

ADJUDICATORS DECISION

In the matter of adjudication pursuant to the
Building and Construction Industry Payments Act 2004 (the Act)

IAMA Adjudication No: 30077

Between

Big Concrete Pours Australia Pty Ltd

The Claimant

And

Gallagher Development Group Pty Ltd

The Respondent

The Decision

- a) **The adjudicated amount to be paid by the Respondent to the Claimant in respect of the Adjudication Application lodged 14 December 2006 is \$8,866.00 (inclusive of GST).**
- b) **The date on which the amount became payable is 5 December 2006.**
- c) **The applicable rate of interest payable on the adjudicated amount is the penalty rate prescribed under Queensland Building Services Authority Act 1991 Section 67P.**
- d) **The Claimant and the Respondent are liable in equal proportions for both the ANA application fee and the Adjudicator's fees and expenses.**

Adjudicator: **John Savage**

ANA: **Institute of Arbitrators and Mediators Australia**

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Preliminary Matters

Background

- 1 This adjudication arises from an agreement the parties entered into in June 2006 for the Claimant to provide quotations for various works over a one year term and the contract is based on terms and conditions of that period contract agreement with scope of works determined by the issue of drawings, site instructions and purchase orders by the Respondent. For the project in question verbal and written instructions, purchase orders and drawings were provided requesting the provision of labour to carry out formwork boxing, reinforcement placement, concrete placement and finishing works for a showroom development being delivered by the Respondent in Brisbane Queensland. There was no date agreed for practical completion of the project works, however, a “Certificate of Classification” was issued by a Building Certifier dated 20 November 2006. A payment claim dated 20 November 2006 was served on and disputed by the Respondent who issued a payment schedule for a reduced amount. A dispute has arisen over the scope of work carried out and liability for rectification of defects.

Appointment of Adjudicator

- 2 The Claimant lodged an Adjudication Application with the QLD Chapter of the Institute of Arbitrators and Mediators Australia (IAMA) on 14 December 2006. The Institute of Arbitrators and Mediators Australia Queensland Chapter is an Authorised Nominating Authority under the Act.
- 3 By letter dated and received 18 December 2006 from the Institute of Arbitrators and Mediators Australia Queensland Chapter the Adjudication Application was referred to me to decide as the Adjudicator.
- 4 By letter dated 19 December 2006, sent by express post to the Claimant and the Respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.

Scope of the Decision

- 5 The Act at Section 26(1) determines what I am to decide and states:
“(1) An adjudicator is to decide_
(a) The amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount); and
(b) The date on which any amount became or becomes payable; and
(c) The rate of interest payable on any such amount.”
- 6 The Act at section 34(3)(b) gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the Authorised Nominating Authority fees.

- 7 The Act at section 35(3) gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the Adjudicator's fees and expenses.

Matters Regarded in Making the Decision

- 8 Section 26(2) restricts the matters that I may consider in coming to my adjudication decision and states:

“(2) In deciding an adjudication application, the adjudicator is to consider the following matters only--

- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
- (b) the provisions of the construction contract from which the application arose;*
- (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
- (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”*

- 9 In making my decision I have had regard for the following:

- (a) The provisions of the *Building and Construction Industry Payments Act 2004* and, the relevant provisions of Part 4A of the *Queensland Building Services Authority Act 1991*.
- (b) The provisions of the Period Trade Contract Conditions agreement dated 30 June 2006 between the parties from which the Adjudication Application arose;
- (c) The Payment Claim dated 20 November 2006 to which the application relates;
- (d) The Payment Schedule dated 1 December 2006 issued by the Respondent;
- (e) The Adjudication Application lodged 14 December 2006 and enclosed submissions;
- (f) The Adjudication Response dated 22 December 2006 and received same date was considered by the Adjudicator;

- 10 In determining this adjudication I did not exercise the discretion empowered by Section 25(4) of the Act, to request written submissions, conference or inspections. I received unsolicited submissions from both parties after receiving the Adjudication Response and I have not considered any content from those submissions in my Decision.

The Parties

- 11 Big Concrete Pours Australia Pty Ltd (the Claimant)
ABN: 18 118 767 365
6 Kunde Street
Cornubia, QLD 4130

Phone Number: 0439 743 443

Fax Number: 07 3806 2306

Represented by Quinn and Scattini Lawyers

- 12 Gallagher Development Group Pty Ltd (the Respondent)

ABN: 98 104 954 314

PO Box 58

Ashmore City, QLD 4214

Phone Number: 07 5597 7000

Fax Number: 07 5597 6661

Represented by Walsh and Partners Lawyers

The Contract and Application of the Act

- 13 Section 7 of the Act states:

“Object of the Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person-

(a) undertakes to carry out construction work under a construction contract; or

(b) undertakes to supply related goods and services under a construction contract.”

- 14 Section 10(1)(a) and (b) of the Act provides:

“Meaning of construction work

(1) Construction work means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;

- 15 The Claimant in the Adjudication Application Submissions at Item 2.1 describes the nature of the work stating inter alia as: “...*internal and external concreting, including carparks of Building A and B (the “works”)*.... ” and has provided an engineering drawing at annexure CS-14. The Respondent has not contested this description of the nature of the work except to the extent that only the George Frame engineering drawing 2411-1A is the only relevant drawing.

- 16 I find, based on the descriptive evidence provided in the Claimant’s submissions, that the works the subject of the Payment Claim is “Construction Work” captured within the definition provided in Sections 10(1)(a) & (b) of the Act highlighted above.

- 17 Schedule 2 of the Act defines a construction contract:

*“**construction contract** means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”*

- 18 The Claimant in the Adjudication Application Submissions at Items 3.1 to 3.3 in relation to the contract states:
- “3.1 On or about the 26 May 2006 the Claimant entered into a contract with the Respondent for the concreting of two buildings at the premises.*
- 3.1.1 The contract is taken to be entered into on the date that the Respondent accepted the terms of the quote and the updated labour costs.*
- 3.2 The contract was part oral and part written and comprised the following:*
- 3.2.1 The Quote;*
- 3.2.2 The verbal agreement between the Claimant and the Respondent regarding the altered labour costs;*
- 3.2.3 The Respondent’s letter dated 18 August 2006 (assumed to be 18 August 2005?) accepting the terms of the quote; and*
- 3.2.4 The Respondent’s letter dated 26 May 2006 accepting the altered labour costs;*
- 3.3 The contract provided inter alia the following terms:-*
- 3.3.1 The Claimant was to complete internal and external concreting works at the premises as per the Respondent’s plans and the Respondent’s instructions;*
- 3.3.2 The Respondent will pay the Claimant the sum of \$13.00 per hour (assumed to be square metre?) for labour required to complete the works;*
- 3.3.3 The Claimant will provide excavation works only to 50mm; and*
- 3.3.4 The Claimant will not supply materials for the construction of the works.”*
- 19 The Claimant in the Adjudication Application Submissions Affidavit of Mr Salmon at CS-01 has provided a copy of a quotation by ‘Crack Free Concrete’ to ‘Gallagher Developments’ dated 18 August 2005 and the subsequent response at CS-02 from ‘Gallagher Developments’ dated 18 August 2005 indicating acceptance of the quote by signing at the appropriate location. The Claimant further submits a letter dated 26 May 2006 from Gallagher Developments to ‘Crack Free Concrete’ at CS-03 accepts its verbal quotation of \$13.00 per square metre for pouring and finishing concrete slabs.
- 20 The Respondent in the Adjudication Response submissions at Item 2 has contested the Claimant’s assertions with regard to the constitution of the contract and states:
- “The background and the Contract are as set out in the Affidavit of Dean Gallagher in paragraphs 3 to 10 of his Affidavit. Wherever, the Claimant’s Submissions are inconsistent, the Respondent joins issue with the submissions and points to what is set out in Mr Gallagher’s Affidavit. In particular, and without derogating from the generality of the content of Mr Gallagher’s Affidavit, the terms of the Contract are specifically those referred to in paragraphs 3 to 7 of Mr Gallagher’s Affidavit.”*
- 21 The Affidavit of Mr Gallagher at paragraphs 3 to 7 sets out the constitution of Contract as being that ‘All States Period Contract Conditions Agreement’, a copy annexed to the Affidavit dated 30 May 2006, between Gallagher Development Pty Ltd and Big Concrete Pours Australia Pty Ltd signed by both parties.

- 22 The Claimant's assertion regarding what constitutes the Contract is based on a quotation by another entity, that being 'Crack Free Concrete', to the Respondent in 2005 and subsequent responses from the Respondent to 'Crack Free Concrete' in 2005 and 2006. In addition the letter from Gallagher Developments makes reference to a labour rate of \$13.00 per square metre, however, the Tax invoice No 6 by Big Concrete Pours Australia Pty Ltd applies the rate of \$16.00 per square metre and the Respondent has made payment of those components of the invoice. For these reasons I am not satisfied that the above quotations form any part of the contract between Big Concrete Pours Australia Pty Ltd and Gallagher Development Group Pty Ltd.
- 23 I prefer the submission of the Respondent who has provided a signed copy of a contract and issued site instructions and purchase orders in relation to that Contract and the Affidavit of Mr Gallagher at Item 9 regarding what forms the Contract.
- 24 The project has proceeded on the above stated basis and I find that the contract is constituted by the work progressing and progress payments being made under the 'Period Trade Contract Conditions' Contract signed by the parties. This evidence leaves little doubt that there was an intention between the parties to create legal relations and for the Claimant to perform services for consideration.
- 25 Section 3(1) of the Act provides:
"(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3-
(a) whether written or oral, or partly written and partly oral; and whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland"
- 26 Based on the material provided I find a contract existing between the parties to which the Act applies satisfying Section 3(1) of the Act.
- 27 I have already found that the contract was entered into on or about 30 June 2006.
- 28 I find the contract between the parties was entered into on or after the commencement of Parts 2 and 3 of the Act that being 1 October 2004, therefore satisfying the criteria of Section 3(1) of the Act.
- 29 Section 3(2)(a) provides:
"This Act does not apply to--
(a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes--
(i) to lend an amount or to repay an amount lent; or
(ii) to guarantee payment of an amount owing or repayment of an amount lent;
or
(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or"
- 30 I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

31 Section 3(2)(b) provides:

“This Act does not apply to--

(b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or”

32 The works as previously described are for a commercial showroom development and the parties to the contract are not ‘resident owners’ and I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

33 Section 3(2)(c) provides:

“This Act does not apply to--

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied.”

34 The contract is constituted by an agreement covering terms and conditions with scope of work determined by issue of purchase orders and site instructions and cost based on rates submitted for work carried out and I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

35 Section 3(3)(a) provides:

“(3) This Act does not apply to a construction contract to the extent it contains_

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied;”

36 The Claimant and the Respondent are both commercial trading businesses and the agreement between them being a contract for building works therefore there is no exclusion of this contract from application of the Act under this section.

37 Section 3(3)(b) provides:

“(3) This Act does not apply to a construction contract to the extent it contains_

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or”

38 I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

39 Section 3(3)(c) provides:

“(3) This Act does not apply to a construction contract to the extent it contains_

(c) *provisions under which a party undertakes--*

(i) *to lend an amount or to repay an amount lent; or*

(ii) *to guarantee payment of an amount owing or repayment of an amount lent; or*

(iii) *to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract.”*

40 I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

41 Section 3(4) provides:

“This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.”

42 The Claimant in the Adjudication Application submissions at Item 2.1 describes the location of the project as “39-45 Compton Road Underwood in the State of Queensland”.

43 I find that the works the subject of the Contract were carried out inside Queensland, allowing no exclusion of the contract under Section 3(4) of the Act.

44 Neither party has made any submission in respect of the work being the subject of a notice of claim of charge under the *Subcontractors’ Charges Act 1974*. Therefore Section 4 of the Act is not currently applicable to this adjudication.

45 I find the contract to be within the jurisdiction of the Act.

Reference Date

46 Section 12 of the Act states:

“Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract”

47 Schedule 2 of the Act provides:

“reference date, under a construction contract, means_

a) a date stated in, or worked out under, the contract as the date on which a claim for a 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.”

48 The parties have made no submissions with regard to reference dates for payment claims and the period contract agreement between the parties does not provide for such dates, therefore the default provisions of the Act apply. Based on the work commencing in July 2006, as evidenced in the invoices provided, I find the reference date is 31 July 2006 and the last day of each later named month.

49 The Payment Claim was served on 20 November 2006 and the prior reference date is 31 October 2006. The Respondent has not submitted that any other payment claim refers to this reference date.

50 I therefore find the Reference Date for the Payment Claim served 20 November 2006 is 31 October 2006.

Amount of Progress Payment

51 Section 13 of the Act provides:

“Amount of progress payment

(a) the amount calculated under the contract; or

(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.”

52 As found earlier in this decision the Claimant has not provided a quotation for the work but been awarded with a contract therefore S13(b) applies and the amount of progress payment is calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person under the contract.

53 Section 14 of the Act provides:

“Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued--

(a) under the contract; or

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

(i) the contract price for the work; and

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

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.”

54 The agreement between the parties for carrying out the work had comprised of period contract for terms and conditions and the issue of purchase orders and site instructions for the scope of work with insufficient information to calculate progress payments due, therefore S14(1)(b) applies in this case.

The Payment Claim

- 55 The Payment Claim is comprised of a document comprising a letter dated 20 November 2006 copied below and attached Site Instruction No's 22, 23 and 27, and Purchase Order No's 1090, 1091, 1092 and 1097 on the Respondent's letterhead.



20 November 2006

GALLAGHER DEVELOPMENT GROUP PTY LTD
P.O Box 58
Ashmore City
QLD 4214

ATTEN : Dean Gallagher
FACSIMILE : (07) 5597 6661

This is a payment claim made under the Building and Construction Industry Payment Act 2004 (QLD)

INVOICE 00000006 DATED 14/09/2006

For money that was withheld as final payment \$5000.00 plus GST of \$500.00
For money owed for day labour. We refer to your company letter dated 12th October 06 that was sent to Big Concrete Pours Australia PTY LTD. We refute the claim that it was recorded that 2 employees spent 3 hours assisting the machine to achieve sub grade levels in the large area between building A&B. We have documents signed by your foreman acknowledging the times and hours carried out by our employees which total 174 hours not the 6 hours you claim. Therefore we are making a payment claim for the amount of \$7830.00 plus GST of \$783.00

TOTAL AMOUNT PAYABLE GST INCLUSIVE \$14113.00

THANKING YOU IN ANTICIPATION

PAYABLE TO : BIG CONCRETE POURS AUSTRALIA PTY LTD
(10 DAY ACCOUNT)

BANK DETAILS : SUNCORP
BSB 484 799 ACC NO : 500749788

MAILING ADDRESS : 6 KUNDE STREET
CORNUBIA 4130

56 The Claimant in the Adjudication Application proforma sheet under “*PAYMENT CLAIM DETAILS*” states that the Payment Claim was served on “21-11-06”. And in the Claimant’s Submissions at Item 4.2 states:
“The Payment Claim was served on the Respondent by ordinary prepaid post and forwarded to the address of the Respondent’s ordinary place of business.”

57 The Respondent has not contested the date of service of the Payment Claim.

58 Therefore, I am satisfied that the Payment Claim was served by the Claimant on the Respondent on 21 November 2006.

59 Section 17(2) of the Act in respect to payment claims states:

“(2) A payment claim--

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and

(c) must state that it is made under this Act.”

60 The Payment Claim had site instructions attached which identifies the contract as “*ALTO SHOWROOMS CNR COMPTON AND EWING*”, states the amount of the payment claim as \$14,113.00 (inclusive of GST) and states clearly in the opening paragraph “*This is a payment claim made under the Building and Construction Industry Payment Act 2004 (QLD)*”

61 I have previously found the Reference Date for this Payment Claim to be 31 October 2006.

62 I find that the Payment Claim to which the Adjudication Application relates satisfies the requirements of section 17(2) of the Act and was served by a Claimant entitled to serve a Payment Claim on the Respondent under the Act.

63 Section 17(4) of the Act in respect to payment claims states:

“(4) A payment claim may be served only within the later of--

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.”

64 I have previously found the contract was executed on or about 30 June 2006, however, the contract did not provide for a period to completion but correspondence between the parties in their respective submissions show that the work was in progress into November 2006. This has not been contested by the Respondent.

65 Therefore I find the Payment Claim complies with s17(4)(b) of the Act.

66 Section 17(5) and (6) of the Act in respect to payment claims states:

“(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.”

67 As previously found and not contested by the Respondent there had been no other Payment Claim made in relation to the reference date of 31 October 2006. I find only one payment claim relating to that reference date therefore satisfying Section 17(5) of the Act.

68 I find the Payment Claim to be a valid payment claim under the Act.

The Payment Schedule

- 69 The Payment Schedule is comprised of a document (8 pages) dated 1 December 2006 and showing a 'faxed' same date including annexures 'A' to 'E' being a reconciliation of payment due as follows:

01/12/2006 15:08 FAX
01-DEC-2006 11:31 From: WALSH & PARTNERS 61755386544 To: 38290086 P.1/8

WALSH & PARTNERS

Litigation Lawyers
Suite 11, Second Floor
Rodman Centre
11 Karp Court
BUNDALL
GOLD COAST QLD 4217
AUSTRALIA
Alon L. Walsh BA LLB
PO Box 4891
GCMC QLD 9726
Tel: (07) 5538 6577
Fax: (07) 5538 6544
info@walshpartners.com.au
ABN: 72 861 871 804

Our Ref: AN:TC:051931
Your Ref:

1 December 2006

The Company Secretary
Big Concrete Pours Australia Pty Ltd
ACN 118 767 365
C/- Maxfield Mills Accounting & Taxation Services
107 Cane Street
REDLAND BAY QLD 4165

By facsimile: 3829 0086

And To:

6 Kunde Street
CORNUBIA QLD 4130

By facsimile: 3806 2306

Dear Sir

PAYMENT SCHEDULE NOTICE PURSUANT TO SECTION 18 BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004

We are solicitors acting for Gallagher Development Group Pty Ltd which hereby gives you this Payment Schedule pursuant to Section 18 of the Building and Construction Industry Payments Act 2004.

This Payment Schedule identifies the payment claim to which it relates as the claim of Big Concrete Pours Australia Pty Ltd to Gallagher Development Group Pty Ltd dated 20 November 2006, a copy of which is attached and marked "A" and all prior claims made by Big Concrete Pours Australia Pty Ltd in that connection.

Pursuant to Section 18(2) of the Building and Construction Industry Payments Act 2004, Gallagher Development Group Pty Ltd states that the amount of the payment, if any, that Gallagher Development Group Pty Ltd proposes to make (the scheduled amount) is nil.

Pursuant to Section 18(3) of the Building and Construction Industry Payments Act 2004, Gallagher Development Group Pty Ltd states that the reason why the scheduled amount is nil and why Gallagher Development Group Pty Ltd is

01/12/2006 15:06 FAX
01-DEC-2006 11:31 From: WALSH & PARTNERS 61755386544 To: 36290686 P.2/9

- 2 -

Big Concrete Pours Australia Pty Ltd
ACN 118 767 365

1 December 2006

withholding that claimed payment is because, in breach of its contract with Gallagher Development Group Pty Ltd, Big Concrete Pours Australia Pty Ltd charged an amount in excess of the amount to which it was entitled for the work carried out by it and because the work carried out by Big Concrete Pours Australia Pty Ltd was not carried out in a proper and workmanlike manner, particulars of all of which have previously been given by Gallagher Development Group Pty Ltd to Big Concrete Pours Australia Pty Ltd in letters dated 12 October 2006 (attached and marked "B"), 12 October 2006 (attached and marked "C"), 21 October 2006 (attached and marked "D"), and 7 November 2006 (attached and marked "E") respectively.

Gallagher Development Group Pty Ltd reserves all rights at law against Big Concrete Pours Australia Pty Ltd and including, but not limited to, the right to recover all loss and damage as it has and may suffer by reason of breach by Big Concrete Pours Australia Pty Ltd of its contract with Gallagher Development Group Pty Ltd.

Yours faithfully
WALSH & PARTNERS

per:


A. Walsh

For and on behalf of Gallagher
Development Group Pty Ltd

cc. Gallagher Development Group Pty Ltd

70 Section 18 of the Act states:

- "(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.*
- (2) A payment schedule--*
- (a) must identify the payment claim to which it relates; and*
 - (b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).*
- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.*
- (4) Subsection (5) applies if--*
- (a) a claimant serves a payment claim on a respondent; and*
 - (b) the respondent does not serve a payment schedule on the claimant within the earlier of--*
 - (i) the time required by the relevant construction contract; or*
 - (ii) 10 business days after the payment claim is served.*

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”

- 71 The contract has not provided a time for issue of a payment schedule and the parties have not made any submission in this regard. Therefore, I find that the default provisions under s18(4)(b)(ii) of the Act applies being 10 business days after the payment claim is served.
- 72 I have previously found that the Payment Claim was served on the 21 November 2006, and adding 10 days as per the Act it would require the Payment Schedule to be served on or before 5 December 2006. The Claimant in the Claimant’s Submissions at “*PAYMENT SCHEDULE DETAILS*” of the proforma sheet confirms that the Payment Schedule was served on 1 December 2006 and is therefore within the time allowed under the Act.
- 73 The Claimant in the Adjudication Application at Item 5.2 states:
“The Claimant denies that the Respondent’s Payment schedule is made in accordance with section 18 of the Act as:-
5.2.1 The Respondent has addressed the Payment Schedule directly to “The Company Secretary” of the Claimant;
5.2.2 Pursuant to s18(1) the Payment Schedule is required to be served on the “Claimant”.
5.2.3 As such the addressing of the Schedule to the “Company Secretary” is contrary to section 18;
5.2.4 Furthermore. The Respondent has failed to identify the Payment Claim to which the Payment Schedule relates and has intended to make the Payment Schedule extend to “all prior claims made by Big Concrete Pours Australia Pty Ltd in that connection”. As such it is unclear as to the claim the Respondent seeks to respond to in the Payment Schedule.”
- 74 With regard to Items 5.2.1 to 5.2.3 above having perused the document and the Respondent’s submission in reply at Item 4 of the Adjudication Response Submissions I do not accept that addressing the letter to “The Company Secretary” is any different than addressing the letter to “The Manager” being a representative of Big Concrete Pours Australia Pty Ltd to deal with the matter. I also concur with the Respondent that the Claimant has acknowledged service in the Adjudication Application at Item 2.9 of the Claimant’s Submissions. Therefore, I am unable to find that this submission invalidates the Payment Schedule.
- 75 With regard to Item 5.2.4 above having perused the document and the Respondent’s submission in reply at Item 5 of the Adjudication Response Submissions rejecting the assertion I do not accept that the reference to “*all prior claims made by Big Concrete Pours Australia Pty Ltd in that connection*” intended to make any other reference than a reference to the Invoice No 6 and to money withheld statements of the Payment Claim. Therefore, I am unable to find that this submission invalidates the Payment Schedule.
- 76 The Payment Schedule letter dated 1 December 2006 is on Walsh and Partners letterhead who have identified themselves as lawyers representing the Respondent,

has stated in the second paragraph that it is in relation to the Claimant's Payment Claim dated 20 November 2006, and stated in the third paragraph the amount of payment to be made and provided reasons for reduced payment.

- 77 I find that the Respondent's letter dated 1 December 2006 and received same day by the Claimant is a payment schedule and complies with the requirements of s18(2), s18(3) of the Act.

Due Date for Payment

- 78 Section 26(1)(b) of the Act requires that I am to decide the date on which any adjudicated amount became or becomes payable.

- 79 Section 15(1) of the Act states:

"Due date for payment_

1) A progress payment under a construction contract becomes payable-

(a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W11--on the day on which the payment becomes payable under the provision; or

(a) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W-10 business days after a payment claim for the progress payment is made under part 3."

- 80 Section 10(2) of the Act in defining 'Construction Work' states:

"(2) To remove doubt, it is declared that construction work includes building work within the meaning of the Queensland Building Services Authority Act 1991."

- 81 The parties have not made submissions as to the due date for payment, and, neither the period agreement nor the purchase orders make reference to any time for payment.

- 82 I find that Section 15(1)(a) of the Act applies and for reasons set out earlier in this decision I am satisfied the Payment Claim was served on 21 November 2006. Therefore, adding 10 business days, I find the due date for payment is 5 December 2006.

The Adjudication Application

- 83 The Adjudication Application was lodged with the Institute of Arbitrators and Mediators Queensland office on 14 December 2006 and states that a copy was served on the Respondent on the same day.

- 84 Section 21(1)(a)(i) of the Act states:

"(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if--

*(a) the respondent serves a payment schedule under division 1 but--
(i) the scheduled amount stated in the payment schedule is less than the
claimed amount stated in the payment claim; or”*

85 The Payment Schedule provides for a nil payment amount, being less than the claimed amount. Therefore, I find that the Claimant is able to apply for adjudication in accordance with s21(1)(a)(i) of the Act.

86 Section 21(3) of the Act states inter alia:

“(3) An adjudication application--

(a) must be in writing; and

*(b) must be made to an authorised nominating authority chosen by the claimant;
and*

(c) must be made within the following times--

*(i) for an application under subsection (1)(a)(i)--within 10 business days after
the claimant receives the payment schedule;”*

87 The Adjudication Application is in writing and has been lodged with the Institute of Arbitrators and Mediators Australia (IAMA), a registered Authorised Nominating Authority under the Act (Registration Number N1057859).

88 I have previously found that the Payment Schedule was served by the Respondent on the Claimant on 1 December 2006 and the Adjudication Application was lodged with IAMA on 14 December 2006 being the 9th business day after receipt of the schedule.

89 I find that the Claimant has complied with the requirements of s21(3)(a), (b) and (c) of the Act.

90 Section 21(3)(d) of the Act states:

“An Adjudication Application----

*(d) must identify the payment claim and the payment schedule, if any, to which it
relates; and”*

91 The completed pro-forma attached to the covering letter clearly sets out the details of the agreement, the Payment Claim and the Payment Schedule, and I find that the Adjudication Application satisfies Section 21(3)(d) of the Act.

92 Section 21(3)(e) of the Act states:

“An Adjudication Application----

*(e) must be accompanied by the application fee, if any, decided by the authorised
nominating authority; and”*

93 The Adjudication Application included details of the payment by cheque of the application fee IAMA (QLD), therefore Section 21(3)(e) of the Act is satisfied.

94 Section 21(4) of the Act states:

*“(4) The amount of an application fee must not exceed the amount, if any, prescribed
under a regulation”*

- 95 There has been no regulation that prescribes a fee amount issued under the Act.
- 96 Section 21(5) of the Act states:
“A copy of an adjudication application must be served on the respondent.”
- 97 The Adjudication Application states that a copy was served on the Respondent on the same day, however, the Respondent has confirmed service by mail on 18 December 2006 in the Adjudication Response cover sheet, thereby satisfying s21(5) of the Act.
- 98 Section 21(6) of the Act states:
“(6) The authorised nominating authority to which an adjudication application is made must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22.”
- 99 The IAMA referred the application to me on the second business day after receiving the documents satisfying the ‘as soon as practicable’ requirement of s21(6) the Act.
- 100 Section 22 of the Act states:
“When person may be an adjudicator
(1) A person may be an adjudicator in relation to a construction contract if registered as an adjudicator under this Act.
(2) A person is not eligible to be an adjudicator in relation to a particular construction contract--
(a) if the person is a party to the contract; or
(b) in circumstances prescribed under a regulation for this section.
(3) A regulation may be made under subsection (2)(b) only to prescribe circumstances in which the appointment of an adjudicator might create a conflict of interest.”
- 101 I am a Registered Adjudicator under the Act. Registration Number J1057073. I am not a party to the contract and I have no conflict of interest with the parties to this adjudication therefore Section 22 of the Act is satisfied.
- 102 The Claimant seeks adjudication of the Payment Claim for \$14,113.00.
- 103 The Adjudication Application comprised a completed proforma of 5 pages and a bundle of documents containing the Claimant’s Submissions and supporting annexure as listed:
(i) The Claimant’s Submissions being pages numbered 1 to 10 containing Items 1 to 8.
(ii) Affidavit of Christopher Salmon being pages numbered 1 to 8 including attached exhibits marked CS-01 to CS-14 as listed:
CS-01 Quote from Crack Free Concrete to the Respondent undated.
CS-02 Copy of CS-01 quote returned to Crack Free Concrete signed by the Respondent with fax date marking of “19-08-05 12:20”.

- CS-03 Facsimile sent by Respondent to Crack Free Concrete dated 26 May 2006 with fax date marking "26-05-2005 12:44"
- CS-04 Copies of Big Concrete Pours Australia Pty Ltd invoices described as being all invoices issued to the Respondent for the works completed.
- CS-05 Copies of Big Concrete Pours Australia Pty Ltd Invoice number 6 described as being the final invoice.
- CS-06 Copies of Big Concrete Pours Australia Pty Ltd Invoices numbered 6 and 7 described as being a copy of all variations agreed to between the parties.
- CS-07 Copies of the Respondents Site Instruction No 15, 14 and 13 described as being copies of paid variations.
- CS-08 Copies of the Respondents Site Instruction No 22, 23 and 27, and Purchase Orders 1090, 1091, 1092 and 1097 described as being copies of unpaid variations.
- CS-09 The Payment Schedule dated 1 December 2006.
- CS-10 The Payment Claim dated 20 November 2006.
- CS-11 Copy of the Respondents letter dated 7 November 2006 described as being a copy of the list of Items for rectification.
- CS-12 Copy of an information sheet on shrinkage cracks from Cement Concrete and Aggregates Australia.
- CS-13 Copy of an information sheet on curing oil from Cement Concrete and Aggregates Australia.
- CS-14 Copy of George Frame Engineers Pty Ltd Drawing No 2411-1A Sheet 1 of 13 and FMG Koukourou Engineers Drawing No 36838-04 Rev A.

The Adjudication Response

104 Section 24 of the Act states:

"Adjudication responses_

- (1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within the later of the following to end--*
 - (a) 5 business days after receiving a copy of the application;*
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application.*
- (2) The adjudication response--*
 - (a) must be in writing; and*
 - (b) must identify the adjudication application to which it relates; and*
 - (c) may contain the submissions relevant to the response the respondent chooses to include.*
- (3) The respondent may give the adjudication response to the adjudicator only if the respondent has served a payment schedule on the claimant within the time specified in section 18(4)(b) or 21(2)(b)*
- (4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.*
- (5) A copy of the adjudication response must be served on the claimant."*

- 105 The Claimant in the Adjudication Application proforma sheets has indicated that it would serve a copy of the Application on the Respondent on the same day of lodgment with the ANA. The Respondent in the Adjudication Response has submitted that the Adjudication Application was received “*in the mail on 18 December 2006*”.
- 106 The Claimant has adduced no evidence to show that it served a copy of the Adjudication Application on the Respondent on 14 December 2004. The document if posted on the 14 December 2006 would have arrived, in the ordinary course of postage delivery times published by Australia Post, two business days later on 18 December 2006.
- 107 I prefer the submission of the Respondent and find that the Adjudication Application was served on the Respondent on 18 December 2006. I accepted the Adjudication Application by letter express posted to the parties on 19 December 2006 which with overnight delivery would be received by the Respondent on 20 December 2006. Therefore, the time for the Adjudication Response is the later of 2 business days after receiving my letter of acceptance which is 22 December 2006 or 5 business days after service of the Adjudication Application which, after accounting for the excluded days pursuant to Schedule 2 of the Act, is 2 January 2007.
- 108 I received a faxed copy of the Adjudication Response Submissions with Affidavits attached on 22 December 2006 and the referred annexure by hand delivery on 23 December 2006 being within the time allowed and satisfying s24(1) of the Act.
- 109 I have already found that the Payment Schedule was correctly served on the Claimant within the time allowed under s18(4)(b) of the Act in response to the Payment Claim served 21 November 2006, therefore, I am able to consider the Adjudication Response and I find s24(3) of the Act is satisfied.
- 110 I find that the Adjudication Response was in writing and identified the Adjudication Application to which it related in the covering letter and attached summary details and contains various submissions of the Respondents choosing, therefore satisfying s24(2) of the Act.
- 111 The Adjudication Response covering letter, prepared by the Respondent’s solicitor, has not stated that the same submission will be duly served on the Claimant. Therefore, at this time I am unable to find that the Adjudication Response has been served on the Claimant to satisfy s24(5) of the Act. There is no time frame imposed by the Act for service of the Adjudication Response on the Claimant.
- 112 The Adjudication Response included a letter dated 22 December 2006 on Walsh & Partners letterhead acting for the Respondent with attached documents comprising:
1. The Respondent’s Submissions (pages numbered 1 to 8).
 2. Affidavit of Dean John Gallagher (7 pages) and attached annexure as follows:
 - A. Copy of the Period Trade Contract Conditions dated 30 June 2006.
 - B. Copy of George Frame Engineers Pty Ltd Drawing No 2411-1A.

- C. Copy of Building Act 1975 s103 & s104 Certificate issued by the Building Certifier.
- D. Various photographs
- E. Affidavit of George Andrew Frame (6 pages).
- F. Neilsen's concrete delivery docket.
- G. Site Inspection Certificate by G.A. Frame.
- H. Neilsen's Concrete comment on 'Effect of Addition of Water on concrete strength and slump'.
- I. Neilsen's Concrete comment on 'Preventing Dusting, Curing Concrete, Concrete Cracks and Hot Weather Concreting Problems'.
- J. Neilsen's 'Concrete Test Record' for 20-9-06.

The Adjudicated Amount

- 113 Section 26(1)(a) of the Act requires that I decide the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount). I will assess each claimed element of the work in the Payment Claim and decide an amount to be carried to collection of the Adjudicated Amount for calculation of the progress payment due. These item amounts are excluding GST, which is added in the Collection.
- 114 I will be deciding the progress payment due from the amounts claimed in the Payment Claim. There have been considerable submissions in the Adjudication Application and the Adjudication Response that relate to agreements being reached on other components of Tax Invoice No 6 that have no relevance to the amount actually claimed in the Payment Claim and although having considered these submissions, I have made no reference to those submissions in this Decision. I will deal separately with the claimed hours of labour and the retention and defects issue.
- 115 Section 24(4) of the Act states:
“(4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.”
- 116 The Respondent in the Payment Schedule has stated two reasons (fourth paragraph) for withholding monies and these reasons will be considered in assessing each submission.
- 117 I have already found earlier in this decision that the terms and conditions of the 'Period Trade Contract Conditions' apply for this contract.

Unpaid Labour Hours Invoice No 6

- 118 The Claimant in the Payment Claim has claimed 174 hours in the amount of \$7,830.00 and the Respondent in the Payment Schedule has scheduled nil payment due. The reason for withholding payment provided by the Respondent in the fourth paragraph being inter alia *“..in breach of its contract with Gallagher Development Group Pty Ltd, Big Concrete Pours Australia Pty Ltd charged an amount in excess of*

the amount to which it was entitled for the work carried out by I and because the work carried out by Big Concrete Pours Australia Pty Ltd was not carried out in a proper and workmanlike manner...”

119 The Claimant in the Adjudication Application submissions at Item 6.1.1, 6.1.6, 6.1.7 and 6.1.8 in relation to invoiced hours states:

“6.1 The Claimant denies that the reasons for non payment referred to in the Respondents Payment Schedule are sufficient to justify the Respondents non payment as :-

6.1.1 The reasons in the Payment Schedule are incorrect and have no basis;

6.1.6 All variations which the Claimant completed were requested by the Respondent and/or approved by the Respondent’s Site Foremen;

6.1.7 The times spent working on all variations were recorded by the Respondent’s Site Foremen at the end of each day.

6.1.8 Any disputes in relation to the amounts claimed for the variations should have been raised by the Respondent or the Respondent’s Site Foremen at the end of each day, prior to recording the Claimant’s time for the variations.”

And at Item 6.2.1 states:

“The Respondent requested the Claimant carry out excavation works in the area between Building A and B in order to prepare for the laying of the concrete:-

6.2.1.1 The Respondent required the site to be excavated to 200mm, as such the works were outside of the terms of the contract;

6.2.1.2 The excavation works were agreed to as a variation to the contract;

6.2.1.3 The Respondent and the Claimant agreed that the labour for the excavation works would be charged at \$45.00 per hour, plus GST;

6.2.1.4 The Claimant performed the work at the Respondent’s request and because of time constraints in construction;

6.2.1.5 The Claimant completed the work with assistance of the Respondent’s machinery in 174 hours;

6.2.1.6 The hours taken to complete the excavation works were verified and recorded by the Respondent’s Site Foreman;

6.2.1.7 The Respondent claims that the excavation works were “recorded on site” to have taken only 42 hours (being 2 men at 3 hours per wall with 7 walls). The Claimant denies that this was the time that it took to complete the entire excavation works;

6.2.1.8 Furthermore, the Claimant submits that this may have been the time taken to a “sub-grade” level being only 50mm, however, the Claimant completed further 200mm of excavation beyond the sub-grade level;

6.2.1.9 The Respondent submits that the amount of \$7,830.00 plus GST remains outstanding and unpaid by the Respondent for the excavation works.”

120 The Respondent in the Adjudication Response submissions at Items 6 and 7 states:

“6. It is denied that the Respondent’s Payment Schedule provides insufficient justification for the non payment of the claimed amounts. See the affidavit of Mr Gallagher for the particularity of that justification.

7. *The Respondent joins issue with the allegation in paragraph 6.1.1 that the reasons in the Payment Schedule are incorrect and have no basis. See Mr Gallagher's affidavit.*"

And at Item 13 states:

"13. As to Paragraph 6.1.7, and paragraph 6.1.8, the allegation that all variations were time recorded by the Respondent's site foreman at the end of each day is false."

And at Item 14 to 16 states:

"14. As to Paragraph 6.2.1.4, the Respondent denies that the Claimant performed the works because of time constraints in construction, which allegation is false and the Respondent refers to what is set out in paragraph 21 and other paragraphs of Mr Gallagher's Affidavit.

15. As to Paragraph 6.2.1.5, the claim for 174 hours by the Claimant is false. See paragraph 15 of the Affidavit of Mr Gallagher.

16. As to the Claimant's allegation that \$7,830.00 plus GST remains outstanding and unpaid by the Respondent as alleged in paragraph 6.2.1.9, the Respondent refers to paragraph 16 and paragraph 24 of the Affidavit of Mr Gallagher. The unpaid money is \$5,500.00 being monies withheld and \$4,603.50 in respect of day labour component of the claim, in total \$10,103.50 inclusive of GST. The Claimant is not entitled to this money for the reasons set out in the Payment Schedule, the documents attached to the Payment schedule, and the facts and matters set out in Mr Gallagher's Affidavit and including in paragraphs 24 and 25 of that Affidavit by reference to the earlier paragraphs and the factual history of the matter."

121 The Affidavit of Mr Gallagher at Paragraphs 15, 16 states:

"15. In the Claimant's claim dated 20 November 2006, it says that it has documents signed by the Respondent's foreman acknowledging the time and hours carried out by the Claimant's employees which total 174 hours. I have added up the hours claimed in the site instructions and the purchase orders issued by the Respondent to the Claimant in respect of Tax Invoice No 6 dated 14 September 2006 (the subject of the Claimant's claim dated 20 November 2006) which are exhibited to Mr Salmon's Affidavit and they come to 135 hours, not the 174 hours claimed.

16. On the basis of the site instructions and purchase orders that were issued by the Respondent to the Claimant, as a matter of arithmetic the Claimant is entitled to claim 135 hours at \$45.00 per hour (\$6,075.00) plus GST (\$607.50) making for a total of \$6,682.50, however, to be deducted from that amount, is the amount of \$1,890.00 (item 15 in the letter from the Respondent to the Claimant dated 12 October 2006 which is Attachment B to the Payment Schedule) plus GST (\$189.00) making for a total of 2,079.00 for item 15 which altogether with other amounts was paid by the Respondent to the Claimant as set out in that letter. Thus, on the arithmetic, the differential is \$6,682.50 less \$2,079.00 equals \$4,603.50, which amount, but for the Claimant's breach of the contract in respect of the sub standard and deficient concreting works performed by the Claimant would be payable to the Claimant.

122 The nature of the contract requires the issue of site instructions or purchase orders by the Respondent to request a particular scope of work to be carried out by the

Claimant and I place considerable importance on the substantiation documentation provided with the claim.

- 123 I have examined the Claimant's Tax Invoice No 6 claiming payment for 174 hours of labour and analysed what components are covered by site instructions or purchase orders and what items are paid as confirmed in the Respondent's letter of 12 October 2006 attached to the Payment Schedule or remain unpaid. (Refer Annexure 1)
The Claimant has attached copies of site instructions and purchase orders signed off by the Respondent's representative which amount to 110 hours in substantiation of the claimed amount and there is a further 64 hours claimed without any supporting documentation totaling the number of hours claimed by the Claimant. I am unable to determine how the Respondent arrived at 135 hours from the documents provided. The alternative calculation provided by the Respondent includes use of the rate per hour of \$45.00 (excluding GST) therefore not being contested by the Respondent.
- 124 The Claimant has not provided any evidence to support its statement that the full 174 hours claimed have been signed off by the Respondent or its representative, or has it credited the previously paid component of 42 hours by the Respondent and I concur with the Respondent that excessive hours appear to have been claimed.
- 125 The Respondent in its reasons for withholding payment has alleged that the Claimant has breached the contract by claiming an amount in excess of the amount to which it was entitled. It is not the role of an adjudicator to make a finding as to the alleged breach and damages claims are not covered under the Act, however, from the analysis I have deduced that only 110 of the 174 hours claimed have supporting evidence to satisfy me and substantiate the claim is legitimate and deducting the 42 hours previously paid by the Respondent it leaves 68 hours at \$45.00 per hour payable with substantiating documentation. **Therefore the amount of \$3,060.00 for 'Unpaid Labour Hours Invoice No 6' is carried to Collection of the Adjudicated Amount.**

Claim for Release of Retention

- 126 The Claimant in the Payment Claim has claimed release of monies previously withheld in the form of retention stating:
"For money that was withheld as final payment \$5,000.00 plus GST of \$500.00."
The reason for withholding payment provided by the Respondent in the fourth paragraph being inter alia *"..in breach of its contract with Gallagher Development Group Pty Ltd, Big Concrete Pours Australia Pty Ltd charged an amount in excess of the amount to which it was entitled for the work carried out by I and because the work carried out by Big Concrete Pours Australia Pty Ltd was not carried out in a proper and workmanlike manner..."*
- 127 The Claimant in the Adjudication Application submissions at Item 6.1.1 to 6.1.5 in relation to defects states:
*"6.1.1 The reasons in the Payment Schedule are incorrect and have no basis;
6.1.2 There are no defects in the work completed by the Claimant;*

6.1.3 What defects were alleged to exist by the Respondent have been rectified by the Claimant.

6.1.4 The rectification works completed by the Claimant have been signed off on (sic) and affirmed by the Site Foreman, Bruce.

6.1.5 All work completed by the Claimant has been completed in a reasonable and tradesman-like manner and to a tradesman-like quality.”

And at Item 6.4 the Claimant responded to the letter of 21 October 2006 annexed to the Payment Schedule and setting out what items required rectification prior to release of the retention amount withheld, those items being:

- Removal of large lumps of concrete left by the wooden trowels on the surface and at the expansion joints;
- Large shrinkage cracks on Building B footpath;
- Concrete not finished behind stainless steel downpipes;
- Excess concrete on bottom of tilt panels and windows;
- ‘Ableflex’ jointing product sitting proud of face to be cut back;
- Removal of footprints and residue concrete on footpaths;
- Crack to concrete outside Major tiles tenancy on Ewing Road;
- Excess concrete on internal slabs in front of roller doors.

The Claimant’s response being that rectifications had been carried out for removal of concrete lumps and excess residue items, the Claimant’s was not responsible for the concrete cracking but had carried out some repairs, the gap behind the downpipes was not able to be finished and the use of covers had been proposed by the Respondent, the cutting back of the ‘Ableflex’ was completed using a method suggested by the Respondent’s representative with only minimal and unnoticeable marking remaining and items rectified had been signed off by the Respondent’s representative.

And at Item 6.5 the Claimant responded to the letter of 7 November 2006 (incorrectly noted as letter of 20 November 2006) annexed to the Payment Schedule and setting out items still outstanding being still some excessive concrete lumps to be removed, shrinkage cracks on Building B footpath, concrete cracks.

The Claimants response being that all items were rectified and approved by the Respondent’s representative, denied liability for the cracking to concrete slabs.

And at Items 6.6 to 6.9 the Claimant submits that the repair of defective work was completed in a tradesman-like manner and that the Respondent is liable for concrete cracking by failing to comply with the engineer’s plans and specification regarding preparation work of foundation material for slabs and failing to apply a curing agent to slabs or sealant to the expansion joints and cutting corners in the construction of the works. The Claimant also denies liability for any future defects in the works as the work was completed in accordance with the Respondents specification and the Engineer’s plans.

- 128 The Respondent in the Adjudication Response submissions at Items 8 to 12 states:
“8. As to paragraph 6.1.2, the allegations that the work was not defective and has been rectified are false. This is dealt with in detail in Mr Gallagher’s affidavit in paragraphs 18 to 22 and does not require restatement here. The degree of defectiveness and the extent of the breaches of Contract by the Claimant are patent, extensive and material, and constitute a fundamental breach by the Claimant of the contract with the respondent.”

9. *There is excessive cracking in the concrete due to excess water in the concrete when poured. The Claimant's director and employee Christopher Salmon, was told that the concrete was to be poured with 80 slump yet the slump of the concrete as placed when watered down by the Claimant was well in excess of this; as appears from paragraphs 20 to 23 of Mr Gallagher's Affidavit, information obtained from Neilson's Concrete. This has been the major cause of shrinkage and cracking.*
10. *As to paragraph 6.1.3, the allegations that the defects have been rectified by the Claimant is patently false. See paragraphs 20 to 23 of Mr Gallagher's Affidavit.*
11. *As to paragraph 6.1.4, the allegation that all rectification works were signed off by the foremen is patently false and the photographic evidence (amongst other evidence) exhibited to Mr Gallagher's Affidavit and does not require to be repeated here. The Claimant performed this work recklessly. So deficient and substandard is the work, that much of the work cannot be rectified at all. See both the Affidavit of Mr Gallagher and the Affidavit of Mr Frame sworn 21 December 2006.*
12. *The Respondent denies the allegation in paragraph 6.1.5 that all work has been completed by the Claimant in a reasonable and tradesman-like manner and to a tradesman quality. That allegation should be tested against the evidence contained in the Affidavit of Mr Gallagher paragraphs 20 to 23 and Mr Frame. The allegation is totally false."*

And at Item 21 and 22 in relation to defects states:

"21. As to item 6.4.1, the Respondent joins issue with the Claimant's denial and refers to Mr Gallagher's Affidavit.

22. It is denied that the shrinkage cracks referred to in item 6.4.3 are the responsibility of the Respondent and it is also denied that the Claimant is not liable for rectification for such cracks. See Period Trade Contract Conditions 1,2,5,9 and 13. See paragraphs 18 to 23 of Mr Gallagher's Affidavit."

And at Items 23 to 57 the Respondent submits that the work was not carried out in accordance with the requirements of the contract, to the reasonable satisfaction of the Respondent or in a tradesman-like manner. The Respondent also submits that the Claimant failed to properly advise of conditions unsuitable for pouring concrete and of the need to provide curing protection to the concrete after pouring. The Respondent denies avoiding time delays was a consideration in any decision taken during construction or that any 'cutting of corners' had taken place. The Respondent also submits that the Claimant had a duty to advise of potential problems that may arise in regard to unsuitable weather conditions and protection of the concrete laid and denies the Claimant as any basis for alleging that the Respondent is liable for all shrinkage cracks and refers to the terms and conditions of the contract which were not complied with by the Claimant. The Respondent disputes the claim that the gap behind the downpipe and grinding marks left by the Claimant were unavoidable or that direction was provided as to the method of carrying out the works. The Respondent also denies that all rectification of defects completed by the Claimant has been carried out in a tradesman-like manner and been approved by its representative.

129 The Contract at Items 1, 2, 5, 9 and 13 in regard to workmanship and defects states inter alia:

“1. TRADE WORKS

(a) The Trade contractor must carry out and complete the trade works:

- (i) to the reasonable satisfaction of the principal contractor;*
- (ii) in accordance with the plans, the specifications and the Law;*
- (iii) at the reasonable times directed by the principal contractor.*

(c) The Trade contractor must supply everything necessary to carry out the trade works.

2. VARIATIONS

(a) The trade contractor must not:

- (i) make any changes to the trade works*
- (ii) carry out any extra work; or*
- (iii) leave any detail of the trade work unfinished, unless directed in writing*

by the principal contractor.

(b) The principal contractor may, by giving a written direction, require the trade contractor to carry out a variation.

5. DEFECTS LIABILITY PERIOD

(a) The trade contractor must, at its own cost, make good any work that does not conform with the requirements of this trade contract before the end of the defects liability period.

(b) The principal contractor may direct the trade contractor to, correct remove or replace, any non-conforming work before or during the defects liability period.

(c) If the trade contractor does not comply with such a direction, the principal contractor may have the work carried out by others and the cost is a debt due and payable by the trade contractor to the principal contractor.

(d) In addition to exercising other rights and remedies, the principal contractor may set-off such debt against a retention held and any amount due or which becomes payable to the trade contractor in connection with this trade contract.

9. DAMAGE AND SITE CLEANING

(a) The trade contractor is responsible for:

- (i) any damage caused by the trade contractor and its agents or employees;*
- (ii) keeping the trade contractors areas clean at all times;*
- (iii) the removal of its tools, plant and equipment, and if required the removal debris and refuse, arising out of the trade works.*

(b) If the trade contractor fails to comply with sub clause 9(a), the principal contractor may rectify the breach and the cost is a debt due and payable by the trade contractor to the principal contractor.

13. DEFAULT

A party is in default of this trade contract if it:

- (i) is in substantial breach of this trade contract;*
- (ii) becomes insolvent, bankrupt or makes an assignment of that party's estate for the benefit of creditors;”*

- 130 The Respondent had initially retained retention of \$20,000.00 and subsequently reduced the amount to \$5,000.00 as reflected in the Payment Claim and in the Payment Schedule. The Claimant has not contested the entitlement of the Respondent to retain a retention amount, as such, even though the contract does not indicate an amount to be retained. In addition the defects liability period is not defined in the contract. The letter of 21 October 2006 annexed to the Payment Schedule indicates “*We still have a balance outstanding of \$20,000.00 when the following are rectified with Bruce on site this will be forwarded to you:*”, thereby not stating a particular future defect period but linking the time for release of retention monies to rectification of the defects stated in that letter.
- 131 The documents and Affidavits provided to me by the Respondent do indicate that defects are evident in the project works. I will first address the issue of liability.
- 132 The scope of work is defined by the George Frame Engineers drawing 2411-1A issued and the subsequent directions issued in the form of site instructions and purchase orders. There is sufficient evidence provided in the submissions from both parties and the invoices annexed to the Payment Claim for me to find that the materials were supplied by the Respondent and there has been no contention from either party otherwise, although this is contrary to the requirement of the Period Trade Contract Conditions Clause 1(c) above. There is nothing to indicate who supplied the reinforcement, formwork or other ancillary materials such as bar chairs, reinforcement ties etc needed to complete the works, however and in support of the contention that the Respondent was to supply all materials, with regard to curing compounds the fact that the Respondent has indicated it would have supplied the necessary product if recommended by the Claimant is evidence that in the least the Respondent was to supply the curing compound.
- 133 The Affidavit of the engineer Mr Frame at item 2. states that “*I am consultant engineer to Gallagher Development Group Pty Ltd and I am the engineer appointed for purposes of all engineering work, inspections and certification, for the project of Gallagher Development Group Pty Ltd at “Alto” Retail Centre, Ewing road/Comptom Road, Woodridge, ..*” The concrete was supplied by the Respondent and as such it would be in order for the Respondent to ensure compliance with the specification of the product supplied with regard to the quality and supply requirements. It would seem to me that the Respondent has engaged the services of the engineer Mr Frame to supervise the construction works and as such that commission would include ensuring that the concrete supplied complied with his specification with regard to strength and concrete mix design and supply to site. In the event of non compliance it would be the discretion of the engineer to reject any particular batch of concrete especially if it was evident that water had been added by any party other than the engineer. It appears from the Affidavit of Mr Gallagher at Item 23 that the ordering of the concrete was agreed to be as requested by the Claimant but on the Respondent’s account, however, I do not find this to be other than the Claimant ordering sufficient batch quantities to complete each section of the works. I am unable to find any evidence in the form of an instruction or direction that, for the concrete supplied, places liability on the Claimant to ensure compliance with the concrete mix specification other than to ensure the correct quantities are ordered. In addition with regard to the application of curing compound the drawing

states “*Cure all concrete using an approved method in accordance with ACSE specification. Curing compounds shall conform to ASM C308.*” and I would expect that the approval of the curing compound material to be supplied by the Respondent would be approved by the engineer along with the method of application to be utilised by the Claimant and that this to be provided in the form of a direction to define the scope of work required. No such direction is evident and there is no evidence from the Respondent, other than the drawing, to establish exactly what was the scope of work to be carried out by the Claimant with regard to application of a curing compound.

With regard to the decision to pour or not to pour when there was a risk of inclement weather affecting the finished result it would be generally a decision taken after consultation with the supervising engineer or his agent as to the risk involved with that particular pour and the further decision to take additional precautions if the pour were to proceed. (for instance: covering the work, or a different method of pouring, or a different mix design)

- 134 The Respondents submissions detail various reasons including addition of water to the mix, curing and inclement weather as possible causes for the cracking defect appearing in the concrete slabs but, for the reasons stated above I find that the Respondent has failed to satisfy me that there was any direction to the Claimant or liability derived from the drawing generating a liability for the Claimant to ensure concrete materials complied with the engineer’s specification or the nature and type of curing compound to be supplied. To the contrary I find that a significant portion of the liability rested with the Respondent.
- 135 The other defects indicated in the annexed letters to the Payment Schedule relate to removal of excess lumps of concrete and resolution of the issue of a gap behind the downpipes and rectification of marking to the tilt wall panels. The Claimant has submitted that all defects were carried out and approved by the Respondent’s representative and provided a copy of the Respondent’s letter of 7 November 2006 at CS-11 of Mr Gallagher’s Affidavit hand marked showing that items “1, 2, 4, 6 were done” and “See Dean for 3-5” and asserted to be signed by the Site Foreman, Bruce. The Respondent’s submissions supporting the withholding of the monies from the Payment Claim relate primarily to the cracking defects in the slabs and these defects are the significant cost items. The outstanding items which I consider requiring of rectification at the Claimant’s cost, are, item 3 being the resolution of the downpipe gap and item 6 being the solution to cover the marking of the tilt panels, and possibly the cost of further removal of excess concrete lumps however, the Respondent has provided no detailed cost of rectification for these items as an alternative for me to consider other than to withhold the \$5,000.00 held in retention.
- 136 Retention is money withheld from certified payment of construction work for the purpose of security for the Respondent to ensure the Claimant’s performance of its obligations under this subcontract. The contract makes no provision for determining the amount of any retention to be held and the Respondent has not established an entitlement under the Contract to withhold a particular amount. I am not satisfied by the Respondent’s submissions that the \$5,000.00 is a reasonable amount to withhold when considering my assessment of the extent of the Claimant’s liability.

- 137 I find for the reasons stated above that the Retention amount withheld is to be released for payment of **\$5,000.00 to be carried to the Collection for calculation of the Adjudicated Amount.**

The Collection of Adjudicated Amounts:

138

Unpaid Labours Hours Invoice No 6	\$3,060.00
Retention to be released	\$5,000.00
Adjudicated Sum (Exclusive of GST)	\$8,060.00
GST	\$806.00
Adjudicated Payment Amount	\$8,866.00

Rate of Interest

- 139 Section 26(1)(c) of the Act requires that I am to decide the rate of interest payable on the adjudicated amount.

- 140 Section 15(2) and (3) of the Act provides:

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

(a) the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;

(b) the rate specified under the contract.

(3) For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.”

- 141 The Parties have made no submissions regarding the rate of interest applicable to this Contract.

- 142 Schedule 2 of the QBSA Act definition of building work states inter alia:

“Building work means---

(a) the erection or construction of a building; or

(b) the renovation, alteration, extension, improvement or repair of a building; or

(c) the provision of lighting, heating, ventilation, air-conditioning, water supply, sewerage or drainage in connection with a building; or

(d) any site work (including the construction of retaining structures) related to work of a kind referred to above; or”

- 143 I find no exclusion of the work under QBSA Act Regulations Part 2 section 5 and that the construction work in this contract, being a commercial showroom building complex, is captured by the QBSA Act definition of “building work”.

- 144 I find that the contract is governed by the provisions of the Queensland Building Services Authority Act 1991 and Section 67P of this Act provides:
“*Late Progress Payments*_
(1) *This section applies if*_
(a) *the contracting party for a building contract is required to pay an amount (the progress amount) to the contracted party for the building contract; and*
(b) *the progress amount is payable as the whole or a part of a progress payment; and*
(c) *the time (the payment time) by which the progress amount is required to be paid has passed, and the progress amount, or part of the progress amount, has not been paid.*
(2) *For the period for which the progress amount, or part of the progress amount, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, for each day the amount is unpaid.*
(3) *In this section*_
*Penalty rate means*_
(a) *the rate made up of the sum of the following*_
(i) *10% a year;*
(ii) *The rate comprising the annual rate, as published from time to time by the reserve Bank of Australia, for 90 day bills; or*
(b) *If the building contract provides for a higher rate of interest than the rate worked out under paragraph (a) _ the higher rate.”*

145 For example the 90 day bill monthly rate published by the Reserve Bank of Australia for November 2006 is 6.37%, therefore the penalty rate of interest payable under Section 67P of the QBSA Act 1991 will be 16.37% per annum simple interest. The monthly rate for December 2006 to be used if published at the time of calculation of interest payable.

146 The rate prescribed under the Supreme Court Act 1995, section 48 (1) nominated in the Regulation is 10% per year. The Contract does not provide a rate for interest on overdue payments.

147 I find the rate of interest payable on any amount due is the penalty rate prescribed under the QBSA Act 1991 Section 67P(3)(a) being the greater of the two rates.

Authorised Nominating Authority and Adjudicators Fees

148 Section 34(3) of the Act provides for Authorised Nominating Authority fees stating:

“*The claimant and respondent are--*

- (a) *jointly and severally liable to pay any fee; and*
- (b) *each liable to contribute to the payment of any fee in equal proportions or in the proportions the adjudicator to whom the adjudication application is referred may decide.”*

149 Section 35(3) of the Act provides for Adjudicators Fees stating:

“The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.”

- 150 The Claimant in the Adjudication Application Submissions at Item 8 submits that I should exercise my discretion to decide that the Respondent is liable for all adjudication fees and expenses but has provided no basis for this assertion.
- 151 The Respondent in the Adjudication Response Submissions at Item 58 submits that the Claimants submissions should not be accepted but makes no other submission as to costs
- 152 I have worked through the submissions of the Payment Claim, Payment Schedule, Adjudication Application and the Adjudication Response, and found both parties pursued their respective well prepared cases with significant vigor and belief in their entitlements, however, neither party has been entirely successful in their respective claims. I am not persuaded by the submissions to deviate from the default provision of the Act and decide not to exercise the discretion provided in the Act and find the Claimant and the Respondent jointly liable to contribute to the ANA's and the Adjudicator's fees and expenses in equal proportions.

DECISION

153 I, John Savage, as the Adjudicator (Registration No J1057073) pursuant to the Building and Construction Industry Payments Act 2004 (the Act) for the reasons set out in this decision having perused all of the properly served submissions (whether referred to or not) decide that:

- a) The adjudicated amount to be paid by the Respondent to the Claimant in respect of the Adjudication Application lodged 14 December 2006 is \$8,866.00 (inclusive of GST).**
- b) The date on which the amount became payable is 5 December 2006.**
- c) The applicable rate of interest payable on the adjudicated amount is the penalty rate prescribed under Queensland Building Services Authority Act 1991 Section 67P.**
- d) The Claimant and the Respondent are liable in equal proportions for both the ANA application fee and the Adjudicator's fees and expenses.**

John Savage
Adjudicator (Registration No J1057073)
15 January 2007

Annexure 1

Tax Invoice No 6								
Date	SI/PO	Unpaid with SI/PO	Unpaid without SI/PO	Paid or Resolved	Total Hrs	Rate	Total Invoice	Unpaid
15/08/2006							\$2,516.80	
16/08/2006							\$2,640.00	
16/08/2006	19			4	4	\$ 49.50	\$198.00	
16/08/2006	19			2	2	\$ 49.50	\$99.00	
16/08/2006	20			3	3	\$ 49.50	\$148.50	
17/08/2006							\$1,320.00	
17/08/2006	22			3	3	\$ 49.50	\$148.50	
17/08/2006	22	4			4	\$ 49.50	\$198.00	\$198.00
23/08/2006	23	8			8	\$ 49.50	\$396.00	\$396.00
23/08/2006	23	8			8	\$ 49.50	\$396.00	\$396.00
24/08/2006	27	6			6	\$ 49.50	\$297.00	\$297.00
24/08/2006	27	4			4	\$ 49.50	\$198.00	\$198.00
24/08/2006							\$443.93	
24/08/2006							\$385.55	
25/08/2006							\$2,640.00	
25/08/2006	28			2	2	\$ 49.50	\$99.00	
26/08/2006	1090	12			12	\$ 49.50	\$594.00	\$594.00
5/09/2006	1091	24			24	\$ 49.50	\$1,188.00	\$1,188.00
6/09/2006	1092	16			16	\$ 49.50	\$792.00	\$792.00
6/09/2006	1092	8			8	\$ 49.50	\$396.00	\$396.00
6/09/2006	1092			8	8	\$ 49.50	\$396.00	
7/09/2006	1097	8			8	\$ 49.50	\$396.00	\$396.00
7/09/2006	1097	12			12	\$ 49.50	\$594.00	\$594.00
7/09/2006	1097			3	3	\$ 49.50	\$148.50	
7/09/2006							\$2,164.80	
8/09/2006				8	8	\$ 49.50	\$396.00	
8/09/2006			6		6	\$ 49.50	\$297.00	\$297.00
8/09/2006			16		16	\$ 49.50	\$792.00	\$792.00
8/09/2006			6		6	\$ 49.50	\$297.00	\$297.00
8/09/2006			4		4	\$ 49.50	\$198.00	\$198.00
8/09/2006							\$1,619.20	
9/09/2006			24		24	\$ 49.50	\$1,188.00	\$1,188.00
9/09/2006							\$1,496.00	
12/09/2006							\$7,250.10	
13/09/2006			8		8	\$ 49.50	\$396.00	\$396.00
14/09/2006							\$8,093.80	
Total of Invoice							\$40,816.68	\$8,613.00
Total Hours					207			
Paid/Resolved Items							\$30,570.18	
Paid Hours				33		\$ 49.50	\$1,633.50	
Unpaid with SI or PO		110						\$5,445.00
Unpaid without SI or PO			64					\$3,168.00
Paid Item 15 12/10/06				42				