

Adjudicator's Decision

Pursuant to the Building and Construction Industry

Payments Act Qld (2004)

CIVIL MINING AND CONSTRUCTION PTY LTD

(Claimant)

And

GAIRLOCH DEVELOPMENTS PTY LTD

(Respondent)

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Decision

I, Jonathan Nicholas Smith, as Registered Adjudicator Number J106610 pursuant to *the Building and Construction Industry Payments Act (Qld) 2004* (the Act), for the reasons set out in this decision, decide that:

- (a) The adjudicated amount in respect of the Application made on the 4th May 2006 is Nine Hundred and Seventy One Thousand, Two Hundred and Sixty Two Dollars and Ninety One Cents. (\$971,262.91) inclusive of GST (\$882,966.29 exclusive of GST)
- (b) The date on which the amount becomes payable is the 16th May 2006.
- (c) The applicable rate of interest is 10.00%.
- (d) The parties will pay the ANA's fee in equal shares.
- (e) The parties will pay my fees and expenses in equal shares.

Background

1. This adjudication arises from a Payment Claim dated 10th April 2006 made by the Claimant that it asserts is for civil construction work undertaken for the Respondent at Bargara Views Estate Stage 2B.
2. The Claimant served the Payment Claim on the Respondent on the 11th April 2006.
3. The Respondent has served upon the Claimant a Payment Schedule dated the 26th April 2006 on the 27th April 2006 stating that "the scheduled amount is nil as an amount of \$63,297.76 is owed by CMC to Gairloch"..
4. The Claimant made application to the Institute of Arbitrators and Mediators (Queensland Chapter) for adjudication of the matter on the 4th May 2006.
5. On the 5th May 2006, The Institute of Arbitrators and Mediators wrote to the Claimant and Respondent nominating me as the Adjudicator in this dispute.
6. On the 5th May 2006, the Institute of Arbitrators and Mediators referred the Adjudication Application to me.
7. On the 10th May 2006, I wrote to the parties accepting the Adjudication Application.
8. On the 12th May 2006, the Respondent served an Adjudication Response on me.
9. Later that same day I received an e-mail from the Respondents solicitor advising me of two typographical errors in their application and asking if they should

amend all of the submitted documents. This email was copied to the Claimant and the ANA.

10. I opened this e-mail on the 15th May 2006 and advised the Respondent by e-mail, copied to the Claimant and the ANA that they need not amend their submission but that I would assess this information in line with the timing in the Act.

Appointment of Adjudicator

11. On the 4th May 2006 the Claimant lodged with the Institute of Arbitrators and Mediators Australia (Queensland Division) an Authorised Nominating Authority, Registration Number N1057857, under the Act, an adjudication application (referred to in this decision as the “Adjudication Application” and the “Application”) pursuant to the Building and Construction Industry Payments Act (Qld) 2004.
12. I am registered under the Act as an Adjudicator; my registration number is J1066110.
13. By letter dated 5th May from the Institute of Arbitrators and Mediators, the Adjudication Application was referred to me to determine as the Adjudicator. The Institute of Arbitrators and Mediators (referred to in this decision as “the Institute” and “the ANA”) is an Authorised Nominating Authority, Registration Number N1057857, under the Act.
14. The time scale in the Act operates on business days. The Act in schedule 2 defines a business day thus...

“business day has the meaning given in the *Acts Interpretation Act 1954*, section 36 but does not include 27, 28, 29, 30 or 31 December.”

The Acts Interpretation Act 1954 section 36 defines a business day thus...

business day means a day that is not—

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done

15. As this application was made on the 4th May 2006, relevant dates are...

5 th May 2006	Business day (1)
6 th May 2006	Saturday – Not a business day - s.36 of the Acts Interpretation Act
7 th May 2006	Sunday – Not a business day - s.36 of the Acts Interpretation Act
8 th May 2006	Business Day (2)
9 th May 2006	Business Day (3)
10 th May 2006	Business Day (4)

16. Section 32 of the Act states...

32 Claimant may make new application in certain circumstances

- (1) This section applies if—
- (a) a claimant does not receive an adjudicator’s notice of acceptance of an adjudication application within 4 business days after the application is made; or
 - (b) an adjudicator who accepts an adjudication application does not decide the application within the time allowed by section 25(3)
- (2) In either of those circumstances, the claimant—
- (a) may withdraw the application, by notice served on the adjudicator or authorised nominating authority to whom the application was made; and
 - (b) may make a new adjudication application under section 21.19

17. Section 23 of the Act states...

23 Appointment of adjudicator

- (1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by serving notice of the acceptance on the claimant and the respondent.
- (2) On accepting an adjudication application, the adjudicator is taken to have been appointed to decide the application.

18. By letter to the Claimant and the Respondent, (jointly referred to in this decision as “the Parties”) copied to the ANA, dated 10th May 2006, within four business days after the application was made, I served notice that I accepted the Adjudication Application, and thereby became the appointed Adjudicator.

Scope of this Determination

19. The Act at Section 26(1) requires that I am 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 amount.
20. The Act at Section 34(3)(b) gives me the discretion to decide the proportion to be made by the Claimant and by the Respondent to the Authorised Nominating Authority's fee.
21. The Act at Section 35(3) also gives me the discretion to decide 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 Determination

22. Section 26(2) of the Act restricts the matters, which I may consider in deciding an adjudication application. Section 26(2) provides:
“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 an inspection carried out by the adjudicator of any matter to which the claim relates.

23. In making this decision I have had regard to the following:

- (a) The provisions of the Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991, part 4A* (referred to in this decision as ‘the QBSA Act’);
- (b) The provisions of the Contract from which the Adjudication Application arose.
- (c) The Payment Claim dated the 10th April 2006, served on the 11th April 2006 to which the application relates.
- (d) The Payment Schedule dated the 26th April 2006 and served on the 27th April 2006.
- (e) The Adjudication Application dated the 4th May 2006 and enclosed documents.
- (f) The Adjudication Response dated and received by me on the 12th May 2006 and the e-mail from the Respondent of the same date.

The Construction Contract and the Application of the Act.

24. I refer to the decision in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport [2004] NCWCA 394* at [53] where Hodgson JA states....

53 What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).

25. The Act in schedule 2 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.

26. The Claimant has provided in its adjudication application, copies of tender documents for Bargara View Estate Stage 2B Contract No. 05058 including a document summary at Tab 1 attachment B, it’s initial tender offer at Tab 1 attachment C, Notice to tenderers No.1 from Brock and Associates (hereinafter referred to as ‘Brock’) at Tab1 attachment D, it’s Response to Notice to Tenderers No.1 at Tab 1 attachment E, and Brock’s Letter of Acceptance at Tab 1

attachment F. All of these documents refer to the construction of Bargara Views Estate Stage 2B. The document summary states that 'the following documents form part of the Contract'.

27. In its Adjudication Application the Claimant points to the definition of 'Construction Work' in section 10(1) of the Act....

10 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;
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
- (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
 - (i) site clearance, earth-moving, excavation, tunnelling and boring; and
 - (ii) the laying of foundations; and
 - (iii) the erection, maintenance or dismantling of scaffolding; and
 - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
 - (v) site restoration, landscaping and the provision of roadways and other access works;
 - (f) the painting or decorating of the internal or external surfaces of any building, structure or works;
 - (g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;
 - (h) any other work of a kind prescribed under a regulation for this subsection.

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

(3) Despite subsections (1) and (2), **construction work** does not include any of the following work—

- (a) the drilling for, or extraction of, oil or natural gas;
- (b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose.

28. Further the Claimant asserts that the work is also supply of related goods and services within the meaning of section 11 of the Act...

11 Meaning of *related goods and services*

(1) *Related goods and services*, in relation to construction work, means any of the following—

(a) goods of the following kind—

(i) materials and components to form part of any building, structure or work arising from

construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind—

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services relating to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory services relating to construction work;

(iv) soil testing services relating to construction work;

(c) goods and services, in relation to construction work, of a kind prescribed under a regulation for this subsection.

(2) In this Act, a reference to related goods and services includes a reference to related goods or services.

29. I accept the Claimants contention that the construction of Bargara Views Estate Stage 2B is construction work within the meaning of section 10(1) of the Act and is not excluded by virtue of s10(3) of the Act and supply of related goods and services within the meaning of s.11 of the Act and that the intent of the tender process is for the parties to enter into a contract, agreement or other arrangement to carry out that construction work and supply of related goods and services.

30. Thus I accept that any contract, agreement or other arrangement entered into as a result of the tender process is a construction contract within the meaning of the Act, subject to it passing the tests contained in the Act. I will firstly turn to the question of whether a Contract, Agreement or Other Arrangement exists before I turn to the terms of any Contract, Agreement or Other Arrangement and whether that construction contract passes those tests.

Does any Contract, Agreement or Other Arrangement exist between the parties?

31. I have not been furnished with a formally executed contract document evidencing a contract exists between the parties.

32. In its Adjudication Application the Claimant has provided a significant amount of documentary evidence of its performance of the works referred to in the tender documents. The Respondent does not dispute that the Claimant performed the works.

33. The Claimant further submitted a copy of a letter of acceptance from Brock dated the 10th August 2005 but received by it on the 11th August 2006 stating that it had

been instructed by its client, Gairloch Developments (the Respondent), to accept the Claimants tender dated the 26th May 2005.

34. The Respondent has made payments for work undertaken by the Claimant on the project, the subject of that tender and thus I accept that Brock had authority to accept the tender submitted by the Claimant on behalf of the Respondent notwithstanding that I have not been furnished with a signed formal instrument of agreement.
35. Thus I accept that the Claimant offered to perform the work at Bargara Views Estate Stage 2B, the Respondent accepted that offer and that it was for the consideration mentioned in the letter of acceptance namely \$660,968.97 including GST.
36. At points 6 & 7 of its Adjudication Application, the Claimant asserts that the contract was entered into on the 10th August 2005, the date of the letter of acceptance, as by its own submission the Claimant shows by date stamp that it was received by it on the 11th August 2006, I disagree. I decide that the parties entered into a contract to perform the construction works at Bargara Views Estate Stage 2B on the 11th August 2005.
37. As I have already decided that any contract entered into as a result of the tender process fulfils the definition of a construction contract under the Act, I accept that the contract entered into is a construction contract within the meaning of the Act subject to the tests contained in the Act.
38. Parties to the Contract are Civil Mining and Construction Pty Ltd trading as Sheppard Earthmoving as Contractor and Gairloch Developments Pty Ltd as Principal.

What was offered and what was accepted?

39. The Claimant has submitted with its adjudication application the tender documentation mentioned above. Brock's letter of acceptance states that it is accepting the Claimants tender of the 26th of May 2005. This is the Claimants initial tender offer. However it refers to the price of \$660,968.97 including GST that was the amount offered by the Claimant in its response to Brocks Notice to Tenderers No.1 dated the 26th July 2005. Thus I accept that it has accepted the amended offer of that date.
40. Much of the dispute between the parties derives from interpretation of the terms of that contract and subsequent agreements. I will deal with those matters in turn; however at this point I am satisfied that the contract initially entered into include the terms of the tender documentation and correspondence supplied to me by the Claimant in its adjudication application at point 7 and also noted in the Payment Claim at page 2. The Respondents Payment Schedule does not contest these terms.
41. The documents provided to me in the Adjudication Application make clear that the Australian Standard Conditions of Contract are an integral part of the contract between the parties. They are not referred to specifically at point 7 of the

Adjudication Application and indeed the Claimant contends that the General Conditions of Contract (annexure only) form part of the contract. However on the first page of the annexure it states 'This contract shall be conducted in accordance with the provisions of AS2124-1992, which shall be read in conjunction with the following Annexure.' Thus I consider that the Australian Standard Conditions of Contract AS2124-1992 form a part of the contract even though neither party has furnished me with a copy of them.

42. The Act at s.26 (2) (c) requires me to consider the provisions of the construction contract from which the application arose. I have not been furnished with the whole document but have been given those clauses from which this dispute arose. Thus I am satisfied that I am acting within s.26 (2) (c).

Is the Contract within the jurisdiction of the Act?

43. Section 3(1) of the Act provides that

- (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
 - (b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland.

44. Subordinate legislation 2004 No.91, schedule 2 provides that parts 2 and 3 of the Act commenced on the 1st October 2004.

45. I have already decided that the contract is a construction contract within the meaning of the Act

46. I am satisfied that the contract was entered into on the 11th August 2005 and thus does not offend section 3(1) of the Act.

47. The Act at section 3(2) states that the 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
- (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
- (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.

48. The Claimant has raised the matter of a loan agreement, contract of guarantee or contract of insurance and asserts that the contract contains no such clause. The Respondent has not raised the matter. I am satisfied that s.3 (2)(a) does not exclude the contract from the operation of the Act.
49. The documents supplied to me indicate that the Respondent is a development corporation based in Bundaberg, Queensland. I am satisfied that the Respondent is not a resident owner of the subject property

I am satisfied that the work is not domestic building work being undertaken for a resident owner and therefore that s.3 (2)(b) does not exclude the contract from the operation of the Act.

50. There is no indication in the submissions made by the parties that the consideration for the work carried out under the contract is to be valued by reference to anything other than the value of the construction work carried out. I am therefore satisfied that s. 3(2)(c) does not exclude the contract from the operation of the Act.
51. The Act at section 3(3) states...

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; or
- (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
- (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.

52. I am satisfied that the Claimant is not undertaking the construction work as an employee of the Respondent and hence the contract is not excluded from the operation of the Act by virtue of s.3 (3)(a) of the Act.
53. Neither the contract documents nor the submissions by the parties indicate that the construction work is undertaken or related goods and services are supplied under this contract, are supplied as a condition of a loan agreement with a recognised financial institution and are hence not excluded from the operation of the Act under s. 3(3)(b) of the Act.

54. I am satisfied that the contract which is the subject of this adjudication application is not excluded from the operation of the Act by virtue of any of the undertakings in s. 3(3)(c) of the Act.

55. Section 3(4) of the Act states...

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.

56. The construction work is to be done in Queensland and the related goods and services to be supplied under this contract are to be supplied for construction work in Queensland. None of the submissions by the parties indicate that the construction work or the related goods and services the subject of the Adjudication are supplied for construction work carried out outside of Queensland. Both the Claimants and the Respondents places of business are in Queensland, I am therefore satisfied that it is not excluded by section 3(4) of the Act.

57. It is my decision that the construction contract is within the jurisdiction of the Act.

Reference Date

58. Section 12 of the Act provides:

12 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.

59. Section 7(b) of the Act states...

7 Object of 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.

60. As evidenced by the submissions, the Claimant has undertaken to perform construction work and supply related goods and services under a construction contract and is thus entitled to recover progress payments.

61. 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.

62. The Claimants adjudication application deals with the issue of the reference date at page seven.

63. The contract was entered into on the 11th August 2005. The definition of reference date at schedule 2 (a) above says that the reference date should be worked out under the contract. The Claimant asserts that at Clause 42.1 of the contract that claims for payment may be made at the times states in the Annexure.

64. I can only assume the Clause stated is a clause in AS2124-1992 but I accept from the submissions that this is the standard contract used by the parties as amended in the documents provided to me as they are not contested. I have not been furnished with a copy of this Australian Standard in the Adjudication Application.

65. The Australian Standard Conditions of Contract are not available ‘at large’; they are available upon payment of a fee.

66. The Act is clear in s.26 (2) that I am only to consider those submissions put before me. I cannot go searching for information nor can I use my own knowledge of the Standard. The Respondent has been given notice by the Claimant at page 2 of its Payment Claim and at point 7 of the Adjudication Application that the annexure ‘only’ forms part of the contract and has thus been given ample opportunity to refute this, it has not done so. In any event I have already decided that I am acting with s.26 (2)(b) as I have the provisions from which the application arose.

67. The note on the Payment Claim page 2 and the Adjudication Application point 8 are explanatory only to the list of documents that the Claimant asserts form the contract.

68. Thus I have not sought a copy of the Australian Standard and will rely on the submissions put before me. In any event, the submissions made to me do not question the wording of the Clauses of AS2124-1992 that have been put before me; they merely disagree on the interpretation of them.

69. Notably in this situation, the Respondent neither in it’s Payment Schedule nor in it’s Adjudication Response; should I later consider that a properly made submission; contested the wording of clause 42.1 asserted by the Claimant. Thus I accept that the Clause as stated in the Claimants submission does in fact say that.

70. I have been furnished with a copy of the annexure in the Adjudication Application Tab 1 B and it states that the payments are to be made monthly.
71. The Claimant has further directed me to the decision of Acting Justice Macready in *Beackhaus v Brewarrina Council [2002] NSWSC 960* at [29]-[30] on the meaning of monthly. It follows from that decision that if monthly means once per month and only one claim under s17(5) of the Act ...

17 Payment claims

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

...may be made from each reference date then for each date of a month to be a date on which a claim may be made, the reference date must therefore be the last day of the preceding month.

In this case the contract was entered into on the 11th August 2005, therefore under the contract and the decision of Acting Justice Macready, claims under this contract may be made once per calendar month from the last day of August 2005.

72. It is important to note the decision in *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited [2003] NSWSC 1103*. that a claim under the Act is a different animal to a claim under the contract. A claim under the contract must strictly comply with the requirements of the Act. I only have jurisdiction to adjudicate claims made under the Act.
73. Thus I decide that the reference date for this contract is the last day of each month and a properly made claim, made on the 10th April 2006, relates to the 31st March 2006 reference date and agree with the Claimants assertion at point 45 in its Adjudication application.
74. Was more than one claim made under the Act for this reference date?
75. The Claimant asserts at point 47 of its Adjudication Application that a previous claim was made under the Act on the 6th February 2006.
76. The Respondent in its Payment Schedule has asserted that the claim the subject of this application was not properly served in accordance with the provisions of the Act and also in its Adjudication Response at point 6 that it has no knowledge of another claim under the Act. I will deal with this issue under the heading Progress Claim.
77. Regardless of whether I later accept the Adjudication Response point on this matter as a properly made submission or whether that point relates to the statement in its Payment Claim, any claim made under the Act on the 6th February 2006 would have related to the 28th February 2006 reference date and thus as there are no submissions from either party that any other claim was made within the period covered by the 31st March 2006 reference date, I must accept that the

claim I have been asked to adjudicate is the only claim made under the Act for the 31st March 2006 reference date.

Amount of a Progress Payment

78. Section 13 of the Act provides:

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

- (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.

79. Neither party has given me a copy of AS2124-1992. The annexure submitted in the Adjudication Application at Tab 1 attachment B provides no information as to the amount of a progress payment. However points 6 and 17 of the General Conditions of Tendering in that same attachment show that the form of contract intended is a lump sum contract.

80. Point 17 (c) of those conditions states...

17. The purpose of the Bill of Quantities is to:

- c) Provide a basis for assessing / calculating the value of the work for payment claims or possible variations to the work.

81. In its Payment Claim the Claimant submits at page 4 of 6, that...

Therefore, irrespective of whether a 'Bill of Quantities' or a 'Schedule of Rates' Contract, in the circumstances of this claim, the proper application of the Contract is to multiply the actual quantities of each item of work completed by the unit rates set out in the Contract for each item of work. That is in accordance with Clause 3.1 of the Contract, "*(t)he principal shall pay the Contractor... for work for which the principal accepted a lump sum, the lump sum.. for work for which the Principal accepted rates, the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Contract by the rate accepted by the Principal for the section or item, adjusted by any additions or deductions made pursuant to the Contract.*"

82. This contention has not been disputed by the Respondent in its Payment Schedule was not repeated in the Adjudication Application and is not contested in the Adjudication Response.

83. I therefore decide that the contract does have a clause in relation to the amount of a progress payment in accord with in s.13 (a) of the Act.

Valuation of construction work and related goods and services

84. Section 14 of the Act provides for the valuation of construction work and related goods and services. I have already decided that the subject matter of this contract is both Construction work carried out or undertaken to be carried out and supply of related goods and services. At section 14 the Act states...

14 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.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

(a) under the terms of the contract; or

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

(i) the contract price for the goods and services; 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 goods are defective, the estimated cost of rectifying the defect.

(3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

85. Neither party has given me a copy of AS2124-1992. The annexure submitted in the Adjudication Application at Tab 1 attachment B provides no information as to the valuation of work. However points 6 and 17 of the general Conditions of Tendering in that same attachment show that the form of contract intended is a lump sum contract.

86. Point 17 (c) of those conditions states...

17. The purpose of the Bill of Quantities is to:

c) Provide a basis for assessing / calculating the value of the work for payment claims or possible variations to the work.

87. In its Payment Claim the Claimant asserts two alternative views with regard to scheduled items...

88. Clause 3.2 of the General Conditions of Contract provides, inter alia, “(a) *direction shall not be required to be given by the Superintendent by reason of the actual quantity of an item required to perform the Contract being greater or less than the quantity shown in the Bill of Quantities or Schedule of Rates.*”

Then:

Clause 4.1 of the General Conditions of Contract and the annexure provide that the Bill of Quantities “*forms part of the Contract*” (ie Alternative 1 specified).

Clause 4.4 of the General Conditions of Contract provides, inter alia, *(i)f the Bill of Quantities is in error in that it ... contains an incorrect quantity in relation to any item included therein ... then ... where an item is deficient in quantity ... upon application in writing to the Superintendent by the Contractor ... the lump sum accepted by the Principal for the execution of the whole of the work to which the Bill of Quantities relates shall except when the value of the error is less than \$400, be adjusted by such amount as is required to correct the error, determined in the manner provided by Clause 40.5 for the valuation of variations as if the correction were a variation under Clause 40.*

The Bill of Quantities shall be deemed to be in error as aforesaid to the extent that the items and quantities included in it differ from those required for the execution of the Works in accordance with the method of measurement evidenced by the contract.”

Adjustments under Clause 4.4 are not subject to the limits of accuracy as are those under Clause 3.3, however the Conditions of Tender which form part of the Contract confirm inter alia, “*(t)he purpose of the Bill of Quantities is to ... provide a basis for assessing / calculating the value of ... variations to the work*” (Clause 40).

Or in the alternative:

Clause 3.3 of the general Conditions of Contract provides, inter alia, “*(w)here other wise than by reason of a direction of the Superintendent to vary the work under the Contract, the actual quantity of an item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates (a) where the Principal accepted a lump sum for the item, the difference shall be valued under Clause 40.5 as if it were varied work directed by the Superintendent as a variation;*

(b) where the Principal accepted a rate for the item the rate shall apply to the greater or lesser quantities provided that where limits of accuracy are stated in the Annexure the rate shall apply to the greater or lesser quantities within the limits and quantities outside the limits shall be valued under Clause 40.5 as if they were varied work directed by the Superintendent as a variation.”

Clause 2.1 of the Special Conditions of Contract provides. “*(w)here the description of an item of work in the Bill of Quantities includes the qualification*

“(Provisional Quantity)” the item of work was not measured exactly at the time of preparing the Tender Documents.

Notwithstanding anything to the contrary in paragraph (b) of Clause 3.3 of AS2124-1992, where the description of an item of work in the Bill of Quantities includes the qualification “(Provisional Quantity)” the scheduled rate for that item shall apply to the whole of the quantity of that item actually carried out, whether greater or lesser than the quantity shown in the Bill of Quantities and regardless of any limits of accuracy stated in the Annexure.”

By the Bill of Quantities, Items A3, A4(c), A5(b), A18, A19, C2, D3, E8 and E9 are provisional items not subject to Clause 3.3 of AS2124-1992 and for which *“the scheduled rate for that item shall apply to the whole of the quantity of that item actually carried out, whether greater or lesser than the quantity shown in the Bill of Quantities and regardless of any limits of accuracy stated in the Annexure.”*

The limits of accuracy provided by the annexure for which the Principal accepted a rate or rates are “+/- twenty (20%) percent”.

89. The Claimant asserts that there is an ambiguity as to whether the Contract is a Bill of Quantities or Schedule of rates based contract and that I should apply the Contra Proferentem rule against the drafter of the contract, the Respondent.
90. I do not believe there is any ambiguity in whether this is a Bill of Quantities or Schedule of Rates Contract. The General Conditions of Tendering submitted by the Claimant and not contested by the Respondent that I have accepted forms part of the Contract at point 6 states...

6. The Tenderer is required to state in the Bill of Quantities provided in the tender documents the lump sums and rates at which the Tenderer offers to perform the Contract. The Tender is required to show, the place provided in the Bill of Quantities provided in the tender documents the lump sums and rates at which the Tenderer offers to perform the Contract. The tender is required to show, in the place provided in the Bill of Quantities, the total amount arrived at by summing: the lump sums, the sums ascertained by calculating the products of the rates for items of work and the corresponding quantities, and the provisional sums. The amount so shown will be for the information of the Principal and if any error be made in the calculation or summation the Tenderer shall remain bound by the lump sums.

And further at 17...

17. ...In addition to the items in the “Bill of Quantities”, the Tenderer shall include in the priced Bill of Quantities, and provide for in the lump sum, all items necessary for the execution of the Works (the whole of the work to be executed in accordance with the Contract). The quantities which are included in the Bill of Quantities are provided as a guide only. The submitted tender is to be based on the Tenderer’s own calculations of the required quantities to complete the works.

91. These General Conditions of Tendering have been submitted for my consideration by the Claimant and I have accepted that they form part of the contract; therefore I decide that this is a Lump Sum contract. And accept the first alternative at page 3 of the Claimants Payment Claim.
92. There is an ambiguity that I must construe against the Respondent.
93. That ambiguity is found between Point 17 of the General Conditions of Tendering in respect of the requirement for a tenderer to make their own assessment of quantities and submit those with their tender, an option the Claimant did not exercise and the subsequent ability to amend the quantities afforded by Clause 4.4 of the General Conditions of Contract should those quantities be in error. The Claimant correctly points to there being no order of precedent for the competing documents and thus I must construe this against the drafter of the contract – The Respondent.
94. The Respondent has not addressed nor contested the Claimants submissions on these issues in its Payment Schedule nor its Adjudication Response.
95. Therefore I decide that the contract does contain clauses that relate to the valuation of construction work and the supply of related goods and services and thus s.14 (1) (a) and s.14(2)(a) apply.

Due date for payment

96. The Special Conditions of Contract at 35 states when a progress payment shall be payable...

‘Subject to the provisions of the Contract, within thirty-five (35) days after receipt by the Superintendent of a claim for payment or within twenty one (21) days of issue by the Superintendent of the Superintendent’s payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the principal shall pay the amount of the Contractors claim.’

97. I accept that a day referred to in the above clause is a calendar day.
98. Section 15(1)(a) of the Act provides:
- (1) A progress payment under a construction contract becomes payable—
 - (b) 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 67W— on the day on which the payment becomes payable under the provision;
99. The contract contains no pay when paid provision and thus there is no provision that is void under s.16.

100. Section 67U of the *Queensland Building Services Authority Act 1991* (the QBSA Act) states...

67U Void payment provision in construction management trade contract or subcontract

A provision in a construction management trade contract or subcontract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 25 business days after submission of a payment claim.

101. The definition of a construction management trade contract is found in schedule 2 of the QBSA Act – dictionary...

construction management trade contract, for part 4A, see section 67A.

Section 67A of the QBSA Act definition is...

construction management trade contract means a building contract described in section 67B.

Section 67B of the QBSA Act states...

67B Meaning of *construction management trade contract* in pt 4A

(1) For this part, a building contract is a *construction management trade contract* if—

- (a) the contracting party for the building contract is a principal; and
- (b) the contracted party for the building contract is the holder of a licence, other than a licence identified under a regulation as a general building licence; and
- (c) the building work the subject of the building contract is part of a wider project of building work (the *project*) involving the principal in entering into 1 or more other building contracts, also as a principal, for the carrying out of other building work that is also part of the project.

(2) For deciding whether a principal has entered into a building contract, it does not matter if the building contract was entered into on behalf of the principal, including, for example, by a person described in the contract as a construction manager.

102. The definition of subcontract is found in schedule 2 of the QBSA Act – dictionary...

subcontract, for part 4A, see section 67A.

Section 67A of the QBSA Act states...

subcontract means a building contract described in section 67D.

Section 67D of the QBSA Act states...

67D Meaning of *subcontract* in pt 4A

For this part, a building contract is a *subcontract* if—

- (a) both the contracting party and the contracted party for the contract are building contractors; and
- (b) for the contract, the contracted party is a subcontractor for the contracting party; and
- (c) the building work the subject of the contract is the whole or a part of building work the subject of—
 - (i) another building contract, under which the contracting party mentioned in paragraphs (a) and (b) is the contracted party; or
 - (ii) a domestic building contract between the contracting party mentioned in paragraphs (a) and (b) and a consumer.

103. I am satisfied that the contract is not a construction management trade contract or a subcontract within the meanings in the QBSA Act.

104. Section 67W of the QBSA Act states...

67W Void payment provision in commercial building contract

A provision in a commercial building contract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 15 business days after submission of a payment claim.

The definition of a commercial building contract is found in Schedule 2 – Dictionary to the QBSA Act...

commercial building contract, for part 4A, see section 67A.

Section 67A of the QBSA Act states...

commercial building contract means a building contract that is not a construction management trade contract or a subcontract.

Section 67AAA of the QBSA Act defines a building contract...

67AAAMeaning of *building contract*

(1) For this part, a *building contract* means a contract or other arrangement for carrying out building work in Queensland but does not include—

- (a) a domestic building contract; or
- (b) a contract exclusively for construction work that is not building work.

(2) In this section—

construction work see the *Building and Construction Industry Payments Act 2004*, section 10.

I decide that the work the subject of this application is construction work that is not building work within the meaning of the QBSA Act.

105. As the contract does not contain a provision that is void under section 16 of the Act or sections 67U or 67W of the QBSA Act, I decide that a progress payment under this contract becomes payable under special condition 35 of the contract.
106. The claim is dated the 10th April and was served on the 11th April 2006, 35 calendar days after that date is the 16th May 2006. The Superintendents payment certificate is dated the 26th April 2006, 21 calendar days after that date is the 17th May 2006.
107. The Superintendents payment certificate is the trigger for the contractual provision even though it has no standing against a payment schedule under the Act in all other cases.
108. The earlier of these two dates is the due date for payment, the 16th May 2006.

Interest

109. Sections 15(2) and 15(3) of the Act provide:
- (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 67P12 applies because it is a building contract, interest is payable at the penalty rate under that section.
110. I have already decided above that this contract is not a building contract subject to the QBSA Act and thus s.15 (3) does not apply.
111. The current rate of interest under the *Supreme Court Act* s.48 for debts under a judgement or order is 10% per annum simple interest.
112. In the contract annexure the rate of interest payable on overdue payments is stated at six percent (6%) per annum.
113. The greater of these two rates and thus the rate of interest applicable, is the Supreme Court rate of 10% per annum simple interest and I agree with the Claimants submission at points 176 to 178 of the Adjudication Application.

The Amount Submitted for Determination

114. The Claimant seeks adjudication of their Payment Claim dated the 10th April 2006 served on the 11th April 2006 for an amount of \$988,411.92 inclusive of GST.

The Payment Claim

115. Section 17 of the Act states...

- (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the “**claimant**”) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the “**respondent**”).
- (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.
- (3) The claimed amount may include any amount—
 - (a) that the respondent is liable to pay the claimant under section 33(3);14 or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (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.
- (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.

116. The Payment Claim was dated the 10th April 2006 and the Claimants Adjudication Application asserts that it was served upon the Respondent, on the 11th April 2006 at point 46 of its Adjudication Application.

117. The Respondent in its Payment Schedule has asserted that the Payment Claim was not properly served in accordance with the provisions of the Act. Notably I inform the Respondent in relation to point 5, 6, 7 and 14 of its Adjudication Response, that I am Adjudicating the BCIPA claim served upon the Respondent, not Payment Claim No.6 served upon the Superintendent. The reason given on the Payment Schedule was that the Claim was not served in accordance with the Provision of the Act; that is the matter I have jurisdiction to adjudicate. Refer *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited [2003] NSWSC 1103*

118. The Claimant in its Adjudication Application at points 46 to 57 deals with whether the Payment Claim was properly served.

119. The claim identifies the work in the heading of the Payment Claim as being for Bargara Views Estate stages 2b Contract Number: 05058, thus I am satisfied that it is in accord with s.17(2)(a) of the Act.

120. The claim states the amount of the progress claim the Claimant claims to be payable, \$898,556.29 excluding GST (\$988,411.92 including GST) and hence satisfies s.17(2)(b) of the Act.
121. The Claim states that it is made under the Act and thus satisfies s.17 (2)(c) of the Act.
122. The claim does not seek an amount under s17 (3)(a).
123. The Claim seeks return of retention monies and thus seeks payment for an amount allowed under s.17 (3)(b).
124. I have accepted that the claim has been served within the period that is covered by the 31st March 2006 reference date. The later of this date and 12 months after the construction work to which it relates was last carried out and related goods and services were last supplied has not elapsed. Thus it has been served within time under s.17(4).
125. I have already decided that the Claim is the only claim served in relation to the 31st March reference date and hence it does not offend s.17 (5) of the Act.
126. The Claim includes amounts that the Claimant asserts were included in a previous BCIPA Payment Claim. I have not been given a copy of that claim but in any event this is allowed under Section.17 (6) of the Act.
127. The Respondent in its Adjudication Response at points 6 to 10 expands upon its statement in its Payment Schedule, that the Payment Claim was not served in accordance with the provisions of the Act. I have dealt with whether this is a properly made submission under the heading Adjudication Response and as to my jurisdiction to decide this above.
128. At point 6 it says that it has no knowledge of a previous BCIPA claim. As the purported date of that claim does not relate to the reference date of that Claim and as that Claim did not proceed to Adjudication (refer s.27 of the Act), it has no bearing on my Adjudication of this BCIPA claim and certainly does not effect the service of this Claim.
129. The contention at point 7 is similar.
130. At point 8, The Respondent asserts that pursuant to s.103 of BCIPA the payment Claim could have been served on Gairloch at the two addresses noted. I accept that contention as it fits section 103(1) of the Act, however that does not; as the Claimant has asserted in its Adjudication Application; stop the Claimant serving the Claim in accordance with s.103(2) of the Act. The Claimant and the Respondent agree that the Claimant served the claim personally upon a director of the Respondent on the 11th of April 2006 at Awoonga Dam via Gladstone. Personal service is completely in line with service under s.39(1)(a)(i) of the *Acts Interpretation Act 1954*...

39 Service of documents

(1) If an Act requires or permits a document to be served on a person, the document may be served—

(a) on an individual—

(i) by delivering it to the person personally; or

131. At point 9, I accept the Respondents contention; however this has no effect on the personal service above.
132. At point 10, I accept the assertions by the Respondent in particular that service was effected upon a director of the Respondent in a manner that fits with s39(1)(a)(i) of the *Acts Interpretation Act 1954*. In doing so I need not make a decision on whether or not a request was made to provide a physical address as it has no bearing on the actual service.
133. I do not have jurisdiction to decide whether the service that was in accord with the *Acts Interpretations Act 1954*; was; or was not designed to intimidate.
134. As the Claim fulfils all the requirements of the Act and was served in accordance with the Act I decide that it is a valid payment claim under the Act and I disagree with the assertion of the Respondent that it was not served in accordance with the provisions of the Act.

The Payment Schedule

135. Section 18 of the Act states...

18 Payment schedules

- (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.

136. The Adjudication Application at point 62 asserts that the Payment Schedule dated the 26th April 2006 was served on the Claimant on the 27th April 2006, the Respondent has not contradicted this date and I accept it to be correct.
137. The Claimant asserts at point 60 of its Adjudication Application that the Payment Schedule does not identify the Payment Claim to which it refers unless the covering letter is intended to be part of the Payment Schedule. The Claimant concludes that it does. This conclusion is correct. The Claimant has included with its Adjudication Application at TAB 1 attachment L, a copy of the decision of Einstein J in Leighton Contractors Pty Ltd v Campbelltown Catholic Club [2003] NSWSC 1103 at [59]. Justice Einstein found that a covering letter to a claim that referred to the 'attached' claim where the endorsement required was only to be found on that covering letter should be read as a whole...
- 59 The question is a close one in terms of the document here claimed to have constituted the relevant payment claim. The so-called progress claim is in fact enclosed as an attachment to the covering letter. The covering letter which uses the words "This is a payment claim made under the [Act] ". The attached document does not use those words. Whilst in other fields of discourse this may be regarded as a matter of no moment, it must be appreciated that one could have a circumstance where a covering letter may enclose a number of documents, yet still *itself* purporting to be the vehicle conveying the section 13(2)(c) endorsement. **It would not be appropriate to hold that the endorsement provision had been complied with if, for example, only some of those enclosed documents were claimed to be the relevant payment claim.** This is not an area in which the recipient of the payment claim should be in any doubt *from its terms* as to *what it is* and as to the fact *that it is made under the Act.* (My emphasis)
138. The Covering letter to the Payment Schedule identifies the Payment Claim to which it relates as "*With reference to your Payment Claim submitted under cover of your letter of 10 April 2006*". Thus I accept that it is in accord with s.18 (2)(a) of the Act.
139. The Payment Schedule states that it proposes to pay "*nil as an amount of \$63,297.76 is owed by CMC to Gairloch*" and thus I accept that it fulfils the requirements of s.18(2)(b) of the Act.
140. The Payment Schedule gives three pages of reasons why the Scheduled Amount is less than the claimed amount. Therefore I accept that the payment schedule conforms to the requirements of s.18 (3) of the Act.
141. I cannot find any provision in the contract documents supplied to me for the time in which a Payment Schedule must be served therefore s18(4)(b)(i) does not apply and the schedule must be served in accordance with s18(4)(b)(ii). The Payment Schedule was dated the 26th April 2006 and served on the 27th April 2006, this is within the 10 business day period after the date of service of the Payment Claim on the 11th April 2006 and thus complies with s 18(4) of

the Act. The Claimant accepts this as correct at point 69 of its Adjudication Application. Therefore s.18(5) of the Act is not triggered.

142. As the Payment Schedule complies with all of the requirements of the Act, I decide that it is a valid Payment Schedule under the Act.

The Adjudication Application

143. In regard to the Adjudication Application dated and served on the 4th May 2006 and enclosed documents. The Act at s.21 states...

21 Adjudication application

(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

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies can not be made unless—

(a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice.

(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;

(ii) for an application under subsection (1)(a)(ii)— within 20 business days after the due date for payment;

(iii) for an application under subsection (1)(b)—within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and

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

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

(f) may contain the submissions relevant to the application the claimant chooses to include.

- (4) The amount of an application fee must not exceed the amount, if any, prescribed under a regulation.
- (5) A copy of an adjudication application must be served on the respondent.
- (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.
144. This application has been made under s.21 (1)(a)(i) of the Act.
145. The Application has been made in writing and therefore fulfils the requirements of s.21 (3) (a) of the Act.
146. The Application was made at the choice of the Claimant to the Institute of Arbitrators and Mediators Queensland Division which is an Authorised Nominating Authority registration No N1057859, thus the application conforms with s.21(3)(b) of the Act.
147. The application was made on the 4th May 2006, this is five (5) business days after the Payment Schedule was served, thus the application conforms with s21(3)(c)(i) of the Act.
148. The application fee of \$385.00 was short paid on the 4th May 2006 a situation that was rectified by the Claimant on the 5th May 2006; section 21(4) does not apply.
149. The Claimant asserts that the Adjudication Application was served upon the Respondent on the 4th May 2006, the Respondent does not contest this date, thus it complies with s.21 (5) of the Act.
150. The application was referred to me on the 5th May 2006, thus s.21 (6) of the Act has been complied with.
151. Thus I decide that the Adjudication Application dated and made the 4th May 2006 is a valid Adjudication Application.
152. The Adjudication Application consists of the following.
- Adjudication Application Covering Letter
 - Adjudication Application Form
 - Annexure A – Claimants Submissions relevant to the Application
 - Annexure B - List of Bundle of Supporting Documents
 - Tab 1 – Payment Claim Letter
 - Attachment A – Progress Payment Application Schedule
 - Attachment B – General Conditions of Tendering
 - Attachment C – Initial Tender

- Attachment D – Notice to Tenderers (NTT) No. 1
- Attachment E – Response to NTT No. 1
- Attachment F – Letter of Acceptance
- Attachment G – Progress Payment No. 5
- Attachment H – CMC Quantity calculations
- Attachment I – Variation Directions and Calculations
- Attachment J – Extension of time calculations
- Attachment K – Extension of Time Claims & Awards
- Attachment L – Copy of *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited [2003] NSWSC 1103* judgement.
- Tab 2 – Payment Schedule
- Tab 3 – Additional Documentation regarding Rock
- Tab 4 – Additional Documentation regarding Practical Completion
- Tab 5 – Additional Documentation regarding Extension of Time
- Tab 6 – Additional General Information

The Adjudication Response

153. Section 24 of the Act states...

24 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).¹⁵

(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.

154. I have already decided that a Payment Schedule was served within the time specified in s.18 (4)(b) and thus s.24(3) does not preclude an Adjudication Response.

155. The Respondent was served a copy of the Adjudication Application on the 4th May 2006, five business days after that date is the 11th May 2006.

156. I accepted the nomination as Adjudicator on the 10th May 2006, 2 business days after that date is the 12th May 2006.
157. The later of these two dates is the 12th May 2006.
158. The Respondent gave me a written Adjudication Response on the 12th May 2006 and sent me an email on the same day amending two typographical errors in the Adjudication Response earlier that day. I accept that the email is within time and is only a minor amendment to the Adjudication Response submitted earlier that day and is not intended to supersede the whole of that earlier submission.
159. Thus the Adjudication Application was made within time and complies with s.24(1) of the Act.
160. The Adjudication Response in is writing and thus complies with s.24(2)(a) of the Act.
161. The Adjudication Response identifies the Adjudication Application it relates to and as such complies with s.24 (2)(b) of the Act.
162. The Respondent's Adjudication Response contains seventy eight (78) points and attaches copies of correspondence between the parties.
163. I refer the parties to the decision in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport [2004] NCWCA 394* where Hodgson JA laid down the "Basic and Essential" conditions for the existence of an Adjudicators decision including that a construction contract exists between the Claimant and the Respondent to which the Act applies. Any submission that goes to the existence of the contract or any of the "Basic and Essential conditions" laid out in Brodyn, regardless of when it is made, as part of a Payment Schedule, Adjudication Response or as a separate submission, given to me at any time before I release my decision, is one that I believe I should consider. To not do so would be to put me in peril of releasing something that is not in fact an Adjudicators Decision.
164. To that end, I have considered any matter in those submissions in the Adjudication Response that goes to these "Basic and Essential" conditions of jurisdiction regardless of whether it has been raised in the Payment Schedule.
165. Section 24(2)(c) allows the Respondent to make submissions relevant to the response subject to the section 24(4) condition, that if those submissions relate to a reason for non-payment then they can only be made if they have already been included in the payment schedule. I have dealt with my ability to address jurisdictional matters above.
166. I refer the parties to the decision of Palmer J.in *Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140* at [76]-[77]...

76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the

project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

167. In this case I believe that the parties; a development company and a construction company involved in a significant undertaking; fit into the group that give and receive payment claims and payment schedules and who are experienced in the construction industry and thus significantly more cryptic descriptions are sufficient to appraise the other party of the substance of their submissions. Appraising each other of the substance of the submission does not mean that they have to agree with it merely that they understand it. An Adjudicator is not privy to this same level of intimate knowledge of the subject matter but must be satisfied that the party receiving such a submission is aware of its meaning.
168. To this end my decision as to whether the 78 points raised by the Respondent in the Adjudication Response are generally properly made expansions of reasons given in the Payment Schedule or properly made submissions as to jurisdiction is shown in the table overleaf. It includes a decision on whether I believe that the subject matter of each point is within the intimate knowledge of the party receiving it.
169. However as there are numerous points made under the same point numbers in the Adjudication Response, I may consider that some offend s.24(4), I will deal with those issue in addressing the matters for determination.

Item number on Adjudication Response	Point made by Respondent	Accepted as valid expansion on reason given on Payment Schedule	Matter within the Claimant's intimate knowledge of the Contract or Project	Reason
1	Refers to paragraph 10 of Claimants Adjudication Application	Yes	Yes	Effects the date of practical completion raised at point V31 of the Payment Schedule Explanation Sheet and also mentioned on the face of the sheet headed PAYMENT SCHEDULE.
2	Refers to paragraph 12 of Claimants Adjudication Application	Yes	Yes	Effects the date of practical completion raised at point V31 of the Payment Schedule Explanation Sheet
3	Refers to paragraph 13 of Claimants Adjudication Application	Yes	Yes	Raised on the covering letter to the Payment Schedule which I accept as part of the Payment Schedule.
4	Refers to paragraph 14 of Claimants Adjudication Application	Yes	Yes	Raised on the covering letter to the Payment Schedule which I accept as part of the Payment Schedule.
5	Refers to paragraph 15 of Claimants Adjudication Application	Yes	Yes	In the Payment Schedule the Respondent raised the matter of the validity of the Payment Claim not the Validity of the Superintendents Certificate.
6	Refers to paragraph 47 of Claimants Adjudication Application	Yes	Yes	Not raised on the Payment Schedule - Service is a Basic & Essential requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-54]
7	Refers to paragraph 48 of Claimants Adjudication Application	Yes	Yes	Not raised on the Payment Schedule - Service is a Basic & Essential requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-54]
8	Refers to paragraph 50 of Claimants Adjudication Application	Yes	Yes	Not raised on the Payment Schedule - Service is a Basic & Essential requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-54]
9	Refers to paragraph 51 of Claimants Adjudication Application	Yes	Yes	Not raised on the Payment Schedule - Service is a Basic & Essential requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-54]
10	Refers to paragraph 52 of Claimants Adjudication Application	Yes	Yes	Not raised on the Payment Schedule - Service is a Basic & Essential requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-54]
11	Refers to paragraph 64 of Claimants Adjudication Application	No		Not raised on the Payment Schedule - more detailed requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-44] and in any event this is not contested.
12	Refers to paragraph 78 of Claimants Adjudication Application	No		Not raised on the Payment Schedule - more detailed requirement - see Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport & Anor. [2004] NSWCA 394 at [53-44] and in any event this is not contested.
13	Refers to paragraph 79 of Claimants Adjudication Application	No		Not raised in the Payment Schedule - Superintendents Payment Certificate not submitted with Payment Schedule, I may refer to them if they are submissions in the Adjudication Application.
14	Refers to paragraph 80 of Claimants Adjudication Application	Yes	Yes	Not a reason for non payment - Jurisdictional issue.
15	Refers to paragraph 82 of Claimants Adjudication Application	Yes	Yes	Defective work was raised by the Respondent in the Payment Schedule
16	Refers to paragraph 90 of Claimants Adjudication Application	Yes	Yes	The heading Trench Rock to Stockpile on Site is shown as a variation and not as the scheduled item C2(a) for the same quantity.
			Yes	Given that this is such a large quantity and a large part of the claim would alert a competent contractor to the difference in description.
			Yes	The Claimant is also aware of correspondence of the 1st November 2006
17	Refers to paragraph 91 of Claimants Adjudication Application	Yes	Yes	As above
18	Refers to paragraph 93 of Claimants Adjudication Application	Yes	Yes	Expands on the reason given at A4 on the Payment Schedule
19	Refers to paragraph 94 of Claimants Adjudication Application	Yes	Yes	Expands on the reason given at A4 on the Payment Schedule
20	Refers to paragraph 95 of Claimants Adjudication Application	Yes	Yes	Expands on the reason given at A4 on the Payment Schedule
21	Refers to paragraph 97 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
22	Refers to paragraph 98 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
23	Refers to paragraph 99 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
24	Refers to paragraph 100 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
25	Refers to paragraph 101 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
26	Refers to paragraph 102 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
27	Refers to paragraph 103 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
28	Refers to paragraph 104 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
29	Refers to paragraph 105 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
30	Refers to paragraph 106 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
31	Refers to paragraph 107 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
32	Refers to paragraph 108 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
33	Refers to paragraph 109 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.
34	Refers to paragraph 110 of Claimants Adjudication Application	Yes	Yes	The Payment Schedule at V1 refers to a method of measurement of rock quantity by truck loads, this would indicate to a competent contractor that there is a difference in the methods of measurement between the parties.

Item number on Adjudication Response	Point made by Respondent	Accepted as valid expansion on reason given Payment Schedule	Matter within the Claimant's intimate knowledge of the Contract or Project	Reason	
35	Refers to paragraph 111 to 113 of Claimants Adjudication Application	Yes	Yes	The Respondent mentions a rate of \$45/m ³ for rock from Bulk Earthworks.	
				Yes	This is one of the items in question.
				Yes	This would alert a competent contractor to the difference in rate.
36	Refers to paragraph 114 of Claimants Adjudication Application	Yes	Yes	The Claimant is also aware of correspondence of the 1st November 2006	
				Yes	The Respondent mentions a rate of \$45/m ³ for rock from Bulk Earthworks.
				Yes	This is one of the items in question.
37	Refers to paragraph 117 of Claimants Adjudication Application	Yes	Yes	This would alert a competent contractor to the difference in rate.	
				Yes	The Claimant is also aware of correspondence of the 1st November 2006
				Yes	Referred to in the Payment Schedule at V20(d).
38	Refers to paragraph 118 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
39	Refers to paragraph 119 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
40	Refers to paragraph 120 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
41	Refers to paragraph 121 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
42	Refers to paragraph 122 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
43	Refers to paragraph 123 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at V20(d).	
44	Refers to paragraph 124 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at A20	
45	Refers to paragraph 126 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at A20	
46	Refers to paragraph 128 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at A20	
47	Refers to paragraph 129 of Claimants Adjudication Application	Yes	Yes	Referred to in the Payment Schedule at A20	
48	Refers to paragraph 130 of Claimants Adjudication Application	No		The method of valuing variations was raised in the Payment Schedule but not addressed in the payment schedule	
49	Refers to paragraph 131 of Claimants Adjudication Application	Yes	Yes	Explanations are given on the Payment Schedule.	
50	Refers to paragraph 132 of Claimants Adjudication Application	Yes	Yes	Referred to at V5 of the Payment Schedule	
51	Refers to paragraph 135 of Claimants Adjudication Application	Yes	Yes	Referred to at V5 of the Payment Schedule	
52	Refers to paragraph 137 of Claimants Adjudication Application	Yes	Yes	Referred to at V5 of the Payment Schedule	
53	Refers to paragraph 138 of Claimants Adjudication Application	Yes	Yes	Referred to at V30 of the Payment Schedule	
54	Refers to paragraph 139 of Claimants Adjudication Application	Yes	Yes	Referred to at V30 of the Payment Schedule	
55	Refers to paragraph 141 of Claimants Adjudication Application	Yes	Yes	Referred to at V30 of the Payment Schedule	
56	Refers to paragraph 143 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
57	Refers to paragraph 146 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
58	Refers to paragraph 147 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
59	Refers to paragraph 148 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
60	Refers to paragraph 149 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
61	Refers to paragraph 151 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and to this matter at V31 in its Payment Schedule.	
62	Refers to paragraph 153 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to this matter at V31 in its Payment Schedule.	
63	Refers to paragraph 154 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to this matter at V31 in its Payment Schedule.	
64	Refers to paragraph 155 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to this matter at V31 in its Payment Schedule.	
65	Refers to paragraph 156 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to this matter at V31 in its Payment Schedule.	
66	Refers to paragraph 157 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to this matter at V31 in its Payment Schedule.	
67	Refers to paragraph 158 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion on the Payment Schedule	
68	Refers to paragraph 162 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion on the Payment Schedule	
69	Refers to paragraph 163 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion on the Payment Schedule	
70	Refers to paragraph 164 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion on the Payment Schedule	
71	Refers to paragraph 165 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion on the Payment Schedule	
72	Refers to paragraph 168 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
73	Refers to paragraph 171 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
74	Refers to paragraph 172 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
75	Refers to paragraph 173 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
76	Refers to paragraph 174 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
77	Refers to paragraph 175 of Claimants Adjudication Application	Yes	Yes	The Respondent refers to the date for Practical Completion and Retentions on the Payment Schedule	
78	Refers to paragraph 183 of Claimants Adjudication Application	n/a	n/a	Goes to my jurisdiction under s.35(3) of the Act and accepted as a valid submission	

170. Thus there are reasons given that offend s24 (4) but this does not render the Adjudication Response void, it merely disregards portions of it to the extent that they offend s.24 (4) of the Act.
171. An Adjudication Response by virtue of s.24 (2)(c) may include submissions relevant to the response the Respondent chooses to include but by virtue of s.24(4) cannot include any reasons for withholding payment unless those reasons have already been included in the payment schedule. The Act does not limit 'submissions' to reasons for withholding payment. I have already stated previously that this does not bar the raising of jurisdictional issues.
172. Either party may make submissions as to jurisdiction at any time up until I serve my decision, from that point those submissions should be made to the Courts should the aggrieved party seek to have their contractual rights enforced in accordance with s.100 in civil proceedings.
173. Thus I accept the Adjudication Response as a properly made submission in accordance with s.24 of the Act.

Matters for Determination

174. At point 85 of the Adjudication Application, the Claimant asserts that the breakdown of its claim is as follows...

Undisputed Scheduled Items	\$654,946.26
Disputed Scheduled Items	\$160,740.35
Undisputed Variations	\$ 65,719.68
Disputed Variations	\$ 1,900.00
Undisputed Delay Costs	\$ 0.00
Bonus for Early Completion	\$ 15,250.00
TOTAL CLAIMED	\$898,556.29
GST	\$ 89,855.63
AMOUNT OF PAYMENT CLAIM	\$988,411.92

175. The Respondent has issued a Payment Schedule for an amount of \$ 0.00 claiming that it is owed \$63,297.76.
176. The Respondents Payment Schedule at Tab 2 of the Adjudication Application dated the 26th April 2006 and served on the Claimant on the 27th April 2006 consists of a covering letter, a summary sheet headed 'Payment Schedule' and a three page document entitled 'Explanation Sheet'; it does not include a schedule of works. The sheet headed 'Payment Schedule' seems to be another document relabelled with this heading.
177. The Claimant in their Adjudication Application submits at Tab 6 a Progress Payment Certificate dated the 26th April 2006 received by the Claimant on the 27th April 2006 issued by the Superintendent (Brock). This is not a Payment Schedule in accord with the Act. However it is instructive as it is for the same amount as the Payment Schedule issued by the Respondent in accord with the Act and it contains the same sheet I have noted above as being relabelled but with the heading

‘Progress Payment certificate No 6. I believe them to be the same document relabelled for the purpose of issuing the Payment Schedule. It also submits a copy of the same three page document labelled ‘Explanation Sheet’, a bill of quantities as it relates to the Payment Progress certificate and an Extension of Time Register.

178. I have spent a great deal of time sifting through the various submissions from the parties in order to determine the size of the competing claims. I agree with the Claimants frustration with the lack of a schedule of works in the Payment Schedule noted at page 78 of the Adjudication Application, this has added considerably to the cost of this adjudication although I disagree that this absence renders the Payment Schedule unintelligible. As I have mentioned previously it is my preference in this case for the cryptic explanations in the Payment Schedule as noted in *Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 114*, the additional cost is because I don’t have the intimate knowledge of the subject matter that both the Claimant and Respondent do have.

179. I refer to the decision of McDougall J in *Abacus v Davenport [2003] NSWSC 1027* at [35]...

35 It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.

180. Further the Claimant in its Payment Claim refers to the decision in *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited [2003] NSWSC 1103* at [38] and supplies a copy at attachment L...

It is correct to say that the amount of a progress payment is to be ‘the amount calculated in accordance with the terms of the contract’ where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued ‘in accordance with the terms of the contract’ where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation ‘in accordance with the terms of the contract’ is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.

181. I do not intend to be bound by the Superintendent’s Certificate but as the Claimant at point 81 in its Adjudication Application states that ‘...CMC provide additional material bearing on issues raised in the Payment Claim and Payment Schedule and rely upon that material which is attached to this application at TAB

2 to TAB 6 of Annexure B inclusive”, I do intend to use the schedules attached to it in order to decipher the parties positions. The Claimant has said that they rely upon it.

182. The Respondent at point 13(b) of its Adjudication Response asserts that the ‘provisions of BCIPA do not prevent the Adjudicator from referring to the Superintendents Payment Certificates to assist in interpretation of the Payment Schedule.’ In *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited, Campbelltown Catholic Club Limited v Leighton Contractors Pty Limited [2003] NSWSC 1103* at [38] above his honour says that I do not have to rely upon it, he does not say that I cannot refer to it. In this case it was submitted and relied upon by the Claimant. Also in this case the parties are experienced in the construction industry and can rely on more cryptic reasons in its Payment Schedule as I have noted above from *Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140*. In these circumstances I believe that the Respondents assertion is correct only for parties that are in such a situation.
183. Further in accord with Campbelltown above, the Payment Certificate cannot stand in place of a Payment Schedule however this does not mean that it is not information within the knowledge of the Claimant. It received it on the same day and submits it and relies upon it in its Adjudication Application. Whilst the Respondent has not submitted schedules of works with its Payment Schedule and I cannot consider it part of the Payment Schedule, the Claimant has submitted it and I believe I can use it for the purpose mentioned above. This in no way says that I will agree with them.
184. From my assessment of the information put before me I believe the competing submissions to be as follows...

ITEM	CMC Claim	Payment Schedule	Ajudication Application
	From Adjudication Application TAB 1 Attachment B	From Adjudication Application TAB 6	From page 12 of Adjudication Application
UNDISPUTED SCHEDULED ITEMS			
Schedule A	428,975.47	463,568.48	
Schedule B	32,000.00	38,200.48	
Schedule C	80,247.00	95,022.00	
Schedule D	375.15	4,089.90	
Total Undisputed Scheduled Items	541,597.62	600,880.86	654,946.26
DISPUTED SCHEDULED ITEMS			
A4(a) On leads to Fill Future Stages	1,209.60		
A4(c) excavation of rock (PROVISIONAL) (extra over item4(a))	247,629.00		
A8(c) Edge Beam ER1 (Ped Link)	1,960.00		
A16(d) Caramel Exposed Concrete Aggregate	13,630.00		
A18(j) Excavation and backfilling of conduit ends for cabling	-300.00		
A18(k) Rippable and hammered rock extra over	-28,568.25		
A20 Preparation of Environmental Control Plan	500.00		
B3(b) Supply and install sluice valves incl marker, surface box and surround On 150mm dia. main	1,045.00		
B5(c) Water service connection (incl. tapping band, stop cock) Double connection from 100mm dia. main	-290.00		
C2(a) Rippable and hammered rock extra over ((b) in original tender)	37,519.64		
D3 Turfing Park Areas (Provisional)	-246.00		
V5(d) Ergon 100mmø + Ergon 40mmø + Telstra Conduits Scheduled Item A18		57.00	
V5(e) 100mmø Ergon + Telstra Conduits Scheduled Item A18		2,412.00	
V5(f) 40mmø Ergon Conduits Scheduled Item A18		25.00	
V28 Turfing Around Field Inlets Scheduled Item D3		246.00	
Total Disputed Scheduled Items	274,088.99	2,740.00	160,740.35
UNDISPUTED VARIATIONS			
Installation of pavement	27,000.00		
Installation of Electrical Conduit	22,105.25		
Supply and Install FL-Soc Adaptors	2,067.40		
Changes between tender set and for construction plans	10,399.00		
Installation of New Streetlight Foundation	1,320.00		
Demolition and Construction of Stormwater Pits	2,828.03		
Total Undisputed Variations	65,719.68	77,356.40	65,719.68
DISPUTED VARIATIONS			
Installation of Electrical Conduit	400.00		
Installation of 4 ea 150mm 45 deg bends in water line	1,500.00		
Cl35.8 Claims Payment - Bonus for Early Completion	15,250.00		
Total Disputed Variations	17,150.00		1,900.00
Cl35.8 Claims Payment - Bonus for Early Completion			15,250.00
Undisputed Delay Costs	0.00		0.00
Liquidated Damages		-80,000.00	
Retentions		-30,044.04	
TOTAL CLAIMED	898,556.29	570,933.22	898,556.29
Progress Claim No. 1			69,256.37
less GST on Payment			6,296.03
Progress Claim No. 1 Excluding GST			62,960.34
Progress Claim No. 2			275,347.18
less GST on Payment			25,031.36
Progress Claim No. 2 Excluding GST			250,315.62
Progress Claim No. 3			206,135.88
less GST on Payment			18,739.63
Progress Claim No. 3 Excluding GST			187,396.25
Progress Claim No. 4			140,584.90
less GST on Payment			12,780.45
Progress Claim No. 4 Excluding GST			127,804.45
Progress Claim No. 5			0.00
less GST on Payment			0.00
Progress Claim No. 5 Excluding GST			0.00
PAID TO DATE EXCLUDING GST	628,476.66	628,476.66	628,476.66
PAYMENT PROPOSED EXCLUDING GST	270,079.62	-57,543.44	270,079.63
GST	27,007.96	-5,754.34	27,007.96
PAYMENT PROPOSED INCLUDING GST	297,087.58	-63,297.78	297,087.59

185. Much of the difficulty in assessing the competing claims lies in the different interpretation of what is a variation and what is scheduled works and whilst the total of the Claimants amount for adjudication doesn't change from the Payment Claim to its Adjudication Application (\$898,556.29 incl GST) its contention of what is a disputed scheduled item, and what is not, changes. Thus the Claimants assertions are equally as unhelpful as the Respondents failure to provide the schedule of works with its Payment Schedule. Indeed I believe that the Respondents method of assessing the claim is in line with the Contract, with a few minor exceptions, the Claimants method of claiming all of a particular quantity against the scheduled item is in line with a schedule of rates contract as opposed to this lump sum contract and has added significantly to the cost of the adjudication. Having said that; it is the Claimants inclusion of the Payment Certificate No. 6 in its Adjudication Application that has made an assessment possible.
186. My understanding of the contract method of calculating a Progress Payment stems from my assessment under the headings Amount of a Progress Payment and Valuation of Construction Work and Related Goods and Services.
187. At point 88 of its Adjudication Application, the Claimant asserts that there are some items which appear in dispute that are not in fact in dispute due to this different interpretation on what constitutes a variation and what should be claimed as a scheduled item. My assessment above agrees with that assertion, however there seems to be other scheduled items where this is also the case that may be the difference between those items seemingly in dispute at the time of the Payment Claim and those shown in dispute at item 85 of the Adjudication Application.
188. At point 88 of its Adjudication Application, not contested by the Respondent, the Claimant asserts...
- A14(a) is not in dispute – I agree
 - A14(b) is not in dispute – I agree
 - A16(b) is not in dispute – I agree
 - A16(c) is not in dispute – I agree
 - A17 is not in dispute – I agree
 - B01(c) is not in dispute – I agree
 - B03(b) is not in dispute – I disagree – There are 3 sluice valves on 150mmø mains shown on the tender schedule, at V9 on the payment certificate one has been removed from the contract, however at V23 another is removed, leaving one left scheduled and two claimed.
 - B05(a) is not in dispute – I agree
 - B05(b) is not in dispute – I agree
 - D03 is not in dispute – I disagree – The tendered quantity of Turfing to Park Area's is 266m², at V12 21m² is added to the contract but then at V28 (incorrectly labelled Supply and install sluice valves incl marker, surface box and surround) on the payment certificate removes 85% of this 266m² that is 226m², leaving 61m² in the contract of which the Claimant has claimed 21m². As the Respondent is paying the balance of the quantity in the contract it is paying 61m² in its Payment Schedule.

189. Can I deal with these items as the parties do not show them in dispute? I am to adjudicate the whole of the Payment Claim submitted for determination, the submissions from the parties have led me to the conclusion that they are in dispute, therefore I believe that I am bound to resolve them based upon whether they have been claimed and the submission of the parties.
190. There are several other items that appear to be in dispute in the Payment Claim that are not in dispute at the time of the Adjudication Application because amounts over the scheduled quantity were claimed entirely under the scheduled item, when the Payment Certificate shows the original quantity in the scheduled item and the additional quantity as a variation. These scheduled items are A5(b), A6(a) to (c) inclusive, A13(a) to (i) inclusive, A16(g), A16(h), A18(k), D1 and D2.
191. The Claimant at point 89 concedes that its claim at item A8(c) is in error.

Item C2(a) (item C2(b) in original tender) – Rippable and hammered rock extra over

192. The Claimant at point 90 of its Adjudication Application asserts that it is only the quantity that is in dispute, the Respondent concedes this is the case at point 16 of its Adjudication Response and thus much of the discussion about points 97 to 110 of the Adjudication Application and points 21 to 34 of the Adjudication Response to the extent that they relate to the volume for this item are irrelevant.
193. This is an item that was added to the schedule as a result of the Claimants response to Notice to Tenderers No.1. dated 26th July 2005 at Attachment E to Tab 1 of the Adjudication Application (part of the Payment Claim). In that submission, the Claimant says at point 4...

Provisional Extra Over Rock Rate = \$98.50/m³. Items A4, A13, A18, B1 and C1 were tendered and assumed that rock excavation would be an extra over. Due to the Readymix Quarries decision to not accept anymore rock, we had to allow to cart any surplus rock to the Local Council Dump, which charge \$9.00 per m³ to dispose.

194. The Claimant says in its submission that

Gairloch appears to have adopted Brock's reasons (while not including Brock's schedules as part of the Payment Schedule), those reasons do not include any reason for a variation in the schedule rate from the contract rate of \$98.50 to \$75.00. Therefore the payment due should be as claimed by CMC in its Payment Claim at the contract rate of \$98.50 per cubic metre.

195. The Respondent in its Adjudication Response counters by saying...

(b) The difference between the Payment Schedule and the Claim is apparent in the description of item V2.

(c) the work was varied from what was in the original contract by virtue of the fact that the rock was to be stockpiled on site for later crushing by CMC (changed to Gairloch on e-mail on same day as Adjudication Response).

(d) The Payment Schedule describes the work as "Trench rock to stockpile on site". A reduced unit rate has been negotiated with CMC for this item, being \$45.00/m³ (changed to \$75.00/m³ on e-mail on same day as Adjudication Response). Evidence of this negotiated rate is provided in the attached correspondence dated 1 November 2005 from Gairloch.

196. I assume in (d) above the Respondent means the letter dated 1 November 2005 which is attached to the Adjudication Response from the Respondent which deals with rock rates. This offers at the bottom...

The Revised rates are as follows:

2. Trench Excavation Rock to Stockpile on site: \$75.00/m³

197. The Claimant asserts at 111 to 113 of its Adjudication Application in relation to 'Contract rate for extra over payment of Excavation in Rock that the offers made in its letter of the 1st November 2006 and its subsequent verbal offer to reduce them were rejected by the Respondents Superintendent, Brock by letter of the same date.

198. I have not been given a copy of the rejection letter of the 1st November 2005 from Brock to the Claimant but in any event the Respondent in its Adjudication Response at point 35(c) concedes that agreement was not reached.

199. The parties agree (Payment Claim pages 3 & 4 and Adjudication Response Item 35) and I concur that where the parties do not agree the price for a variation it shall be priced in accordance with Clause 40.5 of the General Conditions, that is at specific rates or prices in the Contract or at rates or prices in a priced Bill of Quantities or Schedule of Rates to the extent that it is reasonable to use them.

200. The priced Bill of Quantities as a result of Notice to Tenderers No. 1 does not contain a rate for Trench rock to Stockpile on site.

201. The contract as a result of Notice to Tenders No. 1 by virtue of the Covering Letter dated 26th July 2005 which I have accepted as the offer accepted by the Respondent in its Letter of Acceptance of the 10th August 2005 (because of its acceptance of the price in that 26th July 2005 letter's price) includes at point 4 above that the rate for Extra Over Rock will be \$98.50/m³.

202. That point of the letter does deal with costs to dump the rock at the Local Council Dump; however it does not distinguish between the ultimate destinations of the rock in its pricing. The rate offered would seem to cover all destinations including on site, no information is provided to indicate whether the Claimant was to make their own estimation of how much was to be taken to any destination and adjust their rate to suit or whether this was the price only for taking to the Local Council Dump, therefore I must conclude that this rate is extra over all situations. Certainly the wide range of types of excavation encountered in items A4, A13,

A18, B1 and C1 infer that the rock rate offered is an for an amalgam of different situations.

203. In its Adjudication Response at 34 – 36 the Respondent deals with the issue of the rock description. I accept that discussions were held and that the Superintendent noted that a deduction may be available due to a difference in description as noted in the minutes of the meeting of the 18th October 2006 (disputed as correct by the Claimant), as the material was not being taken off-site. Similarly I accept that the Claimant took the off-site rock to the Port rather than the Council Dump.
204. However in the absence of an agreement to the reduced rates offered by the Claimant or some other agreement to vary the tendered rate, I must abide by that part of Clause 40.5 of the Contract to which I am directed by the Claimant, in the absence of the Respondent in its Payment Claim or in its Adjudication Response at points 16, 17, or 111-115 informing me of a contractual right to vary the rate from that originally tendered by the Claimant.
205. Clause 40.5 refers to whether it is reasonable to use the rates. I believe from my discussion of an amalgam of rates above, that it is reasonable to use them.
206. No submissions have been made by the Respondent as to how I might otherwise deal with this; it has expressly rejected the Claimants offer of lower rates in the letter of the 1st November 2005 and therefore the conditions attached to those prices in that letter; and yet seek to use them. Therefore the rate for rock in items A4, A13, A18, B1 and C1 under the contract is as tendered and accepted at \$98.50/m³
207. Thus I decide that the valuation in accordance with the contract for this item is...

$$380.91\text{m}^3 @ \$98.50/\text{m}^3 = \$ 37,519.64$$

Item A4(b) – Earthworks on leads to Fill Future Stages

208. The Claimant asserts that there is an additional earthwork quantity due to an increase in depth of the pavement as the whole of the road is in cut.
209. The Respondent has not contested that the whole of the road is in cut.
210. The Claimant asserts that there is no additional earthwork because the pavement depth has decreased.
211. The Respondent has varied the depth of the pavement subsequent to testing of the subgrade.
212. Neither party has contested that the thickness of concrete at intersections has changed nor the levels of the finished surface.

213. The Claimant asserts that their contention regarding the pavement is backed by the certification of the Superintendent of the additional pavement quantity. The Respondent says that the Superintendent has not certified the additional pavement quantity.
214. The original quantities of pavement material based upon the initial drawings for which the Claimant entered into a lump sum contract were...

Base Course	489m ³
Sub-Base Course Stabilised	172m ³
Total	661m ³

I disagree with the Respondents assertion that they have not been certified. The total certified by the Superintendent in its Payment Certificate No. 6 which is not contested by the Claimant is...

Base Course	489m ³ - 100m ³ (V8) =	389m ³
Sub-Base Course Stabilised	172m ³ - 172m ³ (V8) =	0m ³
Sub-Base Course Type 2.4 (V8)		432m ³
Total		821m ³

215. If the whole of the road is in cut and the amount of pavement has increased, then logically the amount of earthworks has increased due to the varying of the pavement depths by 160m³. The Respondent asserts that the depths decreased, this does not tally with an increase in pavement quantity, this is a lump sum contract and a change in the depths is a variation. Therefore the Claimants assertion that the quantity of earthworks has increased succeeds.
216. The Claimants claim for an increased quantity of earthworks is accepted and is valued in accordance with the contract at the rate in the schedule of quantities at...
3175 m³ @ \$7.56 = \$24,003.00

Item A4(c) – Earthworks – excavation of rock (extra over item 4(a))

217. The Claimant asserts that there are two issues, the rate and the quantity.
218. I have already decided under the heading Item A4 (b) – Item C2(a) (item C2(b) in original tender) – Rippable and hammered rock extra over that the rate for this item is \$98.50/m³.
219. I will now deal with the quantity.
220. There are great numbers of submissions from the parties on the quantity of rock, what that quantity was and how it should be measured.
221. The Claimant deals with this at points 97 to 110 of the Adjudication Application and the Respondent counters these arguments at points 21 to 34 of its Adjudication Response.
222. Significantly the amount the Respondent proposes to pay for part of this in its Payment Schedule is based upon an estimate of truck loads and the balance based

upon a Superintendents assessment. The Claimant asserts that the measurement was to be in stockpile. To cut through much of the Respondents submissions,

At point 22(d) of its Adjudication Response it admits that...

...'it was agreed to measure the material in stockpile. This does not in any way mean that the paid quantity would be the stockpile volume.'

At point 28 of its Adjudication Response it admits that ...

- (a) There was an agreement that measurement would be by way of survey of the stockpiles, due to the difficulty in quantifying the volume of boulders in place.
- (b) There was no agreement that the surveyed quantity would be the quantity to be paid, as this would be contrary to the Specification.

223. Point 22 of the Adjudication Response was in regard to the quantity of material taken to the port. Point 28 in the Adjudication Response is in reply to point 104 of the Adjudication Application which does not refer specifically to the rock from trenches.

224. The Respondent agrees that the rock was not a homogeneous mass and that it has attempted to measure by truck volumes for one of the quantities and the other is a 'Superintendents assessment', it acknowledges that measurement under the contract specification is virtually impossible. The submissions put before me indicate that there was an agreement to measure the rock in stockpile. To have one method of measurement for the trench rock and the rock to the Port and another for other rock, when in one of the cases they were sitting in adjacent stockpiles (from the surveyors sketch), is highly improbable. I prefer the Claimants assertion as to an agreement to measurement in stockpile and based upon the admission in points 22(d) and 28(a) of the Adjudication Response.

225. The agreement to measure the rock in stockpile therefore forms part of the contract as varied. I accept that this agreement referred to all rock from earthworks, the rock from trenches had been dealt with by the parties in a separate non-contested agreement.

226. Thus the Respondents assessment of Rock Hauled off site from Bulk Earthworks at 620m³ at V2 of its Payment Schedule by truckloads is not based upon the contract and is rejected.

227. Thus the Respondents assessment rock at V3 Rock from Bulk Earthworks to Stockpile on site at 700m³ at V3 of its Payment Schedule by Superintendents assessment is not based upon the contract and is rejected.

228. The Claimants assertion that the stockpile volume should be used is accepted.

229. The Claimant at Tab 1 attachment H provides independent survey assessments of the stockpile volumes by Jon Hammond Engineering Surveyor.

230. The first is dated (facsimile transmission 28/11/2005) the 25th November 2005, headed Volume Report – Bargara Views – Stockpile of rocks at Bundaberg Port (25/11/05). The volume is 1512m³. Attached to this is a facsimile header from the Claimant to the Respondent dated the 28th November 2005, where the report is transmitted to the Respondent. I accept that this is the volume referred to as Rock Hauled off-site.

231. The second is dated (facsimile transmission 29/11/2005) the 28th November 2005. It does not distinguish between scheduled items for payment and in any event as I have found that the rock rate is the same it is of no matter. The volumes submitted for the four stockpiles are...

BVR1 119m³
BVR2 1040m³
BVR3 1002m³ (noted as rock)
BVR4 767m³

The volume at BVR3 stockpile is marked with an asterisk as Rock. The covering letter to this report is headed Volume Report - Bargara Views - Stockpile of Rocks (28/11/05)

232. At point 26 of its Adjudication Response when discussing the volume of rock from trenches the Respondent asserts that the in stockpile volume of the rock was 767m³, I accept that this is the volume shown for BVR4 above.

233. The Claimant contends that stockpile BVR3 with a volume of 1,002m³ was the rock stockpiled on site.

234. The sum of the volume of material at the port and the material in stockpile BVR3 is 2,514m³ as claimed by the Claimant at item A4(c).

235. However there is still contention about the matters raised at 22(d) and 28(b) in the Adjudication Response with respect to bulking.

236. At V1 of the Payment Schedule, the Respondent has contested the rock volume by truck quantities and at V3 it has simply stated that it is the Superintendents assessment; at no point does it deal with voids in stockpiles. By offering payment in this manner it effectively refutes its agreement at points 22 and 28 of the Adjudication Response.

237. There is no mention in the submissions from the Respondent in its Payment Schedule of compaction or bulking factors. It does mention at V1 that use of loose volumes is not in accordance with the contract – but this refers to loose truck loads not stockpiles. Thus the Respondent cannot now claim as it does at various points in its Adjudication Response that a factor should be applied to a stockpile volume as these are new reasons not made in the Payment Schedule that I cannot consider by virtue of s.24(4) of the Act.

238. The specification forms part of the contract.

239. Clause 3.14 of the Specification at Tab 1 attachment B of the Adjudication Application states that “Earthworks quantities are measured as undisturbed in place volumes or compacted fill volumes. The Contractor must allow for bulking or compaction effects.”
240. The Claimant asserts at point 99 in its Adjudication Application that either the compacted state is the stockpile volume or alternatively that as rock is not subject to expansion or bulking as soil is, that I should also use the stockpile volume.
241. The parties have also agreed to vary the Contract by agreeing to measurement in stockpile as admitted by the Respondent at 28(a) of the Adjudication Application. This effectively deletes Clause 3.14 of the Specification and any reference to bulking or compaction. Should the parties have wanted to apply a bulking or compaction factor then the agreement should have reflected that. The Respondent has not availed itself of the opportunity in the Payment Schedule to assert this, but to refute, and then in the Adjudication Response accept, that the agreement to measure in stockpile ever existed.
242. Thus I must accept the Claimants assertions as to the volume and that the measurement would be the surveyed quantity free from any bulking adjustment.
243. Thus I decide that the quantity as claimed at 2,514m³ is correct.
244. The value of this item in accordance with the contract and the subsequent agreement contained therein is thus...

$$2,514\text{m}^3 @ \$98.50/\text{m}^3 = \$247,629.00$$

[V20] incl A16(d) Concrete Paving – Caramel Exposed Aggregate

245. The Claimant has claimed 290m² of this item, only 145m² has been paid a difference of \$13,630.00.
246. The Respondent in its payment schedule at V20(d) asserts that the deduction was due to ‘agreed 50% reduction due to unsatisfactory materials as agreed between David Ahern and Michael Brock.’
247. I believe that a note ‘unsatisfactory materials’ would have alerted the Claimant to the issue of the aggregate due to its intimate knowledge of the project and given the discussions and correspondence with the Respondent, thus the Respondent is able to expand on this in its Adjudication Response.
248. At point 37 the Respondent asserts that the materials were not in accordance with Notice to Tenderers No.1 and reasserts the agreement to reduce the payment.
249. At point 38 the Respondent specifically points to the fact that the panels did not comply with the colours used in previous stages.
250. The Claimant points me to a letter at point 119 of the Adjudication Application from the Claimant to the Superintendent regarding the concrete.

251. Significantly in its Adjudication Response the Respondent does not refute the letters contents. In the letter the Claimant offers a 15% reduction and specifically rejects the 50% reduction proposed.
252. The issue between the two parties is over the colour of the finished product.
253. There is no issue with the replacement of the two panels that the Respondent says failed concrete strength tests, the Claimant replaced them and does not seek additional payment for two panels extra.
254. I accept that both stone and pigment colour are both materials that fit with the description I have accepted that the Respondent can argue in an Adjudication Response.
255. The contract for this item arises from the notice to tenderers No. 1 dated the 14th July 2005 which says...
- Stamped and stencilled concrete will no longer be used in this project. They will be “caramel exposed aggregate” as previous stages, note joints, with chocolate coloured trims. The islands in stage 1 were cast on site with caramel exposed aggregate infill. You are required to keep with this appearance. Please advise if any changes to your lump sums will apply.
256. There are no drawings or other details attached to this Request for Information supplied to me that refer to this item.
257. The specification for these works is as per notice to tenderers No. 1 - importantly that “You are required to keep up with this appearance” and the specification for the finishing of exposed aggregate concrete (10.3.6 of the Job Specification) supplied to me by the Claimant at Tab1 attachment B. The Respondent does not rely on the second document in denying this claim.
258. In the letter referred to above the Claimant concedes that the colour of the exposed concrete panels is not as per the previous stages and gives reasons why this is not the case including the relative ages of the panels.
259. In pricing the work to keep up with the appearance of previous stages rather than insisting or naming in its reply to NTT No. 1, of a specification that named the cement product and stone location & supplier, the Claimant must meet the appearance of previous stages.
260. Thus I reject the contention of the Claimant that it is due this claim.
261. I prefer the Respondents version of events in this matter as to whether an agreement was reached on the size of the reduction as its arguments are persuasive on each point of its Adjudication Response and accept the 50% reduction.

262. The valuation of this item in accord with the contract and later agreements incorporated therein is as proposed for payment by the Respondent in its Payment Schedule, which is...
- 145m² @ \$94.00/m² = \$13,630.00

Item A20 [incl V22] Preparation of Environmental Control Plan

263. The Claimant has prepared an environmental control plan and submitted it to the Superintendent. The Respondent considers that it was too late.
264. The contract at 14.4.8 of the Special Conditions requires that the environmental control plan be submitted prior to possession of the site being granted.
265. The Claimant contends that the Respondent has waived its right to enforce this condition by giving the Claimant possession of site. It says that no assertion as to the inadequacy of the plan or whether the environmental measures were in place was made.
266. At least at the time of a Progress Claim No. 1 given to me by the Respondent with their Adjudication Response the Superintendent says in a letter to the Respondent that the measures were not in place. This is very early in the project. If the measures were not in place or were unsatisfactory one would have expected the Superintendent to stop works until they were. This is not contended by either party. Thus the Respondent has waived their rights to delivery prior to possession being granted.
267. The Respondent on its Payment Schedule says that it is not paying for this item as receipt of the plan near the end of the project is unsatisfactory as the Superintendent has had no opportunity to assess it. This must fail due to its waiver of time. If the Superintendent wanted to assess the plan and the proposed measures, then possession of site should not have been granted until it had.
268. The Respondent contends in its Adjudication Response that the plan was due on the 25th August 2005 and that it was received on the 24th February 2006.
269. The Respondent has not contested the Claimants assertion at point 125 of its Adjudication Application that the environmental measures were in place during the works.
270. The Respondent has given possession of site prior to receiving the Environmental Management Plan and the Claimant asserts that it has waived its rights under the contract because of this. I believe that contrary in part to the assertions of the Respondent at point 45 of its Adjudication Response it has waived its rights only on timing.
271. The Special Condition says payment will not occur until the Superintendent is satisfied with the plan. The Respondent has only asserted that the Superintendent is unhappy with the timing not its contents. As the Respondent has waived its

rights on timing and has not contested the contents of the plan provided I must allow this claim.

272. The Claimant is successful on this point and the value of the claim is \$500.00

CV/5 – Installation of Electrical Conduit

273. The Respondent has made a deduction of \$400.00 from the amount claimed as it believes that the supply of polymeric board for conduit lines has been an Ergon requirement since 2003.

274. I accept the parties assertion that the Ergon requirement is in place.

275. The Claimant at Tab 1 attachment I to the Adjudication Application attaches the variation quote for the conduits which clearly shows the 'hardcover' or Polymeric Board.

276. The Respondent asserts at point 51 of its Adjudication Response that the original tendered rates should have included the cost of the Polymeric Board.

277. The rates in the variation quote were not tendered rates in the original accepted tender, but prices for new conduit configurations to those tendered.

278. It is the Claimant choice as to how the quote was presented or the breakdown as the Claimant contends at point 133 of its Adjudication Application, it included the Polymeric Board in the quote and has done the work including the Polymeric Board for which it quoted. That it didn't include the board in the metre rates for each conduit configuration as contended by the Respondent in its Adjudication Response at point 51 is irrelevant.

279. The Claimant is correct in its assertion that the Respondent makes no submission that the board was not required.

280. Thus the Respondent has no justifiable reason for denying this claim. It is irrelevant whether the board has been an Ergon requirement since 2003; the work was done as quoted.

281. The valuation of the claim in accordance with the contract is \$22,505.25.

CV/12 – Installation of bends in water line.

282. The Respondent has denied a claim of \$1,500.00 for Installation of 4 No. 150mm \varnothing x 45 degree bends in water line to avoid a clash with a stormwater line.

283. The Respondent contends in its Payment Schedule that the Claimant should have allowed for construction about service clashes as they should have been apparent at the time of tender and that other construction methods were used that did not involve bends at other locations.

284. The Claimant Asserts that all other bends were shown on the tender drawing 05058-18 schedule.
285. In dealing with the Valuation of construction work and related goods and services earlier, the Claimant had directed me to an ambiguity between item 17 of the Conditions of Tender and Clause 4.4 of the General Conditions of Contract relating to quantities in the schedule and that I should apply the Contra Proferentem rule against the drafter of the Contract – The Respondent. I accepted this contention.
286. Thus whilst the schedule does not include these bends and the Claimant asserts that they are necessary for the construction of the work (Adjudication Application point 138 & 140), I must allow their addition at scheduled rates if I accept that they are necessary. Where no scheduled rate exists they should be costed as per Clause 40.5 of the contract.
287. I do not believe that the cost is unreasonable and the Respondent has not contended that the cost is unreasonable.
288. The Payment Schedule contends that other construction methods were available; this is repeated in the Adjudication Response at 53(b) and (c).
289. The Claimant has contended that the bends were necessary for the construction of the works, the Respondent says and this is backed up by the correspondence between the parties that other methods of construction were available.
290. I accept the Respondents assertion that other methods were available thus I do not accept that the bends were necessary and hence reject the Claimants claim for this variation.
291. The valuation of this item under the contract is \$0.00

Other Variations

292. As I have previously said many of the matters shown in dispute are not necessarily in dispute but arise due to a difference in interpretation of what is a variation and what is a scheduled item and where it should be claimed. In its Adjudication Application at point 130-131, the Claimant seeks payment for further variations which it asserts amount to \$67,619.68 (excl GST).
293. I note the contentions of the Respondent at points 48 and 49 of its Adjudication Response.
294. Under the heading matters for Determination, I have dealt with other areas of disagreement between the parties that become apparent upon inspection of the documents provided to me by the Claimant and the Respondents Payment Schedule.

295. The Matters are...

- a. The Early Completion Bonus or Liquidated Damages which I will deal with separately.
- b. Item A8(c) which has been conceded by the Claimant in their Adjudication Application. Value \$0.00
- c. Item A18(j) – Excavation and backfilling of conduit ends for cabling – The Claimant has not claimed this amount but the Respondent has paid it. Therefore as I am adjudicating the Claimants Claim, I will accept the Claimants valuation at \$0.00
- d. Item B3(a) – Sluice valve on 150mmø water mains mentioned previously. Two have been deducted at V9 and V23 from the original three, the Claimant has claimed two. At V23 of the Payment Schedule the Respondent concedes that one was reduced, two were used, thus I accept the Claimants Claim for \$1,045.00.
- e. Item C5(c) – Double Connection from 100mmø water main. – The Respondents Payments Schedule pays one of these and yet none were claimed thus I accept the Claimants claim of \$0.00.
- f. Item D3 – Turfing Park Areas – The original quantity was 266m², V12 added 21m² and V28 removed 226m² leaving 61m², which the Payment Schedule pays. The Claimant has only claimed 21m² and as this is less than that offered; I accept the amount as claimed. Value \$129.15

Date of Practical Completion

296. The Respondent in its Payment Schedule at V31 gives two reasons for the denial of the claim for early completion...

- a. This claim is outside of the contract time frame of 28 days for claiming EOT refer AS2124 Clause 35.5 and...
- b. Included in the notice to tenderers No. 1 Complete As-Constructed drawings shall be provided 1 week prior to the works being presented for the “On-Maintenance” Inspection. Complete As Constructed drawings were received by Brock and Associates on 2nd March 2006. Therefore the date of Practical Completion is determined a 9th March 2006.

297. Reason (b) above refers to the Date of Practical Completion.

298. The Claimant asserts at point 148 of its Adjudication Application that as the date of practical completion effects a payment that any reasons given that relate to this date are reasons for non-payment and therefore if none are given then they cannot provide any additional reasons in its Adjudication Response.

299. I concur with that reasoning. Section 24(4) is clear that an adjudication response cannot contain any reasons for withholding payment unless they have already been included in the payment schedule. In this case the two reasons given above are specifically for non-payment of the early completion bonus and thus I

have accepted them as valid reasons upon which they may elaborate in their Adjudication Response.

300. I agree with the part of the Claimants assertion with regard to point 146 of its Adjudication Application. There is no deeming provision in the contract that Practical Completion will be certified 1 week following the submission of as-constructed drawings.
301. However I take issue with ‘this is not any reason not to award Practical Completion.’
302. The Respondent correctly elaborates at point 58(b) of its Adjudication Response that the as-constructed information supplied throughout the contract was to ensure that there was not major remediation work required at the end of a job that would only come to light upon review of the as-constructed drawings. I don’t accept that the Claimant is not aware of this.
303. The contract allows a one week period during which the checking of the plans prior to the Contractor presenting the works for an ‘On Maintenance’ inspection may be done; not as the Claimant contends as a deeming provision, there is no guarantee the works as presented will not display major faults that would preclude the granting of Practical Completion. This aligns with the Respondents claim that a fit for purpose test should be applied.
304. However in this case the Respondent has acceded to the ‘On-Maintenance’ inspection prior to getting the As Constructed Drawings and has thus waived its right to rely on the one week prior condition in the contract and thus also it’s fit for purpose test. It allowed the final ‘On-Maintenance’ inspection to go ahead without having received the As Constructed drawings. In this case fit for purpose could not be achieved until the Superintendent had checked the drawings. The time that the Superintendent might take to do that is completely out of the hands of the Claimant, the Claimant had done all it could.
305. There is no contention as the Claimant asserts at point 149 of the Adjudication Application that any of the works at the time of the ‘On-Maintenance’ inspection was carried out were majorly defective.
306. Thus there was no right to deny Practical Completion once the Respondent had waived their right to rely on the one week prior to presenting the works condition.
307. I decide that Practical Completion was achieved on the 2nd March 2006.

Date for Practical Completion

308. The Respondent has denied the last two of the extension of time claims by the Claimant.
309. The Respondent states the Date of Possession of site on the face of the Payment Schedule as the 19th Sept 2005 this is consistent with other claims in the submissions.
310. At point 1 of its Adjudication Response it asserts that whilst the Claimant commenced work on the site on the 27th September 2005, it was granted possession of the site on the 19th September 2005. The Claimant agrees that work started on the site on the 27th September 2005 at point 10 of its Adjudication Application.
311. The Respondents calculations of the contract periods are based upon that date. At Tab 6 of the Adjudication Application, the Claimant submits for my consideration the Superintendents Payment Certificate No. 6 which it relies upon. That certificate shows the date of possession as the 19th September 2006 and includes a schedule of extension of time claims and the Superintendents assessment of them.
312. The Adjudication Application at Tab 1 attachments J & K provide the Claimants calculation of the extension of time claims and the Date for Practical Completion. Its calculation is based upon a date of possession of site of the 19th September 2005. Thus I accept that the parties agree on that date.
313. The crux of the dispute between the parties is thus the two denied extension of time claims.
314. The Respondent in its Payment Schedule at V31 gives two reasons for the denial of the claim for early completion...
- a. This claim is outside of the contract time frame of 28 days for claiming EOT refer AS2124 Clause 35.5 and...
 - b. Included in the notice to tenderers No. 1 Complete As-Constructed drawings shall be provided 1 week prior to the works being presented for the "On-Maintenance" Inspection. Complete As Constructed drawings were received by Brock and Associates on 2nd March 2006. Therefore the date of Practical Completion is determined as 9th March 2006.
315. Reason (a) above relates to the Date for Practical Completion
316. The Claimant asserts that no time bar applied as the words "or a soon as practicable thereafter" are used or; in the alternative; that I should look to the decision of Adjudicator Sullivan in BMD Major Projects Pty Ltd v Queensland Nickel, that a provision providing a time bar for claims, is void under s.99 of the Act.

317. I agree with Adjudicator Sullivan's assessment at [62] in that decision that in relation to contractual provisions that make the valuation of construction work or related goods and services Nil, thus excluding a claim under s.12 of the Act is void under s.99 of the Act and thus also with the Respondent at point 62(b) of its Adjudication Response that the Claimant cannot rely on a time bar at point 15 of its Adjudication Application. I have already dealt with the issue of whether the claim was a valid one under the heading Payment Claim above.
318. Thus I accept that the time bar is excluded by virtue of s.99 of the Act.
319. The Respondent asserts at point 61 of its Adjudication Response that its rejection was based upon the contract. As any time bar that existed under clause 35.5 of the General Conditions of Contract is void under s.99 of the Act, this does not apply.
320. The Respondent asserts at point 63 of its Adjudication Response that its rejection was based upon the time bar in the contract, as any time bar that existed under clause 35.5 of the General Conditions of Contract is void under s.99 of the Act, this contention is rejected.
321. I reject the assertion of the Respondent at point 64 in its Adjudication Response for the reasons given above.
322. I note point 65 in the Adjudication Response and disagree.
323. With respect to point 66, CMC did not have to explain to Gairloch how s.99 of the Act operates.
324. I read from the submission from the parties at point 158 in the Adjudication Application and point 67 of the Adjudication Response, that should I decide that the Date for Practical Completion is any time after the day before this event, that the claim will be accepted.
325. I have decided that the Date of Practical Completion as relates to payment in this Adjudication is the 2nd March 2006. As the claim is for the 2nd March 2006, I decide that this extension of time is warranted and agreed between the parties on that basis, indeed it is shown as granted; but after the Date of Practical Completion; on the EOT schedule in the Superintendents Payment Certificate No. 6 at Tab 6 of the Adjudication Application.
326. I have already decided in this matter that I can make my own assessments independent of those of the Superintendent by virtue of the decision in *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited [2003] NSWSC 110*, thus I agree with the Claimant at points 160 and 161 in the Adjudication Application.
327. I note the Respondents contentions at points 68 to 70 of the Adjudication Application and disagree for the same reasons.

328. In none of its submissions has the Respondent questioned the length of time that should be allowed for the rock delay, it has concentrated on its incorrect assumption that Clause 35.5 contained a valid time bar.
329. I accept that the amount of time claimed is a reasonable assessment of the time for that delay.
330. Thus I decide that the Claimant is due the two denied time extensions.
331. At point 163 of the of the Adjudication Application the Claimant asserts that it reached Practical Completion on the 3rd March where elsewhere in the documents submitted it shows the 2nd March 2006, I accept that the 3rd is shown in error. I have already decided that the Date of Practical Completion as relates to payment in this Adjudication is the 2nd March 2006.
332. I accept the Claimants submission on the Date for Practical Completion at the 14th April 2006.
333. The Claimant has finished the project 30.5 working days early.
334. Thus the Claimant has proved its entitlement to the early completion bonus. I decide that the items are valued in accordance with the Contract excluding those provisions excluded by s.99 of the Act at...

30.5 working days at \$500 / working day = \$15,250.00

Other Deductions made by Gairloch

335. The Claimant asserts that other deductions have been made in the Payment Schedule for Liquidated Damages and Retention and that the Respondent has not identified the basis of entitlement for either of these deductions.
336. The Respondent at point 71 of its Adjudication Response had submitted that its Payment Schedule provides the basis for these deductions.
337. As I have decided above that the Claimant is due the early completion bonus and the Respondents assertion on the issue of liquidated damages fails and I agree with the Claimants assertion at point 166 of the Adjudication Application.
338. There is no contention that the Bank Guarantee provided by the Claimant has not been converted by the Respondent to cash. The parties agree.
339. The parties agree that upon Practical Completion the amount of retention monies is reduced to Nil.
340. The parties agree that Practical Completion has been granted.
341. In relation to point 75 of the Respondents Adjudication Response, the conversion was based upon an amount owing to the Principal under a previous

Payment Certificate. I do not have jurisdiction over that certificate, I may only decide matters relating to a Payment Claim under the Act that has been submitted for adjudication and referred to me.

342. Additionally the only outcome of a decision that the conversion was unwarranted is the possibility of damages. I cannot decide a matter for damages unless they are available under a contractual provision in the contract and a method of calculating them is given and in any event the Claimant has not claimed such an amount.
343. I agree with the Claimants assertion at point 174 of its Adjudication Application that the Respondent is holding its full entitlement.
344. As there is no dispute as to Practical Completion having been granted and as I have decided that no amount is owing to the Respondent as at the time of this Payment Claim under the Act, that clause 5.7 reduces the amount to Nil.
345. Therefore the Retentions are returned to the Claimant as part of the Adjudicated amount.

Is the amount submitted for adjudication calculated in accordance with the Act?

346. I have decided above that the amount of a progress payment will be calculated by s.13(a)
347. The contract value is based upon an adjusted lump sum amount as I have decided earlier.
348. The Respondent has to date paid an amount of \$691,324.33 (Including GST).
349. The amount submitted for Adjudication is \$988,411.92 (Inclusive of GST) or \$898,556.29 (Excluding GST). This is whole of the value of the works without deducting payments already made.
350. The amount the Claimant has submitted as the value of the claim is thus \$297,087.59 (including GST) or \$270,079.63 (Excluding GST)
351. I have said much of the difference in what the parties consider to be scheduled items and what is considered variations, this does not effect calculation of the amount submitted for adjudication under the contract; it makes assessment of the different positions of the parties more difficult.
352. Thus I accept that the amount submitted for Adjudication is calculated in accordance with the Act.

The Adjudicated Amount

353. Section 26(1)(a) of the Act states that I am to decide...

- (c) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the “**adjudicated amount**”)

354. In assessing the provisions of the contract and the submissions of the parties, I decide that the adjudicated amount is Nine Hundred and Seventy One Thousand, Two Hundred and Sixty Two Dollars and Ninety One Cents. (\$971,262.91) inclusive of GST (\$882,966.29 exclusive of GST) as shown in the table overleaf.

355. I note that the Respondent has already paid an amount of \$691,324.33 (Including GST).

GAIRLOCH DEVELOPMENTS PTY LTD			CLAIMED				PAYMENT SCHEDULE (ENGINEERS CERTIFICATION NO.6)				DIFFERENCE	ADJUDICATED AMOUNT
BARGARA VIEW ESTATE STAGE 2B												
SUMMARY												
SCHEDULE A - EARTHWORKS, ROADWORKS AND DRAINAGE			665,035.82				428,975.47				236,060.35	649,445.82
SCHEDULE B - WATER RETICULATION			32,755.00				32,000.00				755.00	32,755.00
SCHEDULE C - SEWERAGE RETICULATION			117,766.64				80,247.00				37,519.64	117,766.64
SCHEDULE D - LANDSCAPING			129.15				375.15				-246.00	129.15
VARIATIONS			82,869.68				65,719.68				17,150.00	82,869.68
OTHER											102,228.25	-102,228.25
SUBTOTAL			898,556.29				709,545.55				189,010.74	882,966.29
GST			89,855.63				70,954.56				18,901.07	88,296.63
TOTAL			988,411.91				780,500.11				207,911.81	971,262.91
GAIRLOCH DEVELOPMENTS PTY LTD												
BARGARA VIEW ESTATE STAGE 2B												
EARTHWORKS, ROADWORKS AND DRAINAGE - SCHEDULE A												
Internal Works												
Item	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount			
1	Clearing & Grubbing	1	LS	1,389.00	1,389.00	1	LS	1,389.00	1,389.00		1,389.00	
2	Provision for Traffic	1	LS	500.00	500.00	1	LS	500.00	500.00		500.00	
3	Stripping Topsoil over earthworks and lofill areas, stockpiling, and respreading over finished surface (PROVISIONAL)	29120	m2	0.60	17,472.00	29120	m2	0.60	17,472.00		17,472.00	
4	Earthworks											
	(a) On leads to Fill Stage 2b	1220	m3	7.43	9,064.60	1220	m3	7.43	9,064.60		9,064.60	
	(b) On leads to Fill Future Stages	3175	m3	7.56	24,003.00	3015	m3	7.56	22,793.40	1,209.60	24,003.00	
	(c) excavation of rock (PROVISIONAL) (extra over item-4(a))	2514	m3	98.50	247,629.00		m3	74.54		247,629.00	247,629.00	
5	Trim and compact											
	(a) road subgrade, internal rds incl testing	3567	m2	1.80	6,420.60	3567	m2	1.80	6,420.60		6,420.60	
	(b) Removal and replacement of unsuitable material in subgrade (Provisional)	90	m3	61.56	5,540.40	90	m3	61.56	5,540.40		5,540.40	
6	in place)											
	(a) Base - Type 2.1 (CBR 80) (175mm)	389	m3	66.50	25,868.50	389	m3	66.50	25,868.50		25,868.50	
	(b) Sub-base Cement Stabilised (2MPa)(125mm)		m3	82.40			m3	82.40				
	(c) Supply and Place A44 Geofabric over subgrade		m2	2.20			m2	2.20				
7	(a) Asphaltic Surface in place - 25mm Tick (incl primer seal)	2617	m2	11.40	29,833.80	2617	m2	11.40	29,833.80		29,833.80	
	(b) Seal Cost to temporary turnaround	295	m2	1.55	457.25	295	m2	1.55	457.25		457.25	
8	Kerb and / or channel in place											
	(a) Layback kerb & channel KC3	724	m	34.50	24,978.00	724	m	34.50	24,978.00		24,978.00	
	(b) Kerb SM2 in roundabout	44	m	35.00	1,540.00	44	m	35.00	1,540.00		1,540.00	
	(c) Edge Beam ER1 (Ped Link)	56	m	35.00	1,960.00		m	35.00		1,960.00	1,960.00	
9	Bro-pit gully inlets (not incl chambers)											
	(a) 1C1T	7	No.	1,290.00	9,030.00	7	No.	1,290.00	9,030.00		9,030.00	
	(b) 1C2T	5	No.	1,650.00	8,250.00	5	No.	1,650.00	8,250.00		8,250.00	
10	Drainage access chambers											
	(a) Stormwater Chamber (refer Dwg 04039-09)	12	No.	750.00	9,000.00	12	No.	750.00	9,000.00		9,000.00	
	(b) Provide Blocks in Stubs to Chambers, MH's or pipes.	2	m3	187.00	374.00	2	m3	187.00	374.00		374.00	
11	Field gully inlets											
	(a) Type 1 Field inlet 900mm x 900mm (no optional apron)	4	No.	1,400.00	5,600.00	4	No.	1,400.00	5,600.00		5,600.00	
	(b) Type 2 Field inlet 600mm x 600mm	2	No.	1,472.00	2,944.00	2	No.	1,472.00	2,944.00		2,944.00	
	(c) Type 2 Field inlet 900mm x 600mm	5	No.	1,410.00	7,050.00	5	No.	1,410.00	7,050.00		7,050.00	
12	Drainage outlets											
	(a) Hand placed 100mm dia rock at outlet	4	m3	57.50	230.00	4	m3	57.50	230.00		230.00	
13	Trench excavation in all materials, supply, lay, joint, sand bed and backfill drainage pipes											
	(a) 255 dia uPVC	86.5	m	63.00	5,449.50	86.5	m	63.00	5,449.50		5,449.50	
	(b) 300 dia Rein Conc. EB Joint Class 2	96	m	75.00	7,200.00	96	m	75.00	7,200.00		7,200.00	
	(c) 375 dia Rein Conc. EB Joint Class 2	116.5	m	83.00	9,669.50	116.5	m	83.00	9,669.50		9,669.50	
	(d) 450 dia Rein Conc. EB Joint Class 2	8.5	m	108.00	918.00	8.5	m	108.00	918.00		918.00	
	(e) 600 dia Rein Conc. EB Joint Class 2	51	m	135.00	6,885.00	51	m	135.00	6,885.00		6,885.00	
	(f) 750 dia Rein Conc. EB Joint Class 2	33	m	195.00	6,435.00	33	m	195.00	6,435.00		6,435.00	
	(g) 825 dia Rein Conc. EB Joint Class 2	9.5	m	245.00	2,327.50	9.5	m	245.00	2,327.50		2,327.50	
	(h) 900 dia Rein Conc. EB Joint Class 2	81.5	m	267.00	21,760.50	81.5	m	267.00	21,760.50		21,760.50	
	(i) Rippable and hammered rock extra over		m3	75.00			m3	75.00				

GAIRLOCH DEVELOPMENTS PTY LTD										
BARGARA VIEW ESTATE STAGE 2B										
EARTHWORKS, ROADWORKS AND DRAINAGE - SCHEDULE A										
Internal Works										
Item	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount	Amount
14	Kerb Adaptors (2 per lot)									
	(a) adaptors only	24	No.	93.00	2,232.00	24	No.	93.00	2,232.00	2,232.00
	(b) adaptors and 100 dia uPVC drainage pipe to boundary	27	No.	230.00	6,210.00	27	No.	230.00	6,210.00	6,210.00
15	Subsurface drainage complete incl. connection to gully pits	887	m	19.50	17,296.50	887	m	19.50	17,296.50	17,296.50
16	Concrete Paving									
	(a) 1.2m wide pathway in road verge	496	m2	54.90	27,230.40	496	m2	54.90	27,230.40	27,230.40
	(b) 2.0m wide pathway in pedestrian links	18	m2	54.90	988.20	18	m2	54.90	988.20	988.20
	(c) Pram ramps	4	No.	260.00	1,040.00	4	No.	260.00	1,040.00	1,040.00
	(d) Caramel Exposed Concrete Aggregate	290	m2	94.00	27,260.00	145	m2	94.00	13,630.00	13,630.00
	(e) Precast splitter islands to roundabout	4	No.	2,050.00	8,200.00	4	No.	2,050.00	8,200.00	8,200.00
	(f) Precast splitter islands to Road G	3	No.	2,260.00	6,780.00	3	No.	2,260.00	6,780.00	6,780.00
	(g) Besser Type C 80mm clay pavers'Charcoal' incl sand bedding in pedestrian links		m2	90.24			m2	90.24		
	(h) Exposed agg. concrete pads in pedestrian links		m2	87.00			m2	87.00		
17	Water supply conduits incl. exc., supply, lay, joint, backfill, kerb markers - 100mm dia uPVC XI 12	7	No.	690.00	4,830.00	7	No.	690.00	4,830.00	4,830.00
18	Ergon and Telstra (incl exc., supply, lay, joint, backfill, kerb markers) (PROVISIONAL)									
	(a) 125mm + 100mm + 40mm + Telstra		m	48.00			m	48.00		
	(b) 125mm + 40mm + Telstra		m	44.00			m	44.00		
	(c) Telstra (provisional)		m	26.00			m	26.00		
	(d) 100mm + 40mm + Telstra	91.5	m	38.00	3,477.00	91.5	m	38.00	3,477.00	3,477.00
	(e) 100mm + Telstra	328	m	36.00	11,808.00	328	m	36.00	11,808.00	11,808.00
	(f) 40mm	101	m	25.00	2,525.00	101	m	25.00	2,525.00	2,525.00
	(g) 100mm Road crossing (Extra over conduit items above)	6	No.	210.00	1,260.00	6	No.	210.00	1,260.00	1,260.00
	(h) Street light foundations	13	No.	550.00	7,150.00	13	No.	550.00	7,150.00	7,150.00
	(i) 11kVa Padmount transformer foundation and siteworks	1	LS	2,600.00	2,600.00	1	LS	2,600.00	2,600.00	2,600.00
	(j) Excavation and backfilling of conduit ends for cabling		LS	300.00			LS	300.00		-300.00
	(k) Rippable and hammered rock extra over		m3	75.00		380.91	m3	75.00	28,568.25	-28,568.25
19	Grassing (PROVISIONAL)									
	(a) drill seeding									
	(b) turfing	3631	m2	6.15	22,330.65	3631	m2	6.15	22,330.65	22,330.65
20	Preparation of Environmental Control Plan	1	LS	500.00	500.00		LS	500.00		500.00
21	Implementation of Environmental Control Plan incl sediment traps, sediment fence, disposal of sediment etc	1	LS	2,840.00	2,840.00	1	LS	2,840.00	2,840.00	2,840.00
22	As-constructed drawings (Earthworks, roadworks, drainage)	1	LS	3,260.00	3,260.00	1	LS	3,260.00	3,260.00	3,260.00
23	Signs (incl posts and footings)									
	(a) Street name plates	3	No.	111.00	333.00	3	No.	111.00	333.00	333.00
	(b) Narrow profile 'Keep Left'	8	No.	59.99	479.92	8	No.	59.99	479.92	479.92
	(c) posts, footings and fittings	11	No.	120.00	1,320.00	11	No.	120.00	1,320.00	1,320.00
24	Line marking	1	LS	150.00	150.00	1	LS	150.00	150.00	150.00
25	Set-out for construction	1	LS	3,156.00	3,156.00	1	LS	3,156.00	3,156.00	3,156.00
	TOTAL (Earthworks, Roadworks and Drainage)				665,035.82				428,975.47	236,060.35
										649,445.82
GAIRLOCH DEVELOPMENTS PTY LTD										
BARGARA VIEW ESTATE STAGE 2B										
WATER RETICULATION - SCHEDULE B										
Item	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount	Amount
1	Excavate, sand bed, supply, lay, joint and backfill water mains complete incl bends and specials									
	(a) 100mm dia. uPVC Class 12	80	m	48.00	3,840.00	80	m	48.00	3,840.00	3,840.00
	(b) 150mm dia. uPVC Class 12	303	m	55.00	16,665.00	303	m	55.00	16,665.00	16,665.00
	(c) Rippable and hammered rock extra over		m3	98.50			m3	98.50		
2	Supply and install fire hydrants complete incl tee, pavement and kerb markers, surface box and surround									
	(a) On 100mm dia. main	2	No.	780.00	1,560.00	2	No.	780.00	1,560.00	1,560.00
	(b) On 150mm dia. main	4	No.	945.00	3,780.00	4	No.	945.00	3,780.00	3,780.00
3	Supply and install sluice valves incl marker, surface box and surround									
	(a) On 100mm dia. main	2	No.	820.00	1,640.00	2	No.	820.00	1,640.00	1,640.00
	(b) On 150mm dia. main	2	No.	1,045.00	2,090.00	1	No.	1,045.00	1,045.00	1,045.00
4	Supply and install DICL fittings 150mm complete incl thrust blocks									
	(a) 150x150 dia. Tee	1	No.	586.00	586.00	1	No.	586.00	586.00	586.00
	(b) 150x100 dia. Tee	1	No.	534.00	534.00	1	No.	534.00	534.00	534.00
	(c) DEGB 100mm	2	No.	298.00	596.00	2	No.	298.00	596.00	596.00

	(d) DEGB 150mm	1	No.	314.00	314.00	1	No.	314.00	314.00		314.00
5	Water service connection (incl. tapping band, stop cock)										
	(a) Single connection from 150mm dia. main		No.	312.00			No.	312.00			
	(b) Double connection from 150mm dia. main		No.	312.00			No.	312.00			
	(c) Double connection from 100mm dia. main		No.	290.00		1	No.	290.00	290.00	-290.00	
6	Connection to existing 150mm water main (by Council)	1	Item	900.00	900.00	1	Item	900.00	900.00		900.00
7	As-constructed drawings	1	Item	250.00	250.00	1	Item	250.00	250.00		250.00
	TOTAL (Water Reticulation)				32,755.00				32,000.00	755.00	32,755.00
GAIRLOCH DEVELOPMENTS PTY LTD											
BARGARA VIEW ESTATE STAGE 2B											
SEWERAGE RETICULATION - SCHEDULE C											
Item	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount		Amount
1	Excavate, sand bed, supply, lay, joint and backfill 150 sewer complete										
	(a) 0m-3.3m deep uPVC Class SH	510	m	83.00	42,330.00	510	m	83.00	42,330.00		42,330.00
2	Excavation in Rock (extra over Item 1) (PROVISIONAL)										
	(a) Rippable rock			-	-			-	-		-
	(a) Rippable and hammered rock extra over ((b) in original tender)	380.91	m3	98.50	37,519.64		m3	98.50		37,519.64	37,519.64
3	Construct 1050 dia. Cast in situ sewer manholes complete	11	No.	2,368.00	26,048.00	11	No.	2,368.00	26,048.00		26,048.00
4	House connections to sewers complete										
	(a) Type A	3	No.	289.00	867.00	3	No.	289.00	867.00		867.00
	(b) Type B	17	No.	354.00	6,018.00	17	No.	354.00	6,018.00		6,018.00
	(c) Type C	2	No.	632.00	1,264.00	2	No.	632.00	1,264.00		1,264.00
5	House connections to manholes complete										
	(a) Type A	2	No.	220.00	440.00	2	No.	220.00	440.00		440.00
6	Supply and install stubs to manholes incl end caps										
	(a) 150dia	4	No.	325.00	1,300.00	4	No.	325.00	1,300.00		1,300.00
7	Testing of sewers	1	Item	1,675.00	1,675.00	1	Item	1,675.00	1,675.00		1,675.00
8	As-constructed drawings	1	Item	305.00	305.00	1	Item	305.00	305.00		305.00
	TOTAL (Sewerage Reticulation)				117,766.64				80,247.00	37,519.64	117,766.64
GAIRLOCH DEVELOPMENTS PTY LTD											
BARGARA VIEW ESTATE STAGE 2B											
LANDSCAPING - SCHEDULE D											
Item	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount		Amount
1	Timber bollards to pedestrian link road frontages		No.	87.00			No.	87.00			
2	CCA durability Class 1 hardwood garden edging		m	15.00			m	15.00			
3	Turfing Park Areas (Provisional)	21	m2	6.15	129.15	61	m2	6.15	375.15	-246.00	129.15
	TOTAL (Park Improvements)				129.15				375.15	-246.00	129.15
GAIRLOCH DEVELOPMENTS PTY LTD											
BARGARA VIEW ESTATE STAGE 2B											
VARIATIONS											
No.	Description	Q'ty	Unit	Rate	Amount	Q'ty	Unit	Rate	Amount		Amount
CV4	Installation of pavement	1		27,000.00	27,000.00	1		27,000.00	27,000.00		27,000.00
CV5	Installation of Electrical Conduit	1		22,505.25	22,505.25	1		22,105.25	22,105.25	400.00	22,505.25
CV6	Supply and Install FL-Soc Adaptors	1		2,067.40	2,067.40	1		2,067.40	2,067.40		2,067.40
CV7	Changes between tender set and for construction plans	1		10,399.00	10,399.00	1		10,399.00	10,399.00		10,399.00
CV8	Installation of Water Service Conduits	1				1					
CV9	Installation of New Streetlight Foundation	1		1,320.00	1,320.00	1		1,320.00	1,320.00		1,320.00
CV10	Demolition and Construction of Stormwater Pits	1		2,828.03	2,828.03	1		2,828.03	2,828.03		2,828.03
CV11	Added Internal drop & Core on existing SMH	1				1					
CV12	Installation of 4 ea 150mm 45 deg bends in water line	1		1,500.00	1,500.00	1				1,500.00	1,500.00
CV13	CI35.8 Claims Payment - Bonus for Early Completion	1		15,250.00	15,250.00	1				15,250.00	15,250.00
	TOTAL (Variations)				82,869.68				65,719.68	17,150.00	82,869.68
OTHER											
V1	Rock Hauled off Site from Bulk Earthworks			To A4(c)		620	m3	68.00	42,160.00		-42,160.00
V2	Trench Rock to Stockpile on Site]			To A18(k)		380.91	m3	75.00	28,568.25		-28,568.25
V3	Rock from Bulk Earthworks to Stockpile on Site			To A4(c)		700	m3	45.00	31,500.00		-31,500.00
	TOTAL (Other)								102,228.25	-102,228.25	

Due Date for Payment Decision

356. Section 26(1)(b) of the Act states that I am to decide...

(b) the date on which any amount became or becomes payable

357. In assessing the provisions of the Contract, I have decided the Payment Claim became payable on the 16th May 2006.

Rate of Interest Decision

358. Section 26(1)(c) of the Act states that I am to decide...

(c) the rate of interest payable on any amount.

359. In assessing the provisions of the contract, I have decided that the rate of interest payable is 10.00% per annum simple interest.

Authorised Nominating Authorities Fees

360. Sections 34(2) & (3) provide that the Claimant and the Respondent are jointly and severally liable to pay the ANA's fee and are each liable to pay a proportion of the fees as I may decide.

361. The Claimant has asserted at points 182 and 183 that I should award these fees against the Respondent, as it believes that the Payment Schedule is unmeritorious and ill-prepared, that the Respondent has wrongfully withheld a significant amount of payments due and that it has incurred significant cost and expense in attempting to recover amounts properly due.

362. The Claimant has been substantially successful in its claim, however as I have earlier noted much of the cost in this adjudication stems from the Claimants method of claiming, I decide that the parties will pay the ANA's fee in equal proportions.

Adjudicators Fees

363. Sections 35(2) & (3) provide that the Claimant and the Respondent are jointly and severally liable to pay the adjudicators fees and expenses and are each liable to pay a proportion of the fees as I may decide.

364. The Claimant has asserted at points 182 and 183 that I should award these fees against the Respondent as it believes that the Payment Schedule is unmeritorious and ill-prepared, that the Respondent has wrongfully withheld a significant amount of payments due and that it has incurred significant cost and expense in attempting to recover amounts properly due.

365. The Claimant has been substantially successful in its claim, however as I have earlier noted much of the cost in this adjudication stems from the Claimants

method of claiming, I decide that the parties will pay the Adjudicators fees and expenses in equal proportions.

Determination

366. For the reasons set out above, I decide that the adjudicated amount in respect of the Adjudication Application dated 4th May 2006 is Nine Hundred and Seventy One Thousand, Two Hundred and Sixty Two Dollars and Ninety One Cents. (\$971,262.91) inclusive of GST (\$882,966.29 exclusive of GST), the date on which the amount becomes payable is the 16th May 2006, the applicable rate of interest is 10.00% per annum simple interest and the parties will pay the ANA's fee and the Adjudicators fees and expenses in equal proportions.

Jonathan Smith
Registered Adjudicator No. J1066110
23rd May 2006