ADJUDICATORS DECISION

In the matter of adjudication pursuant to the

Building and Construction Industry Payments Act 2004 (the Act)

IAMA Adjudication No: 30135

Between

McDonald Keen Group Pty Ltd
The Claimant

And

Barry Edward Ingleton

The Respondent

The Decision

a) The Adjudicated Amount to be paid by the Respondent to the Claimant in respect of the Adjudication Application lodged 13 December 2007 is Two Hundred and Two Thousand, Four Hundred and Sixty Five dollars and no Cents, inclusive of GST. ($202,465.00).

b) The date on which the amount became payable is 10 December 2007.

c) The applicable rate of interest payable on the adjudicated amount is the penalty rate prescribed under Queensland Building Services Authority Act 1991 Section 67P.

d) The Claimant and the Respondent are liable in equal proportions for both the ANA application fee and the Adjudicator's fees and expenses.

Adjudicator: **John Savage**

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

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Preliminary Matters

Background

1 This adjudication arises from an agreement the parties entered into on or about 21 March 2006 for the Claimant to carry out works being civil site works services for the Highway Commercial Project. The Claimant submitted a price based on a set of documents prepared by the Respondent which after further negotiations resulted in a contract being awarded. The project set out completion in three stages with the final stage having a date for practical completion of 4 September 2006 which was extended by the Respondent to 22 February 2007. Practical completion was achieved on Stage 1 and 2, however, for reasons associated with unsatisfactory timing of the project delivery the Respondent deleted the bulk of the Stage 3 scope of works in May 2007 and no separate Stage 3 practical completion was issued. A payment claim dated 19 November 2007 was served by the Claimant and the Respondent issued a payment schedule for a nil amount. The Claimant has proceeded with an adjudication application. There were variations issued to the scope of work and several of these remain in dispute. The Claimant has claimed cost associated with additional time for completion of the works and interest on various amounts where payment is outstanding or was paid late, and also for claim preparation costs.

Appointment of Adjudicator

2 The Claimant lodged an Adjudication Application with the Institute of Arbitrators and Mediators Australia (IAMA), QLD Chapter on 13 December 2007 and by letter dated 14 December 2007 and received same day from the IAMA Queensland Chapter the Adjudication Application was referred to me to decide as the Adjudicator.

3 By letter dated 17 December 2007, transmitted by facsimile and originals sent by express post to the Claimant and the Respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.

Scope of the Decision

4 The Act at Section 26(1) determines what I am to decide and states:
*"(1) An adjudicator is to decide_*
(a) The amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount); and
(b) The date on which any amount became or becomes payable; and
(c) The rate of interest payable on any such amount."

5 The Act at section 34(3)(b) gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the Authorised Nominating Authority fees. And at section 35(3) gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the Adjudicator's fees and expenses. I will decide theses matters after arriving at my Decision.

Matters Regarded in Making the Decision

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

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

(a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act1991, part 4A;
(b) the provisions of the construction contract from which the application arose;
(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

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

(a) The provisions of the *Building and Construction Industry Payments Act 2004* and, the relevant provisions of Part 4A of the *Queensland Building Services Authority Act1991*.
(b) The provisions of the Contract dated 21 March 2006 between the parties from which the Adjudication Application arose;
(c) The Payment Claim dated 19 November 2007 to which the application relates;
(d) The Payment Schedule served 3 December 2007 by the Respondent;
(e) The Adjudication Application lodged 13 December 2007 and enclosed submissions;
(f) The Adjudication Response dated 20 December 2007 and received same date.

8 In determining this adjudication I did not exercise the discretion empowered by Section 25(4) of the Act, to request a conference or inspections.

The Parties

9 McDonald Keen Group Pty Ltd (the Claimant)
ABN: 98 090 921 949
14 Neon Street
Sumner Park, QLD 4074
Phone Number: 07 3715 8355 Fax Number: 07 3715 8988

10 Barry Edward Ingleton (the Respondent)
ABN: 15 876 873 487
Suite 4A
3 Gibson Road
Noosaville, QLD 4566
Phone Number: 07 5449 0716 Fax Number: 07 5449 0714

The Contract and Application of the Act

11 Section 7 of the Act states:

"Object of the Act
The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person-
(a) undertakes to carry out construction work under a construction contract; or
(b) undertakes to supply related goods and services under a construction contract."

12 Section 10(1)(b) of the Act provides:

"10 Meaning of construction work
(1) Construction work means any of the following work—
*(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;*

And Section 10(1)(e) of the Act provides:

"(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;" **(emphasis added)**

13 I find, based on the descriptive evidence in the Contract Documents provided clearly including roadworks, drainage, water services and earthworks in a civil works package, that the works the subject of the Payment Claim is "Construction Work" captured within the definition provided in Sections 10(1)(b) and (e) of the Act above.

14 Schedule 2 of the Act defines a construction contract:

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

15 I have been provided with a copy of the executed contract documents dated 21 March 2006 which constitutes the agreement between the parties and the Respondent has not contested that the work is captured by the Act.

16 The project has proceeded on the above basis and I find a contract is in existence with intentions between the parties to create legal relations and for the Claimant to perform works and services captured by the definition of construction work under the Act for consideration determined under the Contract.

17 Section 3(1) of the Act provides:

"(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3-

(a) whether written or oral, or partly written and partly oral; and whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland"

18 I find the written contract existing between the parties was entered into on or after the commencement of Parts 2 and 3 of the Act on 1 October 2004, to which the Act applies satisfying Section 3(1) of the Act.

19 Section 3(2)(a) provides:

"This Act does not apply to--

(a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes--

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

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

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

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

21 Section 3(2)(b) provides:

"This Act does not apply to--

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

22 The works as previously described are for works and services relating to major commercial civil works, and I find no evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

23 Section 3(2)(c) provides:

"This Act does not apply to--

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

24 The contract is constituted by a contract between the parties incorporating rates, terms and conditions and scope of work as decided by the parties and I find no

evidence in the submissions provided from either party that would allow exclusion of this contract from application of the Act under this section.

25 Section 3(3)(a) provides:

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

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

26 The parties are commercial trading businesses and the agreement between the parties is a contract for major civil works therefore I find no exclusion of this contract from application of the Act under this section.

27 Section 3(3)(b) and (c) provides:

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

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

(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."

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

29 Section 3(4) provides:

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

30 The Contract between the states that it is for construction work in Springfield QLD, therefore, I find that the works the subject the Payment Claim were carried out inside Queensland, allowing no exclusion of the contract under Section 3(4) of the Act.

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

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

Reference Date

33 Section 12 of the Act states:

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

34 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."

35 The Claimant in the Adjudication Application Submissions at Item 8 states: *"The reference date for any payment claimed under the Contract is every four weeks."*

36 The Contract Annexure Part A at 'Times for Payment Claims (Clause 42.1)' has the insertion *"4 WEEKS"*. The Formal Instrument of Agreement includes the Respondent's letter of acceptance dated 10 March 2006 and in the first paragraph of page 3 it states inter alia:
"The payment claims under the contract will be made by the contractor no less than 30 days after the execution of the contract and commencement of work on site and every 30 days thereafter. …"

37 The Contract has created uncertainty on the point and therefore I find it does not adequately provide for a reference date. The Claimant in the Payment Claim at Item 2.21 fifth paragraph notes the discrepancy in the Contract and states that both parties have accepted a monthly payment cycle and it is not an issue. The Respondent has provided no contesting submissions on the reference date and I see no reason to make any further finding on the contract provisions. Therefore I find that the default provision under the Act applies and the last day of the named month in which work was first carried out and the last day of each later named month is the reference dates.

38 Section 12 of the Act states that a person is entitled to a progress payment from each reference date and as this payment claim was made on the 19 November 2007, and, as the Respondent has adduced no evidence that any other payment claim has been served in relation to this date, I find this Payment Claim to be a claim in relation to the reference date of 31 October 2007.

Amount of Progress Payment

39 Section 13 of the Act provides:

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

And Section 14(1) of the Act provides:

"Valuation of construction work and related goods and services
(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued--
(a) under the contract; or
(b) if the contract does not provide for the matter, having regard to--
(i) the contract price for the work; and
(ii) any other rates or prices stated in the contract; and
(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
(iv) if any of the work is defective, the estimated cost of rectifying the defect.

40 The Contract provides for calculation of the amount of progress payments and the valuation of construction work, therefore, I find s13(a) and s14(1) of the Act apply in this case.

The Payment Claim

41 The Claimant in the Adjudication Application submissions has provided a copy of the Payment Claim which is comprised of a bound document of 102 pages and a further four volumes (lever arch files) of supporting documents. The bound document incorporates a covering letter dated 19 November 2007 and summary of each element of the claim and submissions to support the claimed amounts.

42 The Respondent has not contested that the Payment Claim submitted is in fact a copy of the original document served on the Respondent or that it was served on 19 November 2007.

43 The Respondent in the Payment Schedule at Items 87 to 92 has asserted that the Claimant has failed to comply with the provisions of Clause 21.1 of the Contract by failing to provide evidence of insurance policies held and as a consequence has no entitlement to make a payment claim.

44 The Claimant in the Adjudication Application at Item 127 to 130 submits evidence that it did fact provided a Certificate of Currency for Public Liability and a copy of a Tax Invoice for the Construction Insurance policy endorsed for the project, listed in its outgoing mail for 3 April 2006, and therefore complied with the requirements of Clause 21 1 of the Contract.

45 The Respondent has not pressed its assertions in the Adjudication Response and has provided no evidence of specific requests being made in relation to the policies. Having perused the documents submitted I accept the Claimants submissions satisfy

the Contract and find this issue does not restrict the Claimants entitlement to make a payment claim.

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

"(2) A payment claim--

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

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

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

47 The covering letter of the Payment Claim identifies the construction work as 'Highway Commercial – Spring Lakes Metro' and the Respondent as the party to the contract, claims an amount of $1,188,848.86 to be payable, and states clearly in the second page footer *"This is a Payment Claim under the Building and Construction Industry Payments Act 2004"*

48 I have previously found the Reference Date for this Payment Claim to be 31 October 2007.

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

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

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

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

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

51 The Payment Claim states that it includes for work performed up to 31 October 2007 and the Respondent at Item 24 of the Payment Schedule states practical completion was achieved for Stage 1 on 22 December 2006 and Stage 2 on 10 April 2007. The Contract in the Annexure Part A provides for a Defects Liability Period of 52 weeks, therefore, the payment claim is within the period of the construction contract and within a 12 months period from the time the work was carried out.

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

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

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

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

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

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

Due Date for Payment

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

57 Section 15(1) of the Act states:
*"Due date for payment_*
1) A progress payment under a construction contract becomes payable-
(a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W11--on the day on which the payment becomes payable under the provision; or
(a) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W-10 business days after a payment claim for the progress payment is made under part 3."

58 The Contract at Clause 42.1(g)(h) and (i) in relation to payment states inter alia:
"….Within 15 Business Days after the later of the date:
(g) Provided for in this clause for the submission of a payment claim by the Contractor; or
(h) Of submission of a payment claim by the Contractor,
The Principal shall pay to the Contractor, or the Contractor shall pay to the Principal, as the case may be….."

59 Clause 42.1 of the Contract does not provide an actual date for submission of a payment claim by the Contractor but rather a time period of 4 weeks. The Contract contains no pay when paid provision (s16 of the Act) but does contain a provision about the due date for payment matter that, in the event that the QBSA Act applies to this construction work, is not void under section 67U or 67W of the QBSA Act, therefore s15(1)(a) of the Act applies.

60 I find that the contract provision applies being payment within 15 business days after the payment claim is received by the Respondent. As earlier found in this Decision I am satisfied the Payment Claim was served on 19 November 2007, therefore by adding 15 business days, I find the due date for payment is 10 December 2007.

The Payment Schedule

61 The Claimant in the Adjudication Application Volume 7 at Tab MKG-2 has provided a copy of the Payment Schedule which is comprised of a 121 page bound document dated 3 December 2007.
And in the Adjudication Application submissions at Item 20 states:

*"It is noted that the Payment Schedule was received by the Claimant by email on 3 December 2007. The attachments, however, were not provided to the Claimant until 4 December 2007. The attachments were served out of time and do not form part of the Payment Schedule. A true copy of the Payment Schedule is attached to this Adjudication Application and marked '**MKG-2**'."*

62 The Respondent in the Adjudication Response Volume 5 has provided its version of the payment schedule which comprises the bound 121 page document plus a further lever arch file entitled *"Volume 1"*. The Respondent in the Adjudication Response submissions Volume 1 at Items 1 to 4 has contested the Claimant's assertion that the Payment Schedule was served in two parts at Item 2 states: *"The respondent refers to the statutory declarations sworn by Barry Ingleton, David Holt and Mathew Peters, all sworn on 18 December 2007. The respondent served thee payment schedule, being a spiral bound document containing the payment schedule and a lever arch file (entitled Volume 1) containing documents that formed part of the payment schedule, by hand on both the applicant's registered office and its business office on 3 December 2007"*

63 I have perused the statutory declarations relating to service of the payment schedule and am satisfied that the full document incorporating the attached Volume 1 file as submitted by the Respondent was served on the 3 December 2007 and reject the Claimant's assertion that the attachments were served out of time on the 4 December 2007.

64 Section 18 of the Act states:

"(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

(2) A payment schedule--

(a) must identify the payment claim to which it relates; and

(b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).

(3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

(4) Subsection (5) applies if--

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of--

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

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

65 The Payment Schedule clearly states that it is from the Respondent and identifies the Payment Claim of 19 November 2007, states an amount for payment of $nil and provides reasons for the withholding of payment.

66 The Contract at Clause 42.1 does provide a time for the issue of a payment schedule under the Act which matches the default provisions under s18(4)(b)(ii) of the Act, that being 10 business days after receipt of a claim for payment and I find that period to apply in this case.

67 I have previously found that the Payment Claim was served on the 19 November 2007, and adding 10 business days as per the Contract it would require the Payment Schedule to be served on or before 3 December 2007. As stated earlier in this Decision I have found that the Payment Schedule was served on the 3 December 2007 and within the time allowed under s18(4) the Act..

68 I have found compliance by the Respondent with all of the requirements of the Act, therefore, I find that the Payment Schedule served 3 December 2007 is a valid payment schedule and satisfies s18 and of the Act.

The Adjudication Application

69 The Adjudication Application was lodged with the Institute of Arbitrators and Mediators office on 13 December 2007.

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

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

(a) the respondent serves a payment schedule under division 1 but--

(i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or"

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

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

"(3) An adjudication application--

(a) must be in writing; and

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

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

(i) for an application under subsection (1)(a)(i)--within10 business days after the claimant receives the payment schedule;"

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

74 I have previously found that the Payment Schedule was served by the Respondent on the Claimant on 3 December 2007 and by adding 10 business days this requires the Adjudication Application to be lodged by 17 December 2007. The Adjudication Application was lodged with IAMA on 13 December 2007 and

therefore within the time allowed in the Act. I find that the Claimant has complied with the requirements of s21(3) of the Act.

75 Section 21(3)(d) of the Act states:
"An Adjudication Application----
(d) must identify the payment claim and the payment schedule, if any, to which it relates; and"

76 The completed pro-forma page clearly sets out details of the Payment Claim and the Payment Schedule, and I find that the Adjudication Application satisfies Section 21(3)(d) of the Act.

77 No application fee is imposed by IAMA, therefore s21(3)(e) and s21(4) of the Act is satisfied.

78 Section 21(5) of the Act states:
"A copy of an adjudication application must be served on the respondent."

79 In my letter of acceptance to the parties I requested that each party provide details of the service of the Adjudication Application on the Respondent and I received confirmation from both parties that the document was in served on 13 December 2007, thereby satisfying s21(5) of the Act.

80 The IAMA ANA referred the application to me on 14 December 2007 being within 1 business days of receiving the document, thereby satisfying the 'as soon as practicable' requirement of s21(6) the Act.

81 I am a Registered Adjudicator under the Act. Registration Number J1057073. I am not a party to the contract and I have no conflict of interest with the parties to this adjudication therefore s22 of the Act is satisfied.

82 The Adjudication Application comprised seven lever arch folders containing the information indexed below:

Volume	Documents
1.	Application and Submissions
2.	Payment Claim MKG-1 Volume 1 of 5
3.	Payment Claim MKG-1 Volume 2 of 5
4.	Payment Claim MKG-1 Volume 3 of 5
5.	Payment Claim MKG-1 Volume 4 of 5
6.	Payment Claim MKG-1 Volume 5 of 5
7.	Payment Schedule MKG-2, Statutory Declaration MKG-3, Legal Cases MKG-4, Superintendent's Notices MKG-5 and Insurance Documents MKG-6

The Adjudication Response

83 Section 24 of the Act states:
*"Adjudication responses_*

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

84 I have earlier found service of the Adjudication Application on the Respondent occurred on 13 December 2007.

85 I accepted the Adjudication Application by letter faxed to the parties on 14 December 2007. Therefore, the time for the Adjudication Response is the later of 2 business days after receiving my letter of acceptance which is 16 December 2007 or 5 business days after service of the Adjudication Application which is 20 December 2007.

86 I received a hand delivered copy of the Adjudication Response with all attachments on 20 December 2007, being within the time allowed and satisfying s24(1) of the Act.

87 I have already found that the Payment Schedule was correctly served on the Claimant within the time allowed under s18(4)(b) of the Act in response to the Payment Claim served 19 November 2007, therefore, I am able to consider the Adjudication Response and I find s24(3) of the Act is satisfied.

88 I find that the Adjudication Response was in writing and identified the Adjudication Application to which it related in the covering letter and attached summary details and contains various submissions of the Respondents choosing, therefore satisfying s24(2) of the Act.

89 The Claimant has not confirmed receipt of the Adjudication Response. The Act does not provide a time for service of the Adjudication Response on the Claimant, therefore, although s24(5) of the Act is not yet satisfied, it does not prevent me from determining the application.

90 The Adjudication Response comprised five volumes, four in lever arch folders containing submissions and documents and one set of specifications and drawings, as indexed below:

Volume	Documents
1	Submissions, Statutory Declarations and Statements, Schedule of Changes to Drawings and Legal Cases
2	Statutory Declaration, Photos and Drawings
3	Photos
4	General conditions of Contract AS2124-1992 As Amended, Specification for Siteworks Package and a full set of Contract Drawings
5	Payment Schedule including all attachments

The Adjudicated Amount

91 Section 26(1)(a) of the Act requires that I decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount). I will assess each claimed element of the work in the Payment Claim and decide an amount to be carried to collection of the Adjudicated Amount for calculation of the progress payment due. These item amounts are excluding GST, as stated in the Payment Claim, and GST is added in the Collection.

92 I will be deciding the progress payment due from the amounts claimed in the Payment Claim that has been pressed in the Adjudication Application. In relation to the additional items claimed the onus is on the Claimant to provide supporting documentation sufficient to satisfy me as to its entitlement and quantification.

93 The Respondent in the Payment Schedule has submitted various reasons for withholding monies for each item and these reasons will be considered in assessing each submission. I will deal separately with the deductions for set-off amounts claimed in the Payment Schedule and the onus in this case shifts to the Respondent to demonstrate entitlement to set-off and quantification.

94 The Respondent in the Adjudication Response has submitted a report of Mr John Eberhart who was requested to provide an expert report for the purposes of the adjudication. Mr Eberhart does not purport to provide an 'expert report' as such and in fact titles the report as a 'Statement'. The report includes many opinions and comment based on information and instruction provided by the Respondent rather than first hand experience of or on this project. In relation to whether or not Mr Eberhart is an 'expert' the report does not specifically describe the basis on which I might consider him to be an expert in any particular matter commented on and being claimed in this Payment Claim other than to provide his curriculum vitae (CV) and statement at Item 2 inter alia of *'I have had more than 30 years experience in the construction industry. …"* and at Item 3 inter alia of *"I am usually involved in 20 to 30 projects per year, most of those have a civil engineering component. …"*.. I have perused his CV and find nothing to indicate that his experience is exceptional in the field of claims management or contract administration such that I should weight any of the comment above that of any third party construction person who may have been asked to comment in a similar statement of evidence and I will limit my weighting of

his statements accordingly. In my Decision the primary use of the report has been to direct me to issues raised rather than accepting any opinion of the author.

95 The Claimant in the Payment Claim at Item 1.1 last paragraph states:
"This payment claim is presented as the total of work completed less the total amount paid to date (which is unknown)."
The Claimant also states that it has had difficulty in reconciling the last two payments made by the Respondent, however, I find it difficult to understand why the amount paid to date is unknown and will deal with that issue later in this Decision. In any event I will compose my determination in the same manner as the Payment Claim

FRAUD, TRADE PRACTICES ACT AND THE COLLATERAL AGREEMENT

96 **Fraud** - The Respondent in the Payment Schedule at Item 2 has raised the issue of fraudulent conduct by the Claimant and expanded on this matter in the Adjudication Response submissions at Items 21 to 34. The Respondent submits that it is my role to make a finding on this matter, however, firstly I am restricted by s26(2) of the Act as to what I can consider in deciding an adjudication application and the Act does not mention any Commonwealth Legislation under which a claim involving fraud could be advanced. Secondly, although the Act does include consideration of the Payment Schedule in which the Respondent has raised the issue, fraud is clearly a triable issue for a Court and an adjudicator operating under the Act has severe time and process limitations which effectively prevent the making of any finding of fraudulent activity. The Respondent has outlined the impact a finding of fraud may have on decisions made by adjudicators and although that may be the case, I am not considering any of the submissions on the issue of fraud put by the Respondent in making my decision and will leave that an issue to be determined in a Court of Law should my Decision be contested at a later date by the Respondent.

97 **Misleading and Deceptive Conduct** - The Respondent in the Payment Schedule at Item 2 has raised the issue of breaches of the Trade Practices Act by the Claimant. As for issues relating to fraud the Act at s26(2) does not include any parts of the Trade Practices Act to be considered by an adjudicator. This is also a triable issue for determination in a Court of Law and I will not be considering any submissions from the parties accordingly and will restrict my finding to assessing the submissions on the various claimed amounts in the Payment Claim on the basis that I must be satisfied an amount for payment is due, performing my role as limited by the Act and in particular s26 of the Act.

98 **The Collateral Agreement** – The Claimant in the Payment Claim at Item 2.5 states:
"The arrangement under which the present claim is made has two components:
(a) the written contract dated 21 March 2006; and
(b) a collateral agreement between the Principal and MKG, pursuant to which the Principal was able to direct variations.
The collateral agreement was brought into existence through the conduct of the parties. At various stages over the performance of the works, the Principal directed

MKG to perform variations. MKG, for its part, accepted these directions as binding and performed them accordingly."
The Respondent in the Payment Schedule at Item 256 rejects the Claimants assertion that a collateral agreement exists and states that it was only created at the very last minute.

99 The Claimant in the Adjudication Application at Items 24 to 49 sets out the case that a collateral agreement was formed by the conduct of the Principal's agent Mr Holt in providing binding directions relating to variations in contract works to the Claimant. The Claimant's reason for this submission is to limit the application of time bar clauses applied to variations where the direction has been provided by a Principal's agent other than the Superintendent.

100 As will be seen later in this Decision I have reverted to the Contract, as I am permitted to do pursuant to s26(2) of the Act, to assess compliance by the Respondent or its agents when providing time bar clauses as a reason for withholding payment and in all cases decided that the appropriate notices were not issued to the Claimant to trigger time running in any event. Therefore, unless this issue is raised for any other reason in submissions I see no reason to make a finding on whether or not a collateral contract had been formed that may affect my determination in relation to variation claims. Should the issue again arise I will deal with the matter in that section of my Decision.

PARTS A TO J – ORIGINAL SCOPE OF WORKS

101 The Claimant in the Payment Claim Summary spreadsheet has set out the claim for these parts as below:

PART	Description		Claim Amount
Part A	Preliminaries		$268,680.00
Part B	Roadworks		$1,288,358.00
Part C	Roofwater		$80,000.00
Part D	Stormwater		$296,232.00
Part E	Sewer		$128,000.00
Part F	Fire Services		$175,000.00
Part G	Water Service		$82,000.00
Part H	Electrical and Communication		$365,689.00
Part I	Gas		$62,500.00
Part J	Earthworks & Bio-retention Basin		$271,528.00
	Total excluding GST		**$3,017,987.00**

102 The Respondent in the Payment Schedule attachments has relied on the Superintendents Progress Payment Certificate No 14 and all parts listed above have been listed as approved amounts in this certificate subject to adjustment by way of Contract Price Adjustment (CPA) variations issued**. Therefore, I find the amount of $3,017,987.00 for Parts A to J being 'Original Scope of Works' is to be carried to Collection of the Adjudicated Amounts**.

PART K1 –VARIATIONS PREVIOUSLY CERTIFIED ON-COST CLAIM

103 The Payment Claim at Part K1 claims the amount of $246,698.17 representing an increased amount of $32,801.42 as set out in Appendix 10 for increased mark-up to previously certified variation amounts. The amount is determined by adjustment of the 10% overhead and profit on direct job costs previously allowed by the Superintendent, to an amount determined by applying 15% on-site overheads and then applying a further 10% for off-site overheads in a compounding manner.

104 The Claimant in the Payment Claim has set out the factual background at Item 2.19, the basis of claim at Item 3.7 and quantification at Item 5.4. The Claimant has provided the reason for this claim being that it came to the conclusion its earlier claim of 9% and 10% margins, and the Superintendents certification of variations with a 10% on-cost margin were too low and determined on an inappropriate basis of a government departments contract document extract using a similar standard form of contract. The Claimant at Item 3.7.1 argues that the blanket application of 10% is not reasonable for this civil project and the Superintendent has not exercised his duty correctly to determine 'reasonable rates or prices' and 'a reasonable measure of work' as required by clauses 40.5(c) and 23 of the Contract. The Claimant goes on to explain the industry use of average percentages to cover any on-costs to variations. And at Item 3.7.1 in the fifth paragraph states inter alia:
"The Superintendent's Representative has applied an arbitrary on-cost of 10%, which has no commercial or contractual basis and he has failed to show that it satisfies the requirement to be "reasonable" in Clause 40.5 (c) and Clause 23.….)
And at Item 5.4.1 first and second paragraph states:
"Off-site overheads on one project simply cannot be measured accurately for a construction company with offices in Brisbane, Gladstone, Sunshine Coast & Melbourne with many concurrent contracts in several states in Australia. This has long been recognised in the industry and there are formulae used in order to estimate off-site overheads; e.g. Hudson, Eichleay, Laan etc. all of which give different answers, some being significantly high. For reasonability and simplicity MKG use 10% for the total of off-site overhead and profit. This is a well accepted civil construction industry amount and satisfies the requirement to be "reasonable" under Clause 40.5 and Clause 23 of the contract.
It is a figure used frequently by the Department of Main Roads when assessing claims for civil works contracts."

105 The Respondent has applied the 10% on-cost in certifying variations and in the Payment Schedule at Items 467 to 476 has maintained that percentage fairly compensates the Claimant for its on-costs and rejects the Claimants percentages as being high and unsubstantiated and provides notice that it will provide independent expert evidence to that effect. The Respondent at Item 471 submits that it is not clear whether the claimant is relying on a breach of contract, but should that be the case clause 46.1 provides for notice requirements that the Claimant has failed to satisfy. The report of Mr John Eberhart includes an opinion at Items 320 to 326 on the overhead percentages claimed, which supports the Superintendent's assessment and questions the lack of substantiation from the Claimant of any higher percentages.

106 The Claimant submits that I should accept the higher margins as 'a well accepted civil construction industry amount' and states that the Respondent has failed to show that it has been fair and reasonable. Equally the Respondent claims that it has been fair and reasonable at all times by using the lower margin. I find both parties have failed to provide any clear substantiation for their respective statements on the matter, however, the onus here is on the Claimant to satisfy me. The Claimant has noted the research provided in various publications (*Hudson, Eichleay, Laan etc. all of which give different answers, some being significantly high)* and I concur that the industry margins can vary by significant degrees and also that on many projects agreement is generally reached to apply 'average' percentages due to the difficulty in accurate assessments of on-costs to variations. The Claimant has defined the on-cost as a margin to direct job costs but does not explain exactly what items are being reimbursed or what costs have been incurred. For instance does the margin reimburse for progressive preliminaries items, what rates are being used in direct job costs, does the direct job cost include discounts for early payment or off-site overheads where contract rates are being used. The impact of individual variations can be considerable and do warrant special consideration by the assessor in some particular cases, but the claimant has not described any such circumstances. The 15% margin for an off-site overhead and profit percentage is not supported by any factual data in the form of company turnover and overall overhead costs on an annual basis but is in fact only supported by the assertion that the percentages are well accepted industry amounts. The Claimant has provided no submissions in relation to this project on what factors have contributed to an increase in off-site overheads. I will however consider any special factors in submissions on particular variations that would attract a margin above the 10% being applied across the board by the Superintendent.

107 In relation to the Claimants reliance on a breach of contract by the Respondent due to the valuation method used by the Superintendent, the Claimant submits that the remedy for such a breach is to properly value the work under the terms of the contract. As I am not satisfied any higher margin is justified or supported by the submissions I see no reason to address the issue of breach in this instance.

108 I have checked each item against the adjustments issued in CPA advices and find all except Variations 42 and 44 of the above listed items have been included in those adjustments to the Contract Amount. Variation 42 and 44 are adjusted in CPA 07 but I have not been provided with a copy of that CPA, however, the amount of CPA 07 has been included in the Respondent's agents certification and no mention is made of rejection of these items.

109 I find no evidence provided in the Claimants submissions that support the percentages quoted such that would satisfy me the increase is warranted, **therefore, I reject the claim for an increased on-cost margin and find the amount of $213,896.75 for Part K1 is to be carried to Collection of the Adjudicated Amount**.

PART K2 - VARIATIONS NOT PREVIOUSLY CERTIFIED

110 For clarification please note that a reference to a line item in the variation assessments relates to the tendered breakdown provided by the Claimant and

included in the executed documents. And a reference to 'certificate submissions' is to the certificate of the Superintendent which I have previously accepted as being part of the Payment Schedule.

111 **Variation 14** - Remove and relay water line. The Payment Claim claims the amount of $21,197.61 and the Respondent has rejected the claim by reason that no Superintendent's instruction was given and that the Claimant is responsible due to faulty workmanship in failing to set out the overall pipework lines and checking site dimensions prior to starting work.

112 The Claimant in the Payment Claim at Item 4.2 has set out the basis of claim to be resulting from the failure on the part of the Respondent to issue the revised 'For Construction' drawing prior to the work being commenced on 18 June 2006. The revised drawing was issued on 5 July 2006. In addition The Claimant asserts that it is a valid claim under Clause 8.1 'Discrepancies' of the Contract.

113 The Respondent in the Payment Schedule has asserted that the work was the result of faulty workmanship in the form of failure by the Claimant to properly check all information and fully set out the works prior to commencement. The Respondent also asserts that the hydraulics design drawings were specified to be 'only diagrammatic.'

114 The Respondents reason for rejecting the claim relies on the Claimant's contractual onus to check various items before commencing work. The contract at Clause 1.12 in the first paragraph informs the Contractor that the hydraulic drawings are diagrammatic and indicate generally the location of materials and equipment and that architectural and structural and drawings of other trades must be referred to for dimensions and clearances. The specification goes on to state in the fourth paragraph: *"The dimensions shall be checked before work is commenced or prefabricated, all levels and dimensions of existing services shall be confirmed before commencing work. The invert levels shown on the drawings are recommended only and shall be checked on site before excavation or installation of pipework, to ensure connections to supply sources are correct and fall in pipework, etc."*

115 This requirement in the contract does not require the Claimant to fully check and verify the hydraulics design, and no mention of such a check is included in Clause 1.02 'Scope' of the Contract. It does require all dimensions and set out positions to be taken from the architectural documents and it does require various on site checks to ensure connections and levels at supply sources. The degree of checking carried out in this case has not been demonstrated or covered in the submissions to determine if it were sufficient and satisfied the contract requirements, or in fact would have or should have detected this problem.

116 The circumstances of this matter relate to design level changes made by the Respondent's agent on a 450 diameter pipe of significant length, but not advised to the Claimant until after the work had commenced and the problem became evident. In my view the onus was on the Respondent to ensure that all latest issue drawings were with the Claimant prior to commencement of the work. The Claimant has

demonstrated and satisfied me that this was not the case, and I find a variation is justified.

117 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $18,432.70 being $16,757.00 plus margin of $1,675.70.

118 For the reasons stated above **I decide the amount of $18,432.70 for 'Variation 14' is to be carried to Summary of Variations Not Previously Certified**.

119 **Variation 15** - Remove and relay water line, sewer line clash. The Payment Claim claims the amount of $6,633.66 and the Respondent has rejected the claim by reason that no Superintendent's instruction was given and the Claimant is responsible due to faulty workmanship in failing to set out the overall pipework lines and checking site dimensions prior to starting work.

120 The Respondent in the Payment Schedule has relied on a similar reason to that provided in Variation 14 but has added that these works are 'house drainage' and as such should be treated differently to hydraulic work in civil projects.

121 The scale of plumbing and drainage works on this project is significant and the particular pipework the subject of this variation claim being 525 diameter RCP pipe, I do not accept the Respondents submission relating to the works being 'house drainage' Adjudication Response at Item 5.3.

122 In relation to the obligation on the Claimant under Clause 1.12 the parties are referred to my earlier reasons for accepting Variation 14 and the same reasoning applies here. The submissions do not address the degree of checking that would have unearthed the problem and I do not accept that the Contract allows all discrepancies resulting from a checking process as described in Clause 1.12 of the Contract can be sheeted home to the Claimant.

123 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $5,768.40 being $5,244.00 plus margin of $524.40.

124 For the reasons stated above **I decide the amount of $5,768.40 for 'Variation 15' is to be carried to Summary of Variations Not Previously Certified**.

125 **Variation 18 & 20** - Spoil Material from Site. This variation has been decided along with Variation 40.

126 **Variation 30** - Stand down of Excavator on 1 August 2006. The Payment Claim does not claim any amount and indicates the claim has been withdrawn, therefore, **I make no valuation for 'Variation 30 is to be carried to Summary of Variations Not Previously Certified**.

127

128 **Variation 31A** - Excavation in Rock to Roof water, Water and Fire Services lines. The Payment Claim claims the amount of $55,700.00 and the Respondent has previously certified $45,952.50. The Respondent rejects the additional amount claimed by reason that the clause 40.2 time bar precludes the claim being made more than 12 months after the earlier approval.

129 The Claimant in the Payment Claim at Item 4.7 submits that the volume of rock at 557 cubic metres was accepted by the Respondent when CPA 03A was issued, and although the original claim for the variation used a rate of $75.00 m3, the rate in the Contract is in fact $100.00 m3.

130 The Respondent in the Payment Schedule response certificate in relation to Variation 31A submits that it is unreasonable to re-submit a variation that had been approved in full, more than 12 months after the approval and relies on Clause 40.2 of the contract to bar a further claim, although acknowledging that this clause does not preclude the Claimant from making another claim.

131 The Respondent has described this claim as a variation on a variation, but I do not concur that is the case here. In my view the Claimant has used an incorrect rate at the time of presenting the claim and is now seeking an adjustment to the previously approved amount. I am satisfied that use of the contract rate of $100.00 per cubic metre (no margin attracted), as submitted in the Claimant's offer letter 28 February 2006, is justified for rock excavation to trenches other than the sewers specifically mentioned in the rock qualification item.

132 The Respondent has not provided and specific details of dates or notices that would apply to this item, but in any event I do not accept that Clause 40.2 is applicable here and is not a valid reason for the Respondent to reject this claim.

133 I am satisfied that the claimed amount is justified and reasonable determined by 557m3 at $100.00 per cubic metre **and I decide the amount of $55,700.00 for 'Variation 31A' is to be carried to Summary of Variations Not Previously Certified**.

134 **Variation 34** - Fire Main Reconfiguration. The Payment Claim claims the amount of $4,543.88 and the Respondent in the Payment Schedule has included the reduced amount of $4,346.32 by reason that only a 10% allowance has been included for overheads and profit.

135 The Claimant in the Payment Claim at Item 4.9 has set out the basis of claim and referred to the amount included in CPA 12 of $3,951.20.

136 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

137 The amount of $3,951.20 in CPA 12 already has a 10 % margin included as the direct job costs was $3,592.00 and I can only regard the further margin added by the Respondent to be a concession on this particular variation. For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

138 Therefore, I accept the Respondents determination of $3,951.20 plus a margin of $395.12, **and decide the amount of $4,346.32 for 'Variation 34' is to be carried to Summary of Variations Not Previously Certified**.

139 **Variation 18, 20 and 40** - Spoil Material Off Site. The Payment Claim for Variation 18 and 20 claims the amount of $69,328.15 and the Respondent has rejected the claim by reason that the Claimant entered into an agreement direct with Dobson Projects (another contractor on site) to remove their spoil from site and it was agreed at the site meeting of 5 September 2006 that the Claimant would negotiate direct with the building contractor on site for reimbursement of costs. The Payment Claim for Variation 40 claims the amount of $230,703.59 and the Respondent has included the amounts of $85,524.45 in CPA 09 and $63,390.05 in CPA 11 (both amounts inclusive of margin) with the reason for withholding payment being no agreement reached on the rates for removal and the Superintendent electing to value the works at the lesser amount although based on quantities provided by the Claimant.

140 The Claimant in the Payment Claim at Variation 18 & 20 has referred the reader to Variation 40 for 'Factual Background' and 'Basis of Claim' and at Item 4.4.3 and 4.12.3 in relation to quantification sets out the assumptions made in this claim being:

"(a) Contract haulage rates (e.g. $ per m3 do not include loading of the truck, loading of the trucks by excavator was provided by MK Group).

(b) For every 40 truck operating hours: 1 hour of water cart hire has been allocated to maintain dust suppression.

(c) For every 40 truck operating hours: 1 hour of grader hire has been allocated to maintain access and egress.

(d) For every 40 truck operating hours: 2 hours of MK Group Foreman's time has been allocated.

(e) For days where only one truck has been deployed, the excavator has been allocated for 20% of the daily truck hours."

And further states:

"Variations 18 and 20 have been combined as they cover the spoil removal between the dates 1 June 2006 & 24 July 2006 where as Variation 40 deals with spoil from 25 July 2006 onwards." However, the Claimant has not clarified why the claim has been presented for cost to and from 24 July 2006.

141 The Respondent in the Payment Schedule certificate response in relation to rejection of Variation 18 & 20 states inter alia:

"These two variation claims were for removal of spoil for Dobson Projects. This spoil is in addition to all of the measured spoil in MKG's contract as in Claim No 40 and accepted in CPA 11.

This was carried out by McDonald Keen Group at the request of Dobson Projects. The removal of the spoil was agreed between the 2 parties and does not form part of the Contract.…..”

142 I am at a loss to understand why removal of excess material off the site, described to have been stockpiled, would be defined as belonging to one contractor or another, unless the other contractor had an obligation to remove the spoil off site. That work was carried out from 15 June 2006 to 24 July 2006 and the only reference to any agreement regarding this work was in the Novelli email of 4 September 2006 (Payment Claim Appendix M) where it appeared agreement with the other contractor was imminent and the minutes of Site Meeting of 5 September 2006. The line item 1.9 in the minutes reads:
“Some spoil has been removed from site. Dobson Projects spoil costs to be negotiated directly.”
The words ‘some spoil’ in the minutes appears to be referring to a relatively small quantity or it is significantly understating the total quantity involved and the statement does not appear to support the Respondents assertion that an agreement was reached at that site meeting. The assertion above *“This was carried out by McDonald Keen Group at the request of Dobson Projects.”* has not been contested by the Claimant in the Adjudication Application and leads me to a view that some form of arrangement was in place between the two contractors on site for at least part of the spoil cartage. This is supported by the Claimant separating the claim at what appears to be a nominal date of 24 July 2006.

143 If I am wrong in my view that a separate arrangement was in place for at least part of this particular spoil I will continue to assess the claim in relation to entitlement and payment under the Contract.

144 The Respondent in both the Payment Schedule and the Superintendent’s response accept the Contract exclusion in MKG offer dated 28 February 2006 which clearly stated as a qualification to the tender was that it excluded any allowance to spoil off site. The qualification stated:
"Excludes spoiling any material off site;”
In my view this has the clear meaning of only including that material actually carried off the site, and does not include material carried from the excavation or earthworks location or workface to a stockpile on site. In some instances it would be expected material would be moved directly off site from the work location if it was an efficient exercise to carry out in that manner. The Claimants submissions do not specifically address the matter of what material was moved directly off site as opposed to being stockpiled on site and moved off site at a later time or provided any substantiation as to the most efficient manner to be engaged other than to state that the Respondent has not contested the issue of efficiency of the operation.

145 The Claimant in the Payment Claim at Item 4.12.2 in relation to basis of claim states inter alia;
“The contractual basis of claim is simply that all spoil costs (loading, trucking, dump fees, maintenance of haul roads, dust control, cleaning roads, supervision etc) are a variation to the contract and MKG is entitled to have the variation valued under

Clause 40.5. There is no applicable rate in the contract, so under Clause 40.5(c) a reasonable rate applies..…..”
I do not agree that ‘all spoil costs’ are a variation to the contract, refer my interpretation of the qualification above, and the Claimant has not provided any submissions to support this assertion of entitlement under the Contract.

146 The Respondent in the Payment Schedule at Item 600 in relation to entitlement states:
“I dispute the Superintendent’s view that variation 40 is in fact a variation. The term in the contract “excludes spoiling any material off-site” has no meaning and must be ignored in the interpretation of the contract. If the interpretation is correct, it means that variation 40 was never a variation, I reserve the right to put further submissions to any arbitrator in that regard,”
I do not agree with this interpretation for reasons previously stated and also by reason that the specification for Site Control (Clause 2.14.2) does address the issue of materials being removed from site, but requires the contractor to recycle and reuse materials in an arrangement with the Superintendent and I find it reasonable that a contractor would qualify its tender given that the extent of any work undertaken would be unknown at that time and also that other contractors would be contributing to any spoil stockpile.
The Respondent at Items 583 to 599 further provides submissions setting out its review of the Claimants supporting material and strongly contesting the validity of the material and at Item 599/3 describes at points ‘A’ to ‘R’ the areas within the variation claim that are questionable. I summarise the Respondent’s primary points as being:

a) Equipment dockets includes for spoil material being moved on site.
b) Truck dockets also include materials being carted onto the site e.g. rock.
c) Spoil material was included for another contractor on site.
d) Discrepancies with volumes carted and volumes dumped reflected in fees charged.
e) Spoil material may have been sold at particular dump sites.
f) Cartage costs included in other variations may have been duplicated in this claim.
g) No adjustments have been made for spoil material generated from the Claimants mistakes on site e.g. incorrect benching and extra trenching.
h) No adjustments have been made for inefficient work practices on site or delays caused by the Claimant resulting in material movement.
i) Specific concerns regarding the assumptions on which the Claimant bases its claim for other equipment and labour.

And further the Respondent in the Adjudication Response has submitted a report by Mr John Eberhart which includes a very detailed analysis of the Variation 40 claim setting out the Respondents query and comment on each docket on each invoice claimed (a significant number of items being queried) and also submitting various scenarios of the volumes that could have been moved given the machinery hours and the use of proportional time estimates for supporting machinery e.g. loaders, graders etc. The outcome has resulted in the Respondent determining that an overpayment has already been made and that a set-off may be due under the Contract. I will deal with the set-off claim later in the Decision.

147 I have spent some considerable time reviewing the volumes of supporting information provided by the Claimant for this variation and considering the issues raised by the Respondent in relation to that information. The fact that the dockets demonstrate that costs for movement of material within the site is included, is the major item of concern to me and this is exacerbated by the use of assumptions based on truck hours claimed to calculate the components of dust suppression, maintaining access and egress, loading hours for excavators and labour. I have on a random basis investigated queries raised in the detailed analysis Mr John Eberhart and find concurrence with the queries raised. For example the manner in which the Claimant has utilised Bastow's Earthmoving Pty Ltd on site and the lack of detail provided to substantiate that the claims were for spoil was being taken off site.

148 It appears from the lack of site instructions on the matter that no opportunity was taken up by Respondent to provide clear direction as to which material was to be removed from site under a variation for that operation or that the Claimant referred any trucking dockets or other regular recording documentation to the Respondent's agents for verification by sign off even though the Claimant has stated that due to the lack of agreement of the removal rate, full records were kept to enable a claim for actual costs to be made. It is not the role of an adjudicator to trawl through all of the dockets and materials submitted (500 plus pages) and reconfigure the claim to determine the extent to which I consider it is a valid claim.

149 Therefore, for the reasons stated above, and primarily due to my interpretation of the qualification in the tender letter and the failure of the Claimant to satisfy me on any basis that movement of spoil on site should be included, my concurrence with the Respondents concerns regarding the accuracy and lack of detail provided in the supporting material, and my concern at the use of assumptions to estimate costs for supporting machinery and labour, I am not satisfied by the Claimants submissions that this method of actual cost has been substantiated by the material provided.

150 In relation to the Claimants submission of an estimated quantity at a rate per cubic metre, to which the Respondent has not agreed but has certified what it considers to be a reasonable rate, I find little in the Claimants submissions to substantiate the rate of $19.50 m3 and am not convinced by the Claimants argument that allowance should be made for *"…to take into account the lead distances, intermittent nature of the work or working in a restricted and confined site. It does not include dumping fees at the multiple locations or road cleaning.."* as stated in Item 4.12.1 of the Payment Claim. In my view these consideration are more related to movement of spoil on site rather than off site and the issue of dumping fees was addressed by virtue of CPA 11 when a further adjustment was made. I do not consider the Respondents agents assessment using quantity times a published rate to be unreasonable given the uncertainty of operation, particularly as the Claimants quantities are applied in that determination. In any event due to the fact that I am not satisfied by the Claimants submissions for actual cost to be reimbursed I am left with the Respondents assessment which I prefer in valuing Variation 40.

151 For the reasons stated above **I decide the amount of the Respondents combined certified amounts of $148,914.50 for Variation 40 is to be carried to Summary of Variations Not Previously Certified.**

152 In relation to Variation 18 and 20 my primary concerns relate to the Claimant not establishing an entitlement to claim the full scope of this work as a variation to the contract by contesting the issue of the separate agreement with another site contractor or providing evidence of specific direction from the Respondent. In addition, my concerns in relation to the material submitted for Variation 40, are also concerns I have with regard to the material submitted for this variation. The Respondent has rejected the claim in the Payment Schedule, however, in the Adjudication Response at Item 15 in relation to this variation has conceded that the material claimed was not from other contractors spoil but has come from excavations for the crib wall. The Respondent at Item 15 states:
"Mr Eberhart has relied upon the applicant's figures of 6,500m3 to make his assessment. The respondent does not agree with those figures (and neither does Mr Eberhart) but they are adopted for the sake of argument and can (for the purposes of this adjudication only) be accepted by the adjudicator.
The assessment is $27,301.68 as set out in Mr Eberhart's statement."
I prefer the Respondent's alternative assessment in valuing this variation.

153 The Respondent in the Adjudication Response is relation to claiming a set-off at Item 15 states inter alia:
"Given that the respondent has overpaid the applicant on variation 40 by $99,969.95, it is submitted that the adjudicator should determine that nothing is payable for this variation."
And at Item 16 states:
"I submit that the Adjudicator is bound to consider and take into account this off setting claim against the applicant."
I have based my valuation of Variation 40 on acceptance of the amount included by the Respondent in the Payment Schedule and not on the 'Eberhart' assessment. I do not accept that the 'Eberhart' assessment in using a global method of productivity assumptions has allowed for all considerations relating to the work, in particular the degree of error generated in the scenarios quoted by the fact that the dockets on which Mr Eberhart relies to derive truck hours I have found to include a considerable amount of very inefficient cartage hours for material moved to stockpile on site. In addition the assessment of $45,864.00 derived by using the Claimants volume does not make any allowance for associated loading and supporting equipment, any labour or other incidentals peculiar to this works operation. The Respondent in the Payment Schedule has included the overpayment of Variation 40 as a reason for withholding payment, however, I am not sufficiently satisfied by the submissions relating to overpayment to accept the revised assessment provided in the Adjudication Response, therefore, I find no set-off amount is available from Variation 40.

154 For the reasons stated above the claim for Variation 18 and 20 **I accept the Respondents assessment and decide the amount of $27,301.68 for 'Variation 18 & 20' is to be carried to Summary of Variations Not Certified**

155 **Variation 49** - Remove and replace soft material in subgrade. The Payment Claim claims the amount of $2,378.20 and the Respondent in the Payment Schedule has included the reduced amount of $2,068.00 by reason that only a 10% allowance has been included for overheads and profit.

156 The Claimant in the Payment Claim at Item 4.14 has set out the basis of claim and referred to the amount included in CPA 12 of $1,880.00.

157 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

158 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads, therefore, I accept the Respondents determination of $1,880.00 plus a margin of $188.00, **and decide the amount of $2,068.00 for 'Variation 49' is to be carried to Summary of Variations Not Previously Certified**.

159 **Variation 50** - Re-profile AC to achieve 3% grade. The Payment Claim claims the amount of $2,020.25 and the Respondent in the Payment Schedule has rejected the claim by reason that clause 40.2 precludes the claim due to the time bar as claim was not received within the 20 working days stipulated.

160 The Respondent in the Payment Schedule certificate response has provided the time bar as the only reason for rejecting this claim stating:
"These works were carried out mid December 2006. As the claim schedule is dated 23 February 2007, ….."

161 Clause 40.2 of the Contract requires the Contractor to advise the Superintendent within 20 days of receiving a notice in writing from the Superintendent advising the Contractor of a proposed variation under clause 40.

162 The Respondent has provided no details of the date of any such notice for this variation issued pursuant to clause 40 and my perusal of the site instructions issued since December 2006 does not unearth such a notice.

163 The Respondent in the Payment Schedule at Item 355 states:
"I say that it was always made clear that the Principal's Representative had no power to issue instructions. MKG were told that on many occasions and that, if the Principal's Representative issued an instruction, it was to be confirmed to the Superintendents Representative by MKG."

164 The Respondent has not contested that the direction was given by the engineer Mr Ide presumably acting as an agent of the Respondent and it would be expected that such a direction would have been followed up with a Superintendents site instruction in any event, but this appears not to have occurred. The Claimant has issued confirmation of such instruction, by virtue of its payment claim 22 December 2006 to the *Superintendents Representative*, resulting in a claim being made under the contract as a variation.

165 I do not accept that the Respondent has complied with the contract sufficient to allow a time bar to be invoked in this instance.

166 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $1,979.00 being $1,704.00 (80m2 of 50AC pavement at line item 2.17 rate of $21.30 per square metre), plus excavator cost of $275.00 ($250.00 plus margin of $25.00)

167 For the reasons stated above **I decide the amount of $1,979.00 for 'Variation 50' is to be carried to Summary of Variations Not Previously Certified**.

168 **Variation 51** - Additional Trench for Electric Conduit. The Payment Claim claims the amount of $2,213.75 and the Respondent in the Payment Schedule has rejected the claimed amount by reason that the work was included in the original scope and no direction was issued by the Respondent.

169 The Claimant in the Payment Claim at Item 4.16 has set out the basis for the claim as being given a direction by the Respondents agents to provide a 70m trench for electrical conduit to the Garden Centre. And at Item 4.16.2 states inter alia: *"This work is additional to the tendered scope of work as it did not form part of the original layout. …"*

170 The Respondent in the Payment Schedule certificate response for this variation asserts that there was no direction given and the Contract required a conduit be provided to the Garden Centre in any event, however, due to program delays the original conduits had not been installed in time and a separate line was installed from a different location to provide the service. The Respondent maintains that it was done in this manner for the convenience of the Claimant as it was due to programming deficiencies in that the work was programmed to be completed by 21 July 2006 but remained uncompleted in early December 2006.

171 The Claimant has not adduced any written evidence to support its claim that a direction was given or provided details of what the direction entailed in regard to the original layout of conduits to show that it was additional to the original scope of works. Nor has the Claimant address the reason for rejecting the claim provided in the Payment Schedule.

172 For the reasons stated above the Claimant has not satisfied me of an entitlement under the Contract to a variation and, therefore **no valuation amount is decided for 'Variation 51' to be carried to Summary of Variations Not Previously Certified**.

173 **Variation 52** - Relocate Fire Hydrant at McDonalds. The Payment Claim claims the amount of $3,461.96 and the Respondent in the Payment Schedule has rejected the claim by reason that clause 40.2 precludes the claim due to the time bar as claim was not received within the 20 working days stipulated.

174 The Respondent in the Payment Schedule certificate response has provided the time bar as the only reason for rejecting this claim stating:
"As it appears these works were carried out in early January 2007and the claim schedule is dated 23 February 2007, ….."

175 Clause 40.2 of the Contract requires the Contractor to advise the Superintendent within 20 days of receiving a notice in writing from the Superintendent advising the Contractor of a proposed variation under clause 40.

176 The Respondent has provided no details of the date of any such notice for this variation issued pursuant to clause 40 and my perusal of the site instructions issued since January 2007 does not unearth such a notice.

177 The Respondent in the Payment Schedule at Item 355 states:
"I say that it was always made clear that the Principal's Representative had no power to issue instructions. MKG were told that on many occasions and that, if the Principal's Representative issued an instruction, it was to be confirmed to the Superintendents Representative by MKG."

178 The Respondent has not contested that the direction was given by the Mr Holt presumably acting as an agent of the Respondent and it would be expected that such a direction would have been followed up with a Superintendents site instruction in any event, but this appears not to have occurred. The Claimant has issued confirmation of such instruction, by virtue of its payment claim 23 February 2007 to the *Superintendents Representative*, resulting in a claim being made under the contract as a variation.

179 I do not accept that the Respondent has complied with the contract sufficient to allow a time bar to be invoked in this instance.

180 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $3,010.40 being $2,736.73, plus margin of $273.67.

181 For the reasons stated above **I decide the amount of** $**3,010.40 for 'Variation 52' is to be carried to Summary of Variations Not Previously Certified**.

182 **Variation 54** - Spoil clean up at retail building. The Payment Claim claims the amount of $1,199.22 and the Respondent in the Payment Schedule has rejected the claim by reason that clause 40.2 precludes the claim due to the time bar as claim was not received within the 20 working days stipulated.

183 The Respondent in the Payment Schedule certificate response has provided the time bar as the only reason for rejecting this claim stating:
"As it appears these works were carried out in early January 2007and the claim schedule is dated 23 February 2007, ….."

184 Clause 40.2 of the Contract requires the Contractor to advise the Superintendent within 20 days of receiving a notice in writing from the Superintendent advising the Contractor of a proposed variation under clause 40.

185 The Respondent has provided no details of the date of any such notice for this variation issued pursuant to clause 40 and my perusal of the site instructions issued since January 2007 does not unearth such a notice.

186 The Respondent in the Payment Schedule at Item 355 states:
"I say that it was always made clear that the Principal's Representative had no power to issue instructions. MKG were told that on many occasions and that, if the Principal's Representative issued an instruction, it was to be confirmed to the Superintendents Representative by MKG."

187 The Respondent has not contested that the direction was given by the Mr Holt presumably acting as an agent of the Respondent and it would be expected that such a direction would have been followed up with a Superintendents site instruction in any event, but this appears not to have occurred. The Claimant has issued confirmation of such instruction, by virtue of its payment claim 23 February 2007 to the *Superintendents Representative*, resulting in a claim being made under the contract as a variation.

188 I do not accept that the Respondent has complied with the contract sufficient to allow a time bar to be invoked in this instance.

189 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $1,042.80 being $948.00, plus margin of $94.80.

190 For the reasons stated above **I decide the amount of** $**1,042.80 for 'Variation 54' is to be carried to Summary of Variations Not Previously Certified**.

191 **Variation 56** - Extent 225mm stormwater line. The Payment Claim claims the amount of $2,034.12 and the Respondent in the Payment Schedule has included the reduced amount of $1,768.80.00 by reason that only a 10% allowance has been included for overheads and profit.

192 The Claimant in the Payment Claim at Item 4.19 has set out the basis of claim and referred to the amount included in CPA 12 of $1,608.00.

193 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

194 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

195 Therefore, I accept the Respondents determination of $1,608.00 plus a margin of $160.80, **and decide the amount of $1,768.80 for 'Variation 56' is to be carried to Summary of Variations Not Previously Certified**.

196 **Variation 57** - Excavator hire to remove spoil. The Payment Claim claims the amount of $5,151.71 and the Respondent in the Payment Schedule has included the reduced amount of $4,479.20 by reason that only a 10% allowance has been included for overheads and profit.

197 The Claimant in the Payment Claim at Item 4.20 has set out the basis of claim and referred to the amount included in CPA 12 of $4,072.50.

198 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

199 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

200 Therefore, I accept the Respondents determination of $4,072.50 plus a margin of $407.25, **and decide the amount of $4,479.75 for 'Variation 57' is to be carried to Summary of Variations Not Previously Certified**.

201

202 **Variation 58** - Remove and replace damaged rag bolt. The Payment Claim claims the amount of $2,085.99 and the Respondent in the Payment Schedule has included the reduced amount of $1,813.90 by reason that only a 10% allowance has been included for overheads and profit.

203 The Claimant in the Payment Claim at Item 4.21 has set out the basis of claim and referred to the amount included in CPA 12 of $1,649.00.

204 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

205 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

206 Therefore, I accept the Respondents determination of $1,649.00 plus a margin of $164.90, **and decide the amount of $1,813.90 for 'Variation 58' is to be carried to Summary of Variations Not Previously Certified**.

207 **Variation 59** - Fire Hydrant Service and Branch Tee. The Payment Claim claims the amount of $6,471.74 and the Respondent in the Payment Schedule has rejected the claim by reason that no instruction was issued and the work is included in the original scope of works under the contract.

208 The Claimant in the Payment Claim at Item 4.22 sets out the basis of the claim as having been a direction by the Superintendent verbally on site on 24 January 2006. (appears to be a typing error)
And at Item 4.22.1 states inter alia:

"Fire hydrant service was extended to buildings B &C and a branch tee was installed as directed by the Superintendent's Representative on 25 January 2007. …"
And at Item 4.22.2 states inter alia:
"The work directed by the Superintendent's Representative was not contained in the tendered scope of work and is a variation to the contract in accordance with Clause 40.1."

209 The Respondent in the Payment Schedule in relation to this variation denies that any direction was given by the Superintendent and that he was not on site on 24 January 2006 or 2007 in any event. The Respondent in paragraph two further states: *"Contract drawing H15/d clearly indicates the fire services to be taken to within 2 metres of the Office A and B core. The extension line of the fire hydrant service from the fire hydrants to the building cannot be a variation."*

210 The Claimant has stated that the service was "*extended to buildings B &C and a branch tee was installed"* rather than Office A and B which I find confusing. I have perused the drawing referenced and find that the fire service lines are shown to be installed to a point adjacent to the Office A and B core area and also to Suites 1-20 which may relate to the Claimants reference to a building C.

211 The Claimant, in the Adjudication Application submissions has not contested the Respondents assertion that the work is covered on the hydraulic drawings or adduced further evidence to support the assertion in the payment Claim that the work is outside the scope of contract works.

212 The Claimant has failed to satisfy me in the submissions that there lies an entitlement to this claim for a variation, therefore, **no valuation for 'Variation 59' is carried to Summary of Variations Not Previously Certified**.

213

214 **Variation 60** - Re-survey Kerb Line. The Payment Claim claims the amount of $1,138.50 and the Respondent in the Payment Schedule has included the reduced amount of $990.00 by reason that only a 10% allowance has been included for overheads and profit.

215 The Claimant in the Payment Claim at Item 4.23 has set out the basis of claim and referred to the amount included in CPA 12 of $900.00.

216 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

217 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

218 Therefore, I accept the Respondents determination of $900.00 plus a margin of $90.00, **and decide the amount of $990.00 for 'Variation 60' is to be carried to Summary of Variations Not Previously Certified**.

219

220 **Variation 62** - Relocate Parking Bays. The Payment Claim claims the amount of $4,927.18 and the Respondent in the Payment Schedule has included the reduced

amount of $4,284.50 by reason that only a 10% allowance has been included for overheads and profit.

221 The Claimant in the Payment Claim at Item 4.24 has set out the basis of claim and referred to the amount included in CPA 12 of $3,895.00.

222 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

223 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

224 Therefore, I accept the Respondents determination of $3,895.00 plus a margin of $389.50, **and decide the amount of $4,284.50 for 'Variation 62' is to be carried to Summary of Variations Not Previously Certified**.

225 **Variation 63** - Excavate and fill trench for Fire Main. The Payment Claim claims the amount of $705.87 and the Respondent in the Payment Schedule has included the reduced amount of $613.80 by reason that only a 10% allowance has been included for overheads and profit.

226 The Claimant in the Payment Claim at Item 4.25 has set out the basis of claim and referred to the amount included in CPA 12 of $558.00.

227 The Respondent in the Payment Schedule certificate response has noted a 10% margin was also included in CPA 12.

228 For reasons stated earlier in this Decision I do not accept the Claimants higher margins for profit and overheads.

229 Therefore, I accept the Respondents determination of $558.00 plus a margin of $55.80, **and decide the amount of $613.80 for 'Variation 63' is to be carried to Summary of Variations Not Previously Certified**.

230 **Variation 65** - Repair damage to streetlight column. The Payment Claim claims the amount of $894.36 and the Respondent in the Payment Schedule has rejected the claim by reason that clause 40.2 precludes the claim due to the time bar as claim was not received within the 20 working days stipulated.

231 The Respondent in the Payment Schedule certificate response has provided the time bar as the only reason for rejecting this claim stating:
"These works were carried out in early March 2007. As the claim was received on the 16 October 2007, ….."

232 Clause 40.2 of the Contract requires the Contractor to advise the Superintendent within 20 days of receiving a notice in writing from the Superintendent advising the Contractor of a proposed variation under clause 40.

233 The Respondent has provided no details of the date of any such notice for this variation issued pursuant to clause 40 and my perusal of the site instructions issued since March 2007 does not unearth such a notice.

234 The Respondent in the Payment Schedule at Item 355 states:
"I say that it was always made clear that the Principal's Representative had no power to issue instructions. MKG were told that on many occasions and that, if the Principal's Representative issued an instruction, it was to be confirmed to the Superintendents Representative by MKG."

235 The Respondent has not contested that the direction was given by Mr Holt presumably acting as an agent of the Respondent and it would be expected that such a direction would have been followed up with a Superintendents site instruction in any event, but this appears not to have occurred. The Claimant has issued confirmation of such instruction, by virtue of its payment claim 16 October 2007 to the *Superintendents Representative*, resulting in a claim being made under the contract as a variation.

236 I do not accept that the Respondent has complied with the contract sufficient to allow a time bar to be invoked in this instance.

237 I have perused the Claimants determination of the amount claimed and find it reasonable and justified, and I have not been provided with any alternative pricing details from the Respondent. For reasons stated earlier in this Decision I am not satisfied any margin for on-cost above 10% has been substantiated and will reduce the claimed amount accordingly to $777.70 being $707.00 plus margin of $70.70.

238 For the reasons stated above **I decide the amount of $777.70 for 'Variation 65' is to be carried to Summary of Variations Not Previously Certified**.

239

240 **Variation 69** - Additional Road Signs. The Payment Claim claims the amount of $660.00 and the Respondent in the Payment Schedule has included the reduced amount of $330.00 by reason that two signs were swapped, one post relocated and one new sign was required, not three new signs as was claimed.

241 The Claimant in the Payment Claim at Item 4.31.1 states inter alia:
"The Superintendent Representative instructed MKG to install 3 additional road signs in a Superintendent's instruction reference SI-055 dated 20th December 2006. All 3 signs were installed in earlier 2007."

242 The Respondent in the Payment Schedule certificate response refer to the SI 055 which required that two signs were swapped, one post relocated and one new sign was required.

243 The Claimant has incorrectly claimed for three new signs and I am satisfied with the explanation provided by the Respondent. The allowance of $330.00 adjusted by a 10% margin for on-cost amounts to $363.00.

244 For the reasons stated above, **I decide the amount of $363.00 for 'Variation 69' is to be carried to Summary of Variations Not Previously Certified**.

245 Summary of Variations Not Previously Certified

Variation No	Item Description	
14	Remove and relay water line	$18,432.70
15	Remove and relay water line, sewer line clash	$5,768.40
30	Stand down of Excavator on 1 August 2006	$0.00
31A	Excavation in Rock to Roofwater, Water and Fire Services	$55,700.00
34	Fire Main Configuration	$4,346.32
18, 20	Spoil material off site to 24 July 2006	$27,301.68
40	Spoil material off site after 24 July 2006	$148,914.50
49	Remove and replace soft material in sub-grade	$2,068.00
50	Re-profile AC to achieve 3% grade	$1,979.00
51	Additional Trench for Electric Conduit	$0.00
52	Relocate Fire Hydrant at McDonalds	$3,010.40
54	Spoil clean up at retail building	$1,042.80
56	Extent 225mm stormwater line	$1,768.80
57	Excavator hire to remove spoil	$4,479.75
58	Remove and replace damaged rag bolt	$1,813.90
59	Fire Hydrant Service and Branch Tee	$0.00
60	Re-survey Kerb Line	$990.00
62	Relocate Parking Bays	$4,284.50
63	Excavate and fill trench for Fire Main	$613.80
65	Repair damage to streetlight column	$777.70
69	Additional Road Signs	$363.00
Total carried to Collection of Adjudicated Amounts		**$283,655.25**

PART K3 – VARIATIONS PC ITEMS

246 **Variation 24A & 24B** - Adjustment of PC Item 5.1 – Live Works by ICC from the Contract. The Payment Claim claims the amount of $7,537.30 against the Provisional Sum of $10,600.00, being a net deduction of $3,062.70, and the Respondent in the Payment Schedule has provided a different adjustment that I find very difficult to interpret.

247 The Respondent in the Payment Schedule relies on the Superintendent's certificate and contract price adjustments which are incorporated in CPA 04, CPA 05 and CPA 11. In respect of Variation 24:
CPA 04 deducts $10,000.00 (PS amount $10,600.00) and adds $6,083.00 then applies 10% on-cost to the net amount, effectively adding $608.30 on-cost to the value of the work whilst incorrectly deducting $1,000.00 on-cost on the PS amount.
CPA 05 attempts to adjust the CPA 04 error and adds $608.30 on-cost but does not deduct the $1,000.00 on-cost on previously incorrectly deducted with the PS amount then incorrectly adds a further 10% on-cost of $60.83.

CPA 11 further adjusts Variation 24 by adding $4,380.70 but no explanation is given on how this figure is made up. I am unable to reconcile the Overheads and Profit figure of $18,952.06 at all and do not intend to pursue the matter any further. I concur with the Claimant that these contract price adjustments are not reconcilable. NB: CPA 08 also incorrectly deducts the PS amount of $10,600.00 against Variation 48, and I will deal later with that adjustment.

248 The Contract at Clause 11 and the Specification at Part 1 Monetary Schedules clearly sets out adjustment mechanism for provisional sums, being valuation under Clause 40.5. The provision sum includes labour, materials and all costs and margins but not GST.

249 I find that the Claimant in the Payment Claim has complied with the Contract adjustment mechanism for this provisional sum, therefore **I decide the deduction of $3,062.70 for 'Variation 24A and 24B' is to be carried to Summary of Variations PC Items**.

250 **Variation 36A & 36B -** Adjustment of PC Item 6.1 – Hydrant Booster Assembly from the Contract. The Payment Claim claims the amount of $31,627.20 against the Provisional Sum of $21,000.00, being a net addition of $10,627.20, and the Respondent in the Payment Schedule appears to have accepted this adjustment, although, as for the previous variation, I am unable to reconcile the CPA 11 Overheads and Profit figure of $18,952.06 at all and do not intend to pursue the matter any further.

251 The Contract at Clause 11 and the Specification at Part 1 Monetary Schedules clearly sets out adjustment mechanism for provisional sums, being valuation under Clause 40.5. The provision sum includes labour, materials and all costs and margins but not GST.

252 I find that the Claimant in the Payment Claim has complied with the Contract adjustment mechanism for this provisional sum, therefore **I decide a net addition of $10,627.20 for 'Variation 36A and 36B' is to be carried to Summary of Variations PC Items**.

253 **Variation 38A & 38B -** Adjustment of PC Item 8.5 – Relocate Existing Lights from the Contract. The Payment Claim claims the amount of $33,906.40 against the Provisional Sum of $12,000.00, being a net addition of $21,906.40, and the Respondent in the Payment Schedule appears to have accepted this adjustment, although, as for the previous variation, I am unable to reconcile the CPA 11 Overheads and Profit figure of $18,952.06 at all and do not intend to pursue the matter any further.

254 The Contract at Clause 11 and the Specification at Part 1 Monetary Schedules clearly sets out adjustment mechanism for provisional sums, being valuation under Clause 40.5. The provision sum includes labour, materials and all costs and margins but not GST.

255 I find that the Claimant in the Payment Claim has complied with the Contract adjustment mechanism for this provisional sum, therefore **I decide a net addition of $21,906.40 for 'Variation 38A and 38B' is to be carried to Summary of Variations PC Items**.

256 **Variation 48A & 48B** - Live Sewer of PC Item 5.1 – Live Works by ICC from the Contract. The Payment Claim claims the amount of $10,202.72 against the Provisional Sum item previously expended by Variation 24, and the Respondent in the Payment Schedule rejects this claim by reason that the works are part of the contract scope of works and as such are not claimable.

257 The Claimant in the Payment Claim at Item 4.13.1 in relation to the factual background states inter alia:
"Ipswich City Council was overcommitted and unable to carry out the live sewer connection. Permission was given by Ipswich Water for MKG undertake the work. MKG completed this work under the general supervision of the Superintendent's Representative at a cost of $9,275.20.
Variation and Site Instruction and Memorandum No 0976 dated 23 September 2006 detailed the work required for connection to the Ipswich City Council Manhole. The claim for the work was submitted with PC No 7 in the amount of $9,275.20. …."

258 I have perused the instruction issued by Ipswich City Council (ICC) No 0023 and find no comment that supports the Claimants assertion that the work related to the ICC connection works, but rather that it was permission to install two bends related to the house connection line. The Claimants site instruction 0976 states that the work was carried out because ICC could not perform the work, but I have found no evidence in the Claimants submissions to support that statement. In fact the claim includes two manholes and 22 metres of 150 sewer pipe which supports the Respondents submission that the work is not a variation.

259 I find that the Claimant in the Payment Claim has failed to satisfy me that the work is part of the adjustment to the provision sum allowance for work by ICC or that the work is a variation to the scope of work and therefore, **I make no valuation for 'Variation 48A and 48B' is to be carried to Summary of Variations PC Items**.

260 **Variation 68** - Deletion of PC Item 2.23 Steps, Path and Handrail from the Contract. The Payment Claim claims the amount of $9,500.00 against the Provisional Sum Item 2.23, and the Respondent in the Payment Schedule rejects this claim by reason that the provisional sum works have been deleted from the scope of works and the $9,500.00 has been deducted from the contract amount in CPA 11.

261 The Claimant in the Adjudication Application submissions at Item 147 of Section 'H' has withdrawn its claim for $9,500.00.

262 Therefore, I find that the deletion of the provisional sum allowance is valid, **and decide a deduction amount of $9,500.00 for 'Variation 68' is to be carried to Summary of Variations PC Items**.

263 **Live Water Connection** - Deletion of PC Item 7.1 Live Water Connection by ICC from the Contract. The Payment Claim claims no adjustment of the Provisional Sum Item 7.1, and the Respondent in the Payment Schedule rejects this claim by reason that the provisional sum works have been deleted from the scope of works and the $26,500.00 has been deducted from the contract amount in CPA 11.

264 The Claimant in the Adjudication Application submissions at Item 147 of Section 'H' has withdrawn its claim for $26,500.00.

265 Therefore, I find that the deletion of the provisional sum allowance is valid, **and decide a deduction amount of $26,500.00 for 'Live Water Connection' is to be carried to Summary of Variations PC Items**.

266 Summary of Variations PC Items:

Variation No	Item Description	
24A & 24B	Adjustment of PC Item 5.1 – Live Works by ICC	-$3,062.70
36A & 36B	Adjustment of PC Item 6.1 – Hydrant Booster Assembly	$10,627.20
38A & 38B	Adjustment of PC Item 8.5 – Relocate Existing Lights	$21,906.40
48A & 48B	Live Sewer of PC Item 5.1 – Live Works by ICC	$0.00
68	Deletion of PC Item 2.23 Steps, Path and Handrail from the Contract	-$9,500.00
	Deletion of PC Item 7.1 - Live Water Connection from the Contract	-$26,500.00
Total carried to Collection of Adjudicated Amounts		**-$6,529.10**

PART K4 - VARIATION DELETIONS BY SUPERINTENDENT

267 **Work Deleted and Constructed by Others** – The Claimant in the Payment Claim at Item 2.13 sets out its submission that the Respondent has no power to delete works from the Contract and then award that same scope of work to another party. Variations affected by this issue are deletion of grease traps No 64, deletion of McDonald's car park No 66 and deletion of roadworks under Motel and Office A & B No 67.

268 The Claimant, in Item 2.13 in relation to authority under the contract, states:
"The Superintendent has purported to remove this work from MKG's hands pursuant to clause 40.1 of AS 2124. However, neither clause 40.1 nor any other provision in the contract grants it any such power.
It is emphasised here that MKG is not claiming damages for breach of contract. Pursuant to BCIPA, such an exercise would be outside the scope of a payment claim. MKG is instead contesting the ability of the Principal and the Superintendent to deduct from the amount owing to MKG an amount for work taken out of MKG's hands. This work was taken from MKG pursuant to a breach of contract, and it is impermissible for the Principal to withhold money on account of its own breach."

269 The Claimant relies for legal authority on the High Court decision on *Carr v J A Berriman Pty Ltd (1953) 89 CLR 327* stating:

"In that case, the court relevantly said in relation to the use by the principal of the variation power to omit works and give that omitted work to another:
'But they do not, in my opinion, authorise him to say that the particular items so included shall be carried out not by the builder with whom the contract is made but by some other builder or contractor. The words used do not, in their natural meaning, extend so far and a power in the architect to hand over at will, any part of the contract to another contractor would be a most unreasonable power, which very clear words would be required to confer'. Berriman is authority to the effect that a variation power will only permit a Superintendent to remove work from the hands of the Contractor and give it to another party where the contract contains very clear words to that effect."

270 The Claimant is not claiming damages for breach of contract but contesting the validity of the CPA issued and disputes the authority under the contract of the Respondent to delete work and pass that same work to another contractor. My role is to value the work completed under the contract and the Claimant does not dispute that it did not carry out these works. The authority referred to above does not provide me with any powers to include the full value of the work as claimed in the adjudicated amount on the basis that an invalid adjustment to the contract sum has been made by the Respondent. Where no work has been completed I am unable to include a value for these works in the adjudicated amount (other than that allowed by the Respondent) that in some way compensates the Claimant for losses resulting from deletion of the work regardless of whether the work is passed to other to complete or not. These works have been included in full in the Parts A to J of the claim and to arrive at an adjudicated amount I must deduct any works not completed. Therefore, I see no reason to make any finding on the actions of the Respondent in deleting these sections of work in determining the value of completed work in these variations.

271 I do not accept that the Claimant can simply not deduct the value of the works not completed, however, the Claimant may elect to contest the amount of the deduction and it is in this light that I will asses these variations. The Respondent in the Payment Schedule certificate responses has generally indicated that the amounts have been adjusted to allow payment of the profit and overheads component.

272 **Variation 31B** - Deletion of Item 5.7 – Excavation of Rock from the Contract. The Payment Claim claims the amount of $36,300.00 had been deducted in error in the manner of Provisional Sum adjustment, and the Respondent in the Payment Schedule accepted this assertion and corrected the mistake in CPA 11 by reinstating the amount.

273 Therefore**, I decide a nil amount for 'Variation 31B' to be carried to Summary of Variations Deletions by Superintendent**.

274 **Variation 64** - Deletion of Grease Trap. The Payment Claim claims the amount of $7,500.00 had been deducted invalidly under the Contract, and the Respondent in the Payment Schedule certificate response states that the Claimant had agreed to this work being deleted from the scope of work in CPA 07 for the convenience of the Claimant.

275 The Claimant in the Payment Claim at Item 4.26.1 states inter alia:

"Superintendent's Instruction SI-038 dated 4 October 2006 instructed the Hotel grease interceptor trap was deleted including drainage lines back to manhole No HD/IC3A. The work was then awarded to others without any agreement (verbal or otherwise) from MKG or any compensation. MKG was available to execute the work and there is no evidence to the contrary.
Item 5.5 of the Works Schedule lists Grease Traps - 2000 litre at $5,500.
Contract Price Adjustment CPA-07 dated 30 November 2006 deducts the item at $7,500 which is an error by the Superintendent's Representative. ….."
And at Item 4.26.2 states inter alia:
"The Superintendent's Representative has no power under the contract to delete works from the contract and award the same works for immediate construction by others. …."

276 The Respondent has not provided any breakdown of the amount but does indicate that it includes both the grease trap and the house drain line to the manhole and that the margin for profit and overheads is retained by the Claimant. Strangely, I have not been provided with a copy of CPA 07 at Appendix 5 of the Adjudication Application to check the Respondents assertion regarding the on-cost but find, that in determining a valuation for a progress payment on this basis, the Respondent has taken a reasonable approach. The Respondent, although conceding that the Claimant retains a profit and overheads margin, has not made this adjustment.

277 The Claimant has submitted that the Respondent has erred in its calculation by deducting an amount above the line item value of the grease trap at $5,500.00 but fails to account for the deletion of the drainage line. I prefer the assessment of the Respondent in adjusting for this variation, but will apply a further adjustment of 10% margin reducing the deduction amount by $681.82 (being one eleventh of the amount) to $6,818.18.

278 Therefore, **I decide a deduction amount of $6,818.18 for 'Variation 31B' is to be carried to Summary of Variations Deletions by Superintendent**.

279 **Variation 66** - Delete McDonalds Carpark Paving & Kerb. The Payment Claim claims the amount of $129,175.00 had been deducted invalidly under the Contract, and in any event the deduction is excessive and the Respondent in the Payment Schedule certificate response states that the work was deleted from the scope of work in CPA 09.

280 The Claimant in the Payment Claim at Item 4.28.1 disputes the whole of the amount deducted, and also submits that in the event an amount is to be deducted, that the rates used by the Respondent are not appropriate and provides an alternative calculation of $52,571.20 less a margin for on-costs.
And at Item 4.28.3 states inter alia:
"MKG advise that the rate in the contract for CBR 45 (Item 2.4) should be $72/$m^3$ and not $72/$m^2$ but given that MKG claims no deduction is appropriate this point is not pursued."

281 The Claimant does however pursue the point in the Adjudication Application at Items 137 to 139 presenting a case that it is not reasonable to use the line items 2.3 and 2.4 rates for CBR 45 and CBR 80 that were included in the schedule.
And at Item 139 states:
"It is submitted that the mistake is self-evident on the face of the Contract; a rate of $74.00 per square metre of CBR 80 material or $72.00 per square metre of CBR 45 bears no relationship to industry norms and can not plausibly be taken to represent the intention of the parties."
The Claimant at Item 140 has provided an alternative calculation for consideration.

282 The Respondent in the Payment Schedule certificate submissions for this variation has also provided calculations for the amount deducted.

283 I have perused the calculations presented from both parties and the quantities for similar items vary between the parties. Those presented by the Claimant appear to be more accurately determined and reasonable with the calculation of pavement area (1367m2) and base course volumes reflects the specified items correctly. (CBR 45 100 thick at 136.7m3 and CBR 80 125 thick 170.875m3) The Respondent has included an area estimate of 1400m2 and assumed all base course material to be CBR 45. The Claimant has also included an item for sub-soil drains as per line item 2.12 and the Respondent an item for 4m of spillway at $130.00 per metre at the line item 4.20 rate. It should be noted that this line item has been later deducted in any event in CPA 12.

284 I prefer the more accurate calculations of the Claimant and I concur with Claimant that the schedule rates for the base course CBR 45 and CBR 80 material are not reasonable to apply to this deduction. The Respondent has accepted the tendered amount on a lump sum basis and the Bill of Quantities 'alternatives' clauses are rendered 'Not Applicable' in Annexure A and no reference is made to a schedule of rates expressly included in the Contract to be applied in the valuation of variations, therefore the breakdown submitted by the Claimant should only be used to the extent that it is reasonable so to do. The contract area of asphalt pavement (AC) totals 20,100 m2 at line items 2.16 and 2.17 and should it have been intended that the base and sub-base courses were to be measured in square metres then the quantities in line items 2.3 and 2.4 must also reflect similar area as the specification provides for sub-base CBR 45 100 thick under 25 AC and 150 thick under 50 AC paving and base course CBR 80 100 thick under both 25AC and 50AC. For example the line item 2.5 for final trim has a quantity of 21,200 m2. The effect of applying the square metre rates introduces a factor of between 6 and 10 times the value of deduction for these two items and in fact if applied in the manner used by the Respondent deducts $100,800.00 from the line item 2.3 total of $122,396.00 being some 82% when the paved area deducted as a percentage of the total is only some 7%. I am satisfied that it is not reasonable to use the line item rates for the base and sub-base material deduction and therefore the variation will be valued under Clause 40.5(c) of the Contract. In this Decision, as I am determining the value of work completed, and variations in accordance with the Contract, I find that the Respondent is not justified in deducting an amount based on the calculations provided.

285 Therefore, I find the calculations of the Claimant to be the preferred deduction in the amount of $52,571.20, but as conceded by the Respondent, will apply a further adjustment of 10% margin reducing the deduction amount by $4,779.20 (being one eleventh of the amount) to $47,792.00.

286 Therefore, **I decide a deduction amount of $47,792.00 for 'Variation 66' is to be carried to Summary of Variations Deletions by Superintendent**.

287 **Variation 67** - Delete roadworks under Motel and Office A & B – The Payment Claim claims the amount of $95,196.78 has been deducted invalidly under the Contract, and the Respondent in the Payment Schedule certificate response states that the work was deleted from the scope of work in CPA 12.

288 The Claimant in the Payment Claim at Item 4.29 disputes the whole of the amount deducted. And at Item 4.29.3 states inter alia:
*"The claim was submitted previously in progress claim No 12. The claim is simply that no deduction be made to this lump sum contract for the deductions from the contract that were awarded to others. Therefore credit of **$116,155.00** is claimed."*

289 The Claimant submits no calculations and no explanation of the $116,155.00 amount noted in Item 4.29.3 of the Payment Claim. I do not find it to be an alternative determination of the deduction amount but rather it appears to be an amount that has been deducted by the Respondent in the CPA's but I am unable to reconcile that amount.

290 The Respondent in the Payment Schedule certificate submissions for this variation has provided calculations for the amount deducted and as the Claimant has not provided an alternative calculation and has not contested the line items used or the rates applied I am left to determining whether the respondents calculation is reasonable and the amount is justified under the contract. The Respondent has again used the line item 2.3 rate for CBR 45 sub-base material and the parties are referred to my reasons in Variation 66 where I do not accept use of the schedule rate is reasonable or justified and will value the variation under Clause 40.5(c) of the Contract. Applying the same logic as in determining Variation 66 and the Respondents paved area quantity multiplied by the contract specification of CBR materials, I make the appropriate adjustments below:
Area of Paving1010m2

Item	Quantity	Unit	Rate	
Kerbing	345	m	$49.00	$16,905.00
Line Marking	557.5	m	$5.00	$2,787.50
Pram ramps	6	No	$350.00	$2,100.00
25 AC	1010	Sq M		$0.00
CBR 45 Sub-base 100mm	101	Cu M	$72.00	$7,272.00
CBR 80 Base 125mm	126.25	Cu M	$74.00	$9,342.50
Total				$38,407.00

291 Therefore, I find a deduction in the amount of $38,407.00, but as conceded by the Respondent, will apply a further adjustment of 10% margin reducing the deduction amount by $3,491.55 (being one eleventh of the amount) to $34,915.45.

292 Therefore, **I decide a deduction amount of $34,915.45 for 'Variation 67' is to be carried to Summary of Variations Deletions by Superintendent**.

293 **Superintendents Deletions CPA 12 –** The Respondent in the Payment Schedule certificate response has withheld payment on various items listed below which have been deleted from the Contract works in Contract Price Adjustment 12 as works deleted and therefore not completed. The deleted items are:

(a) Spillway two items $1,440.00 (Refer line Item 2.22) and $3,510.00 (Refer line Item 4.20).
(b) Clearmake DD600 from Bin Store $13,500.00 (Refer line Item 3.10).
(c) Bin Store Floor Slab $2,250.00. (may have been part of line Item 8.9)
(d) Fence to top of retaining wall $9,828.00 (Refer line Item 2.30).

The line item references were not noted in the CPA issued and I have added these to provide some clarity. The total deducted is $30,528.00.

294 The Claimant in the Adjudication Application at Item 143 to 145 in relation to the deleted items states:
"143. In some cases, the superintendent has deleted work that has in fact been performed by the Claimant.
144. The Claimant refers to items 2.2 and 3.10 as items that fit this description; the work in respect of these items was performed in full.
145. Substantial work was also performed in the case of item 4.20; and the Claimant incurred significant costs. It still possess a Clearmake DD600 used in this work. The work for item 4.20 was the subject of two show cause notices."

295 The Claimant has asserted that all or substantial parts of work to line Items 2.20, 3.10 and 4.20 was carried out and from perusing the material submitted I relation to the show cause notices the Claimant has advised the Respondent that a claim was being prepared in that regard. The Claimant has the onus to satisfy me what work was carried actually out and what costs may be involved in relation to these items, however, the Claimant has provided no case to support the assertions that work was done or directed me to any information in the submissions that would provide information and costings for my consideration. The referral to the show cause notices does not provide this information.

296 The Respondents assessment has adjusted the line item amounts by 10% rather than one eleventh, but this only decreases the amount deducted, therefore, **I decide a deduction amount of $30,528.00 for 'Superintendents Deletions CPA 12' to be carried to Summary of Variations Deletions by Superintendent**.

297 Summary of Variation deletions by Superintendent

Variation No	Item Description	
31B	Deletion of Item 5.7 Rock Allowance	$0.00
64	Deletion of Grease Trap	-$6,818.18

66	Deletion of McDonalds Carpark Paving & Kerb	-$47,792.00
67	Deletion of Roadworks under Motel and Office A & B	-$34,915.45
CPA 12	Superintendents Deletions	
	Spillways, Clearmake DD600 form Bin Store, Bin Store Floor Slab, Fence to top of Retaining Wall	-$30,528.00
Total carried to Collection of Adjudicated Amounts		**-$120,053.63**

SECTION NO 5.5 – PROLONGATION COSTS

298 The Clamant in the Payment Claim has set out its claim for delay, disruption and prolongation at Item 2.16 Factual Background, Item 3.5 & 3.6 Basis of Claim and Item 5.5 Quantification. The claim is in the amount of $234,647.42 and the Respondent has included no amount in the Payment Schedule and stated the reason for withholding payment as rejection of any entitlement under the Contract, and the time bar in Clause 40.2 of the Contract.

299 The Claimant in the Payment Claim at Item 3.5 & 3.6 submits that the relevant provisions in the Contract in relation to entitlement are Clause 35.5, 36 and 40.5(f) and submits further that due to the issues surrounding the granting of EOT's, and the lack of reasons and explanation with the issued EOT's, access has been limited to Clause 36 where an EOT is a condition precedent to a claim for costs and in the last paragraph states inter alia:
"….MKG will exercise it's entitlement under Clause 40.5(f) in this claim under the contract. Accordingly, there is no dependency on EOTs as awarded (or claimed) to determine MKG's financial entitlement due to Principal caused delays."
The Claimant has made no attempt to analyze what it considers time extensions that should have been granted actually were or the extent of the delays captured by the definition of compensable cause on which it could base a claim for cost pursuant to Clause 36. The Claimant submits that I need only assess the entitlement under Clause 40.5(f) of the Contract. I also refer the parties to my earlier findings on the matter of the overhead and profit margin, and the later section of 'Extension of Time and Liquidated Damages' in this Decision where I have provided reasons for not accepting the Claimants submissions in relation to time being 'set at large' in this Contract.

300 Contrary to the Claimants statement quoted above from Item 3.5 last paragraph, the Claimant in Item 3.6 fourth paragraph includes Clause 35.5 and Clause 36 in setting out its entitlement.

301 **The Global nature of the claim -** The Claimant in the Payment Claim at Item 5.5 sets out its claim for delay, disruption and prolongation by deriving a daily rate for on-costs based on, breaking down the Contract Sum using assumptions of 15% on-site margin and 10% off-site margin less an allowance of 4% profit and adjusted globally for margins in variation amounts as claimed, the total time on site less a concession of 10 days for wet weather to original date for completion of 4 September 2006, and a final adjustment of 25% reduction to accommodate delays that may have been due to the Claimants own causes.

302 In my view the matters to be considered in accepting a claim of this nature are:
(a) The margin for profit and overheads.
(b) Delay affecting the critical path.
(c) Timing and degree of disruption.
(d) Apportionment of the compensable events.
(f) Responsibility for delay event
(g) Liability for weather allowance.
(h) Accommodating this Decision.

303 **The margin for profit and overheads –** I have found earlier in this Decision that the Claimant has failed to satisfy me of the justification to claim percentages of 10 and 15% for on and off-site overheads and profit and this is a primary assumption in the calculations. The Claimant in the Payment Claim at Item 5.5.4 (a) concludes that, having examined the tender pricing of preliminaries and how the amount was derived, that it is not appropriate to use these amounts as they did not contain all the relevant overheads. The purpose of any schedule or breakdown is to define a basis for adjustment to the contract sum and I find this explanation to be unsatisfactory. At (b) the Claimant concludes that detail of actual costs was not sufficient to accurately determine this claim. Real cost figures can only be available from the company records and if not available from that source how can the Claimant state that the 10 and 15% margin is reasonable as these percentages and profit are derived from actual overheads and actual company turnover. Fixed verses variable overhead costs vary on every project and those cost breakdowns must be available from the Claimant for this project, rather than applying an arbitrary percentage adjustment. The adjustment for allowances already paid in variations including recovery on PC amounts and deducted scope of work can be determined accurately rather than applying a percentage again based on assumptions. At (c) the Claimant submits that a 'reliable' method of calculating a daily prolongation rate is using the Contract Sum and applying various assumptions and commonly used data from 'civil' construction industry figures to work back from the Contract Sum, but, as I have stated before these components can vary greatly from project to project and overhead figures from 'civil' companies would be more appropriate. I am not satisfied the Claimants reasons here are sound such to justify a global style of claim.

304 **Delay affecting the critical path –** The Claimant has not provided sufficient program information to ascertain how any events have affects the critical path. The Respondents submissions (and viewing the Claimants Appendix 12 of Payment Claim) satisfy me that no complete program complying with the requirements of the Contract was produced at the start of the project or at any stage during the course of the works and this has generated considerable doubt regarding whether events actually delayed the critical path,. Therefore, this doubt and uncertainty is due to the Claimant failure to comply with the Contract and it is the Claimant now using this fact to support the alternative global method of determining extra costs.

305 **Timing and degree of disruption –** I have reviewed the events as described in submissions from both parties to attempt to ascertain the degree of disruption caused by the changes to the various elements of the work and find there were disruptive events occurring during the course of the works. The timing of clashes with other contractors on site was has resulted from the slow progress in the early stages by the

Claimant and exacerbated by some directions by the Respondent (e.g. spoil issues). The Clamant in the Payment Claim at Item 2.17 has listed issues and events which it states were substantial. Off these the issues associated with spoil sites, survey issues and additional earthworks would have been disruptive, however, I did not find these matters to be such significance that they could be credited as being the total cause of the early delay. In any event the Claimant was in the main granted time claimed. The later events noted as transformer and booster pump assembly would also be disruptive but again the Respondent's agent did extend the contract time. The Claimant has not submitted details of costs associated with disruption of isolated events and I am not satisfied this could not have been done.

306 **Apportionment of the compensable events –** I am concerned at the difficulty in determining the real apportionment of time granted or additional time to complete for the compensable events. The Claimant in its submissions has not provided (other than a percentage concession) any breakdown sufficient to use as a basis for apportionment. I am not convinced the concession approach is reasonable.

307 **Responsibility for delay event –** Determining responsibility for delay events must encompass the performance and productivity of both parties. I concur with the Respondent that slow early progress due to lack of resourcing and planning would have been a significant contributing factor when considering the number of changes to critical personnel on site by the Claimant. I found the declaration of Ron Horner although to be weighted as an ex employee (possibly disgruntled), was convincing as evidence of the lack of resources. The inability to separate Principal caused delay from delay due to resource problems concerns me greatly and I do not accept the global approach is appropriate for this exercise.

308 **Liability for weather allowance -** Along with apportionment goes the weather allowance adjustment for rain after 18 September 2006, as apportionment of the extra time will also determine apportionment of the inclement weather occurring later in the project program.

309 **Accommodating this Decision –** The calculation does not accommodate the different variation amounts allowed in this Decision or what finally may be the resolved amounts.

310 For the reasons stated above, I find the Claimant has failed to make a case for a global claim of this nature sufficient for me to determine a valuation for Delay, Disruption and Prolongation**, therefore I decide no amount is to be carried to Collection of the Adjudicated Amount**.

SECTION NO 5.7 – INTEREST ON LATE PAYMENTS OF CERTIFIED PROGRESS CLAIMS

311 The Clamant in the Payment Claim has set out its claim at Item 2.21 Factual Background, Item 3.8 Basis of Claim and Item 5.7 Quantification. The claim is in the amount of $18,735.96 and the Respondent has included an amount of $3,985.83 in CPA 11 and CPA 13 and stated the reason for withholding payment as rejection of use of the QBSA Act penalty interest rate over the Contract rate, disputed dates for

receipt of progress claims ('PC') and dates payments were made, that a certificate was issued for progress claim 11, and that the Claimant failed to provides a Tax Invoice prior to payment.

312 **Application of the Queensland Building Services Authority Act 1991 ('QBSA Act') –** The Claimant at Item 3.8 has submitted that the construction work the subject of this claim is captured by the provisions of the QBSA Act based on the definition provided in Schedule 2 at Items (a), (c) and (e) and I find concurrence on this point with the Claimant. This has not been contested by the Respondent, however the Respondent in the Payment Schedule at Items 545 and 546 has contested the Claimants use of a compound method of calculation when applying the penalty rate. The rationale provided being that it is more practical to calculate interest based on simple interest and that the QBSA Act would need to clearly state the method of application of the rate if it was to be applied in a compound manner. I do not agree with the Respondent. Clause 67P(2) of the QBSA Act clearly states:
*"For the period for which the **progress amount**, or the part of the **progress amount**, is still unpaid after the payment time, the contracting party is also required to pay the contracted party interest at the penalty rate, as applying from time to time, **for each day the amount is unpaid**."* Highlighting added.
There is reference to two separate amounts, the "progress amount" referred to in the first line and "the amount" referred to in the last line. The "Progress amount" is defined in section 67P(1)(a) and is the original amount owed. The amount on which interest is to be calculated is not the "progress amount" but "the amount" (not defined elsewhere). There is no reference to simple interest whereas other legislation where simple interest is intended, it is specified e.g. where interest is specified to be simple interest only see section 47(3)(a) of the Supreme Court Act 1995). After interest has been calculated for the first day and any day thereafter, the only difference possible between "progress amount" and the "amount" would be the "progress amount" plus interest to arrive at "the amount" on which interest is to be calculated again. In addition, I have previously been provided with advice from the QBSA office that confirms interest should be calculated on a compounding basis.

313 For the reasons stated above, I find that the project is captured by the QBSA Act and the interest rate applicable to payment amounts due under the Contract to be the QBSA Act penalty rate which is higher than the rate of 7% stated in the Contract Annexure, and it is to be applied using a compounding method.

314 **Tax Invoices as a prerequisite to payment –** The Respondent in the Payment Schedule at Item 479 asserts that a Tax Invoice is required under the Contract pursuant to Clause 14.1 which places an obligation on the Contractor to comply with the requirements of 'Acts of the Commonwealth'. I do not agree.
The Respondent has not satisfied me that the Contract requires provision of a Tax Invoice as a prerequisite to payment being made. Neither Clause 14.1 nor the Payments Clause 42.1 imposes any restriction on payment being made. The provision of a Tax Invoice will allow input credits to adjust payment amounts of GST by the Respondent, however, the Respondent has not directed me to a particular clause in any Commonwealth Act that places an obligation on a payee to provide a Tax Invoice prior to payment being made. I find the Respondent has not satisfied me that any bar to payment is created by an 'Act of the Commonwealth'.

315 **The Superintendent –** The Claimant has made many references in the various submissions to the performance of the Superintendent and subsequent breaches of the Contract it claims resulted from that performance. The Respondent has countered these assertions by describing many breach situations on the part of the Claimant. These are matters of such complexity that they are for a Court to decide using all the facility of statements of claims and cross claims, examining and cross examining witnesses and with the luxury of time not being of the essence and resulting in a final and binding resolution. The submissions from both parties in this application are significantly deficient to allow me to draw any reasonable conclusion as to the performance of the Superintendent that may influence my decision. The nature of the adjudication process is to allow a progress payment on account based on a process limited by the Act and in making my decision I can only take into account factual matters sufficient to satisfy me that a progress payment is due from the Payment Claim served on the Respondent. It remains that I must be satisfied any amount is due and payable or withheld on grounds able to be justified.

316 **Late Certification and Dates of Service** - The Respondent in the Payment Schedule certificate response at Item 5.7 has submitted that it did not receive PC 9 and 10 by facsimile transmission as was the mode used for the other progress claims, but rather by post. The Claimant has not contested the fact that these progress claims were posted and has not provided any evidence of posting or any submissions in the Adjudication Application on this matter. Therefore I am not satisfied that the Claimant has made its case for service of the progress claims on the dates provided in the Payment Claim and I will accept the Respondents dates for receipt of the claims being for PC 9, 8 January 2007, and for PC 10, 7 February 2007, with all other progress claims served as per the Claimants submissions. I find the outcome being that PC 9 was not certified late and PC 10 was certified one day late.
In the same regard where dates are contested by the Respondents in submissions in the Payment Schedule ‘Append GC 08.1’ provided as part of the 31 October 2007 payment schedule I am also not prepared to accept dates when payment has been made or service of a mailed item (e.g. a cheque) without supporting evidence and will therefore be accepting the Claimants dates for receipt of payments. I note here that I have some difficulty reading the copy of ‘Append GC 08.1’ provided as quality is very poor and some dates obliterated by what appears to be highlighter applications.

317 **Interest on Late Payment of Certified Amounts –** The Claimant in the Payment Claim at Item 5.7.1 has stated that the claim for interest includes interest on interest for the period from the actual payment date to 31 October 2007. This being achieved in the schedule at Appendix 6 by determining interest to 20 September 2007 on each individual amount for a PC and then applying a global calculation up to 31 October 2007. The Claimant has provided no submissions demonstrating entitlement under the QBSA Act or the Contract in support of this method of determination.
S67P(1) of the QBSA Act states:
"67P Late progress payments
(1) This section applies if-
(a) the contracting party for a building contract is required to pay an amount (the progress amount) to the contracted party for the building contract; and

(b) the progress amount is payable as the whole or a part of a progress payment; and

(c) the time (the payment time) by which the progress amount is required to be paid has passed, and the progress amount, or a part of the progress amount, has not been paid.

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

My interpretation of S67P is that the section applies to amounts 'required to be paid under the Contract' by one party to the other. The Contract provides for the Superintendent to perform the certification role and in doing so determines the amounts 'required to be paid'. The parties are referred to my earlier comments regarding the performance of the Superintendent and I reject the further interest on interest claim.

I have accepted the Claimants explanation set out at Item 2.21.2 of the Payment Claim for progress claims, certification, payment, and set-off amounts in relation to PC 5, PC 9 and PC 10. I have found the 'Due Date' for PC 1 payment to be 16 May 2006 in lieu of 17 May 2006, for PC 6 to be 16 October 2006 in lieu of 14 October 2006 (service date was a Saturday), and for PC 9 to be 30 January 2007 in lieu of 17 January 2007 (due to later date of receipt by Respondent found earlier).

I have used the 'Calculator' found at website:
http://60.231.155.233:8080/bicrs/ourhouse/Interst67P/Interest67PHome.html
The Claimant appears to have incorrectly inserted the dates when interest applies, being from 'the day after the payment was due' to 'the day before the day of payment', into the 'Calculator". Having adjusted the dates (highlighted in schedule) and correctly applying the formulae process I find the amounts set out in the schedule below to be the interest payable on late certified amounts.

318 Summary of Interest on Late Payment of Certified Amounts

PC	Claim Date	Due Date	Payment Date	Amount Paid	Amount for Interest	S67P Interest
1	21/04/2006	16/05/2006	24/05/2006	$148,645.69	$148,645.69	$453.49
3	21/06/2006	12/07/2006	27/07/2006	$216,004.27	$216,004.27	$1,335.65
4	21/07/2006	11/08/2006	23/08/2006	$344,723.40	$344,723.40	$1,686.84
5	24/08/2006	14/09/2006	28/09/2006	$233,506.94	$317,738.12	$1,839.33
5			22/02/2006			
5			22/03/2007	$32,936.90		
5						
6	23/09/2006	16/10/2006	23/10/2006	$323,818.61	$323,818.61	$868.63
7	25/10/2006	15/11/2006	23/11/2006	$270,009.66	$270,009.66	$848.75
8	27/11/2006	18/12/2006	22/12/2006	$854,141.01	$854,141.01	$1,151.62
9	8/01/2007	30/01/2007	8/02/2007	$300,000.00	$552,137.60	$1,987.34
9			14/02/2007	$150,000.00	$252,137.60	$566.54
9			22/02/2007		$102,137.60	$321.12
10	7/02/2007	Offset Amount	22/02/2007		-$152,431.88	
11	23/02/2007	16/03/2007	22/03/2007	$128,881.87	$128,881.87	$290.62

	Sub-Total					$11,349.93
	Less GST					-$1,031.81
Total Interest decided on Late Payments of Certified Amounts carried to Collection of Adjudicated Amounts						**$10,318.12**

SECTION NO 5.8 – INTEREST ON PAYMENT SHORTFALL (OF VARIATIONS)

319 The Clamant in the Payment Claim has set out its claim at Item 2.21 Factual Background, Item 3.8 Basis of Claim and Item 5.7 Quantification. The claim is in the amount of $53,159.18 and the Respondent has included a nil amount in the Payment Schedule certificate response and stated the reasons for withholding payment as constant overcharging by the Claimant, variations being submitted with insufficient supporting evidence and rejection of any entitlement to claim under the Contract.

320 The Claimant in the Payment Claim at Item 5.8 states:
"Again, while MKG's claim that the Superintendent's Representative under-certified amounts in progress claims is real, the difficulty in proving these matters is significant and no claim is made in this payment claim for Contract work. The Payment Shortfall claims are for interest on variations not paid or under paid. Note that no interest is claimed."
I have perused the schedule in Appendix 6 and reject the concept being applied here. The Claimant appears to be saying that due to the inadequate performance of the Superintendent, the resultant breach by the Principal creates an entitlement to claim interest on all claimed amounts, not accepted, certified and paid during the course of the Contract. As can be seen from my assessment for a progress payment, some items are accepted and some items are rejected and I have no intentions of reconfiguring the Claimants spreadsheet based on my assessments of variation amounts. I reject this submission completely and the parties are referred to my earlier comments regarding the performance of the Superintendent. In my view the Superintendent has taken a perfectly reasonable course of action in assessing variation amounts where claimed amounts have not been agreed to enable payment to be made and I do not accept the Claimants assertions that any variation short paid is an under certification by the Superintendent. The progress payments made during the course of the works in a lump sum contract such as this are on account only and it is to be expected that the final agreed costs will be resolved in a final account process.

321 I am not satisfied from the Claimants submissions that an entitlement exists under the Contract for a claim of this nature, and I also find the Claimants calculations to be erroneous in nature considering final agreement has yet to be reached on many of the variations listed**. I make no valuation for Interest on Payment Shortfalls for Variations and no amount is to be carried to Collection of the Adjudicated Amount**.

SECTION NO 5.9.1 – INTEREST ON SECURITY AND RETENTION

322 The Clamant in the Payment Claim has set out its claim at Item 2.22 Factual Background, Item 3.9 Basis of Claim and Item 5.9 Quantification. The claim is in the amount of $5,464.54 and the Respondent has included an amount $794.71 in the Payment Schedule certificate response and stated the reasons for withholding payment as a reduced Superintendents assessment and included the adjustment in CPA 11.

323 I refer the parties to my findings in the previous sections of this Decision on what overdue amounts are valid to attract interest (Certified payment due), the interest rates to be applied (QBSA Act penalty rate) and withholding payment due to not being provided with a Tax Invoice (not valid).

324 I have reviewed the dates, calculations and interpretations of the submissions from both parties used to determine their respective positions. The Claimant claims the full amount of the retention should have been paid due to having provided a bank guarantee for 2.5% of the contract sum, but this has been contested by the Respondent in the Payment Schedule stating that although a copy of a bank guarantee was sent to the Superintendent, no original documents were ever provided to the Principal for approval and acceptance of the form of undertaking being offered resulting in the withholding of retention amounts. The Claimant in the Adjudication Application has not provided any evidence of approval by the Respondent (pursuant to Clause 5.2 of the Contract and has in fact acknowledged this point at Item 2.22) and has not pressed its assertion that a bank guarantee was provided and currently in place. I prefer the submission by the Respondent that no valid bank guarantee was ever lodged with the Principal, therefore, I find the release of 50% of the retention amount to be justified, with the remainder retained during the defects period. I do not accept the Respondents interpretation of the contract clauses relating to due dates and times for payment, but have used the dates and information supplied by the parties and the Contract requirements to derive my determination of interest due.

325 The Payment Schedule certificate response confirms the Superintendent has certified release of 50% of retentions held in PPC 12 RR issued 9 July 2007 in the amount of $40,546.40. Payment under Clause 5.7 of the Contract is required to be made within 14 calendar days of certification hence being due 23 July 2007. The Respondent also states that due to not receiving a Tax Invoice until 2 November 2007, payment was not made until 6 November 2007.

326 The Claimant in the Payment Claim at Item 2.2 has set out its factual background stating Practical Completion of Stage 1 was 22 December 2006 and Stage 2 on 10 April 2006, not disputed by the Respondent. Clause 5.7 of the Contract and Annexure A reduces the Principal's entitlement to security and retention monies by 50% and further if the Superintendent was so inclined. The Notice of Practical Completion Stage 1 and 2 of the 10 April 2007 in the last paragraph states: *"The partial release of Retention Funds for Stage 1 and Stage 2 has been assessed at 80% of the total Retention. The attached Progress Payment Certificate formally releases the partial retention monies."* No certificate was attached which left this ambiguous statement to define the amount to be released. When the Superintendent

finally issued the certificate 9 July 2007 he released 50% of the total retention. The Claimant took it to mean, that the Superintendent intended to release 80% of the total retention held. Another interpretation could be that the 80% simply defined Stage 1 and 2 as a percentage of the total three stages and that in fact 20% of the retention was intended to be retained at 100%, and 80% of the retention reduced by half and this would have reduced the amount to be released. However, I am satisfied that the later certification by the Superintendent at 50% release is the best indication of his intentions at the time and I do not accept the Claimants view that 80% was to be released..
The Principal is required to pay the monies within 14 calendar days of the Superintendents determination of 10 April 2006, that being 24 April 2006. I consider this payment to be due under the Contract in a manner equal to a payment certificate issued by the Superintendent during the progress of the works. A progress claim from the Claimant or a payment certificate from the Superintendent not being required as prerequisites for payment to be due.

327 Therefore, for the reasons stated above, I find interest is due on the amount of $40,546.40 from 24 April 2006 to the date when payment was made on 6 November 2006. I reject the Claimants claim for interest on interest for the same reasons as stated previously in this Decision and using the same 'Calculator' as previously, **I decide the amount of $3,639.41 for Interest on Late Retention Payment is to be carried to Collection of the Adjudicated Amount**.

SECTION NO 5.9.2 – INTEREST ON PROLONGATION

328 The Clamant in the Payment Claim has set out its claim at Item 5.9.2 Quantification. The claim is for interest in the amount of $3,304.46 to be awarded due to the Superintendent not approving and certifying the prolongation item of $234,647.42 in the Claimant's previous payment claim in October 2007, and the Respondent has included no amount in the Payment Schedule certificate response.

329 I reject this claimed item and I refer the parties to my findings for the sections relating to interest claims above for my reasons in finding no entitlement for such a claim**. I make no valuation for Interest on Prolongation is to be carried to Collection of the Adjudicated Amount**.

SECTION NO 5.10 – CLAIM PREPARATION COSTS

330 The Clamant in the Payment Claim has set out its claim at Item 2.24 Factual Background, at Item 3.11 Basis of Claim and at Item 5.10 Quantification. The claim is for an amount of $124,086.00 for cost of resources in preparation of the Payment Claim, and the Respondent has included no amount in the Payment Schedule certificate response and submits reasons for withholding payment at Items 495 to 503 of the Payment Schedule being no entitlement under the Contract and the claim is time barred under Clause 46.1 of the Contract

331 The Respondent in the Payment Schedule submits that an adjudicator has no jurisdiction to consider a claim of this nature and at Item 496 and 497 states:

"496. An adjudicator has no jurisdiction to consider this claim. The work done by Evans & Peck is not construction work, or related goods and services, within the meaning of the Act.
497. The work done by Evans & Peck was not undertaken under the construction contract between MKG and the Principal. It was not ordered by the Principal or the Superintendent's Representative. It is not part of the scope of the work under the construction contract. It is not payable by the Principal under the Act."
The Claimant has not provided submissions on this issue in its Payment Claim or the Adjudication Application.

332 **Jurisdiction -** Is payment claim preparation construction work, or related goods and services, within the meaning of the Act? The Respondent has not provided any enlightening case which may provide an authority on the matter, however, there was mention of the subject matter in Coordinated Construction Pty Ltd v JM Hargreaves (NSW) Pty Ltd Pty Ltd & Ors [2005] NSWCA 228 where the issue related to costs that were necessarily incidental or ancillary to construction work undertaken to be carried out, the Judge at paragraph 62 stated inter alia:
"……If administering a contract involves work or expenses which cannot be related directly to a particular part of the physical construction, such work or expenses may nevertheless be related indirectly to the overall work, or some segment thereof. If so, s 13(2)(a) requires that part of the work, or the whole as appropriate, to be identified. It is inherently unlikely that a contract will provide for a payment unrelated to anything in the nature of physical activities identifiable as construction work……"
I am not aware of any case that directly addresses the issue to be decided here.
The sections of the Act that may prescribe jurisdiction are s11(b)(2) which states:
"(b) services of the following kind--
(ii) architectural, design, surveying or quantity surveying services relating to construction work;"
And Schedule 2 in the definition of 'carry out construction work' which states:
***"carry out construction work"** means—*
(a) carry out construction work personally; or
(b) directly or indirectly, cause construction work to be carried out; or
*(c) **provide advisory, administrative, management or supervisory services for carrying out construction work**."* (highlighting added)

333 It is evident from the case noted above, that administrative work may be part of construction work, providing the work is directly related to the contract works and should the basis of claim satisfy me that the work is directly related to the Contract works I find jurisdiction to decide an amount for a progress payment

334 **Basis of the Claim -** The Claimant in the Payment Claim at Item 3.11 in relation to 'basis of claim' has stated inter alia:
"…..MKG have an entitlement under Clause 40.5 to be reimbursed for all additional costs incurred in claim preparation due to variations and the Superintendent failing to value works reasonably as required by Clauses 40 and 23. ….."
I do not accept the performance of the Superintendent as a valid basis of claim and the parties are referred to my earlier comments in this Decision in this regard. I also do not accept that Clause 40.5 entitles the Claimant to *"be reimbursed for all*

additional costs incurred in claim preparation due to variations" as it requires the direction of the Superintendent pursuant to Clause 40.3 to activate the assessment of reasonable costs for preparing the measurements of variations or other evidence of cost incurred over and above the reasonable overhead cost. I concur with the Respondent that the Contract does not make any specific reference to claiming or assessing cost of making progress claims and the Act does not make specific reference to preparation costs of payment claims, at least not in the manner it does for ANA and Adjudicators fees.
The method clearly accepted and demonstrated by the conduct of both parties during the course of the works has been to allow reimbursement of the Claimant's overhead costs when variations arise by the application of a margin to the variation costs. The claimant has denied giving any such direction and the Claimant has not provided any specific evidence of a direction from the Respondent.
In any event the nature of the work is a claim for a progress payment and the global nature of the claimed item has not been submitted in any breakdown form that would allow me to ascertain if certain parts of the work was in fact directly related to a particular variation. And in addition to demonstrate that the work was clearly over and above a reasonable overhead cost.

335 I find this claim to be quite remote from any claim that could rely as a basis for entitlement on Clause 40.5 of the Contract and I am not prepared to further the case for the Claimant in this regard or in relation to somehow directly relating the preparation work to the construction work the subject of this Payment Claim. The Claimant, in the submissions made in this application, has failed to satisfy me of a direct relationship between the cost of preparing a progress claim and the construction work, or any entitlement to claim preparation for progress claims exists under the Contract or under the Act. **I make no valuation for 'Claim Preparation Costs' and no amount is to be carried to Collection of the Adjudicated Amount**.

EXTENSIONS OF TIME AND LIQUIDATED DAMAGES

336 I will use the abbreviation EOT and LD in this section.

337 The Respondent in the Payment Schedule certificate response has invoked Contract Clause 35.6 and deducted liquidated damages in the amount of $98,000.00.

338 The Respondents agent determined the amount assessing time on the basis set out below:

"(a) Date for Practical Completion Stage 1 and 2	*30 November 2007*
(b) Date of Practical Completion Stage 1	*22 December 2006*
(c) Date of Practical Completion Stage 2	*10 April 2007*
(d) Total Stage 1 late day	*16 days*
(e) Total Stage 2 late days	*102 days"*

The date at (a) I assume should read 2006, not 2007 and the counting of days appears to be business days rather than calendar days.
The determination went on to state:
"34% of the scheduled Stage 3 works had been completed by the time Stage 2 was completed, and therefore the completed works were included in Stage 2 Practical Completion Certificate.

Then based on the Claimants program of 11 May 2006 a period of 30 days was allowed for Stage 3 works and hence 20 days was deducted to adjust for deleted work. The percentage of Stage 3 works completed was determined by proportioning the paved areas in Stage 3. (1600m2 completed against 3100m2 deleted)
The resulting number of days attracting LD's was calculated as 102 + 16 – 20 to equal 98. The Respondent has conceded that no damages apply after 10 April 2007 by including a deduction allowance for work no longer in Stage 3 effectively providing a Practical Completion for Stage 3 within the Stage 2 certificate.

339 The Respondents entitlement to deduct LD's is derived from the Clamant not completing the stages by the extended date for completion.

340 The Claimant in the Payment Claim in relation to extensions of time has set Factual Background at Item 2.17, Basis of Claim at Item 3.5 and Quantification at Item 5.3.

341 The Claimant in the Payment Claim at Item 3.5 submits that the relevant provisions in the Contract in relation to entitlement are Clause 36 and 40.5(f) and submits further that due to the issues surrounding the granting of EOT's, and the lack of reasons and explanation with the issued EOT's, access has been limited to Clause 36 where an EOT is a condition precedent to a claim for costs and in the last paragraph states inter alia:
"….MKG will exercise it's entitlement under Clause 40.5(f) in this claim under the contract. Accordingly, there is no dependency on EOTs as awarded (or claimed) to determine MKG's financial entitlement due to Principal caused delays."
This has created some difficulty for the Claimant in relation to LD's as the submissions will not be focused on the awarding of more time and I will not be in a position assess the EOT claims to ascertain whether any further time should have been granted over and above the time granted by the Respondents agent.

342 The Claimant in the Adjudication Application in relation to recovery of LD's at Items 71 to 73 states inter alia:
"71. ….. It is the position of the Claimant that no liquidated damages are recoverable in the present matter because time has been set at large.
72. In this regard, the Claimant relies for authority on the case of Peak Constructions (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 114. …. Peak provides that a liquidated damages clause will be unenforceable when either of two circumstances arise:
(a) when a contract does not provide a mechanism by which the superintendent can grant an extension of time for delays caused by the principal; or
(b) when the superintendent fails to properly administer an extension of time clause.
73. The Claimant submits that the latter circumstance is present here. …..."

343 Therefore the Claimant case is relying entirely on 'time having been set at large' by the actions of the Superintendent and hence no LD's are recoverable by the Respondent. The Claimant in the Payment Claim at Item 2.11.3 in relation to the Superintendents obligations and discretion to grant time here has quoted the case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) NSWCA 211

which concerns a superintendent's discretion to grant an extension of time even in circumstances where the criteria for an extension of time are not made out.
And further the Claimant rejects the Respondents comments regarding *'Balmain'* in the Payment Schedule at Item 259 which stated:
"On the authority of this case, the Superintendent's Representative was perfectly entitled to refuse an extension of time and yet still be fair and reasonable to both parties. The contract required construction programs. MKG refused to comply with the contract requirements, both in the form of the construction program and the number of construction programs. This left the Superintendent without the aid that the contract had specifically given him to assess extensions of time."
The Claimant asserts that the exception identified is not applicable to the matter in hand as the reason given by the Respondent for not granting EOT's was difficulties due to the Claimant not providing adequate construction programs rather than the elapse of time.

344 I have perused the declarations of Mr Novelli (MKG Operations Manager) and Mr Holt (Principals agent) to ascertain what had occurred with respect to circumstances arising that affected time and some of these being drawing and survey setout, spoil removal, design errors, transformer enclosure, bin stores, fire main etc. Mr Holt has accredited the lack of adequate planning and administration of the works as the main reason for delays to the works in the early stages, when clear access was available to the work faces, which created later issues with coordination when other contractors came on site. Mr Holt has on many occasions noted incidences on site that did not attract any claim for an EOT. e.g. the crib wall construction and interference by fitout crews. Mr Novelli, on the other hand, has quoted many instances where disruption and delay was caused by the lack of direction or information (e.g. crib wall and retaining wall layout, transformer location, fire main) and continually made reference to the fact that no EOT was granted. In my view if a contractor is delayed, the initial onus is on him to provide a claim with supporting documentation such that would allow assessment at the time the incident occurred.
Mr Novelli in his statement at Item 102 to 104 in response to the question of inadequate programs, asserts that he did provide *'appropriate, realistic, meaningful'* programs and that in his opinion the lack of programs *'was not in any way the reason for the delays incurred on the project through to completion'*. I am amazed by this statement, particularly due to the Respondents overall project program demands demonstrated by the extremely onerous programming provisions in Clause 33.2 of the Contract.
The nature of the overall project is clear from the documentation provided as Volume 4 Specifications and Drawings in that several contractors were engaged or to be engaged on the site and as has been submitted on several occasions by the Respondent the Claimant had a Contractual obligation to coordinate its scope of work with the work of other contractors on site.

Mr Novelli appears to totally dismiss the Contract provisions stating as a reason that delays, disruption, poor documentation, lack of direction and timely instructions made it too difficult to program.

345 The Contract provisions required a program that commenced on the date of acceptance of tender and was so comprehensive I felt it worthy of including the entire Contract Clause in my Decision below:

The Contractor's construction program shall commence on the Date of Acceptance of Tender and shall:

(a) incorporate the following criteria:

(i) the work under the Contract shall be broken down into activities of sufficient specificity to enable accurate assessment of progress and the effects of delays to be made;

(ii) clearly defined critical paths shall be shown;

(iii) relationships between activities shall be sufficient in number to clearly indicate the intended sequence of work and shall show all dependencies dictated by constructability and the availability of labour or equipment resources;

(iv) off-site procurement activities shall be shown, including but not limited to:

(A) preparation, submission and approval of all relevant drawings; and

(B) order, manufacture and delivery periods for materials, plant and equipment;

(v) deadlines for selections or approvals by the Superintendent or the Principal shall be shown;

(vi) the lead times for the supply of all drawings and information relating to significant activities;

(vii) approval dates required from Authorities;

(x) all on and off Site activities;

(xi) testing requirements;

(xii) commissioning program

(xiii) inspection of the Works, preparation of a defects list and rectification of defects prior to practical completion;

(xiv) quality assurance inspections and approvals prior to practical completion; and

(xv) dates for placing orders for standard components;

(b) be revised by the Contractor at the Contractor's own cost and expense and submitted to the Superintendent at monthly intervals or whenever the Contractor falls 7 days behind the construction program;

(c) be in Primavera or another electronic form approved by the Superintendent and issued in hard copy to the Superintendent;

(d) be in such detail so as to advise the Superintendent of the details specified in this Clause 33;

(e) as a minimum indicate early start and finish dates and the duration of the Contractor's float;

(f) incorporate a separate program for each separable portion of the Works;

(g) be in sufficient detail to enable the Superintendent to integrate the work of others;

(h) clearly demonstrate the Contractor's ability to meet the Date for Practical Completion; and

(i) indicate all resources, including human resources to be employed on the Contract throughout its duration.

The Contractor shall make available any documentation reasonably requested by the Superintendent relating to the Contractor's construction program or the Contractor's progress of the work under the Contract.

Despite any other provision of this Clause;

(a) any program prepared or provided by the Contractor shall not be used as a construction program for the purposes of this clause until it has been approved by the Superintendent;

(b) the Contractor shall not be entitled to any addition to the Contract Sum arising from a direction of the Superintendent under this clause unless the Contractor has notified the Superintendent that the direction will result in the Contractor incurring more cost (together with an estimate of that cost) within 7 days after receipt by the Contractor of the direction and before the Contractor gives effect to the direction;

(c) the power of the Superintendent to require the Contractor to provide a construction program includes a power to require the provision of an updated construction program whenever the Superintendent requires after a change in the Date for Practical Completion or any circumstances affecting the progress of the work under the Contract;

(d) the Contractor shall provide a construction program and any updated construction program at its own cost and expense; and

(e) the construction program must show the dates by which, or the times within which the milestones set out in the Contract are to be carried out or completed.

The receipt, acceptance, review, approval or comment by the Superintendent of a construction program furnished by the Contractor does not:

(a) relieve the Contractor from its liabilities or obligations, including without limitation the obligation to achieve Practical Completion by the Date for Practical Completion;

(b) evidence or constitute a direction by the Superintendent to accelerate, disrupt, prolong or vary any, or all, of the Works;

(c) affect the time for performance of the Principal's or the Superintendent's obligations.

The Claimant has made no attempt to show its compliance with the contractual provisions for programming in the Contract. When considering the issue to a timely claim for an EOT (*'Balmain'*) I accept that the exclusion was in relation to a significant time lapse creating difficulty in assessing the claim. However, having reviewed the EOT claims, in this case the Claimant has made seven EOT claims of this project between commencement in March 2006 and the end of September 2006 being for wet weather (14 days) and for directions or variations delays (13 days). The Superintendent awarded a total of 24 days in response to these claims. The Claimant has provided in its submissions various one page bar charts that were provided during the first six months that were treated as preliminary programs only by the Respondent and having reviewed the number of occasions mentioned in site minutes that the Respondent has demanded proper programs, I consider that it would have been almost impossible for either the Respondent or the Claimant to have been able to rely on the program document provided to establish whether a critical path had been affected by any delay that occurred.

In my view the Claimants failure to provide adequate program information for its own use was of paramount importance in its subsequent failure to claim EOT's in a timely fashion. From my reading of the material setting out the events of the first six months there was the normal teething type problems and several issues that needed resolution, but nothing that particularly stands out for a project of this type. The Superintendent did not have the benefit of any adequate program material in awarding the EOT's and I find his actions in approving the majority of the first seven claims to be quite reasonable in the circumstances. The first significant claim from the Claimant was in December 2006, some 8 months after the work commenced, for 59 days relating to the transformer and the booster pump assembly and at this time there was still no adequate programming information provided by the Claimant. The time delay in submitting the claims for an EOT for other than weather delay must have increased difficulty in this case. I am at a loss to understand how it could be

expected that the Superintendent should have been able to foresee how delays could have affected the completion dates without any information on which to base his findings and nothing to support the claims being presented. I cannot accept the Claimants view that the Superintendent should have granted additional time in any event when even the Claimant could have had no idea about how each delay affected the critical elements of the project. The Respondents submissions indicate that the EOT granted in November 2006 was as a result of discussions and agreements between the Superintendent and Mr Novelli, but this has been denied outright by Mr Novelli. Regardless of whether or not there was agreement the Superintendent did award a significant EOT without any substantiated claim and without any adequate program information. This act appears to me to be a concession of LD application rather than a fully reasoned and explainable EOT, and in fact I do not see how the Superintendent could have detailed exactly what time was awarded as a compensable cause in any event.

346 The Respondent also points to Clause 35.5 of the Contract last paragraph which states that the Superintendents failure to grant a reasonable EOT within 28 days shall not cause the date to be set at large. I find the Claimant has not satisfied me that the actions of the Respondent's agent were such that the authority in *'Peak'* and *'Balmain'* would have the effect of setting time at large in this contract.

347 I have reviewed the calculations of the Respondents agent used in applying the LD provisions of the Contract and find I would have determined a greater amount by virtue of using calendar days in lieu of business days and not been as conservative with the concession for work deleted and therefore find the deduction reasonable. The Claimant has not contested the method of determination or provided an alternative calculation and the Respondent has the discretion to determine a lesser amount if desired.

348 For the reasons stated above I do not find time has been set at large and **I decide the Respondent calculated LD deduction of $98,000.00 is to be carried to Collection of the Adjudicated Amount**.

SET-OFF AMOUNTS

349 The Respondent in the Payment Schedule at Item 13 to 17 has claimed an entitlement to set off an amount of $9,180,341.91 against any adjudicated amount.

350 The Claimant in the Adjudication Application submissions at Items 84 to 91 has set out its case against any of the claimed set-off amounts being allowed due to the wording of Clause 42.3 of the Contract requiring any amounts claimed to be 'due' rather than simply an asserted or 'claimed' amounts. The Claimant provides for authority on this point the case of State of Queensland v Epoca Constructions Pty Limited & Phillip Davenport [2006] QSC 324 and I concur with the Claimant that in this case the wording does not support a claim which cannot be demonstrated to be 'due' and payable.

351 The Respondent in the Adjudication Response has not contested the Claimants submission in relation to the set-off amounts and has not provided any submissions to support its claims for set-off amounts.

352 The Set-off claimed in relation to Variation 40 has been dealt with earlier in that section of this Decision.

353 The onus is with the Respondent to demonstrate its entitlement and justify the quantum of the set off claimed as a reason for withholding payment and has failed to do so.

354 Therefore, I find that the Respondent has not made its case for entitlement to set off any amount from payment due in this adjudication and has failed to quantify an amount in a manner that would satisfy me a set-off is justified, therefore, **I make no valuation of any deduction amount for set off and no amount is carried to Collection of the Adjudicated Amount**.

RETENTION

355 The Claimant in the Payment Claim includes no Retention amount, however, the Respondent in the Payment Schedule certificate response has determined an amount of $44,015.80 to be retained on the basis of a percentage of the adjusted Contract Sum.

356 I have previously found earlier in this Decision (Refer 'Interest on Late Payment of Retention') that a valid and approved bank guarantee was not put in place or is currently in place, therefore I find the Respondent justified to withhold retention from the adjudicated amount . I have also previously found that the release of Retention at Practical Completion is 50% and not 80% of amounts held.

357 The Respondent in the Payment Schedule at Items 488 to 492 submits that Retention under the Contract is 2.5% of the Contract Sum and not 5% as stated by the Claimant. I concur with the Respondent and it appears that the Claimant is confused by the Annexure at Clause 42.3 where it provides for 5% of the progress payments to be retained up to a maximum of 2.5%.

358 The Claimant also claims that the percentage applies to the original Contract Sum and not the adjusted Contract Sum. I interpret the Contract provisions to be an application of a percentage to the amounts determined in progress payment based on retaining 5% of payment due up to a maximum of 2.5% of the Contract Sum as defined in the Contract definitions to be the accepted Lump Sum including provisional sums but excluding any additions or deductions which may be required to be made under the Contract and not an adjusted Contract Sum. Therefore I concur with the Claimant on this point.

359 The Respondent in its calculation (Refer PPC 14) to determine an amount to be retained has applied the percentage to an amount which includes GST but excludes the withheld Liquidated Damages. This approach cannot be valid as the retained amount is based on the valuation to date and that must include any deduction by way

of Liquidated Damages. This only has an effect during the course of the project in progressively arriving at the maximum to be retained and in this case it will have no effect as the Respondent's Practical Completion has been issued and a reduction to 50% has been made. However, the application of the GST to the valuation of work prior to deducting Retention means that payment of GST on the component of the Retention Amount has not flowed with payment of that amount. This is evident by the certificate PPC-12RR in which no GST has been paid due to it having been incorrectly paid with an earlier payment (and I assume incorrectly claimed as an input credit at that time). The legislation requires GST payment to flow with any monies paid therefore the Retention must be deducted prior to calculating GST with GST on the Retention amount paid when release occurs. I will calculate the adjudicated amount by deducting the Retention and Liquidated Damages amounts prior to adding GST.

360 For the reasons stated above I will deduct an amount of 1.25% of $3,017,987.00 and **I decide a Retention deduction of $37,724.84 is to be carried to Collection of the Adjudicated Amount**.

THE COLLECTION OF ADJUDICATED AMOUNTS:

361 I have decided only those items from the Payment Claim that were pressed in the Adjudication Application and deleted amounts in the Payment Schedule.

362 Previously paid amount – The Claimant has included an amount of $3,391,442.86 determined in a manner explained in Item 5.8 of the Payment Claim being $3,161,618.83 which tallies with PPC 12 RR amount previously certified amount of $3,162,618.83 less $1,000.00 never invoiced by the Claimant, plus PPC 12-RR payment of $40,546.40, plus PPC 13 payment of $189,277.63.
The Respondent has included an amount of $3,391,698.44 as previously certified in PPC 14, however, there appears to be a mathematical problem in the certificates after PPC – RR and I am unable to reconcile this figure with the amount paid and therefore accept the Claimants amount of $3,391,442.86 (inclusive of GST) to arrive at the Adjudicated Amount. The repayment of $12,449.88 in PPC 14 is not included.

363 **Summary of Adjudicated Amounts**.

Part	**Item Description**	
Parts A to J	Original Scope of Works	$3,017,987.00
Part K1	Variations - Previously Certified	$213,896.75
Part K2	Variations - Not Previously Certified	$283,655.25
Part K3	Variations - PC Items	-$6,529.10
Part K4	Variations - Deletions by Superintendent	-$120,053.63
Refer PP 12		
5.5	Prolongation	$0.00
5.7	Interest on Late Payments	$10,318.12
5.8	Interest on Payments Shortfall	$0.00
5.9.1	Interest on Security and Retention	$3,639.41
5.9.2	Interest on Prolongation	$0.00
5.1	Claim Preparation Costs	$0.00
Sub-Total		$3,402,913.80
Less	Set-off Amounts	$0.00
Less	Liquidated Damages	-$98,000.00
Less	Retention at 1.25% of Contract Sum	-$37,724.84
Sub-Total		$3,267,188.96
GST		$326,718.90
Sub-Total		$3,593,907.86
Less	Previously Paid	$3,391,442.86
	Adjudicated Amount	**$202,465.00**

Rate of Interest

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

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

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

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

(b) the rate specified under the contract.

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

366 I have found in this Decision that the construction works the subject of this Payment Claim are subject to the provisions of the QBSA Act 1991 and the Contract does not provide a rate for interest on overdue payments at Clause 42.9 and Annexure Part A which provides for a 7% interest rate to apply to overdue payment amounts. I find the rate of interest applicable to this Payment Claim is the penalty rate prescribed in the QBSA Act 1991 as varied on a daily basis.

Authorised Nominating Authority and Adjudicators Fees

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

"The claimant and respondent are--

(a) jointly and severally liable to pay any fee; and

(b) each liable to contribute to the payment of any fee in equal proportions or in the proportions the adjudicator to whom the adjudication application is referred may decide."

368 Section 35(3)of the Act provides for Adjudicators fees stating:

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

369 S35(3) of the Act provides for the liability of fees and expenses to be shared equally between the parties and I consider equal liability to be the default position.

370 I have worked through the extensive submissions of the Payment Claim, Payment Schedule, Adjudication Application and the Adjudication Response, and found both parties pursued their respective cases with significant vigor and belief in their entitlements. Neither party has been entirely successful in their respective claims nor there any significant event or finding sufficient to persuade me to deviate from the default provision of the Act. I therefore decide not to exercise the discretion provided in the Act and find the Claimant and the Respondent jointly liable to contribute to the ANA's and the Adjudicator's fees and expenses in equal proportions.

DECISION

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

(a) The Adjudicated Amount to be paid by the Respondent to the Claimant in respect of the Adjudication Application lodged 13 December 2007 is Two Hundred and Two Thousand, Four Hundred and Sixty Five dollars and no Cents, inclusive of GST. ($202,465.00).

(b) The date on which the amount became payable is 10 December 2007.

(c) The applicable rate of interest payable on the adjudicated amount is the penalty rate prescribed under Queensland Building Services Authority Act 1991 Section 67P.

(d) The Claimant and the Respondent are liable in equal proportions for both the ANA application fee and the Adjudicator's fees and expenses.

John Savage
Adjudicator (Registration No J1057073) 14 January 2008