iv) *no records* provided to substantiate claim quantities or reason for works.

Adjudication application

404. The claimant dealt with each of the respondent's reasons for non-payment and each of those were considered in turn.

(a) Insofar as the *no directions* were concerned, the claimant argued that it was required to follow all policies of the Moreton Bay Regional Council and the Development Approval Conditions and Operational Works approval (the "local authority requirements") and it referred to the CONTRACT tab;

(b) regarding the *works being covered up*, the claimant's overall rationale was that it was a latent condition and therefore there was no contractual requirement for the works to be held up, and that the respondent was well aware of the situation before any costs were incurred;

(c) regarding the *no notice* reason, the claimant argued that it had provided notice to the superintendent immediately upon identifying the latent conditions;

(d) regarding the *no records* reason, the claimant said that there was no contractual requirement to provide a specific level of records, and that the respondent had not requested it when it rejected the claim, and that the reason for the works was clear to all parties.

405. It is for the claimant to demonstrate its entitlement, and as regard the *no directions* issue, the fact that the claimant needed to comply with the local authority requirements, unfortunately does not, of itself, turn it into a direction issued by the respondent. I have already found that the unsuitable topsoil was removed (under variation 1), and that suitable fill was imported to replace it. The difficulty is the lack of direction by the superintendent to do so.

406. In variation 1, I was prepared to accept the respondent's valuation for variation 1, despite finding there was no latent conditions claim, on the basis that it was a variation within clause 40, and that Mr Gigli had effectively conceded this as a variation (subject to the work being carried out).

407. Unfortunately for the claimant, in this context having regard to Mr Gigli's concerns about variation 3, he made no such concessions regarding this activity. He explained that he had carried out calculations regarding the amount of imported fill from the diary records amounting to 69,247 m^3.

408. He then applied a bulking factor of 1.3 to establish the "inground" volume and calculated the volume of fill important site at 53,266 m^3. He compared this against the Bill of Quantities amount of 56,089 m^3, and concluded that the less fill had been imported by the claimant than what the contract had allowed.

409. I am satisfied from his affidavit that he is a qualified civil engineer since 1988, and in it he had demonstrated significant earthworks experience. Accordingly, I am satisfied that he is in position to provide expert evidence, and he has satisfactorily explained the need for measuring the compacted volume of fill by applying a bulking factor to the truckloads, to assess their bank volume.

410. I therefore find that this argument, albeit based on a generalised calculation about which there can be inherent uncertainty, that less fill was brought in than what the contract allowed for is plausible.

411. Accordingly, although as a matter of logic, the unsuitable topsoil had to be filled, I am not satisfied that this activity entitled the claimant to additional monies.

412. The issue of the work being *covered up* as a reason for non-payment probably does not take the matter too far. Although I was not satisfied that variation 1 was a latent conditions' claim, the fact that the works were covered up, of itself does not justify non-payment, because I could not see that the contract prohibited this taking place.

413. However, if this complaint is coupled with the argument that no records had been provided, then it certainly makes measurement of this alleged works more difficult. Nevertheless, of itself, I am not satisfied that it is a reason for non-payment.

414. Insofar as the *no notice* argument is concerned, I have earlier found that no notice was given as required by the latent conditions clause. Accordingly, this is a satisfactory reason for non-payment, if the claim is based on latent conditions, because it is clause 12.3 that governs payment in those circumstances.
415. Without notice having been provided, and no direction having been issued by the superintendent, it is not possible for the claimant to fall within clause 40.1, entitling it to a variation, and consequential payment pursuant to clause 40.5.
416. Accordingly, the claimant has failed to establish that this was a variation to which it was entitled to claim payment.
417. The *no records* argument does not need closer evaluation, because of my finding.
418. There has been no concession by the respondent's Mr Gigli about this item, and I therefore **value this variation as $0** and this is transferred to annexure LM1.

Variation 8 - Supply and install road base on lot 4 - $65,750

419. The payment claim simply stated this was "Supply and place road base on lot 4" for the sum of $65,088.11. In the payment schedule, the respondent stated $0 on the basis that:
(i) only 75% of the proposed works had been completed;
(ii) rock-based supplied is poor quality and not fit for purpose;
(iii) material supplied inadequate such that removal and replacement required;
(iv) previously certified sum reduced to $0.
420. In the adjudication application, the claimant took issue with each one of the reasons for non-payment as follows:
(i) the claimant refuted that only *75% works were complete,* and said that the respondent occupied the part of the site on which the works were undertaken.

This was corroborated by Mr Mansell at paragraph 31 of his statutory declaration. Interestingly he stated at paragraph 29 that the claimant was advised the site would be used for the storage of the respondent's buildings, and in paragraph 32, that after the respondent moved in, they operated huge forklifts on the site which transmit extreme point loads through their wheels.
(ii) The claimant stated that it had never been advised as to the purpose for which the works would be used, and was not responsible for the design, but provided the respondent what had been requested, such that it denied the *not fit for purpose* allegation.
(iii) The claimant denied the *inadequate materials needing replacement* assertion, in that it not been advised of any subsequent issues throughout the defects liability period, and that any issues were now outside the defects liability period and not a reason for withholding payment.
(iv) The claimant did not deal with the previously certified amount now being zero.
421. The adjudication response, surprisingly, dealt very briefly with this variation in paragraphs 220 through to 229, with the salient points as follows:
(i) the respondent conceded that it requested a variation which was priced by the claimant, and the claimant was directed to proceed with the works;
(ii) it asserted that the superintendent believed that the materials were not suitable, but despite a request, the claimant refused to provide the details of these materials, with the consequence that the respondent maintained its nil valuation;
(iii) it asserted in the alternative that the cost difference between the product actually supplied and what the superintendent had directed be supplied needed to be accounted for, and the absence of any detail about the products supplied and the claimant's refusal to provide that detail, meant that the superintendent believed that the material was recycled from another site should be persuasive;
(iv) and finally, that the extent of rainfall made in the application did not correlate with the claimant's rainfall records.

422. Mr Gigli could not support the respondent's assertion that the works were only 75% complete. In fact, his approach, as identified in paragraph 110 of his affidavit, was to only certify 75% of the value of the variation, which he said was reasonable.

423. Interestingly, he asserted that the respondent had received some benefit from the material that had been supplied, and yet the respondent valued this claim as nil.

My analysis

424. The respondent admitted that it had directed the variation be carried out, and I am satisfied that it is a variation which had been agreed.

425. Insofar as the value of this variation was concerned, the claimant's and respondent's emails between 18 March 2015 and 1 May 2015 about whether the amount agreed was $65,750 plus GST (as asserted by the claimant), or the amount of $59,000 plus GST (as asserted by the respondent) remains an issue that I need to resolve.

426. It appears that the deduction of $6,750 offered by the claimant related to topsoil under part C item 2: topsoil, which it would not claim under that schedule item.

427. The superintendent stated in his emails that the net amount for this work would be $59,000 plus GST.

428. The question then becomes whether the claimant deducted $6750 from part C item 2: topsoil, and I find from the final certificate issued by the respondent on 7 February 2017 that the amount certified for topsoil was $34,662, compared to the contract amount of $41,412. The difference I find is $6750, which means that the claimant, as it had indicated in its emails had deducted this amount from a topsoil claim.

429. Accordingly, I am satisfied that the parties agreed that the amount for this claim was $65,750 plus GST, and I'm satisfied it falls within clause 40.3 where there had been agreement about the price for the variation.

430. The question then becomes whether there are any legitimate deductions the respondent may make under the contract. The respondent asserts the valuation for this variation should be nil, or alternatively the difference between the cost of the products supplied compared to the cost that should have been supplied.

431. It did not point to any provision under the contract for this deduction, and the superintendent did not identify in his affidavit that he had invoked clause 30.3 to 30.6 of the contract.

432. Surprisingly, and quite inconsistently with the respondent's response submissions, Mr Gigli in his affidavit maintained that his valuation of 75% of the variation claim was fair. Nowhere was this amount provided by him or by the respondent.

433. Again, I had recourse to the final certificate, and variation 8 was approved at 75% in the sum of $49,312.50. Elsewhere, the respondent had been at pains to advise of the final certificate was final, and yet in its adjudication response it was essentially deducting $49,312.50.

434. Nowhere has the respondent provided me evidence that the superintendent:

(i) identified the defective materials or work under clause 30.3 and directed the claimant to rectify it;

(ii) accepted the defective material or work under clause 30.4 with a commensurate valuation under clause 40.5;

(iii) instead, accepted the defective materials or work by notification to the claimant with valuation under clause 40.5.

435. Accordingly, I find the respondent has no contractual entitlement to now reduce the valuation of this variation.

436. Nevertheless, when I value a claim under BCIPA, if the contract does not provide for the matter I need to adhere to s14(1)(b)(iv) of BCIPA, and if there is any defective work, to value it in accordance with the estimated cost of rectifying the defect.

437. I find that insofar as this variation is concerned, I do not have to have regard to s14(1)(b)(iv) of BCIPA, because the amount is calculated under the contract, which falls within s13(a) of BCIPA. Even if I'm incorrect in this finding, the respondent has provided me with no estimate of the cost to rectify the defect.

438. I am not satisfied that the valuation of 75% made by the superintendent was in accordance with the contract, as required by clause 30, and there was no evidence to suggest that the works were only 75% complete.

439. Accordingly, I find that the claimant is entitled to its full variation for this claim, because it had, as it had promised, reduced its topsoil claim by the requisite $6750, which it had outlined in its emails.

440. Accordingly, **I value this variation with the full amount of $65,750**, and I transfer this amount to attachment LM1.

Variation 11 - retaining wall costs - $449,000

441. This is the largest single variation claim and relied upon the existence of a latent condition and/or variation, and it requires careful analysis.

442. Before getting involved in the analysis, I have reviewed Mr Stephen Anthony Grove's affidavit in relation to this issue in which he deposed to discussions he had with Boulder Wall Construction ("BWC"), who were allegedly the subcontractor to the claimant.

443. In it he attaches file notes of his conversations he had with that Mr Gavin Turner of BWC and the thrust of the affidavit was to demonstrate that the claimant owed BWC $210,000 including GST.

444. I have rejected this affidavit, because it is hearsay evidence, because it is designed to demonstrate that what Mr Turner said was true, which in my view, is inadmissible as a matter of law. In any event it relates to allege non-payment by the claimant to BWC, which is not an issue between the claimant and respondent, and about which I could not make any finding, because it falls outside s26(2) of BCIPA.

445. Again, I will consider the payment claim, payment schedule, adjudication application and response successively to systematically analyse the dispute between the parties.

Payment claim

446. The payment claim stated as follows:

"Extra retaining walls bio-retention basin:

Extra over cost for the construction of retaining walls due to latent conditions that were not able to be known by MBCC at the tendering stage, as per letter issued to Grove on 19 December 2014. Actual amount of retaining wall is 2200 m²."

Payment schedule

447. The reasons for non-payment at paragraph 30 for this item were:

(i) third time claim made on third different basis. See claim 2 above.
(ii) works within contract scope (see below).
(iii) Latent condition not notified and claim barred by contract.
(iv) No latent condition.
(v) Basis for calculation of claim not clear

448. In paragraphs 31 through to 46, the respondent added further reasons, some of which as I have said under variation 2 above, dealt with the unsuitable material issue, and other paragraphs deal with the variation associated with the retaining wall.

449. At paragraph 32, the respondent stated that the claimant was to submit a design for a retaining wall which would in turn be submitted to the local authority, and required the claimant to plan, design and construct of footings and wall design (subject to engineering certification and council approval).

450. It added that the claimant had proposed to use Precision Boulder Walls to design and construct the wall (Offer schedule 4), and it listed the drawings that formed part of the contract.

451. It then explained that the claimant had prepared a certified design and constructed the retaining wall in accordance with that design which included the necessary excavation work.

452. It argued that no imported material had been brought in to replace the excavated material and that the retaining wall design required the construction of the wall footing where the excavation took place.

453. It said that no additional works had been performed and that the claimant had later engaged a different subcontractor to carry out the retaining wall construction.

454. It said that the claimant and initially made a second claim of approximately $74,250 for extra walls in August 2015 which was then revised on several occasions, and is now asserted to be on the basis that it encountered a latent condition.

455. It argued that the claim did not specify what the latent condition was, how the conditions differed materially from what was capable of being identified at tender time, or any other matter required by the contract.

Adjudication application

456. In paragraph 200 through to 239, the claimant refuted the payment schedule assertions as follows:

Retaining wall design at tender

(i) it conceded that the retaining walls was a design and construct component of project;
(ii) it tendered on drawings see 403E, C404A and C405A;
(iii) these drawings showed a tiered retaining wall with 1.5 m high increments which were stepped back 0.75 m at each tier;
(iv) these walls were shown extending along the entire eastern boundary ranging from approximately 1.36 m high at Lot 1 through to 5.92 m high at the back of Lot 4;
(v) no design details had been shown but the form of retaining wall was common and the claimant is able to price on a design and construct basis. In particular, this wall did not require extensive foundations or embedment to resist the overturning loads, and a crib wall was suitable for this design.

Post award changes and actual site conditions

(vi) the claimant was then issued with "for construction drawings," C403 revision 1, C404 revision 1, and C405 revision 1;
(vii) the design had changed to indicative designs of either standard core filled block work, or cut faced rock walls and was no longer terraced, and had a 6:1 slope;
(viii) a 6m wide strip was shown as excavated and filled below the wall with a note: "*Geotech requires additional 500 – 800 mm of unsuitable material to be removed for footing to be founded into firm ground below*"
(ix) the claimant argued that this monolithic form of wall was considerably different to the wall on which the claimant had tendered and had a considerable overturning moment that needed to be resisted by the foundation;
(x) the post-contract drawings represented a variation to the works, and the claimant had to design an entirely different wall;
(xi) it then referred to its claim under variation 1 and that the actual site conditions differed considerably from those known at tender;
(xii) the level 1 certifier advised Rienmac Pty Ltd of the changed site conditions and the additional testing required;
(xiii) the completed design was received by the respondent on 17 November 2014 with the review being completed by BG Civil on 1 December 2014.

Superintendent' s rejection and notice of dispute

(xiv) on 19 December 2014, the claimant gave notice to the superintendent of the additional cost of this wall;
(xv) on 23 December 2014 superintendent rejected this variation claim on the basis that:
    (a) the retaining wall scope of works was design and construct and was deemed to be included in the agreed lump sum contract;
    (b) variation claim to increase the wall rate from $225 per square metre to $395 per square metre on the basis that sufficient design information and geotechnical details had been provided by the principal at the time of tender; and
    (c) in accordance with clause 40.5 the variation was not approved;
(xvi) the claimant rejected those reasons on the following basis:
    (a) the retaining wall priced on the tender offer was not the type of retaining wall the respondent required to be designed after the award;

(b) the design information in the tender changed, the geotechnical details proved incorrect when latent conditions were identified the change the nature of the wall that had to be designed; and
(c) clause 40.5 is related to valuation, not approval or otherwise of the variations.

(xvii) The claimant added that there were no time bars in the GCC regarding valuation under clause 40.5 and that clause 46.1 regarding notification of claims requirements did not apply to variation claims, or those under clause 12.3.

(xviii) In any event, the claimant said that it notified the superintendent of the additional costs within 42 days when it could first become aware of the additional cost of the wall;

(xix) on 13 January 2015, the claimant sent correspondence to the superintendent requesting a reconsideration of several disputed claims including the additional war cost and that the supply geotechnical information did not identify the weak foundations that necessitated a different design that was costlier;

(xx) on 15 January 2015, the superintendent reiterated that it was a design and construct contract that at no time had any concerns regarding the geotechnical details provided by the respondent, nor was the tender conditional on existing foundation/ground conditions;

(xxi) the claimant said that the superintendent's approach meant that it he was not acting honestly in fairly and was simply acting in the interests of the employer;

(xxii) the claimant said that the superintendent had failed to engage with and understand the nature of the latent conditions;

(xxiii) on 29 January 2015 issued a notice of dispute and the respondent replied saying that the contract was a lump sum and there was no entitlement to vary the rate for the construction of the wall based on different ground conditions;

(xxiv) the claimant said that the respondent appeared to rely upon clause 1 of the instrument of agreement stating that was a lump sum with no variations and no terms about latent conditions, despite the tender request for price Bill of quantities and the nomination in the Annexure, that Alternative 1, meaning Bill of quantities applied.

<u>Reasons given in the payment schedule</u>

(xxv) the claimant listed the payment schedule reasons and rejected each of them as follows:
(a) the consistent history above suggested that the respondent was confusing this claim with others;
(b) there was a change in scope for the wall in the "for construction" drawings and the latent conditions of the site;
(c) the wall required post tender was not the same as that which was priced;
(d) claimant further submitted that latent conditions were by definition not within scope;

<u>Latent condition not notified and barred</u>

(xxvi) the claimant argued that the latent conditions in Lot 4 were notified in early October 2014 and that the respondent admitted receiving notification in its email that first rejected this claim which was submitted before construction of the wall commenced;

<u>No latent condition</u>

(xxvii) the claimant relied upon the affidavit of Ron Richards, site tests, and correspondence from BG Civil to establish that there was a latent condition;

<u>Calculation basis unclear</u>

(xxviii) the claimant argued that the respondent had never until a payment schedule asserted that it would pay the claim if the basis of calculation was clearer, or the costs were more reasonable;

(xxix) the claimant incurred significant costs for this wall including:
(a) engineering design costs not required originally;
(b) construction cost for the wall; and
(c) additional time on site for the project;

(xxx) the claimant said that the respondent had never requested supporting information for this claim.

457. Again, I thought it was useful to consider the claimant's submissions in the application before delving into the adjudication response in much detail, because the claimant bears the onus of demonstrating its entitlement to claim with the need to provide a cogent story, establish its entitlement to claim, provide substantiation of its claim, and explain the quantum.

458. I have already analysed the issue of the "for construction drawings" and I am satisfied that the issue of them, showing a single monolithic retaining wall, was entirely different to the short 1.5 m high retaining walls constructed with terraces.

459. To my mind the provision of these drawings to the claimant signalled a change to the retaining wall requirements. I cannot accept the respondent's assertions that changes to the character and quality of wall with different levels, lines, positions or dimensions did not constitute a change in the design and construct scope.

460. The respondent also argued that this was a lump sum contract, such that the claimant was bound to provide a design and construct a retaining wall, essentially notwithstanding any changes to the retaining wall regime.

461. I cannot accept that this is a proper interpretation of the contract, and the respondent has provided no authority to support such a proposition.

462. I agree with the claimant that the alternative 1 was selected for the Bill of Quantities in the annexure, which meant that clause 4.1 of the GCCC stated that they formed part of the contract only to the extent provided in the contract.

463. I do not agree with the respondent that there needed to be a qualification in the tender that the retaining wall was subject to change if the ground conditions differed from those provided at tender time.

464. Even if it was construed as a lump sum contract, there is a variation clause in it to allow for claims to be made for variations to the contract, and valuation of those claims in accordance with the provisions of clause 40.

465. I am satisfied, as noted above, that the new retaining wall regime was a variation and it was brought about by the need for a monolithic retaining wall of heights that in some instances exceeded 6m.

466. In paragraph 17 of Mr Mansell's statutory declaration, he indicated that the original retaining wall design was very simple with a tiered construction and did not require significant engineering input, and he had the work priced by a builder which specialised in such walls.

Adjudication response

467. In the adjudication response, the respondent attempted to adduce evidence from Mr Grove about the claimant subcontractor, and I have rejected that affidavit as it is hearsay, and not relevant to the issues in dispute.

468. Otherwise there is no factual material provided from the respondent to refute Mr Mansell's evidence. However, I note that the respondent referred to Offer Schedule 4 and the proposed subcontractor providing rock walls of $420,000 using Precision Boulder Walls.

469. It added, at paragraph 239 of the response, that the claimant engaged this subcontractor carry out the work, and yet in Mr Grove's affidavit, he referred to another subcontractor, so the respondent has not established who the subcontractor was.

470. The respondent submitted that Precision Boulder Walls's website confirmed that it built Boulder or rock walls, but it did not provide an extract of this website in the response, and I am not prepared to make this finding.

471. Accordingly, I cannot accept the respondent's submissions, without admissible evidence, or indeed any evidence, that the claimant was always intending to build a Boulder wall.

472. In any event, I do not see its relevance, because even if it was a boulder wall that was going to be constructed, on the original tender layout, these walls were only 1.5 m high with terracing, and what the claimant was then required to design and construct was a monolithic wall of much greater magnitude, sometimes exceeding 6 m.

473. In considering this claim for a variation, given that I have already rejected the latent conditions claim, I am not considering the different retaining wall is having any link with the latent conditions. Whilst the claimant relied upon latent conditions in its claim, this was in addition to its argument about the change scope for the wall, for which a variation claim could be made.

474. When I was considering the unsuitable material point about whether there was a superintendent's direction, I found that no direction was given. However, this was in the context of a claim for unsuitable material being removed for a future retaining wall, about which the claimant had never explained why it had to carry out that work in early October 2014.

475. In this case, the "for construction" drawings showed a completely different retaining wall regime, which falls within clause 40.1, definition of variations as I have already found above.

476. The next question is whether the superintendent gave a direction for a variation, and in this instance when dealing with the retaining wall design, by issuing drawings showing a different retaining wall regime, to my mind fell within the concepts of *instruction*, *notice* or *requirement,* all of which can constitute the superintendent's direction under clause 23.

477. This means that clause 40.1 has been satisfied. I therefore find that the claimant has provided a plausible story about the existence of this variation, it has demonstrated its entitlement to claim for a variation, and has substantiated it insofar as showing the differences between the type of retaining wall required at tender time, and that which it was then obliged to design and construct.

478. In the payment claim, it asserted that the amount of retaining wall was 2200 m^2, and this has not been controverted by the respondent. I therefore find this is the new area of retaining wall.

479. The respondent has controverted the rate claimed by the claimant, so this needs to be decided.

480. Before doing so, it is necessary to consider any other response submissions, together with the affidavit of Mr Gigli to ensure that this decision canvasses the issues raised there.

481. At paragraph 233 of the response, the respondent referred to the background facts in its earlier paragraphs 166 through to 183.

482. Having regard to those earlier submissions, which included the affidavit of Mr Gigli, the respondent went into the history surrounding this claim, the issues that probably have not been fully ventilated are:

(i) the note on the drawings about the retaining walls being indicative, and were subject to final design et cetera. To my mind these notes do not demonstrate that the design and construct amount for the retaining wall was a lump sum. In fact, in my view the contrary is likely because there is a variation mechanism under the contract to deal with a substantial change to the retaining walls details which actually occurred;

(ii) there was some history from Mr Gigli of the dates between 1October through to 7 October regarding communications between Mr Richards and the claimant, and between Mr Richards and BG Civil, and between BG Civil and the superintendent. These communications essentially relating to the suitability of the soil conditions for under the retaining wall, and the fact that the retaining wall had not yet been designed. Those issues have already been canvassed under variation 2, because they are essentially dealing with the unsuitable soil conditions and not the variation to the retaining wall itself;

(iii) further history regarding the discussions between Unity water and the respondent about the access to the sewer and the need to reject collate the sewer to the retaining wall and allow future sewer connections were canvassed. All this demonstrates is that Unity water had to be involved in approving the final design to be made by the claimant, and is not contentious;

(iv) however, the respondent then explained that after the retaining wall, which was designed by Rienmac, was provided on 17 November 2014, it showed a wall embedment depth varying between 1.6 m to 2.64 m below natural ground on a 150mm

concrete bed. The respondent then explained that these amended plans were then provided to Unity water, and it was only after their approval on 11 December 2014, was a retaining wall design showing the boulder wall issued by him to the claimant. It appears as if the respondent is considering that this is the first direction regarding this variation, and I have found that the provision of the drawings from BG Civil showing an entirely different retaining wall regime constituted variation, for which I have found a direction was issued by the superintendent, and that is what I have found to be the basis of the variation claim.

483. Turning then to the later extensive response submissions from paragraphs 234 through to 277, the respondent dealt with the claimant's application submissions under the same headings as follows:

Allowance at tender

484. In responding to the claimant's submissions, the respondent criticised the claimant for not explaining what allowances it had made at tender time regarding a tiered core filled block work retaining wall.

485. The thrust of its submissions was that it then tried to demonstrate that the claimant had at all times intended to supply rock walls, which were substantially cheaper than a core filled block work wall (supported by Mr Gigli, and it appears in particular at paragraph 123 of his affidavit), such that the claimant could not argue that it was going to build an alternative design.

486. I have elsewhere rejected the submission regarding the Precision Boulder Wall assertion because no evidence of the website was provided, and in any event what ever the claimant had priced, rock wall or otherwise, the fact is that the entire retaining wall concept was changed from a tiered structure to a single monolithic wall, which to my mind constituted the variation.

Design changes Post award

487. The respondent challenges the claimant's assertion about the "for construction drawings" showing a different retaining wall, including arguing that no transmissions were provided and evidenced by the claimant to demonstrate that these drawings were issued.

488. To my mind, the respondent has not denied, nor could it realistically deny on the evidence that these drawings were provided to the claimant. It is inconceivable that the claimant then went ahead and came up with an entirely new design for a monolithic wall of its own volition.

489. The respondent maintained its argument that revised drawings were only issued by the superintendent on 11 December 2014 after the claimant's retaining wall design had been incorporated and that the superintendent did not direct the change of retaining wall design from core filled block work to a boulder retaining wall.

490. I do not see that this assists the respondent, because it is accepted by the parties that the claimant was responsible for the design and construct component of the retaining wall, but the critical issue was that BG Civil's "for construction drawings" eliminated the 1.5 m high retaining walls using a terraced profile to that of a monolithic retaining wall.

491. To my mind even if the claimant had always considered it would provide a block retaining wall, there is a significant difference to the requirements of a 1.5 m retaining wall to that that exceeds 6 m in height at places, and to my mind that is a different "client requirement", for which the claimant was entitled to claim a variation.

Site conditions

492. These submissions deal with the ground conditions and some additional testing, about which I did not see that they assist in dealing with the retaining wall design, but rather relate to the unsuitable ground conditions which have already been dealt with under variation 2.

Latent condition

493. I have already found against the claimant in relation to the latent condition claimed, so I accept the respondent's submissions in that regard, but they do not deal with the retaining wall variation itself.

Costs

494. These submissions from paragraphs 258 through to 273 deal with the lack of substantiation of any calculation provided by the claimant and the criticism regarding the lack of evidence regarding the claimant's costs.

495. It then relies upon Mr Grove's affidavit regarding the quantum of the claim, and as I have already rejected Mr Grove, this does not assist me at this time. Nevertheless, it appears as if the respondent made an allowance of $14,300 for a retaining wall based on alleged payment by the claimant to its subcontractor. I cannot consider this, because I've rejected the affidavit.

496. The respondent summarised its objections to this claim, and most of the its objections relate to the ground conditions, communications about them and testing, about which I have already found against the claimant.

497. The respondent's complaints regarding lack of substantiation of costs and detail in connection with this claim are justified. However, it argued that the respondent would be denied natural justice if I determine the claim on the basis of the materials included in the application. I cannot understand this argument.

498. An adjudicator is obliged to value a claim based on the materials included in an adjudication application, if they are sustainable, because the respondent has the opportunity in the adjudication response to refute the validity of those materials and the claim. This is precisely what it has done.

499. I appreciate that the claimant linked variation 2 regarding the unsuitable material under the retaining wall, and variation 11 for the retaining wall together, presumably because they related to the same issue surrounding the retaining wall. However, it made it difficult to unravel both the claimant's and the respondent's submissions relating to these two separate issues.

500. It appeared clear to me in the application that the retaining wall claim was based on a changed scope for the wall in relation to the "for construction drawings", and the latent conditions of the site. I have rejected the latent conditions of the site argument regarding this claim, but recognised that the change in scope variation was a live issue, and the respondent had the opportunity to deal with that in its response.

501. In fact, it appeared to me that the respondent recognised this very possibility, because it consistently argued that the first time the superintendent issued drawings was on 11 December 2014, AFTER the claimant had provided its drawings in accordance with its design and construct obligations.

502. Furthermore, the respondent tried to argue that the issue of the "for construction drawings" had not been substantiated by the claimant, which to my mind was an attempt to deny the possibility that the issue of these drawings constituted a direction for which a claimant would be entitled to a variation.

503. This may have been based on the respondent's view that the design and construct component regarding the retaining wall was a lump sum contract, such that whatever changes were made to the layout and details of the retaining wall, the claimant would be paid no more.

504. I have found against the respondent on that point on the basis that a change to a retaining wall arising out of "for construction drawings" which must have been provided to the claimant for it to provide a suitable design in accordance with a monolithic wall, was different from the earlier retaining wall layout.

505. I am satisfied that the earlier retaining wall arrangement with the 1.5 m high walls with terracing was not as complicated, because the overturning forces to which such a wall was subjected, was nowhere near as significant as with a monolithic wall.

506. What remains is the quantum, if any for this variation, and it is necessary for me to price this variation based on the material before me. s14 of BCIPA provides that construction work is to be valued:

(i) under the contract; or

(ii) if the contract does not provide for the matter, having regard to-

(a) the contract price for the work; and

(b) any other rates or prices stated in the contract; and
(c) any variation agreed to by the parties to the contract by which the contract price or any other rates or prices stated in the contract, is to be adjusted by specific amount; and
(d) if any of the work is defective, the estimated cost of rectifying the defect.

507. I will therefore turn to the contract to value this variation.

508. Clause 40.3 does not apply because the parties have not agreed upon a price which means it needs to be valued under clause 40.5.

509. The contract does not provide for specific rates or prices for a monolithic retaining wall, and the only rate I have is $225 per square metre, which was based on the earlier retaining wall layout at tender time. Unless I can find another rate, I may have to apply this rate to the variation, on the basis that the parties had agreed it in the contract.

510. I could find no rates or prices in the Bill of quantities that apply, which means that clause 40.5(c) governs the valuation in which reasonable rates or prices should be used in any valuation.

511. Unfortunately for the claimant, this is where it has misconceived what an adjudicator is required to do, and as I have said earlier, it is not for an adjudicator to make out a claimant's case.

512. There needs to be evidence of a reasonable rate for a monolithic retaining wall, or at least the means whereby I could carry out an analysis to determine a reasonable rate.

513. Most surprisingly at paragraph 239 of the application, when challenged about the basis of calculation of the rates for this wall, the claimant said, "The respondent has never requested supporting information for this claim."

514. This is an adjudication in which the claimant is obliged to prove its case and to simply assert, as it has done at paragraph 238, that it had incurred significant costs for this wall, including:

(i) engineering design costs;
(ii) construction costs for the wall;
(iii) an additional time on site for the project,

and yet nowhere in its application provide any basis for any calculation, nor provide any invoices about engineering design costs or supporting the construction costs, nor provide any basis to quantify the additional time on site for which it may have a claim, is most extraordinary.

515. In its 19 December 2014 letter to the superintendent, the claimant stated a higher rate of $395 per square metre to build the wall and required immediate acceptance of the new per square metre rate so that the wall construction could commence. It did not provide any breakdown of how this figure was derived, which is 76% greater than the original rate for retaining walls.

516. Even now it has not provided any explanation whatsoever as to how this rate was derived. Given that I am obliged to value this variation claim under clause 40.5, I must apply a reasonable rate, and I have no evidence from the claimant about the derivation of the $395 per square metre, and no evidence of any costs that it incurred in constructing this wall which I could utilise.

517. I am unable to find that this rate was reasonable, and the claimant provided no expert evidence to support this rate, which to my mind was the least it should have done.

518. The only rate I have is $225 per square metre for the retaining wall, which the parties had agreed at tender time, and so I apply this rate to the increased area of 2200 m², which the respondent has not controverted, and this means valuation can in fact be made under clause 40.5(a).

519. The original area was 1870 m², so that the difference is 330 m² of retaining wall, to which I apply the rate of $225 per square metre resulting in an additional variation cost of $74,250.

520. **I therefore value this variation at $74,250** and the amount is transferred to LM1.

Variation 14 - additional water reticulation - $119,115

521. The payment claim identified this claim as follows:

"Additional water reticulation based on drawings approved on 11 December 2014; a request from Grove for a quotation on 11 December 2014; and MBCC response of 19 December 2014."

522. The payment schedule provided the following reasons for non-payment;
(i) works within contract scope;
(ii) claim not notified;
(iii) basis for calculation of claim unclear. Costs claim unreasonable and not incurred.

523. I now turn to the adjudication application and adjudication response.

Adjudication application

524. The application dealt with this issue from paragraphs 240 through to 269 and essentially dealt with the matter as follows:
(i) *at tender stage*, the claimant assumed that the 240 m of pipe work in the Bill of Quantities was incorrect and priced this item of work based on 24 m of DN 180 PE SDR 21 pipe. I note that this is what it put in quantities submitted with the tender. In response to a query from the superintendent about its tender rate, it advised the respondent that the rate would remain as is, and that if the length of the main increased, the extra main would be installed at no cost to the respondent;
(ii) it then referred to the *Post award* changes that occurred where the superintendent forwarded water reticulation plans approved by Unity water on 11 December 2014 and requested a variation quotation. It explained that the total length of pipe works had now increased to 311 m, but more importantly the pipe had changed to SDR 11, which it asserted was twice as thick as the SDR 21 pipe, and on 19 December 2014, it submitted its quotation for the revised works amounting to $130,465;
(iii) the claimant then referred to the *superintendent's rejection and its notice of dispute.* In answer to the continual reference by the superintendent to the fact that no additional amount would be payable for reticulation works based on the claimant's email of 16 September 2014, the claimant said that this was not an acceptance of risk of a completely changed design, but was limited to the drawings that had been provided. Furthermore, it added that not only had the pipe length increased, but the pipe thickness was nearly double that of the pipe upon which it had tendered.

525. As to the reasons for non-payment the claimant answered them as follows:
(i) the work was of completely different scope and the superintendent had requested a variation;
(ii) the claim not being notified had no merit because it commenced with a request for variation from the superintendent;
(iii) the claimant said this was a change to the existing Bill of quantities, plus additions for individual components, and that where works were valued according to an existing Bill of quantities rate could not be said to be unreasonable. It added that, as to the costs not being incurred, the claimant said this had no merit.

Adjudication response

526. The adjudication response dealt with several issues as follows:
(i) the claimant was bound to install the additional main at no cost to the respondent;
(ii) the superintendent had not asked for a variation for the water reticulation works;
(iii) although the drawings showed an amended location of the water main, the claimant was always obliged to install SDR 11-gauge pipe, as this was shown on both revisions of drawing C702;
(iv) in the alternative regarding a price, any entitlement to additional costs had to be valued at a reasonable rate and the rate identified by the claimant was excessive;
(v) if I accepted that the pipe quality had changed, the contract rate did not apply to a different pipe type; such that in either event
(vi) the average rate for water main quoted by other tenderers was $117 per lineal metre, which it argued was reasonable;

(vii) over the additional length of pipe claimed although unverified, would equate to $32,409.

527. Mr Gigli dealt with this matter in some detail, which need to be explored as follows:

(i) he said that he sought clarification from the claimant about the reduced quantity of water main from 240 m to 24 m, but had included a rate approximately three times higher than its competitors;

(ii) he said that he invited the claimant to amend its tender but that the claimant said that it did not wish to do so;

(iii) he obtained email confirmation from the claimant on 16 September 2014 that any extra water mains would be installed at no cost, and he included the email in the list of contract documents;

(iv) he said the drawings of the water reticulation included in the contract showed an existing watermain which had not actually been built at the time, because the subdivision to the west of Boundary Road was being built by others;

(v) he then said that the specific details of the watermain, approved by Unity Water, were provided on 11 December 2014;

(vi) when he received the claim for water reticulation on 19 December 2014 from the claimant, he rejected it on the basis that the claimant would install additional pipe at no cost, the rate was three times other tenderers' rates;

(vii) he said that the service connection details showed that the pipe required to be installed was SDR 11, meaning that the pipe quality to be installed did not change;

(viii) he said that he saw no reason to value the claim in any other way, but that the average price from other tenderers for this pipework was $117 per metre.

My analysis

528. It appeared to me that the parties were "ships passing in the night" about some critical issues.

529. The claimant argued that it received fresh drawings on 11 December 2014, and that the superintendent had requested a variation for the water reticulation. On 11 December 2014, in an email, the superintendent requested a quotation for amended sewer reticulation and stormwater drainage works as per the approved plans.

530. In paragraph 287 of the response, the respondent expressly stated that the superintendent did not make a similar request for the water reticulation. Surprisingly this was not corroborated by Mr Gigli, which in my view would have assisted the respondent.

531. Nevertheless, it is for the claimant to demonstrate that the request was made, and Mr Van Der Meer did not declare that he had received a variation request from the superintendent for the water reticulation, either verbally or in writing.

532. The respondent is correct that no written request emanated from the superintendent, and I am not satisfied that any request was made. However, the claimant took it upon itself to make a claim, which the superintendent rejected in any event.

<u>Variation</u>

533. To my mind, the point of departure for this analysis, is whether there was a variation under clause 40, and then if so, whether a direction was made by the superintendent. Turning firstly to the variation, and I deal firstly with the easy aspect.

534. A variation includes a *change in levels, lines, positions or dimensions of any part of the work under the Contract* [clause 40.1(c)].

535. To my mind, the issue of the drawings showing changes to lines and positions of the water reticulation, which is admitted by the respondent in paragraphs 288 and 289 of the response, falls within this category, so I am satisfied that it was a variation.

536. A variation includes an *increase of any part of the work under the Contract* [clause 40.1(a)], and includes a *change the character or quality of any material or work* [clause 40.1(b)].

537. These two issues are more problematic because:

(i) The claimant argued that:

(a) the length of the water main increased, and

(b) the pipe quality changed to SDR11 from the tender drawings SDR21;

(ii) In contrast, the respondent argued that:

(a) whether the length of pipe increased, the claimant was bound to construct the extra length at no extra cost, because of its 16 September 2014 email;

(b) the pipe had always been SDR11.

538. I start with the respondent's arguments, because if they are correct, then the claimant has no entitlement.

539. I find that the claimant did confirm in its 16 September 2014 email that it would install extra length of pipe at no extra cost, with the proviso that its rate of $315.00/metre remained. However, I cannot agree with the respondent that this was an unqualified preparedness to install pipe of whatever length, in the event of a variation to the drawings.

540. The respondent's Bill of Quantities apparently had 240m of pipe identified on it, although I do not have a copy of this document, as neither party provided it.

541. In any event, the Bill of Quantities provided by the claimant only had a length of 24m for pipe, and the pipe was expressly identified as DN180 PE 100 SDR21. This became a contract document through the letter of acceptance dated 25 September 2014. I note that Offer Schedule 1 stated, "Schedule of Rates" Breakdown.

542. Although the Formal Instrument of Agreement stated that the respondent accepted the lump sum of $2,179,166.88 (including GST) [page 22 of the contract], the Annexure to the Agreement provided that the Bill of Quantities alternative applying was Alternative 1, and the GCCC clause 4.1 provided that Alternative 1 provided, "*A Bill of Quantities forms part of the Contract only to the extent provided in the Contract.*" [page27 of the contract].

543. Mr Gigli stated that the uncertainty surrounding the water main was the reason that 240m was included in the tender documents.

544. The water main was designed by BG Civil, and the revision of drawing at tender time, I find was C702E. It showed a water main in Business Drive on the west side of the road (between Lots 2 and 6) with one connection to go across to the future road between Lots 2 and 3, and another on the southern side of Business Drive (at lot 8) across the road from Lot 8 to Lot 4, with no detail about any pipe lengths.

545. In the circumstances of an unknown design layout, it appears to me that the parties had differing views about the water reticulation. The claimant said that it could only find 24m of DN180 PE 100 SDR21 pipe, and rated the work accordingly. I find this is consistent with a schedule of rates approach to an item of work that at the time of tender is unknown.

546. The superintendent considered this rate too high, but accepted it on the basis that the claimant would install whatever length at no extra cost. This suggests to me that he wanted a lump sum for the work, because of his alarm about the high rate.

547. Insofar as the rate is concerned, if 24m was the extent of the pipework, a high unit rate is conceivable as one needs to mobilise and demobilise, in this case in at least 2 locations, without having a long length of to defray these costs and thereby reduce the per metre rate.

548. By doing so, provided only the length of pipe changed, he had secured a lump sum for the respondent of $7,560, whereas on his own evidence, other tenderers had priced the work at $117/meter, presumably for the 240m length. I infer that the "lump sum" for this item from other tenderers would have been approximately $28,080, over $20,000 dearer that that of the claimant.

549. I do not think, considered objectively, that the parties expected that this work would ever be a lump sum, because the water pipe on the western and southern side of Business Drive had not even been built at tender time, notwithstanding BG Civil's drawing identifying it as an existing pipeline, which it was not.

550. The more likely scenario is that the parties contemplated that this item of work was a schedule of rates, and the superintendent was alarmed at the rate being so high, so that he negotiated a lump sum with the claimant.

551. However, that lump sum could only apply if the drawings were not varied, apart from the pipe length, in which case the claimant would have borne the risk.

552. However, the superintendent admitted the 240m length was a quantity put in its BOQ, which I infer bore no relation to what length ultimately may have been required by Unity Water.

553. To my mind, once the water layout was varied, a variation occurred [clause 40.1(c)], which then contractually triggered valuation of this work. The respondent provided no authority to support its argument that, in the event of a change in the water reticulation layout, that the claimant was bound to the lump sum.

554. Drawing C702J showed the water main running up on the eastern side of Business Drive, to be constructed, as well as clearly continuing eastwards along Future Road, with the sewer on the opposite side of the road. This is in complete contrast to C702E which had the existing water on the western side, and sewer on the opposite side of the road.

555. There was uncertainty at tender time about the length of the pipe, so by the water reticulation being reconfigured, with a greater length of 311m, I find that the quantity increased, which is another variation [clause 40.1(a)].

556. The final aspect of the variation that I need to consider is whether there had been a change in the character or quality. The respondent argued that the SDR11 pipe was on the original drawing, which the claimant denied, stating that it was a new pipe.

557. I do not agree with the claimant, as in the "Service Provider Connection 1" in both drawings C702E and J there was reference to DN180 PE100 SPR11, but it is entirely unclear how far it extended. This strengthens my view that the length was unknown, and that this part of the work had to be valued as a schedule of rates, once the extent of work was known.

Direction

558. A superintendent's direction is defined in clause 23 to include an *authorisation, notice, or requirement,* and in my view the provision of the drawing C702J by the superintendent to the claimant fell within this definition, as it was a *requirement* to comply with Unity Water's layout, and the claimant would have been *authorised* to install this water reticulation, having received *notice* of the revised drawing.

Valuation

559. I note that the respondent has provided an alternative valuation of $32,409, if I did not agree with their submissions.

560. The claimant has relied upon its $315/m, which I find was an agreed rate for 24m of DN180 PE 100 SDR21 pipe. Now, if this was the pipe that was installed, the respondent could have been faced with this rate, but it was for a different pipe.

561. In addition, I am obliged to use a reasonable rate, in circumstances where the length of pipe was much greater than the 24m identified by the claimant. I have already discussed that such a rate could have been reasonable for a small amount of pipework.

562. However, I do not accept that this rate is applicable to 311m of pipe. I understand that the claimant has argued that the pipe installed was different and thicker, than what it had priced. It certainly had specified the pipe which it had priced in the BOQ, but has not satisfactorily explained how it derived its $315/m, nor the figure of $119,115 for this work.

563. It did not state that $315/m was reasonable, and in fact its letter of 19 March 2016 to the superintendent, in which it stated that its earlier claim for $205/m for the pipe and $25,000 for the fittings was a fair commercial rate, it is evident that by reverting to the tender rate, because the superintendent refused its claim, suggests that the tender rate was too high for this work.

564. In the 19 December 2014 claim for the variation, the claimant claimed $32,500 for the fittings, whereas it said that $25,000 was a reasonable rate for this item.

565. The respondent did not criticise these rates in the response, and chose to rely upon tender rates from other tenderers of $117/m, which it did not further explain or provide other supporting information from an expert.

566. In the circumstances, and given the claimant's assertion that the $205/m and $25,000 was reasonable, without being controverted by the respondent, I find that this rate and the fittings amount is reasonable, and I find accordingly under clause 40.5(c). The $205/m sits

slightly below the mean between $117/m suggested by the respondent and $315/m submitted by the claimant.

567. By my calculation, the pipework was therefore 311m x $205/m, and the fittings $25,000 amounting to $88,755.00.

568. I have valued this variation using reasonable rates, but I recognise that the claimant had already been paid $7,560 for 24m of DN180 PE 100 SDR21 pipe in the Final Certificate.

569. It appeared as if the superintendent considered this item as a lump sum, and I have found that the variation meant that this amount was no longer applicable to work that was uncertain at the time of tender. I have valued the variation on a schedule of rates basis, which is open to me under Alternative 1, but using reasonable rates.

570. I therefore find that $7,560 must be deducted from this variation, because the entire work carried out for this item was a variation.

571. The value of this work is then $88,755.00 less $7,560 being $81,195.

572. **I value this variation at $81,195.00** and it is taken to LM1.

XIII. Liquidated damages

573. The claim for liquidated damages ("LD's") was identified in paragraph 30 of the payment schedule in item 15 is being calculated to 23 September 2015 amounting to $89,968.

574. The response did not provide any explanation regarding the contents of the LD's claim and I needed to search elsewhere for the calculations supporting this amount and in the payment schedule documents, page 55 of 95, I found an email from the superintendent to the claimant dated 7 October 2015 attaching payment certificate 9.

575. In this certificate, there was an explanation of the calculation of LD's.

576. The respondent identified that the date of practical completion was 3 March 2015, and calculated the LD's from this date until 22 September 2015. It also explained a slight reduction in the LD's daily rate to $406.24 per day.

577. I note that at paragraph 271 of the application, the claimant stated, "*The respondent's calculations of the amount of liquidated damages is as follows:*", but nothing followed, so I assume that this was an omission by the claimant.

578. Without therefore anything controverting from the claimant, I therefore understand the derivation of and calculation of the LD's.

579. The claimant contended that the respondent had no entitlement to liquidated damages on a few bases being:

(i) the respondent prevented completion by issuing variations after the date for completion;

(ii) the respondent had obligations to ensure that the superintendent:
   (a) acted honestly and fairly;
   (b) acted within the time prescribed under the contract, or where no time was prescribed, within a reasonable time;
   (c) arrive at a reasonable measure of value of work, quantities or time;

(iii) that in the case of *Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, the Court held that the superintendent in an AS2124 contract was obliged to act fairly and reasonably to both parties and that obligation extended to granting extensions of time when it was reasonable to do so:

(iv) it argued that the superintendent had failed to grant EOT's for variations, delayed the project and failed to issue EOT's, and that further variations were issued after the date of completion had passed. By so doing, it argued that the respondent was precluded from offsetting liquidated damages and further referred to a case of *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151, that under an AS2124 contract, if the superintendent fails to issue extensions of time, even when not requested, the prevention principle would apply, and it provided a copy of that case.

580. The claimant said that *Probuild* involved an AS2124 contract, and this is not the case because it involved a subcontract. Nevertheless, at paragraph 30 of *Probuild*, identified clause 41.9 which provided:

"(a) Notwithstanding that the *Subcontractor* is not entitled to or has not claimed an extension of time, the *Head Contractor* may at any time and from time to time before the issue of the *Final Certificate* under the *Subcontract* by notice in writing to the *Subcontractor* extend the time for *Practical Completion* for any reason."

581. In this context, therefore it was in similar terms to the sentence around line 40 of clause 35.5 of AS2124 which provided, "*Notwithstanding that the Contractor is not entitled to an extension of time the Superintendent made any time and from time to time before the issue of the Final Certificate I notice in writing to the Contractor extend the time for Practical Completion for any reason*."

582. Both the contract in *Probuild* and this contract stated that any failure to grant a reasonable or any extension of time would not cause the date for practical completion to be set at large. Accordingly, *Probuild* may assist in resolving this issue.

Adjudication response

583. In the adjudication response from paragraphs 304 through to 334, the respondent refuted the claimant's submissions regarding liquidated damages. It identified the following issues:

(i) it argued that as a matter of fact the retaining wall design should have been completed no later than the end of the third week after contract signing, and that by only providing it on 17 November 2014, this delayed the finalisation of the sewer design and the approval of that designed by Unity water;

(ii) it argued that the controlling delay at all relevant times was the construction of the retaining walls, which it said were only complete at the end of May 2015;

(iii) it also argued that the claimant had failed to identify the variations that were so directed and failed to identify how such direction prevented the claimant from achieving practical completion;

(iv) it argued that the law regarding the prevention principle in Australia was presently unsettled but that its reference to Dorter and Sharkey was that liquidated damages could not be recovered for the period in which an active prevention was actually delaying the claimant;

(v) it argued that in either event there was no authority that a contractor could deliver a project 4 months late, and then make general allegations that it was delayed without reference to the works that were occurring on the site, and then simply assert that no liquidated damages could be recovered;

(vi) it said that the claimant must explicitly identify the alleged acts of prevention and the impact this had on the completion of the works, i.e. it must be actually delayed, and that criticism of failure of the superintendent to grant extensions of time even though that no claims were made, and even now the claimant appeared to not have any records to demonstrate a single delay; and

(vii) that records the claimant supplied did not support the proposition it was actually delayed.

My analysis

584. I have already mentioned that I had to find the claim for liquidated damages in the superintendent's email to the claimant dated 7 October 2015 which had the original date for practical completion of 3 March 2015, and the date of practical completion was held to be 22 September 2015.

585. Most surprisingly, the respondent did not engage with the two case authorities referred to by the claimant. These are full-court authorities in New South Wales which are binding on me.

586. In the case of *Peninsular Balmain*, which was identical to the AS2124 contract in this adjudication, Hodgson JA, at paragraph [79] held in the circumstances where there was a reserve power of the superintendent to grant an extension of time, that power was exercisable in the interests of both owner and builder, and the superintendent was obliged to act honestly and impartially in deciding whether to exercise it.

587. This was cited with approval in *Probuild*, and at paragraph 128, McColl JA held that the head contractor in that case, was obliged to exercise the reserve power to grant

extensions of time conferred by clause 41.9 (the equivalent of clause 35.5 in this case) honestly and fairly having regard to the underlying rationale of the prevention principle to which he referred, or if necessary, because there is an implied duty of good faith in exercising the discretion that clause 41.9 conferred.

588. I find this is analogous to the superintendent in this case having regard to the underlying rationale of the prevention principle. It is not necessarily for me to deal with the implied duty of good faith which neither party argued.

589. At paragraph 115 His Honour referred to delays to practical completion caused by variations resulting from the act or default of the principal.

590. He said that, and supported by authorities in Australia and England:
"*Ordering variations after the due date which must substantially delay completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order. In the context of delaying variations, whether ordered before or after the due date for completion, the prevention principle "is grounded upon considerations of fairness and reasonableness*"

591. The reference to the contract providing otherwise, in which His Honour referred to some contending authorities in Australia [paragraphs 120 and 121], but then went on to say that these cases did not consider the effect of the discretionary power provided to the superintendent. His Honour then referred to *Peninsular Balmain* [paragraph 124] and *Spiers Earthworks* [paragraph 126], as authorities where the reserve power was in existence to activate the prevention principle where the superintendent did not exercise the power to grant extensions of time.

592. I find that both these Court of Appeal cases apply in these circumstances, and the failure by the superintendent to grant extensions of time for the variation associated with the retaining wall.

593. Given that the respondent did not engage with the claimant about the import of these two Supreme Court cases such that it provided no submissions about them made it more difficult to resolve the respondent's complaints of the activation of the prevention principle that:

(i) the claimant's own delays in providing the retaining wall design contributed to the delayed completion;
(ii) the controlling delay was always the construction of the retaining walls;
(iii) the claimant failed to identify the variations that were made by the superintendent, and how they prevented the claimant from reaching practical completion;
(iv) liquidated damages could only be allowed for the period when there was actual prevention by the respondent;
(v) the claimant could not deliver a project four months late, and then assert the respondent was not entitled to liquidated damages;
(vi) and the claimant needed to identify specifically where it was delayed;
(vii) and the claimant failed to provide any records demonstrating that it was delayed.

594. I have closely reviewed *Peninsular Balmain* and *Probuild* to discern whether any of these complaints raised by the respondent have a bearing of the activation of the prevention principle in circumstances where the superintendent has a discretion to extend time even if the claimant has not made a claim for an extension.

595. Hodgson JA at paragraph [79] in *Peninsular Balmain* held regarding the superintendent's power to extend time that:

"In my opinion, this power is one capable of being exercised in the interests both of the owner and the builder, and in my opinion the superintendent's obliged act honestly and impartially and deciding whether to exercise this power. Of course, if a timely claim has not been made, and the ground on which an extension is claimed is one which is difficult to decide because of the time that has elapsed since the time when the claim should have been made, that may be a ground on which the superintendent can fairly refuse the extension; but there is no suggestion that that is the case here."

596. Nowhere did I see that there was a qualification that the claimant had to demonstrate that it was actually delayed, because essentially no extension of time claim had been made, and that is why the provision enabling a superintendent to grant an extension of time in his discretion was considered.

597. I have already referred to *Probuild*, and again there seemed to be no qualification regarding the claimant having to demonstrate actual delays.

598. Moreover, having directed the claimant to supply and place road base on lot 4, which was the subject of variation 8, the quotation for which was accepted by the respondent on 17 April 2015, which was after the date for practical completion, to my mind falls within these cases, and the superintendent was obliged to grant an extension of time.

599. His failure to do so to my mind then falls within paragraph 115 of *Probuild* which held: *"The prevention principle applies to delays in practical completion caused by variations resulting from the act or default of the principal. Ordering variations after the due date which must substantially delay completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order. In the context of delaying variations, whether ordered before or after the due date for completion, the prevention principle "is grounded upon the considerations of fairness and reasonableness".*

600. There was no qualification on the superintendent's discretion to grant an extension of time in this case. It is well-known that parties to the AS2124 contracts now provide that, "it is in the superintendent's absolute discretion, and that the superintendent is not obliged to exercise that discretion", to get around the significant impact upon the operation of this clause in the construction industry.

601. Unfortunately for the respondent, particularly because it did not engage with those cases and provide me with assistance, I am satisfied that the prevention principle is activated thereby disentitling the respondent to claim liquidated damages.

602. Accordingly, **I value the liquidated damages claim by the respondent as $0** and this amount is transferred to LM1.

XIV. Valuation

603. Insofar as determining the amount of the progress payment, s13(a) of BCIPA requires me to find the amount calculated under the contract.

604. If I find there is no mechanism under the contract for an amount to be calculated, which means that s13(b) of BCIPA is enlivened for me to determine the value of the related goods and services, which means I need to have regard to s14 of BCIPA.

605. s14 of BCIPA considers *valuation* of the work and services is concerned as follows:

(a) s14(2)(a) of BCIPA under the terms of the **contract; or**

(b) s14(2)(b) if it does not do so, that it is possible to value the services having regard to:

(i) the contract price for the goods and services; and

(ii) other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties;

(iv) if any of the goods are defective, the estimated cost of rectifying the defect.

606. I have carried out the valuation of each variation in the decision above which is consistent with the approach required by BCIPA, and as can be seen from Annexure LM1, to which I took each variation amount, and there are comments in the spreadsheet to assist the parties.

607. The amount my spreadsheet calculated was $205,619.16 (including GST).

XV. The amount of the progress payment

608. Accordingly, I find the **adjudicated amount is $205,619.16 (including GST).**

XVI. Due date for payment

609. As mentioned previously, the payment claim identified that the due date for payment for that payment claim was 11 July 2017, and this is not controverted by the respondent in the payment schedule.

610. The claimant did not explain how this due date for payment was calculated, and it is incumbent upon me to be satisfied that the adjudication application was made within time.

611. I note that the Annexure to the General Conditions of Contract did not identify a time for payment, so I referred to clause 42.1 of the General Conditions of Contract, which provided that within 28 days after receipt by the superintendent of the claim, or within 14 days of the date of issue of the payment certificate, whichever is the earlier, the respondent was to pay the claimant.

612. No certificate was issued by the respondent in relation to this claim, because it argued that a final certificate had already been issued.

613. Accordingly, the 28 days after receipt by the superintendent of the payment claim, governs the due date for payment. The claim was made on 13 June 2017, such that 28 days after that is 11 July 2017, which is the date provided by the claimant.

614. However, the respondent identified that clause 42.1 was void for the purposes of section 67W of the *Queensland Building and Construction Commission Act 1991* because this is greater than the 15 business days after submission of a payment claim, which s67W seeks to prevent.

615. In these circumstances, s67W renders clause 42.1 void, and as the respondent correctly identifies, by s15(1)(b) of BCIPA, the due date for payment is 10 business days after the payment claim. The payment claim was made on 13 June 2017, which means the due date for payment was 10 business days later, which I find is 27 June 2017, as identified by the respondent.

616. I therefore find that the **due date for payment** of this payment claim was 27 June 2017.

XVII. Rate of interest

617. The claimant said that the contract made no provision for interest, whereas the respondent argued that the interest-rate under the contract was 5%, and I find this on page 29 of the contract in the Annexure.

618. S15(3) of BCIPA provides that:

> *"For a construction contract to which the Queensland Building and Construction Commission Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section."*

619. Neither party contended that this penalty rate applied, and I do not find that the civil works falls within the definition of *building work*.

620. Accordingly, I need to have regard to s15(2) of BCIPA which requires me to have regard to the rate prescribed under the *Civil Proceedings Act 2011*, s59(3) for a money order debt, if this is greater than the rate specified under the contract.

621. This provision refers one to the practice direction under the *Supreme Court of Queensland Act 1991*, and I find that Practice Direction Number 7 of 2013 identifies an interest rate of 4% above the cash rate published by the reserve bank.

622. Having regard to the Reserve Bank's website, and the decision on 1 August 2017 to keep the cash rate at 1.5%, I find this is the cash rate to which I need to add 4%. This approach agrees with the respondent's submissions

623. This means that the interest rate of 5.5% is the greater, and I find this is the one applicable.

624. **I find the rate of interest is 5.5 % interest payable on the adjudication amount**.

XVIII. Adjudicator's fees

625. The default provision contained in s35(3) of BCIPA makes the parties are liable for the adjudicator's fees is in equal proportions, unless I decide otherwise.

626. The claimant partially succeeded in its payment claim from a monetary point of view, because variation number 11 was for $449,000, and I only found that it was entitled to just under $80,000 because it provided no assistance in determining a reasonable rate for this variation. However, the respondent's denial about the requirement of a variation for the retaining walls was not sustained.

627. It failed regarding variations 2 and 3, and only partially succeeded with variation 1, which was based on a concession by the respondent. It succeeded with variation 8 & 14, but only partially succeeded with variation number 11 as I have mentioned above.

628. The respondent raised 3 jurisdictional objections, one of which it abandoned in the response, both of which were rejected by me, and they took some time to resolve.

629. The respondent argued strongly that the timing of the payment claim, which was made without prior warning, and essentially was as an ambush claim.

630. To my mind the timing of the payment claim, was still within the claimant's statutory rights, such that any late claim may equally have been prompted by the failure of both parties to resolve the dispute, which was of long-standing. That failure cannot be laid at the claimant's feet, because it takes 2 parties to be in a contract.

631. My finding that the superintendent ought to have granted an extension of time meant that the respondent failed on its liquidated damages claim, about which it had withheld moneys from approximately October 2015. The respondent knew that he had issued a variation for the variation 8 road base hard stand.

632. The respondent's argument that the final certificate applied to constrain this adjudication without referring to the proviso to clause 42.8 was troubling, and took some time to resolve. It also raised a new reason regarding the NOD confining the payment claim to only those variations identified in the NOD, which I rejected.

633. The respondent added that the application was not made in a cohesive, well-organised or detailed basis and the submissions did not expressly state the contractual basis for claims having been made. There is merit in these submissions.

634. The respondent expressed extreme concern over Mr Mansell's paragraph 17 of his statutory declaration which it asserted contained blatant untruths. I could not make such a finding because the evidence from Mr Grove I found was inadmissible because it was hearsay, and I explained why in these reasons.

635. Several of the respondent's reasons were upheld, and although its submissions were sometimes lengthy on points these were to respond to the application. I had to consider whether the claimant had demonstrated entitlement, and there were occasions where the claimant did not demonstrate entitlement insofar is the latent conditions were concerned, which took quite some time to resolve.

636. Furthermore, the claimant did not provide an explanation of its higher rate for the retaining walls for variation number 11.

637. Having regard to section 35A of BCIPA, and having regard to the respondent's submissions, it appeared to me that neither party participated in the adjudication without any reasonable prospects of success or with an improper purpose, and in my view neither acted unreasonably leading up to the adjudication or in the conduct of it.

638. On balance, in my view, there is no need to exercise my discretion to alter the default position that each party share 50% in my fees and that is my finding.

Chris Lenz

Adjudicator

23 August 2017

XIX. ATTACHMENT LM1

This spreadsheet follows on the next page

ATTACHMENT LM1
ADJUDICATION CALCULATIONS

#		Claimant's amount	Respondent's amount	Adjudicated amount	Comment
	Contract sum	$1,962,960.80	$1,961,961.80	$1,961,961.80	Respondent's concession
#	**Variation description**				
1	Topsoil	$24,225	$0.00	$6,560	Respondent's concession
2	Unsuitable material	$32,704	$0.00	$0.00	My finding
3	Additional fill	$37,762.50	$0.00	$0	My finding
4	Additional sewer reticulation	$56,160	$56,160	$56,160	No dispute
5	Alterations to cul-de-sac	$9,370	$9,370	$9,370	No dispute
6	crossing conduits	$13,146.77	$13,146.77	$13,146.77	No dispute
7	Excess topsoil	$65,088.11	$65,088.11	$65,088.11	No dispute
8	Extra road base	$65,750	$0.00	$65,750	My finding
9	Turf to swale drains	$14,400	$14,400	$14,400	No dispute
10	Hydro mulch	$15,627.50	$15,627.50	$15,627.50	No dispute
11	Extra retaining walls	$449,000	$0.00	$74,250	My finding
12	Hazard warning	$385	$385	$385	No dispute
13	Concrete foot paths	$672	$672	$672	No dispute
14	Additional water reticulation	$119,115	$0.00	$81,195	My finding
	SUBTOTAL	$2,866,366.68	$2,136,811.18	$2,282,314.18	
	Liquidated damages		($89,968)	$0	My finding
	SUBTOTAL	$2,866,366.68	$2,046,843		
	Less paid to date	$2,095,387.67	$2,095,387.67	$2,095,387.67	
	SUBTOTAL	$770,979.01	($48,544.49)	$186,926.51	
	GST	$77,097.90	($4,854.45)	$18,692.65	
	TOTAL	$848,076.91	($53,398.94)	$205,619.16	Adjudicated amount