Adjudication Decision: 356792

(Building and Construction Industry Payments Act, 2004 QLD)

Adjudicator	:	Chris Lenz (J622914)

Application Details

Claimant		
Name	:	Alliance Glass and Glazing Pty Ltd
ACN/ABN	:	27 083 141 020
Address	:	31-33 Lear Jet Drive, CABOOLTURE 4510
Respondent		
Name	:	J Hutchinson Pty Ltd
ACN/ABN	:	52 009 778 330
Address	:	PO Box 355, COOLANGATTA QLD 4225
Project		
Type	:	Design and construction of window glazing
Location	:	296 The Esplanade, MIAMI
Payment Claim		
Date	:	12 February 2018
Amount	:	$353,178.18 (excluding GST)
Nature of claim	:	Standard
Payment Schedule		
Date	:	16 February 2018
Amount	:	-$418,793.08
s20A Notice Date	:	N/A
Application Detail		
Application Date	:	1 March 2018
Acceptance Date	:	7 March 2018
Response Date	:	21 March 2018
Claimants reply:	:	N/A
Extension of Time	:	N/A

Adjudicator's Decision

Jurisdiction	:	Yes
Adjudicated Amount	:	$0.00
Due Date for Payment	:	23 March 2018
Rate of Interest	:	11.93%
Claimant Fee Proportion (%)	:	50%
Respondent Fee Proportion (%)	:	50%
Decision Date	:	4 April 2018

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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. **Alliance Glass and Glazing Pty Ltd** (referred to in this adjudication as the "claimant") was engaged by **J Hutchinson Pty Ltd** (referred to in this adjudication as the "respondent"), to carry out design and construction of glazing at the North Residences, 296 The Esplanade, MIAMI (the "work").
2. The claimant asserted that it was given a letter of acceptance and purchase order on 5 June 2017 and was contracted to supply and install commercial grade windows and doors.
3. It then asserted that due to the numerous errors with the plans, which it communicated to the respondent, the project became a design and construct project.
4. In contrast, the respondent submitted that following the letter of acceptance, it forwarded a purchase order and a design and construct subcontract for execution by the claimant on 5 June 2017.
5. The subcontract sum was $818,000 excluding GST.
6. Works commenced after the contract was signed, but the claimant asserted that there were significant difficulties with the details and changes to windows, doors and glass types.
7. The claimant asserted that the respondent directed the claimant that windows and doors had to be fitted for lock-up by Christmas 2017.
8. The claimant further submitted that the respondent then engaged other fabricators and installers to carry out this work and subsequently issued the claimant with a default notice followed by termination of contract.
9. On 12 February 2018 the claimant issued a payment claim in the sum of $353,178.18 (excluding GST).
10. On 16 February 2018, the respondent provided a payment schedule identifying an amount of $-418,793.08 (excluding GST).
11. On 1 March 2018, the claimant lodged an adjudication application in which it claimed $818,000.
12. The respondent submitted that it received the adjudication application from the claimant on 7 March 2018 by means of Dropbox, and it opened the Dropbox on that date.
13. On 7 March 2018, I advised the parties of my acceptance as the adjudicator.
14. On 9 March 2018, I received submissions from the respondent submitting that I had no jurisdiction to adjudicate the matter.
15. On 12 March 2018, I requested the claimant provide me with submissions in response to the jurisdictional objections by 15 March 2018, and for the respondent to respond to those by 20 March 2018.
16. I received both sets of submissions in time.
17. On 21 March 2018 I then received the adjudication response.

II. Material provided in the adjudication

18. I received the claimant's adjudication application material electronically from the QBCC which comprised the following folders:
    (i) Alspec invoices;

(ii) Email correspondence;
(iii) QBCC application, which attached:
1. A statutory declaration of Mr Shaun Pendall dated 23 February 2018;
2. the payment schedule, but no payment claim;
3. A letter dated 22 March 2018 addressed "To whom it may concern" (the "claimant's letter");
(iv) Statutory declarations of the following:
1. Anthony Duckworth
2. Ben Fiers
3. Ian Barnes
4. Shaun Pendall, which was identical to that in paragraph 18(111)(1.) above
(v) 'the esplanade Miami_hutchinson_296 north residences;
(vi) The Masta Glazier Invoices.

19. I received 2 lever arch folder in the adjudication response. This comprised:
(i) The adjudication response submissions;
(ii) The Contract;
(iii) The payment claim;
(iv) The payment schedule;
(v) Statutory declarations of the following (including annexures):
1. Scott Rheinberger;
2. Ben Turnbull;
(vi) A folder with 20 case authorities.

III. Jurisdictional issues

20. On 9 March 2018, the respondent provided submissions that I had no jurisdiction to adjudicate the dispute because:
(i) The payment claim dated 12 February 2018 did not identify the construction work or related goods and services to which the payment claim related;
(ii) The payment claim was made prior to a reference date and was invalid;
(iii) The contract was terminated on 17 January 2018, such that no reference dates accrued after that date
21. None of these objections had been raised in the payment schedule, but they related to my jurisdiction, so I requested the claimant provide submissions in response to those issues, and for the respondent to reply to the claimant's submissions.
22. Both parties provided their submissions in response to my request, and I decided that I must consider these submissions before dealing with the merits of the claim.

Construction work not identified

Claimant's submissions

23. The claimant's solicitor submitted that:
(i) As a matter of fact, the work was sufficiently identified;
(ii) It necessarily incorporated all work completed on the project;
(iii) The respondent had not objected to the description in issuing the payment schedule;
(iv) The parties had operated on the same basis of limited description of works without objection;
(v) 2 cases, in support of its submissions, being:
1. *AMD Formwork Pty Ltd v Yarraman Construction Group Pty Ltd (County Court of Victoria, 2 August 2004);*
2. *Watpac Constructions (NSW) Pty Ltd v Charter Hall Funds Management Ltd* [2017] NSWSC 865
(vi) Distinguished the case of *Neuman Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17; [2009] QSC 376 on the facts, because in that case, no payment schedule had been provided, which is in contrast to this adjudication.

24. The claimant did not provide a copy of the payment claim about which it sought adjudication, but only provided the payment schedule. It may have been an oversight.
25. However, behind Tab C of the adjudication response, the respondent provided a copy of the payment claim dated 12 February 2018 called *Final Claim* in the amount of $388,496.00.
26. I will turn to the respondent's submissions before deciding this issue.

Respondent's submissions

27. The respondent's submissions identified the three aspects contained within the final claim as follows:
    (i) Total cost of materials, labour supplied… $396,971.28;
    (ii) Less progress claim is paid to Alliance to date – $-73,793.19;
    (iii) Time spent for Mark and Sean on meetings and redesign works $30,000.
28. It cited *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd* [2010] QCA 381 that there must be sufficient identification to enable a respondent to understand the basis of the claim.
29. The respondent argued that this payment claim was so different to *57 Moss Road* because this payment claim failed to provide any information to allow the respondent to understand the amounts being claimed.
30. It added that the case of *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd* [2004] NSWCA 393 was authority that, "unless a progress claim identifies the particular work for which payment was claim, it would be impossible for a respondent provide a meaningful payment schedule supported by reasons."
31. As further support, it cited the case of *Coordinated Construction Co-Pty Ltd v Climatech (Canberra) Pty Limited & Ors* [2005] NSWCA 229, where Hodgson JA said, "*… failure to adequately set out in the payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination*".
32. In addition, Basten JA, held that, "*In that sense, the claim, to be valid, must be reasonably comprehensible to the other party.*"

Decision

33. The difficulty for an adjudicator in deciding this issue, at a jurisdictional level, is that the level of particularity of the payment claim is dependent upon whether it is comprehensible to the respondent in the circumstances[1].
34. The two principal cases cited by the respondent of *57 Moss Road* and *Estate Property* were both cases where the respondent was resisting summary judgement because no payment schedule had been provided.
35. In this adjudication, a 5-page payment schedule was provided, and nowhere did the respondent take issue in the schedule with it being unable to understand the claim.
36. In the case of *Climatech*, an adjudicator decided a dispute, and the primary issue was whether the delay damages could be amounts due for construction work carried out under the NSW equivalent of BCIPA.
37. In *Climatech,* Hodgson JA and Basten JA both held that the payment claim must identify the construction work or related goods and services for the respondent to understand the basis of the claim.
38. *AMD* and *Charter Hall* cited by the claimant were also summary judgement applications where no payment schedules had been provided.
39. Neither party was able to point to a case where an **adjudicator** decided a matter, which was then set aside for lack of jurisdiction because of a deficiency in the payment claim.
40. Having regard to the authorities provided, none of which relate to adjudication, except for *Climatech*; it appears that as a matter of principle, that in NSW, the Court of Appeal did not consider that the equivalent of BCIPA's s17(2) is a mandatory requirement identified in *Brodyn*, that was an essential precondition for a valid adjudication.
41. I find that both Basten JA and Hodgson JA were content to allow an adjudicator to evaluate the merits of a payment claim: paragraph [45] Basten JA, and that if an adjudicator found

[1] *Coordinated Construction Co-Pty Ltd v Climatech (Canberra) Pty Limited & Ors* [2005] NSWCA 229, [25] Hodgson JA

that there was a failure to set out in the payment claim, the basis of the claim, then the adjudicator could exclude a relevant amount from determination: paragraph [26] of Hodgson JA's judgement.

42. In addition, McDougal J's reasoning in *Watpac* at paragraph 68 confirmed that I can consider the knowledge of the contract, its history and its administration.
43. I note the respondent's paragraph 29 [20 March 2018] submissions about a show cause, Masta Glaziers taking over some work, and the claimant no longer fabricating materials. However, these facts do not demonstrate that the respondent had no understanding of the contents of the payment claim.
44. I find that the respondent must have understood the basis of the claim because it provided the schedule, in which it had an item "*Certified/Paid to date*" of $73,973.10. This means that it satisfied the *Climatech* test of 2 Appeal Court Judges in NSW, which in my view binds me in Queensland.
45. What appears to me to be particularly apposite is Hodgson JA statement at paragraph [24]: *"Accordingly, the task of the adjudicator is to make a determination within the parameters of the payment claim, although that is not to say that, if an adjudicator were to make an error which can later be seen as taking the determination outside those parameters, it necessarily invalidates the determination."*
46. I therefore reject the respondent's argument that I have no jurisdiction because of any perceived deficiencies in the payment claim. To my mind such a jurisdictional argument needs to be supported by a judicial authority **directly on point regarding a dispute where an adjudicator was involved**. No such authority has been provided.
47. This is not to say that the claim demonstrates entitlement, but that is <u>not the test to be applied at the jurisdictional threshold.</u>
48. The respondent made extensive submissions about deficiencies in the payment claim in the 20 March 2018 submissions, which it echoed again in the adjudication response.
49. However, these submissions to my mind go toward entitlement, rather than jurisdiction, and to follow Hodgson JA's statement, I will make a determination within the parameters of the payment claim and may exclude amounts when I consider the merits.
50. Whether or not the claim demonstrates entitlement, is something that is evaluated when the merits are considered.

Claim before a reference date

<u>Claimant's submissions</u>

51. The claimant combined its submissions for this issue and the contract termination issue together and relied upon the case of *McNab Developments (QLD) Pty Ltd v MAK Construction Services Pty Limited & Ors* 2013 QSC 293.
52. It argued that there had not been claims from each reference date prior to the purported termination of contract and that the claim was valid in reliance upon an accrued reference date.
53. Interestingly, in the footnote to submission 12, the claimant referred to item 37 of Annexure Part A to the contract. I take this to be a concession that there was an Annexure Part A to the contract; rather than the claimant's assertions in the second paragraph of the claimant's letter, that the contract comprised a letter of acceptance and the purchase order.
54. The claimant concluded by stating that claims made prior to reference dates were themselves invalid, and a relevant payment claim for work through to December 2017 would have had to have been made from 30 December 2017, or thereafter.
55. I turn to the respondent's submissions.

<u>Respondent's submissions</u>

56. At paragraph 33 of the 20 March 2018 submissions, the respondent asserted that that there was no dispute that:
    (i) Reference dates were 2 business days after the 28th of each month;
    (ii) The contract was validly terminated on 17 January 2018; and
    (iii) The payment claim was a "final claim" dated 12 February 2008.

57. The respondent argued that in contrast to the *McNab* case where there was evidence of a reference date, albeit incorrectly dated, in this adjudication there was no evidence that the payment claim was for an accrued specified reference date.
58. The respondent argued that this *accrued reference date* was an afterthought included for the first time in the claimant's submission.
59. The respondent submitted that I could not give or imply an accrued reference date, when the payment claim indicated otherwise, and there was no evidence whatsoever that there was a reference date.

Decision

60. I was unable to find any reference in the payment claim to a reference date, that indicated *otherwise* as suggested by the respondent.
61. The respondent provided no authority for it's submission that I cannot give or imply an accrued reference date.
62. In my view there needs to be a finding about a *reference date*, because a payment claim must be **from** a valid reference date, to comply with s12 of BCIPA.
63. The respondent was unable to give me an authority prohibiting me from finding a reference date, in circumstances where no reference date had been pointed out in the payment claim or the application.
64. I am of the view that an adjudicator is obliged to find a reference date, to have jurisdiction to adjudicate.
65. The claimant's submissions confirmed that no previous payment claims had been made before termination, and the respondent did not provide any material to controvert that assertion.
66. The payment claim was dated 12 February 2018, and titled *final claim*, which I find is after the contract termination date of 17 January 2018.
67. After termination there are no more reference dates that accrue[2], but I find, without controverting evidence from the respondent, that any reference dates prior to termination were available to the claimant.
68. Both parties conceded that the contract identified reference dates as 2 business days after the end of a month. A *business day* is defined in clause 1 as *not a Saturday, Sunday or Public holiday*.
69. The 28th December 2017 was a Thursday, and 2 business days after that date I have calculated to be 2 January 2018, which I find is the last available reference date before termination.
70. In the respondent's 20 March 2018 submission #29, which I accept; by 7 December 2017, the claimant was no longer fabricating any materials, and work had been taken out of its hands for levels 6 and 7.
71. I also find that the claimant was subject to a show cause notice of 23 October 2017.
72. By 7 December 2017, it appeared as if a substantial amount of the claimant's work was being carried out by others. This was corroborated by the claimant's letter that windows and locks had to be fitted by Christmas, and other fabricators and installers were engaged by the respondent to do so.
73. The claimant submitted that it was ordered that the material it had purchased from its suppliers, was to be given to the new fabricators and installers, and that it had done so.
74. I am therefore satisfied from the respondent's submissions, and those of the claimant that by Christmas 2017, the claimant's work and materials supply was practically over, and that the 17 January 2018 termination letter formalised that reality.
75. Given the claimant had not previously provided a payment claim, the reference date of 2 January 2018 was available to it, and I find that the 12 February 2018 payment claim was *from* this reference date, as a matter of jurisdiction.

[2] *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors* [2011] QSC 67

Contract termination

76. This submission by the respondent did not take the matter further, because the claimant was not relying upon a post termination reference date, and I have found that the payment claim was made from the 2 January 2018 reference date.
77. **I therefore reject the respondent's preliminary jurisdictional objections because I am satisfied that I have jurisdiction to proceed to consider the merits of the payment claim.**

IV. Right to a progress payment

78. I have already briefly considered s12 of BCIPA regarding *reference dates* to found jurisdiction to consider the merits, but s12 needs to be evaluated more closely to ensure that the adjudication can proceed.
79. s12 of BCIPA 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:
        1. carry out *construction work*;
        2. or *supply related goods and services* under the contract.
80. Having already found a *reference date*, I consider the other elements together.

Construction contract and carrying out construction work or supplying related goods and services

81. In the claimant's letter, the claimant asserted that the contract was to supply and install commercial grade windows based on the letter of acceptance and the claimant's quote.
82. This contrasts with the respondent's material which attached a design and construct contract, provided at Tab B of the adjudication response.
83. I have already found a concession by the claimant through its solicitor providing the further submissions that I had requested, in which it footnoted a reference to Item 37 of Annexure Part A.
84. I have reviewed Scott Rheinberger's statutory declaration about the precontract negotiations and the entry into the contract, and the documents attached to his declaration.
85. I am satisfied from his sworn evidence that the contract was an AS4903-2000 Design and Construct subcontract for aluminium glazing, with the terms and conditions provided at Tab B. Each page of this document was initialled, and the initials appeared to be very similar to the full signature of Mr Pendall, which I found on the Tender Interview Meeting Minutes, on the last page of Tab B.
86. I found that the contract was sent to Mr Pendall on 5 June 2017, with the copy of the purchase order. I also find that the letter of acceptance, found at SR-03, referred to a modified AS4903-2000 Subcontract.
87. Furthermore, I note that Mr Pendall signed the Formal Instrument of Agreement for the contract with the date of 5 June 2017.
88. I must find that this contract is a *construction contract* under BCIPA for the carrying out of *construction work*. The claimant made no submissions regarding whether the contract was a construction contract under BCIPA, and the respondent focussed on there being no jurisdiction, and did not address this issue.
89. 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."*
90. I find that the contract contained a Scope of Works for Aluminium glazing, with a detailed description at Paragraph 2.1 for design and construction of a window and door system.
91. I find that the claimant contracted to:

(i) *carry out work* [construction of aluminium windows and doors] which fell within s10(1)(a) of BCIPA, and s10(e)(iv) insofar as prefabrication of these items was concerned; and

(ii) *supply goods and services* [design the above] which fell within s11(1)(a)(i) of BCIPA for supply and s11(b)(ii) regarding design,

for the respondent.

92. I am therefore satisfied that the claimant has the entitlement to a progress payment as provided by s12 of BCIPA.

V. Payment Claim

93. The respondent provided extensive submissions that the payment claim did not satisfy the requirements of s17(2)(a) of BCIPA, at a jurisdictional level.
94. I have rejected those submissions but will have regard to them when considering entitlement.
95. The payment claim was endorsed and it stated an amount of $388,496 (including GST) owing.
96. The payment claim amount comprised:
    (i) $396,971.28 (excluding GST); less
    (ii) $73,793.10 previously paid; plus
    (iii) $30,000 for time spent by Mark and Shaun on meetings and redesign work,

    totalling $353,178.18, to which $35,317.82 GST was added.
97. I am satisfied that the claim falls within BCIPA for it to be adjudicated.
98. However, for some reason, in the application, the claimant identified an amount of $818,000 (excluding GST), and I will have to consider this in more detail later.

VI. Payment Schedule

99. At paragraph 84 of the adjudication response, the respondent submitted that it provided a payment schedule to the claimant on 16 February 2018, and this was also noted in the application.
100. The respondent's payment schedule was attached at Tab D of the adjudication response.
101. It referred to the payment claim dated 12 February 2018 and valued the claim at $418,793.08) and provided reasons for this valuation.
102. I find that it was served within 10 business days of receipt of the payment claim.
103. I am therefore satisfied therefore that the payment schedule complied with section 18(2) of BCIPA which means it can be adjudicated.

VII. Adjudication application

104. The claimant lodged its application with the QBCC on 1 March 2018.
105. I find that this is on the 9th business day after receipt of the payment schedule and is therefore within the time prescribed under s21(3)(c)(i) of BCIPA.

VIII. Adjudication response

106. The adjudication response was delivered to my agent on 21 March 2018, which was on the 10th business day after the respondent had been served with the adjudication application, thereby satisfying s24A(2)(a) of BCIPA.
107. Given that all the time limits for this adjudication have been satisfied, and I am satisfied as to my jurisdiction, I am therefore able to proceed with the adjudication.

IX. The merits of the claimant's claim under BCIPA

108. I am obliged by section 26(2) of BCIPA to **only have regard to** (my emphasis):
    (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.

109. I carried out no inspection.
110. BCIPA has been recognised as a *fast track interim progress payment adjudication vehicle*[3].
111. Whilst neither party referred to the Court of Appeal's decision in *BMA* [4], it is an important case for adjudicators, because it demonstrates the importance of the adjudicator finding entitlement.
112. In that case an adjudicator decided that a claimant was entitled to a claim for latent conditions, when no such contractual entitlement existed.
113. At paragraph [6], Muir J held:
Before the adjudicator, BMA argued that under cl26.3 an entitlement to be paid in respect of a latent condition could arise only by operation of the mechanism set out in the clause – i.e. by the agreement of the parties or, failing that, the determination of the independent expert. The adjudicator awarded an amount for which no contractual entitlement existed rather than assessing BGC's contractual entitlement as he was required to do by section 14 of the Act. (**my underlining**) *Consequently, the award by the adjudicator constituted a jurisdictional error*
114. When considering BCG's argument about the "*pay now, argue later*" nature of the scheme, Muir J at [68] held:
"The fact that the Act provides for a simple expeditious and robust mechanism for ensuring the payment of progress claims does not, of itself, support the conclusion for which BGC contends. The Act also provides a relatively straightforward framework which facilitates compliance. I am unable to detect anything in the Act which indicates a legislative intention the benefits provided to claimants and the corresponding detriments to respondents under the Act should exist irrespective of whether there has been compliance with the Act's provisions. To the contrary, some of the Act's provisions are expressed in peremptory language."
115. I accept therefore that BCIPA requires rapid decision-making, but in my view, it is not a shortcut to payment. The provisions of BCIPA must be adhered to.
116. s26(2) of BCIPA requires me to look to the contract and the claimant's submissions, and in accordance with *BMA*, in my view, I must find entitlement under the contract.
117. The respondent has made several submissions regarding my jurisdiction, which I have rejected. However, these submissions remain live for consideration in relation to entitlement.
118. I turn firstly to the contract.

X. The contract

119. I have already briefly considered the contract, to ensure that it fell within the definition of *construction contract* under BCIPA.
120. I found that the AS4903-2000 modified contract provided at Tab B of the adjudication response comprised the contract.
121. This dispute relates to a *Final Claim for "Total Cost for Project"* regarding total cost of materials and labour supplied to the project, and further analysis of the contract is required.
122. I turn again to the payment claim which comprised:
(i) $396,971.28 (excluding GST); less
(ii) $73,793.10 previously paid; plus

[3] *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor* [2007] QSC 220, [12]-[13] per (de Jersey CJ).
[4] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394

(iii) $30,000 for time spent by Mark and Shaun on meetings and redesign work.

123. That detail is all that was provided in the payment claim, and there were no substantiating documents, or any further explanation of the amounts claimed.
124. In the application, the claimant claimed $818,000 (excluding GST), which is above the amount claimed in the payment claim.
125. The only logical explanation, which I have gleaned, and which has not been provided by the claimant, is that the claimant was claiming for the entire lump sum.
126. Having regard to clause 2.1 of the contract, I find that the respondent was obliged to pay the claimant a *lump sum* for work, and that lump sum was identified in paragraph 4 of the Formal Instrument of Agreement, as $818,000 (excluding GST).
127. However, for the claimant to be entitled to payment, it was required to carry out and complete *WUS* (the "work under the subcontract") in accordance with the subcontract and directions authorised by the subcontract.

XI. The claimant's submissions

128. The only submissions provided by the claimant was the claimant's letter, and some statutory declarations.

The claimant's letter written by Mr Pendall

129. The claimant referred to a payment plan in three stages per floor, but that due to being ordered to move up a floor until issues on lower levels had been addressed, the claimant said that it was unable to finish a floor until the defects with the buildings were rectified.
130. It argued that it was unable to put in a progress payment because it could not finish any of the stages, and the respondent was completely inflexible, and would not pay the claimant for work that had been completed.
131. It then added that the respondent engaged other fabricators and installers to complete the windows and doors to lock up by Christmas.
132. Furthermore, it said that it had provided materials that it had purchased from its suppliers to the new fabricators and installers and had been led to believe it would be paid for this supply together with any work carried out by the claimant, but this did not occur.
133. It then added that it received a default notice and termination of contract, in circumstances where it was not in breach.
134. Based on the facts asserted in this letter, without having regard to the respondent's submissions, it is evident, and I so find that the claimant did not complete the *WUS*.
135. Mr Pendall explained that the lack of cash flow had prompted its suppliers to stop credit, which was potentially leading the claimant down the path of liquidation after 26 years in business.
136. This is a most unfortunate outcome for the claimant, and BCIPA is designed to facilitate cash flow.
137. However, it is most unfortunate that the claimant has not appreciated that it needed to demonstrate its entitlement to its claims under the contract, and to explain why it is that the contract allowed payment to it.
138. The only other documents that could possibly be construed as submissions are the statutory declarations provided in the application, and I turn to these.

The statutory declarations

139. **Ian Barnes**. This was an unsigned statutory declaration in which Ian Barnes focused on the design and certification work carried out by him.
140. I have already found that the contract was for design and construction of aluminium glazing, such that all Mr Barnes' unsigned statutory declaration demonstrates is that work was completed within a particular timeline.

141. The *Scope of Work* paragraph 2.1(b) on page 3 confirms the work elements to be design, supply and installation of aluminium glazing, including workshop and as-constructed drawings, supply, installation, testing, commissioning and certification.
142. It confirms that design and certification work was carried out and completed, but nothing within this document demonstrates an entitlement to be paid for this work.
143. **Ben Fiers.** This signed statutory declaration confirmed diary entries for the design and specification meetings between the claimant, respondent and Alspec.
144. The diary entries are virtually illegible, and it was incumbent on the claimant to provide legible diary notes, as it bears the onus of proving its case.
145. Even if they were legible, it is unclear how the notes of a third party demonstrate entitlement for the claimant to be paid for design and specification work, which I find formed part of the *WUS*.
146. **Anthony Duckworth**. This was an unsigned letter, which described the respondent making changes to the construction details on the fly, and the architectural documents were changing on a daily basis.
147. There were a whole host of emails attached under this folder demonstrating these changes.
148. These facts may go towards substantiating a claim, but they do not assist with entitlement.
149. The subcontract contained a mechanism for:
    (i) resolving discrepancies under clause 8.1, and allowing additional costs to the claimant if the *Subcontract Superintendent* issued a direction
    (ii) variations in clause 36,

    but there was no evidence provided of any such directions by the *Subcontract Superintendent* to entitle the claimant to any payment under the contract.
150. **Sean Pendall.** Mr Pendle is statutory declaration merely attached all the documents associated with the application, and provided no other submissions in support, apart from the claimant's letter.
151. None of the statutory declarations provide any support for the claimant's entitlement to be paid the payment claim.
152. An adjudicator is not able to decide amounts that are not governed by the contract mechanism (including the contract price and any rates or prices stated in the contract), unless they have been the subject of variation agreed to by the parties. s14 of BCIPA expressly deals with this issue of valuation.
153. No variations have been pointed to in the claimant's material, and I have found that the claimant did not complete the *WUS*.
154. If it had completed the *WUS*, it may have entitled it to payment of the lump sum, provided it had completed the work in accordance with the subcontract and directions authorised within it.
155. However, this did not occur, and the claimant has failed to demonstrate entitlement for payment of any of the *WUS*.
156. Insofar as the $30,000 claim for time spent on meetings and redesign work, I find no basis for this claim where the claimant was responsible to design and construct the aluminium glazing.
157. The claimant pointed to no variations that had been directed by the *Subcontract Superintendent* which could have allowed payment under clause 36.4 of the contract.
158. In fact, the entire payment claim lacked any reference to the contractual mechanism entitling the claimant to payment.
159. This decision does not assist the claimant in obtaining any payment from the respondent, which is most unfortunate.
160. However, with respect, the claimant has failed to appreciate the need to demonstrate its entitlement, and to substantiate its claim, and it did not do so.

XII. Respondent's payment claim objections

161. I am not satisfied that the claimant has discharged its legal and evidentiary onus in support of its entitlement to claim the costs identified in the payment claim.

162. To my mind, it is only if this onus had been discharged that it was necessary to have regard to the respondent's submissions.

163. However, for the sake of completeness, I turn to some of the response submissions which complain about the claimant's failure to prove entitlement.

164. At paragraph 63 of the response, the respondent contended that the claimant had not provided any evidence in support of the claims pursued in the application.

165. At paragraph 65, it argued that it was incumbent upon the claimant prove its claim and that I was obliged to embark on my own assessment of the merits of the claimant's progress claim and whether the claimant was entitled to payment.

166. The respondent provided the cases of *Durham*, *Coordinated Construction* and *Contrax Plumbing* supporting the proposition that the onus was on the claimant to prove entitlement to the amounts claimed.

167. At paragraph 77, the response submitted that there was insufficient evidence from the claimant to enable me to be satisfied of any entitlement to the amounts claimed:

(i) based on evidence provided in the application; together with

(ii) reference to the terms of the subcontract.

168. At paragraph 81, the respondent argued that I should prefer the evidence of the respondent and reject the amounts claimed by the claimant because the claimant:

(i) Bore the onus of establishing entitlement;

(ii) Failed to include a copy of the subcontract in the application;

(iii) In respect of the design works provided no explanation and all materials in relation to that claim;

(iv) Made no explanation in any of its letters and statutory declarations about the services the claimant allegedly provided;

(v) merely attached a number of invoices from Alspec and Masta Glazier without any contacts been provided;

(vi) attached invoices that did not add up to the amount claimed the payment claim; and

(vii) included Masta Glazier's invoices paid by the respondent.

169. At paragraph 83, the respondent stated that even if I found I had jurisdiction to consider the application, I was unable to assess the amount claimed.

170. I agree with the submissions, which reinforces my earlier finding that the claimant has failed to establish its entitlement to any of the amounts claimed in the payment claim.

171. Having regard to the three case authorities provided by the respondent, supported my earlier finding that I needed to be satisfied of the claimant's entitlement, and no such entitlement was demonstrated.

XIII. The amount of the progress payment

172. I have found that the claimant has failed to demonstrate any entitlement for amounts claimed in the payment claim, which means the amount of the progress payment is $0.00.

XIV. Due date for payment

173. There is no amount due for payment, however, I am obliged by s26(1) of BCIPA to find a due date for payment.

174. Clause 37.2 of the contract provides that the respondent needed to pay within 25 business days after the *Subcontract Superintendent* receives a progress claim.

175. Given that the payment claim was made on 16 February 2018, the **due date for payment** of this payment claim would be 23 March 2018.

XV. Rate of interest

176. There is no amount due, but I am obliged to find a rate of interest, and item 39 of Annexure Part A of the contract provides the interest rate on overdue payments as per s67P of the QBCC Act.

177. S67P(2) provides that for the period for which the progress amount, or the part of the progress amount, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, for each day the amount is unpaid.

178. S67P(3) defined "**penalty rate**" as—

> (a) the rate made up of the sum of the following—
>
> (i) 10% a year;
>
> (ii) the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills; or

179. Having regard to the website of the Reserve Bank of Australia https://www.rba.gov.au/statistics/tables/xls/f01hist.xls, I found that the rate for March 2018 was 1.93%.

180. Accordingly, the sum of both these amounts is 11.93% which is the s67P QBCC Act rate.

181. I find the rate of interest is 11.93%, but there is no amount due.

XVI. Adjudicator's fees

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

183. The claimant failed in its payment claim.

184. The respondent raised jurisdictional objections in its adjudication response which were not in the payment schedule.

185. 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.

186. A lot of the decision time was taken up in dealing with the jurisdictional objections of the respondent, which were made before the adjudication response was delivered.

187. On balance, in the circumstances, I see no reason to depart from the default provision and find that the claimant responsible for 50% of my fees and the respondent 50%.

Chris Lenz

Adjudicator

4 April 2018