Adjudication Decision: 58.17.01

Construction Contracts (Security of Payments) Act

Adjudicator : Chris Lenz (58)

Applicant - Claimant

Name [Redacted]
ACN
Address

Respondent

Name [Redacted]
Address

Work

Nature of work : [Redacted]
Applicant's trade : [Redacted]
Location of construction site : [Redacted]

Payment claim

Date : 21 July 2017
Due date for payment claim : 5 September 2017
Amount of payment dispute : $633,407.45 (excl GST)

Application detail

Application service date : 12 October 2017
Appointment date : 17 October 2017
Response date : 26 October 2017

Adjudicator's determination

Amount to be paid : **$477,632.42 plus GST**
Due date for payment **: 4 September 2017**
Amount of interest : **$20,021.30**
Claimant's adjudication costs :50%
Respondent's adjudication costs :50%

Determination date **:29 November 2017 (3 week's extension granted)**
Amended on 15 December 2017 under s43(2) of the Act

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A. DECISION

I have decided under the *Construction Contracts (Security of Payments) Act* ("the Act"), and in respect of the claimant's adjudication application:

- the amount to be paid by the respondent,
- the date upon which the amount is to be paid,
- the amount of interest until this determination, and
- the parties are liable to pay the costs of the adjudication in the proportions,

as shown on the first page of this decision.

B. REASONS

II. Background

1. [*The Applicant*] (referred to in this adjudication as the "claimant") was engaged by [*redacted*] (referred to in this adjudication as the "respondent"), for [*work type redacted*] at [*site address redacted*] (the "work").
2. The work involved [*work details redacted*].
3. There was a written contract executed by the parties on 2 March 2017.
4. Payment claim no 5 dated 21 July 2017 for $820,219.80 (excl GST) comprising a claim under the contract, together with 11 claims for variations, was delivered to the respondent.
5. Payment schedule number C90375, dated 26 July 2017, identified a scheduled amount of $376,474.80 (excl GST) (the "scheduled amount") was payable.
6. The claimant alleged that the respondent has failed/refused to pay the scheduled amount on 4 September 2017.
7. The claimant lodged its adjudication application with RICS (numbered 58.17.01) on 12 October 2017.
8. The respondent lodged its adjudication response on 26 October 2017.
9. On 13 October 2017, the day after it lodged its application 58.17.01, the applicant filed another application with RICS (application 58.17.02) for payment claim 6 claiming $944,871.02.
10. In accordance with s34(3)(b) of the Act, the parties consented to me adjudicating the payment disputes together on 18 and 19 October 2017.
11. On 29 October 2017, I requested the Registrar's consent to extend the time to make a determination, and he granted permission on 30 October 2017 for two weeks' extension.
12. s34(4) of the Act allowed me to take into account information or documents received in the other adjudication in adjudicating each dispute, and I have done so.
13. Given that the disputes were considered together, my normal approach in adjudicating is to:
    (i) firstly, analyse that the claimant has discharged both its legal and evidentiary onus, before giving consideration to the respondent's submissions;
    (ii) thereafter, if the onus has been established, then the respondent's submissions and evidence is considered;
    (iii) after which a finding is made on each live issue.
14. However, given that there were two payment claims to be considered simultaneously which contained quite a deal of overlap of the variation claims, I thought it best to consider each claim by looking at both the claimant's and respondent's submissions together.
15. The issues that emerged from an initial review of both parties' material in no order, were as follows:
    (i) whether the claimant's design obligations precluded it from being entitled to some of the variation claims;
    (ii) whether the claimant was entitled to extensions of time ("EOT's");
    (iii) whether by issuing a credit note on 3 August 2017, the claimant waived its rights to payment claim number 5, thereby preventing me from having jurisdiction to adjudicate this dispute;

(iv) whether the respondent was entitled to set off liquidated damages;
(v) whether the respondent was entitled to set off the costs of having taken the works out of the hands of the claim.

16. These issues provide a roadmap of matters that needed to be considered in this adjudication and I turn now to the matter in more detail.
17. I found that the claimant was entitled to provide submissions in response to the respondent's allegation that I had no jurisdiction, so I received the last submission from the respondent on 17 November 2017.
18. Therefore, I requested the Registrar provide me a further extension of time within which to make the determinations, and he granted the extension until 30 November 2017.

III. Material provided in the adjudication

Application

19. I received two lever arch folders documents from RICS from the claimant dated 12 October 2017.
20. In the application, the claimant outlined the basis of the payment dispute, and provided 19 annexures supporting its submissions that it had provided in the application.

Response

21. The response comprised two lever arch folders, together with a USB of case authorities.

IV. Threshold and jurisdictional matters

Construction contract and construction work

22. Section 33 of the Act provides that an application must be dismissed if it is not a construction contract. Therefore, it must be a construction contract to be within jurisdiction, so I need to carry out an investigation about this issue.
23. Thereafter, s33 (a)(ii) of the Act requires that the application be prepared and served in accordance with s28 of the Act.
24. At paragraph 12 of the application submissions, the claimant submitted that the contract:
    (i) was a *construction contract* within the meaning of s5 of the Act, and
    (ii) the work it performed or undertook to perform was *construction work* within s6 of the Act;
    (iii) the goods and services it supplied were *goods and services relating to construction work* within the meaning of s7 of the Act.
25. In the response submissions, the respondent conceded:
    (i) at paragraph 2.6, that the contract was a construction contract within s5 of the Act;
    (ii) at paragraph 2.7, that the work was construction work within the meaning of s6 of the Act.
26. Accordingly, there is no contest between the parties about this aspect, and I am satisfied that it is a *construction contract* within the meaning of the Act.

Did the application comply with s28 of the Act?

27. s28 of the Act provides a number of statutory requirements in order to found jurisdiction in this adjudication. These include:
    (i) a written application [s28(1)(a)];
    (ii) served on the other party[s28(1)(b)];
    (iii) and served on the prescribed appointer [s28(1)(c)(ii)];
    (iv) provide any deposit or security that the adjudicator requires.
28. At paragraph 2.2 of the response submissions, the respondent conceded that the application had been served on it, and made no submissions that the application was not served in accordance with the requirements of the Act. Given that there is no dispute between the parties, I find therefore that these requirements had been complied with.
29. Furthermore, given that I was appointed by RICS, a prescribed appointer, which sent me the application documents, I find that:

(i) there was a written application to RICS; and
(ii) that Regulation 6 of the Construction Contracts (Security of Payment) Regulations (the "Regulations") which provides that:
(a) the name and contact details of the prescribed appointer;
(b) the applicant's name and contact details;
(c) the name and contact details of the other party to the contract,
was complied with because all these details were on the RICS form.

30. I did not require a deposit, and therefore s28(1)(c)(iv) did not apply.
31. Accordingly, I am satisfied that the application required it to be adjudicated in accordance with my obligations as an adjudicator under the Act.
32. However, the respondent took issue with my jurisdiction to adjudicate payment claim 5, because it argued that there was no *payment dispute*.

Jurisdiction

33. The respondent, at paragraph 2.8 of the response, argued that there was no *payment dispute* because, as it submitted at paragraph 10.3.1.3 of its submissions, on 3 August 2017 the claimant issued a credit note in the sum of $443,745, which it argued functioned as a waiver and release and confirmed the claimant's position that only a sum of $376,474.80 (which had been earlier certified) was payable.
34. The respondent went on, at paragraph 10.3.2 of its submissions, to explain that the certified sum would have been payable on 4 September 2017, but for the issue of a certificate of $573,228.61 which the superintendent certified was payable by the claimant to the respondent for liquidated damages and work taken out of the claimant's hands (the "LD certificate").
35. The respondent argued [paragraph 10.4] that the effect of the LD certificate was that no money was payable on 4 September 2017, but that a *payment dispute* arose on that date taking into consideration:
(i) the claimant's claims in progress claims 5 and 6;
(ii) the respondent's LD certificate in its favour.
36. I will return to this submission about a payment dispute arising on that date a little later. For present purposes I'm focusing on the credit note being a waiver.
37. At paragraphs 8.11 through to 8.20 the respondent argued that the credit note was a waiver of the claimant's entitlement to recover any part of the sum.
38. Turning back to paragraph 2.8 of the response submissions, the respondent argued that I had no jurisdiction to determine any amount payable in relation to this adjudication application.
39. The claimant had made no submissions on this point, because the respondent's payment schedule was sent before the credit note was sent, and it had made no reference to *waiver* in its payment schedule reasons.
40. The respondent's argument identified a fundamental issue to be resolved, such that I considered I needed to hear from the claimant, as a matter of natural justice, as this issue had not been previously raised in the payment schedule, or indeed at any time until delivery of the adjudication response.
41. Accordingly, I emailed the parties and their solicitors on 9 November 2017 under s34 of the Act seeking:
(i) the claimant's submissions in response to the respondent's waiver submissions in paragraphs 8.11 to 8.20 of the response; and
(ii) The respondent's submissions in reply.
42. The claimant provided me with the requested submissions within an extended time to close of business on 15 November 2017, and I received the respondent's submissions by close of business on 17 November 2017.
43. The reason for asking for the submissions on this jurisdictional point was that it needed to be resolved before considering the merits of the application. There was no point in considering the merits if I had no jurisdiction to do so.

V. Jurisdictional point about waiver

Waiver by issue of credit note

44. The respondent in its Executive Summary submitted at paragraph 1.18 that I had no jurisdiction to adjudicate payment claim 5, since there was no *payment dispute* because of the claimant's waiver by issuing the credit note on 3 August 2017 for $443,745 [paragraph 1.15].
45. I have already referred to paragraphs 8.11 through to 8.20 of the respondent's submissions, in which it provided the highest authority to support its arguments on *waiver*.
46. In paragraph 10 of its response submissions it explained in detail why no *payment dispute* existed, and that is the foundation of its jurisdictional submission that there was nothing to adjudicate.
47. I now refer to the claimant's submissions on this point and the respondent's in reply before further analysing this important point.

The claimant's waiver submissions

48. The claimant provided 7 pages of submissions and attached some supporting material and relevant cases. I read all the submissions, and summarise the key points below.
49. In paragraphs 2 and 5 of its submissions, the claimant referred to waiver and 2 other matters that it said had been introduced into the adjudication response, which were not only absent from the payment schedule, but new to the parties' dispute altogether (the "new grounds"). These were:
    (i) the claimant's EOT claims were time-barred;
    (ii) delivery of a [redacted] report ("T report") on the claimant's EOT claims.
50. At paragraph 5, the claimant requested an opportunity to address the new grounds in separate submissions.
51. Given that the waiver point went to jurisdiction, there was no point in considering the claimant's request until, and if, I had jurisdiction.
52. The claimant provided submissions dealing with the respondent's arguments regarding waiver, which I summarise as follows:
    (i) waiver had not been raised in the respondent's payment schedule;
    (ii) I ought not consider waiver as it fell outside the payment dispute that I had been asked to determine;
    (iii) it was otherwise contrary to the express prohibition on waiver set out in s10 of the Act;
    (iv) in fact, there had been no waiver because:
        (a) the claimant did not choose between two mutually exclusive alternatives;
        (b) the credit note formed part of the respondent's imposed process as a precondition to any payment;
        (c) the claimant did not waive or otherwise limit its entitlement to pursue the uncertified balance of payment claim number 5.
53. Furthermore, the claimant, at paragraph 8 of its submissions, repeated its adjudication application submissions, which I identified in paragraph 32.7 of the application that:
    (i) the respondent could not raise it set off claims in the payment schedule or otherwise prior to the date by which it ought to pay the amount certified in the payment schedule;
    (ii) the respondent committed a substantial breach of the contract by failing to pay the full certified value of the payment claim;
    (iii) the respondent's justification for ongoing refusal or failure to pay the certified amount because of set-off (for liquidated damages and extra over costs), was factually and contractually incorrect; and
    (iv) even if the LD's and extra over cost were payable, the respondent was adopting a flawed process to claim set off.

54. I turn to the respondent's submissions in reply before deciding this important jurisdictional issue.

The respondent's submissions in reply

55. The respondent provided 9 pages of submissions, including Appendix 1, and supporting case authorities. I read all the submissions, and summarise the key points below.
56. The respondent submitted, in paragraphs 4&5, that the claimant's request in paragraph 5 of its response submissions to deliver submissions regarding the time-bar raised by the respondent and delivery of the T report, should be rejected by me.
57. However, in Appendix 1 to its submissions, its provided a reply as a matter of prudence. The reply was confined to the T report, and did not respond to the time bar issue.
58. Essentially, the respondent rejected the claimant's arguments about "new grounds" or "new reasons" by submitting that the cases relied upon by the claimant were all cases from New South Wales; which the respondent stated was a fundamentally different model to the one in this Act.
59. The respondent said the Act was modelled on the legislation in Western Australia, and did not follow the East Coast model of security of payment.
60. It submitted, at paragraph 16, that there was no express provision prohibiting a respondent from later raising a new reason for disputing an item stated in a payment claim.
61. It conceded, at paragraph 17, that the claimant had no right of reply under the Act, but given that I had asked for submissions on this point, the claimant had suffered no prejudice.
62. It added, at paragraph 20, that it could not be criticised for advancing the *waiver* ground in its adjudication response submissions, and that its submissions needed to be taken into consideration by me.
63. It maintained that its certification of PC5 should stand together with the certification for LD's and extra over costs.
64. It expanded considerably over the progress payment process, and the claimant's election to issue a credit note, and dismissed the claimant's argument that waiver needed consideration. Furthermore, it argued that the claimant's estoppel submissions were unfounded, and further submitted that the effect of the credit note was to at least:
    (i) to discount any amount that I find the respondent is liable to pay on the invoice; or
    (ii) to offset any amount the respondent was required to pay the claimant
65. It referred to a series of cases to support the argument that the credit note must reduce any amount that might previously said to be payable.

My decision on jurisdiction resulting from waiver

66. Having read both parties submissions, together with those in the application and the response, it appears to me that three threshold issues emerged which have a direct bearing on the waiver jurisdictional point. These are:
    (i) What precisely is the payment dispute, which is the trigger for an adjudication application;
    (ii) whether a respondent is entitled to raise new reasons in the adjudication response, which were not raised in the payment schedule;
    (iii) whether the claimant waived its rights to pursue PC 5.
67. Before considering both these issues under separate headings to finalise the jurisdictional analysis, I make some preliminary comments about the contending submissions.
68. I agree with the respondent that the New South Wales cases have no specific application to the Act because they deal with the East Coast model of the Security of Payment regime. However, the principles of natural justice and procedural fairness underlying the Act is dealt with under the heading of "New Reasons" below.

69. I note that the respondent did not directly engage with the claimant's submissions about the application of Division 5 of the Act. The claimant essentially argued that s20 of the Act activated Division 5 because the largely unamended AS4000-1997 contract did not have written provisions dealing with security of payment matters.
70. The respondent, at paragraph 14, did concede that there were terms implied into contracts, if there were no written provisions about those matters.
71. This is important, because the *notice of dispute* ingredients identified in Division 5 have a bearing on the "new reasons" issue, in which the respondent's position is that new reasons were not prohibited by the Act [paragraph 16].
72. I find that the contract made no written provisions about the Act, so that Division 5 is activated to imply terms into the requirement for the *notice of dispute*, or what is also called, the payment schedule.
73. I was concerned about the respondent's submissions in paragraphs 41 to 43, because they went further than replying to the claimant's submissions, and advanced an additional argument about the *effect of the credit note*, which had not been previously raised.
74. I will revisit this concern after dealing with the jurisdictional arguments.

VI. Is it a payment dispute?

75. At paragraph D of its submissions, and paragraphs 21 and 22 specifically, the claimant submitted:
    (i) the payment claim had been rejected or wholly or partly disputed in accordance with s8(a)(i) of the Act; AND (**my emphasis**)
    (ii) the amount claimed in the payment claim and the amount certified the payment schedule had not been paid in full.
76. However, the respondent took the point that no *payment dispute* existed because of the claimant's issue of the credit note on 3 August 2017.
77. I consider it important to analyse the ingredients of the *payment dispute*.
78. I am satisfied from the material that:
    (i) A payment claim was made on 21 July 2017 for $820,219.80 (exc GST);
    (ii) A payment schedule certifying $376,474.80 (exc GST) was delivered to the claimant, which I accept was on 27 July 2017. I found this payment schedule behind tab 5 of the application, and this is not controverted by the respondent. Furthermore, at paragraph 2.3.3, the respondent stated that its progress certificate dated 26 July 2017 was issued on 27 July 2017.
79. Arguably, those ingredients were sufficient for a *payment dispute* to have arisen on 27 July 2017 under s8(a)(i) of the Act, because in the payment schedule regarding several items, it stated, "*Costs are not accepted by CEA*."
80. The claimant identified 2 payment dispute dates of 27 July 2017 and 4 September 2017.
81. The 4 September 2017 was the date it argued the parties had agreed payment terms of 35 days from the end of the month in which a payment claim was delivered. I note that the respondent agreed with the due date for payment being 4 September 2017 in its response submissions paragraph 2.4.2.
82. Whilst both parties engaged in submissions about the *payment dispute*, neither party provided me with submissions on *when* the payment dispute arose.
83. It was important to be clear when the payment dispute arose, because this provided a framework surrounding the parties' dispute. The claimant argued, at paragraphs 18 and 19 of its *waiver* submissions, that the Waiver Ground did not form part of the payment dispute in respect of PC5.
84. However, the claimant had the payment disputes arising on two dates, 27 July 2017 and 4 September 2017. The credit note was issued between these two dates.
85. Although I can seek submissions from the parties on payment dispute date, quite some time had elapsed in this adjudication dealing with the jurisdictional allegation of *waiver* raised by the respondent.

86. I decided that the adjudication needed to continue without any further delays waiting for the parties' submissions on the date of the payment dispute, so I researched the law to decide this date.
87. In the case of *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4, the Full Court referred to section 8(a) of the Act.
88. Mildred and J at paragraph 3 held
"[3] Subsection 8(a) of the Act provides that a payment dispute arises if, when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed."
89. The Full Court did not deal with the date the payment dispute arose.
90. In the case of *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd & Anor* [2012] NTSC 22 ("*Urban and Rural*"), Barr J had to expressly deal with the date, and *A J Lucas Operations Pty Ltd* was considered by His Honour, but in a different context.
91. Barr J in discussing this issue, and I have set out his findings in full, held as follows:

> *[16] On my reading of s 8(a) of the Act, the introductory phrase "when the amount claimed in a payment claim is due to be paid under the contract" applies to and qualifies each of the described circumstances which then follow, namely, "the amount has not been paid in full" and "the claim has been rejected or wholly or partly disputed".*
>
> *[17] The first defendant argues that, because of the separate reference to rejection or dispute, s 8(a) should be interpreted so as to allow for an "early date construction" such that there would be two possible dates when a payment dispute arises, depending on whether it arises from non-payment or from rejection/dispute: (1) the due date for payment under the contract, if payment has not been made by that date, and (2) the earlier date on which the claim has been rejected or disputed (if it has)....*
>
> *[20] In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.*
>
> *[21] The construction I favour is the one which more accurately reflects the actual text of s 8(a). Further, it provides clarity and certainty in relation to the start date for the 90-day limitation period specified in s 28 of the Act for making an application for adjudication, and avoids the possible mischief that a "payment dispute" might arise, without a party being aware, as a result of (what is subsequently characterized as) the rejection or partial dispute of that party's payment claim before the due date for payment of that claim under the contract.*
>
> *[22] It must be acknowledged that the construction in par [20] means that in some cases, such as the present, a party whose payment claim has been rejected or disputed at a relatively early time may have to 'mark time' and hold off applying for adjudication until the due date for payment under the contract, even though it may be clear that that party's payment claim will not be accepted or agreed to in the intervening period. However, the potential waiting period could be no more than 50 days, the maximum permissible period in a construction contract for payment of a payment claim, [6] and would more likely be a shorter period, [7] given that the rejection or dispute may not be communicated for some*

> *weeks after the payment claim is made. These waiting periods do not seem disproportionately long in the statutory context that an applicant for adjudication has 90 days after the payment dispute arises within which to apply.[8]*
>
> *[23] Moreover, whatever limited delay might be imposed on a party wishing to apply for adjudication, the disadvantage of such is offset by the greater clarity and certainty provided by the preferred construction, as explained in par [21] above. Clarity and certainty are important in achieving the policy objective of a workable process for speedy adjudication outside the court system. The greater the degree of clarity and certainty, the greater the probability that the processes set up by the Act will function effectively without the need for court intervention on jurisdictional grounds."*

92. I was unable to find any more recent authority on this point, so I followed His Honour's reasons, and find the payment dispute arose on 4 September 2017, which was the due date for payment.
93. It was clear on 27 July 2017 that the respondent partly disputed the claim in its payment schedule/notice of dispute of that date, but the law required the claimant to wait until due date for payment, before it was entitled to seek adjudication of its payment dispute.
94. His Honour referred to clarity and certainty to achieve the policy objective of a workable process for speedy adjudication. I glean from the underlying reasoning that the due date for payment was essentially the trigger for any possible adjudication, but I do not find that His Honour said that the trigger in any way qualified what was already in dispute.
95. To my mind, the ingredients of the dispute were found in the respondent's payment schedule/notice of dispute of 27 July 2017. By that time the parties were aware of what was in issue, which a future adjudication could resolve. However, the claimant had to wait until the due date for payment trigger to be able to commence an adjudication.
96. As at 27 July 2017, the credit note had not yet been issued, and the "Reasons for assessed amount or withholding payment" in the payment schedule were as follows, by reference to each item claimed:

Item/s	Schedule amount	Details/reasons
1	$376,474.80	progress claim revised as per attached
2	VO 01	Refer... Costs are not accepted by [*the respondent*]
3	VO 04	Refer... Costs are not accepted by [*the respondent*]
5	VO 07	Refer... Costs are not accepted by [*the respondent*]
6	VO 08	Refer... Costs are not accepted by [*the respondent*]
7	VO 14	Rejected...Costs are not accepted by [*the respondent*]
8	VO 15	Rejected...Costs are not accepted by [*the respondent*]
9-14	VO 17 – 22	Not approved in this claim, still being assessed by [*the respondent*]

97. Essentially there was a scheduled amount of $376,474.80, and at paragraph 18 of the application, the claimant submitted that the respondent had failed to pay this amount.
98. The due date for payment was 4 September 2017, about which both parties agree, and I find on this date no payment was made by the respondent.
99. What was somewhat confusing, was that on 4 September 2017, the respondent provided a payment schedule to the claimant for payment claim number 6, which it also called a certificate under clause 37.2(a) of the contract.
100. In paragraphs 1.16 and 1.17, the respondent argued that it was entitled to set-off as part of the certification for progress claim 6, and that all issues were before me for both claims.
101. I appreciate that I am adjudicating both payment claims 5 and 6, but given the jurisdictional argument about payment claim 5, it is important to consider both disputes separately to eliminate any confusion, on this jurisdictional point.

102. **I find that the ingredients of the payment dispute crystallised on 27 July 2017, and the date of the payment dispute was 4 September 2017.**
103. The respondent argued that by issuing the 3 August 2017 credit note, the claimant waived its rights to recover any part of the sum stated in the credit note.
104. There is no dispute between the parties that a credit note was issued by the claimant on 3 August 2017.
105. The question that I need to consider is whether there was a waiver by the claimant to pursue PC 5 by issuing the credit note. However, before doing so, the claimant had submitted that I was unable to consider waiver, as it was outside the payment dispute.
106. It also submitted that the waiver issue was a "new reason", and should not be considered by me, and I deal with this issue first.

VII. Can new reasons be raised in an adjudication response?

107. The respondent at paragraph 10.3.1.3 in the response, argued that the issue of the credit note was a waiver and release, such that the claimant could only argue that $376,474.80 was payable; and therefore, there was no dispute in relation to any amount owing under payment claim 5.
108. This argument, bypassed the issue of "new reasons", about which the claimant had significant complaints.
109. I have found that the ingredients of the payment dispute crystallised on 27 July 2017. I have also found that the payment dispute date was 4 September 2017. Metaphorically, the payment dispute's buds formed on 27 July 2017, and the flowers came out on 4 September 2017, but in my view, there was no change in the flower's characteristics.
110. The respondent does not dispute that it had not raised this issue in the payment schedule, and I do not find anything about waiver in the payment schedule of 27 July 2017.
111. As I said in my letter requesting submissions from the parties, the respondent could not have raised waiver on 27 July 2017, because the credit note was only issued on 3 August 2017
112. I find therefore, that it was a new reason for non-payment, beyond what had been provided in the payment schedule.
113. The fundamental question, however, is whether the respondent was entitled to raise this issue in the adjudication response.
114. At paragraph 8 of its *waiver* submissions, the claimant said it repeated and relied upon its adjudication application submissions that the respondent could not bring matters it did not raise in the payment schedule into account against the claimant's payment claim.
115. The only reference that I could find in the application submissions was paragraph 32.1 in which the claimant submitted that the respondent did not raise its set off claims in the payment schedule, or otherwise prior to date that it ought to have paid the amount certified in the payment schedule.
116. At paragraph 9 of the waiver submissions, the claimant stated that the matters raised by the respondent for the first time before me, and prior to having put them to the claimant in any form, were unequivocally outside the scope of what I may consider in the adjudication.
117. In paragraphs 11 through to 17 of its waiver submissions, it explained that the AS 4000 – 1997 unamended contract did not deal with Security of payment matters, such that Division 5 of the Schedule applied to what was to be included in the payment schedule, which was to seek to ensure that the claimants had sufficient information to allow them to make an informed decision whether to adjudicate.
118. At paragraph 14, the claimant said that the respondent had to fully state their grounds for withholding payment in the payment schedule to prevent them from raising arguments in the adjudication response, because the claimant did not have an automatic right of response.

119. It then went on at paragraph 18, to argue that the failure to raise the waiver ground in its payment schedule meant that the respondent was not entitled to pursue it before me as it did not form part of the payment dispute in relation to PC5.
120. At paragraph 20, as previously mentioned, it submitted that I am required to afford adjudicating parties procedural fairness on the issues of discrepancies between adjudication responses and payment schedules, notwithstanding there being differences between the Northern Territory act and some of its interstate equivalents. It referred to a series of New South Wales cases to support this approach.
121. I have already agreed with the respondent that these cases do not govern the Act because the legislation is entirely different. The respondent's characterisation of the NSW model as the "East Coast Model", which is entirely different to the Act which is based on the Western Australia legislation, I find is correct.
122. Nevertheless, it is important as a matter of principle to consider whether new reasons are allowable under the Act, because the East Coast model specifically prohibits them from being raised, whereas the Act does not do so.
123. Unfortunately, neither party provided me with any case authority on point to support the contending positions, so it will become a matter of interpreting the Act. I will have regard to the provisions of the *Interpretation Act* to assist in carrying out this task.
124. However, before doing so I needed to identify the precise statutory requirements of a payment schedule/notice of dispute.
125. I have already found that Division 5 governs what is required to be put in a payment schedule because the contract made no reference to the Act; and paragraph 6 of Division 5 provides relevantly as follows:

> *"(1) This clause applies if:*
> *(a) a party receives a payment claim under this contract; and*
> *(b) the party:*
> *(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*
> *(ii) disputes the whole or part of the claim.....*
>
> (3) The notice of dispute must:
> *.(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and*
> *(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and*

126. Insofar as the waiver point was concerned, if the credit note had emerged before the payment schedule was due, s6(1)(b)(i) would apply because of the respondent's argument that the claim not been made in accordance with the contract, because the claimant had waived its rights to do so.
127. Alternatively, s6(1)(b)(ii) would apply because the respondent was disputing the whole or part of the claim, because of waiver.
128. If that fact had been in existence at the time, then it would have been incumbent upon the respondent to raise it in the schedule, and its failure to do so, to my mind meant that it would have failed to comply with Division 5 s6(3).
129. It is academic which provision could have been relied upon by the respondent, because as I have said, the credit note had not been issued on or before 27 July 2017.
130. The question becomes whether, if a new fact emerges after the payment schedule, the respondent is entitled to raise this in the adjudication response.
131. This requires construing the entire Act to discern what it is the Act is trying to achieve, and I refer to the *Interpretation Act* for assistance. The *purposive approach* has been enshrined in s62A which provides:

> ***"62A Regard to be had to purpose or object of Act***
>
> *In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object."*

132. Turning firstly to s3 which deals with the objects of the Act which provides:

> ***"3 Object and its achievement***
>
> *(1) The object of this Act is to promote security of payments under construction contracts.*
>
> *(2) The object of this Act is to be achieved by:*
>
> *(a) facilitating timely payments between the parties to construction contracts; and*
>
> *(b) providing for the rapid resolution of payment disputes arising under construction contracts; and*
>
> *(c) providing mechanisms for the rapid recovery of payments under construction contracts."*

133. In *Urban and Rural* Barr J had to construe the Act to make his finding regarding the date of the payment dispute, and His Honour's approach assists in interpreting the Act. His Honour held:

> *[12] As Southwood J explained in K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Another, [2] the object of security of payments legislation is to facilitate timely payment between parties to construction contracts and thereby overcome cashflow problems faced by many contractors and sub-contractors during the course of fulfilling their contractual obligations.*
>
> *[13] The object and the means to achieve the object are made clear in s 3 Construction Contracts (Security of Payments) Act. The object, namely to promote security of payments under construction contracts, is to be achieved by facilitating timely payments between the parties to such contracts, and by providing for the rapid resolution of payment disputes arising under those contracts.*

134. I have already said there is no authority cited by either side about new facts in general. To my mind, if facts emerge after the payment schedule, but prior to the payment dispute date, the question is, can this eliminate the existence of a *payment dispute?*
135. The payment dispute existed on 27 July 2017, and I have found that this date focuses on the ingredients of the dispute, and the due date for payment is merely the trigger to allow adjudication to commence.
136. The rhetorical question with which I needed to grapple, was whether this approach I have taken, promotes the purpose or the objects underlying the Act.
137. This approach essentially freezes the ingredients of the dispute, in this case on 27 July 2017; and the due date for payment merely facilitates when adjudication can commence.
138. Under this approach, the claimant knows precisely what case it needs to overcome once the payment schedule is in, and merely needs to wait, as suggested by Barr J in *Urban and Rural* before it can adjudicate.
139. This is the approach that I have gleaned that the claimant has taken, although as I've said there are no submissions directly on point.
140. The alternative approach is that the payment dispute, and its ingredients, only ripen at the due date for payment, such that if a credit note is issued before the due date for payment, it is open for a respondent to take this point, albeit only in the adjudication response.

141. To my mind, such an approach does not facilitate the timely payment between the parties to a construction contract, nor does it provide for a rapid resolution of payment disputes, because an adjudicator is confronted with the very issue that has been raised in this adjudication, about which I felt compelled to ask for submissions.
142. Even if this approach is the correct one, and the issue of the credit note invalidated the payment claim on 3 August 2017; given that the adjudication process was already open to the claimant, in my view it would be incumbent upon the respondent to take that point as early as possible to allow for a rapid resolution of the payment dispute.
143. Such an approach, although not dealt with expressly in legislation, would promote the underlying objects of the Act. As at 3 August 2017, and in fact one month later, on 4 September 2017, the respondent did not raise this issue of waiver.
144. It was raised for the first time on 26 October 2017 in the adjudication response, some three months after the payment schedule.
145. To my mind, this circumstance, although unusual, should not be allowed to derail the statutory dispute resolution process regarding a *payment dispute*, insofar as the ingredients were concerned.
146. Accordingly, I consider that the respondent was not entitled to raise this "new reason" in the adjudication response.
147. Furthermore, regarding any "new reason" raised in an adjudication response, where the facts were known at the time of the payment schedule, should also be disallowed, because to allow this approach suggested by the respondent (by stating that new reasons were not prohibited), fails to promote the underlying objects of the Act.
148. Given that the claimant has no right of reply to a response, the claimant is disadvantaged procedurally and as a matter of natural justice in meeting this new case, which to my mind cannot allow for a rapid resolution of payment disputes.
149. Furthermore, it means that adjudicators must be constantly alert to "new reasons", and afford a claimant natural justice, inevitably requesting submissions to respond to the new reasons, and then, of course, also afford the respondent the right of reply. This inevitably delays the adjudication process, which again prevents rapid resolution of payment disputes.
150. Accordingly, in my view, I agree with the claimant that "new reasons" should not be allowed in the adjudication response.
151. However, I have still not established jurisdiction to deal with those issues, so I turn to the waiver submission because it was raised as a jurisdictional issue.

VIII. Whether there was a waiver preventing the claimant pursuing PC 5

152. The respondent submitted that I was required to deal with the question of waiver, because I had given the claimant the opportunity to provide submissions on this point, which it acknowledged had not previously been raised.
153. I have already found that it was not entitled to raise new reasons in its adjudication response.
154. However, arguably, certainly under the East Coast model of adjudication, a jurisdictional point can be raised at any time, because it goes to the heart of whether the adjudicator can adjudicate.
155. Although neither party provided me with authority on this point, in my view, as a matter of principle, I feel compelled to consider the respondent's *waiver* objections as to jurisdiction, whether or not it was a new reason.
156. There is no utility in an adjudicator proceeding in circumstances where there is no jurisdiction for them to do so. Such an approach fails to allow rapid dispute resolution, which as I have said is inconsistent with the Act.
157. Accordingly, I considered the contending submissions of the parties on this point. In this instance I started with the respondent's submissions, as they raised the matter for the first time.

Respondent's response submissions

158. As mentioned above, the respondent in paragraphs 8.11 through to 8.20 introduced its waiver objection to payment claim 5 because of the issue by the claimant on 3 August 2017 with a credit note amounting to $443,745.
159. It argued this constituted a waiver of the claimant's contractual rights because of an election, through words or conduct, to not enforce its right.
160. It provided powerful authority about the principles of waiver, and submitted that the claimant's conduct in issuing the credit note was demonstrably clear and unequivocal proof of evincing an election between two mutually inconsistent rights or courses of action.
161. It argued that following the election, it was no longer open for the claimant to seek to rely upon its invoice to establish a debt due.

Claimant's waiver submissions

162. I requested submissions from the claimant, because the claimant would not have otherwise had the opportunity to comment on this allegation of waiver, with the attendant jurisdictional submissions made by the respondent.
163. As mentioned above, the claimant complained about "new reasons", which I have already dealt with, but in paragraphs 30 through to 47 of its submissions, it explained that it had not waived its entitlement to payment of PC 5, which it erroneously stated was issued on 17 August 2017 [paragraph 30].
164. It explained that there was a process that the parties had developed for payment ("payment process") as follows:
    (i) It would send a draft payment claim to the respondent;
    (ii) The respondent would provide a certificate in response to the draft;
    (iii) The claimant would then revise its payment claim/invoice to reflect the amount certified by the respondent as a precondition to payment of the certified amount.
165. It argued that there was nothing agreed between the parties, nor did the claimant conduct itself in any way which suggested that by revising its invoice to reflect the certified amount, that it was compromising or releasing its entitlement to claim.
166. It added, at paragraph 34, that even if such waiver had occurred, it would be rendered void and ineffective by s10 of the Act, and it extracted the provisions of the Act, in its submissions.
167. It explained the chain of correspondence leading up to the claimant providing the credit note, supported by documents in Annexure 2 of its submissions, that it was simply meeting the respondent's imposed precondition to payment, and that it simply issued the credit note to get paid.
168. It relied upon the authorities provided by the respondent to demonstrate that there was no unequivocal election, and that the claimant did not have to choose between two mutually exclusive alternatives.
169. It then explained that there was no waiver by conduct, which it said required consideration, citing *McDermott v Black* (1940) 63 CLR 161, and no such consideration was present in this case.
170. It then argued that the respondent was estopped from claiming that the claimant had waived its entitlement by pointing to the elements of estoppel that needed to be satisfied for an estoppel to be made out.

Respondent's response to waiver submissions

171. In reply, the respondent disputed that the payment process operated in the circumstances of the claimant issuing a credit note, instead of a revised invoice. It argued that the claimant's election to issue the credit note demonstrated that the claimant waived its entitlement to recover the amount stipulated in the credit note.

172. It explained that there was an election by the claimant because seeking full payment of the invoice, and seeking something less than full payment of the invoice were two mutually exclusive alternatives.
173. It then added that there was a doctrine of waiver independent of the principle of election, such that the claimant could unilaterally release or abandon a right.
174. It argued that *Black* was not authority for the requirement of consideration, and cited Kirby J in *Australian and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 demonstrating that no consideration was necessary for waiver.
175. It dismissed the claimant's arguments about estoppel, principally on the basis that there was no representation made by the respondent, nor did the respondent cause the claimant to issue the credit notes or bring about the claimant's detriment.
176. It then provided further submissions about the effect of a credit note [paragraphs 41 to 43], which I find was not in reply to anything submitted by the claimant. It argued that the credit note allowed for discounting of any amount that I may find payable, or to offset any amount payable, and cited some cases in support of the legal effect of a credit note.

My decision on waiver

177. Firstly, in my view, I have concerns about paragraphs 41 to 43 of the respondents reply submissions because I find they were not in response to what the claimant had submitted, and was not an issue that had been earlier canvassed in the adjudication response. The adjudication response dealt with the credit note alleging waiver alone.
178. Accordingly, as a matter of natural justice I am not prepared to consider those submissions any further.
179. In dealing with this complex issue, it appears to me that I must only deal with the respondent's objection that by issuing the credit note, the claimant had waived any rights to the amount identified in the credit note.
180. I am not satisfied with the claimant's argument about the payment process, because, as the respondent rightly points out, the issue of the credit note is entirely different to revising a payment claim or invoice.
181. The person who issued the credit note knew the payment process, as she was the Project Administrator involved with claims, so it is not entirely clear why this new credit note process had been adopted.
182. The difficulty for the respondent regarding its powerful arguments about *waiver*, is that even if the ingredients of waiver have been established, about which I make no finding, because it is unnecessary to do so; s10 of the Act (to which the claimant referred at paragraph 34 of its waiver submissions), at paragraph (3) expressly states, "*Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.*"
183. The respondent did not answer that submission in its waiver reply submissions, and that to my mind was fatal; because, even if a waiver is made out on the facts, s10 is enlivened to make it of no effect. As I said, the respondent has not provided any submissions to overcome this wide-ranging section.
184. The express reference to a "purported waiver, whether in a construction contract or not, and whether or not in writing", is extremely wide-ranging. However, I need to decide whether it applies in this adjudication.
185. Given that the objects of the Act are to:
    (i) Promote security of payments under construction contract;
    (ii) Facilitate timely payments between the parties;
    (iii) Provide for a rapid resolution of payment disputes,

    it appears to me that s10(3) must be allowed an interpretation which is as wide ranging and all encapsulating as the words within that section expresses.

186. By essentially capturing all possible ingredients of *purported* waiver, in writing or not, and rendering it of no effect, this provides for rapid resolution of this payment dispute, which is precisely what the Act sets out to achieve. s10(3) facilitates the purpose and objects of the Act.
187. Accordingly, after having carefully, and somewhat exhaustively I might add, considered the submissions of the parties on this crucial point, and having regard to s10(3) of the Act, even if a waiver was made out under the facts, I find s10 prevents it from having any effect.
188. **Accordingly, I reject the respondent's submissions on jurisdiction and find I have jurisdiction to adjudicate the matter.**
189. I need to consider the merits of the claimant's claim, together with any setoffs to which the respondent may be entitled.
190. However, it is appropriate to deal with the claimant's complaints about time bars and the T report at this stage, as to whether they were new reasons, or if not, their merits so that these prominent issues are not missed.

IX. Time bar and the T report

191. The claimant raised the respondent's *time bar* issue in paragraph 5 of its waiver submissions, and said that it was a new reason, in which it requested an opportunity to address those new grounds.
192. I did not consider it necessary to do so based on the following reasoning.
193. The time bar was raised by the respondent in paragraphs 8.1 through to 8.4 of the response.
194. At paragraph 8.4, the respondent referred to the [W] declaration and the T report to demonstrate that the claimant was barred from any entitlement to an EOT.
195. I do not accept that the T report dealt with any alleged time bars. It simply concluded in each instance that the claimant had provided "*…insufficient evidence and information either at the time the delay occurred or in its EOT claim to allow for a meaningful assessment of its entitlement to or the magnitude of any potential delay contemplated by the EOT*".
196. Accordingly, I reject that the T report supported any arguments regarding a time bar.
197. Turning then to the [W] declaration, under the heading "Claims for Extension of Time"; in relation to EOT 1 and EOT 2, [W] said that the EOT claims were made outside the time frame of 28 days required by clause 34.3. He made no comment about a time bar for EOT's 3 and 4.
198. [W], at paragraph 112.3 of his statutory declaration referred to the EOT exceedingly 28-day time period, and in paragraph 112.4 he referred to his letter dated 23 June 2017 [attached at tab 15 of the claimant's volume 2], in which he said that the *claim was rejected on that basis*.
199. In [W's] letter (with the last number in the sequence of their reference being "– 202") he stated:

    "In accordance with clause 34.3 of the Contract, the Contractor has failed to

    > *1. Demonstrate, by way of a construction Program, that the Contractor is or will be delayed in reaching Practical Completion.*

    Due to the invalidity of this EOT claim as described above, and EOT shall not be granted"
200. Nowhere in this letter was there reference to a time bar, and yet at paragraph 112.4 of his statutory declaration he said that the claim was rejected on that basis – which can only mean on a time bar basis, and that is simply not correct.
201. At paragraph 116 of his statutory declaration, regarding EOT 2, he referred to the EOT being some months late and not permitted under the contract, and at paragraph 117, he referred to his letter dated 23 June 2016 (attached at tab 16 of the claimant's volume 2), and said that he rejected the EOT claim *on the basis of the matters set out there*.

202. In this letter (with the last number in the sequence of their reference being "– 203"), his answer was precisely the same as the "-202 letter" of the same date, and there was no reference at all to time bars.
203. Accordingly, I find that the respondent had not referred to time bars until its adjudication response. In my view to allow an objection based on time bars, when in earlier correspondence in June 2017, there was no reference to time bars in the EOT assessments, would be to allow the respondent to "ambush" the claimant.
204. The claimant had no opportunity to deal with this objection in its adjudication application.
205. I appreciate the respondent's submissions in paragraphs 8.5 through to 8.10 that I am obliged to consider counterclaim/set offs, about which I make further comments below
206. However, a freshly raised time bar, to my mind does not fall within the umbrella of the counterclaim/set off arguments identified by the respondent.
207. The respondent, quite properly identified at paragraph 8.6 that it had not brought its own adjudication application. This brings me back to my reference at paragraph 36 of these reasons that I need to consider. The respondent has conceded it did not make an adjudication application, so that its submission at paragraph 10.4 of the response that a single *payment dispute* arose on 4 September 2017, considering the totality of payment claims 5 and 6, and the LD's certificate, must be rejected for this adjudication.
208. I accept that I am obliged to consider the respondent's defences to the claim made against it, but I am not prepared to allow a freshly raised issue of a time bar to fall within that umbrella.
209. To my mind that falls entirely outside the dispute regime that is required to be followed under the Act. The respondent could have raised time bars as far back as June 2017, when it rejected the EOT claims 1 and 2, and did not do so.
210. By way of observation, I note that the Appendix 1 respondent's waiver submissions in reply did not engage with the claimant's paragraph request to be allowed to make submissions about the time bar new reason; although, as I have said it did so regarding the T report.
211. **Accordingly, I have ignored the respondent's time bar claims**, which means there is no reason to ask for the claimant's further submissions about this issue**.**
212. For completeness, I deal with the other request in paragraph 5 of the claimant's waiver submissions for the opportunity to provide submissions regarding the respondent's delivery of the T report.
213. The claimant, at paragraph 32.4 of the application, had raised its entitlement to extensions of the time on the basis that the respondent had failed to recognise that the WUC had been delayed by qualifying causes of delay.
214. Moreover, in paragraphs 33 through to 65 of the application, the claimant addressed the issue of the prevention principle. In my view, the issue of extensions of time had been clearly enlivened in the application in a general sense, which entitled the respondent to deal with this in the response, in whatever way it thought appropriate.
215. Accordingly, I see no reason to allow the claimant to provide submissions in response on the basis that the T report was a new reason. However, it is an appropriate opportunity to deal with extensions of time and this report.

X. Extensions of time and the T report

216. The T report analysed the 4 extensions of time claims made by the claimant, and as I have said above, concluded in each instance that the claimant had provided:

> *"…insufficient evidence and information either at the time the delay occurred or in its EOT claim to allow for a meaningful assessment of its entitlement to or the magnitude of any potential delay contemplated by the EOT".*

217. There are several concerns I have about the T report.

218. The T report provided opinion evidence by [*its author*] about extensions of time, as well as his comments regarding EOT1, on page 2:

> *"Therefore, the Contractor should have considered the [redacted] sizing prior to the order and as a result the requirement to order additional [*redacted*] would be as a result of the Contractor not adequately considering the [redacted] diameter in determining the [redacted] sizing."*

219. The respondent submitted this high-quality evidence [paragraph 2.2 of Appendix 1 to the respondent's waiver submissions in reply] to support its response, and invited me to accord much greater weight to the T report than the "scant material and submissions provided by the claimant".
220. I am therefore required to attributed weight to the T report, and whilst I appreciate that section 34(1)(b) states that I am not bound by the rules of evidence, in my view that does not mean that I cannot have regard to the rules of evidence. This is particularly apposite in cases of opinion evidence.
221. Nowhere in the T report was there any evidence of [*the author's*] qualifications to provide expert evidence regarding [*redacted*] construction. He signed the report as an Associate Director, but nowhere did he provide his qualifications, or a CV, to enable me to evaluate whether he was properly qualified to proffer the opinions in the T report.
222. In Appendix 1 of the respondent's waiver submissions in reply, the respondent, at paragraph 2.5, in response to the claimant's paragraph 5 waiver submissions, stated that the claimant should not be given an opportunity to provide separate submission addressing shortcomings in its evidence.
223. I agree that parties, in adjudication, should not be allowed to cure deficiencies in their evidence. As far as possible, the documents provided by the parties should be the evidence used to resolve the dispute. The respondent's T report must be evaluated on its merits, and I am obliged to investigate those merits.
224. The parties consented to me to adjudicator payment claims 5 and 6 simultaneously and s34(4) of the Act allows me to consider information or documents in the other application, and I was prepared to look at the adjudication response in payment claim 6 to see if [*the author of the respondent's T report's*] qualifications were contained within any T report in that response.
225. Unfortunately for the respondent, the T report is identical without any details of [*the author's*] experience or qualifications.
226. In the long-standing case *of Clark v Ryan* [1960] HCA 42, (1960) 103 CLR 486 which dealt with opinion evidence, the majority of Dixon CJ, Fullager J and Menzies J explained the admissibility of expert evidence. I have highlighted particularly pertinent passages.
    (i) Dixon CJ, held:

> *4. The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by J. W. Smith in the notes to Carter v. Boehm, 1 Smith L.C., 7th ed. (1876) p. 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses* ***possessing peculiar skill is admissible*** *whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."*
>
> *5. In R. v. Parker [1912] VicLawRp 32; (1912) VLR 152, one of the cases establishing the evidentiary use of finger prints to prove identity, Cussen J. in that connexion said that expert witnesses may give in evidence statements based on their own experience or study but that they cannot be permitted to attempt to point out to the jury matters which the jury could determine for themselves or to formulate their empirical knowledge as a universal law. To this should be added the observation made by Vaughan Williams J. during the argument of Reg. v. Silverlock (1894) 2 QB 766, viz. "****No one should be allowed to give evidence as an expert unless his profession or***

> ***course of study gives him more opportunity of judging than other people***." *(1894) 2 QB, at p 769 The words "profession or course of study" have of course a wide meaning and application; see per Lord Russell C.J. (1894) 2 QB at p 771 .*

(ii) Menzies J held:

> *5. Opinion evidence to account for a happening that is described to a witness is* ***admissable only when the happening can be explained by reference to an organized branch of knowledge in which the witness is an expert.*** *As Lord Mansfield said in Folkes v. Chadd (1782) 3 Dougl 157 (99 ER 589) , (as quoted by Lord Merrival in United States Shipping Board v. The Ship St. Albans (1931) AC 632, at p 642 ,* "***the opinion of scientific men upon proven facts may be given by men of science, within their own science***".

(iii) Fullager J agreed with both above Justice's decisions.

227. It is evident that the respondent proffered the T report to demonstrate the inadequacy of the claimant's EOT claims. However, there is no evidence of [*the author's*] experience and qualifications, and in a significant contest of this nature, I find that it is unsafe to accord any weight to the T report.
228. Furthermore, the T report focussed on the claimant's deficiencies in the claimant, "*….providing no analysis of how the delay affected the date for practical completion nor how its redirection of resources enabled other areas of the WUC to progress."*
229. This is an attack upon the adequacy of the claimant's EOT claims provided as early as June 2017. Nowhere did the report deal with whether the claimant was entitled to EOT's for delays to the WUC caused by qualifying causes of delay based on a proper assessment.
230. This was the live issue raised in the application; that the superintendent should have granted EOT's and failed or refused to acknowledge that the WUC had been delayed by qualifying causes of delay, and this was not addressed by the T report at all.
231. In this regard, it appears as if the parties' submissions demonstrated "two ships passing in the night." The claimant was essentially focusing in on the prevention principle, with few submissions about the veracity of its EOT claims; whereas the respondent directly engaged on the latter point and focused, almost entirely, on the claimant's inadequacy in providing sufficient evidence and information.
232. Accordingly, I am unable to find, as a matter of law regarding the admissibility of opinion evidence, that the T report supports the respondent's submissions about EOT's.
233. The claimant provided extensive submissions about EOT's and the prevention principle to which I must now turn, because I am obliged to evaluate the set off claims advanced by the respondent, and its liquidated damages claim is contingent upon an evaluation of the claimant's EOT's.
234. At paragraph 33 of the application, the claimant stated that the respondent was asserting its rights to liquidated damages for delay against the claimant by relying on its own breaches of contract and actions to prevent the claimant from reaching practical completion by the unadjusted date for practical completion.
235. The claimant, at paragraph 34 of its application, referred to its contractual entitlement under clause 34 for EOT's for *qualifying causes of delay* and referred to the clause 1 definition of the term being, "*any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not employed by the Contractor).*"
236. It submitted that it had made claims for EOT's for qualifying causes of delay, and it referenced its table of EOT's in at paragraph 67, with references to annexures attaching evidence, which were rejected or otherwise ignored by the superintendent.
237. Furthermore, it argued that clauses 20 and 34.5 of the contract imposed an obligation on the respondent, including via the superintendent, to allow the claimant its reasonable EOT entitlements.

238. It submitted that I was entitled to apply the prevention principle to support its application to prevent the respondent from pursuing its liquidated damages because of the operation of the prevention principle. In support of its submissions, the claimant referred to *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 ("*Probuild*").
239. At paragraph 36 the claimant articulated the prevention principle, which it said, "*...provides that a party cannot insist upon the performance of a contractual obligation if it caused the non-performance. In our circumstances, this would prevent [the respondent] from benefiting from its own breaches to [the claimant's] detriment, via the application of liquidated damages.*"
240. At paragraph 37, the claimant continued that the respondent could not insist upon the claimant's timely performance of the contract if the respondent caused the delay and it could not benefit by applying liquidated damages.
241. Furthermore, it submitted that in the case of Probuild the court found that there was an implied term of good faith governing discretionary EOT's of the kind found in clause 34.5 of the contract.
242. It submitted that the respondent had breached clause 20 of the contract and the implied provision requiring it to act in good faith by benefiting from the failure of the superintendent to afford the claimant its EOT entitlements.
243. The respondent did not engage on any of the claimant's submissions regarding the prevention principle.
244. I consider it necessary to consider these cases carefully because, although the respondent has not provided any submissions to counter those of the claimant, it is incumbent upon me to be satisfied that the claimant has demonstrated its onus. I felt it necessary to extract some of the statements in the cases to clearly explain my reasons, which by necessity has lengthened the decision.
245. Having regard to *Probuild*, which involved a Design and Construct Subcontract AS4303 – 1995, which has similar in wording to the AS4000-1995 contract in this adjudication, because it is part of the AS4000 suite of contracts. It is a sub contract and has the express design obligations in-built into the structure of the contract. In the contract in this adjudication, the design obligations were added in part B clauses 8.7 A and 8.7B.
246. In *Probuild*, DDI completed the sub contract works 144 days late, and had not claimed any EOT's. Probuild claimed $2.3 million liquidated damages as a set-off on the basis that no EOT's had been claimed by DDI. Probuild calculated liquidated damages from the program date for practical completion to the that date the Works were in fact practically complete.
247. The judgement of the Full Court was given by McColl JA, and the essential issue on appeal was whether the primary judge should have held that the adjudicator had not breached natural justice by applying the prevention principle to Probuild's liquidated damages claim.
248. It is important to identify the key words in the *Probuild's* contract, regarding the "residual power" to grant EOT's. At paragraph [30] Her Honour extracted the EOT clauses which provided:

> *"**41.8 Extension of Time Sole Remedy***
>
> *(a) The right of the make a claim for an extension of time pursuant to this clause is the Subcontractor's sole remedy under the Subcontract in respect of any delay or delays. The Subcontractor is not entitled to any Subcontract Sum or any other monetary compensation or damages (including damages for breach of contract in respect of any such delay).*

41.9 Extension of Time Otherwise

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

41.10 Time Not Set at Large

(a) A delay or failure by the Head Contractor to grant a reasonable, or any, extension of time shall not cause the Date for Practical Completion to be set at large."

249. Under this contract, clause 34.5 second paragraph provides:

> *"Notwithstanding that the Contractor is not entitled to or has not claimed an EOT, the Superintendent may at any time and from time to time before the issue the final certificate direct an EOT."*

250. Apart from the superintendent being the person directing EOT's in this contract, compared to the head contractor in *Probuild*, the clauses are essentially similar.
251. Her Honour referred to *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 ("*Peninsula Balmain*") at paragraph 124, which contained a similar clause before the Court in that case, which Her Honour identified as a "reserve power".
252. At paragraph 125 of *Probuild*, Her Honour canvassed Hodgson JA's findings in *Peninsula Balmain* that absent the reserve power, any failure to claim an EOT would have precluded the operation of the prevention principle. However, she added that Hodgson JA held that the reserve power was "*capable of being exercised in the interests of both the owner and the builder and… the Superintendent is obliged to act honestly and impartially in deciding whether to exercise it."*
253. At paragraph 127, Her Honour referred to the case of *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491 in which Osborne J held that, "*the reserve power was to be exercised 'effectively where it [was] is just and equitable to do so,… [was] expressly directed to situations where 'the contractor is not entitled to or has not claimed an extension of time…', is expressed to arise on a separate and distinct basis from the provision for the extension of time pursuant to the primary mechanism [and] [t]he grounds for exercise of the reserve power [were] is expressed in the broadest possible terms."*
254. At paragraph 128, Her Honour held that, "*Probuild was obliged to exercise the reserve power to grant extensions conferred by clause 49 honestly and fairly having regard to the underlying rationale of the prevention principle to which I have earlier referred or, if necessary, because there is an implied duty of good faith in exercising the discretion clause 41.9 conferred."*
255. What was particularly important in *Probuild*, which is apposite to this adjudication, was Her Honour's reference to the fact that the primary judge identified that the adjudicator could not determine the date to which Probuild ought to have granted an EOT.
256. In *Probuild*, Her Honour noted, and paragraph 43, that Probuild's payment schedule focused on DDI's failure to complete the Works by the date for practical completion, and that it had suffered loss and damage as a consequence and elected to apply liquidated damages.
257. At paragraph 50, she referred to the adjudication response that DDI had delayed completion past the date for practical completion and that DDI had not claimed for and was not awarded any extension of time and was not entitled to do so and had no entitlement to extend the date for practical completion. It added that even if an EOT claim had been made (which Probuild denied) such claim would be time-barred.
258. Her Honour referred to the primary judge's analysis at [paragraph 33 of the primary judge's reasons] which held:

> *"Thus, Probuild maintained, as part of its argument, that DDI was not entitled to any extension of time, under clause 41.9 or otherwise. It did so seeking to discharge its onus of persuading the adjudicator of its right to a set off. In response DDI denied that claim at least partly on the basis that Probuild's position was unreasonable, although no argument was developed explaining why unreasonableness on the part of Probuild might provide an answer to its assertion that DDI was not entitled to an extension of time under clause 41.9."*

259. At paragraph 61 of the application, the claimant submitted that, "The fact that the subcontract allowed Probuild to grant a discretionary EOT ruled out Probuild's argument that DDI'S failure to claim EOT's meant that the prevention sensible ought not be applied."
260. I am not in a position based on the material to which I must give weight, what amount of EOT's the claimant in this case is entitled to, as there is no programming analysis provided by the claimant.
261. I was unable to have regard to the T report because I considered it inadmissible for the reasons identified above, but even if I had considered it, it provided no analysis of what the superintendent could have granted, because the report focused on the claimant's failure to demonstrate delays on the critical path.
262. I have resolved this thorny issue, based on the *Probuild* principle that the respondent had the onus to demonstrate its entitlement to liquidated damages. Probuild's case focused on DDI's failure to claim for an EOT, and that any claim would be time-barred.
263. Once the adjudicator, the primary judge and the Court of Appeal considered that the existence of the reserve power meant that Probuild could not rely upon DDI's failures to claim an EOT, because of the underlying rationale of the prevention principle, Probuild was unable to discharge the onus it was entitled to liquidated damages.
264. At paragraph 62 of the application, the claimant referred to the case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] is NSWCA 211, the claimant effort emphasised that the discretionary EOT provisions ought to have been invoked honestly in fairly and that there was an obligation of the parties to cooperate implied by law in all contracts.
265. It argued that the respondent's failure to meet its obligations under the contract meant that it could not apply liquidated damages.
266. At this stage I have not considered whether there had been any failures of the respondent's obligations in respect of design, specification, management, programming and coordination of the WUC.
267. My focus is entirely on the proposition that the respondent had the onus to demonstrate it was entitled to liquidated damages, and in its letter dated 4 September 2017 in which it certified monies due by the claimant to the respondent, it simply stated that, "The WUC did not reach Practical Completion by the Date for Practical Completion."
268. It then proceeded to assess liquidated damages up until 22 August in the sum of $189,589.53. This is what Probuild had done in its payment schedule, which it supported in its adjudication response, at which it also alleged that the claimant would be time-barred.
269. It is not necessary for me to decide how many days EOT's the claimant was entitled because that is not possible on the material. Nevertheless, in paragraph 67 of the application, the claimant referred to its EOT claims, and the entitlement to an EOT based on a Qualifying Cause of Delay, for *any act, default or omission of the Superintendent, the Principal or its consultants, agents or other contractors (not being employed by the contractor).*
270. The claimant in the tables associated with paragraph 67, explained the issue of revised drawings, delay in providing the claimant with design information and subsequent changes in the [*redacted*] route, and the need to carry out rework because of the respondent's lack of response. These submissions arguably fall within qualifying causes of delay, for which the claimant could be entitled to an EOT.

271. In the adjudication response, in response to these EOT submissions, the respondent referred to:
    (i) the time bars;
    (ii) the claimant's conduct and its delay in failing to properly resource the project; and
    (iii) the T report.
272. I have not been prepared to consider the time bar issue for the reasons set out above, and the T report was given no weight also for the reasons set out above.
273. The allegation of the claimant's conduct being the cause of delay did not respond to the allegations of a qualifying causes of delay having arisen, so I am satisfied that there may have been a qualifying cause of delay. This would entitle the claimant to an EOT under the reserve clause, which it is evident the respondent did not exercise, or address in its submissions.
274. As I've said, I am unable to calculate these EOT's, but the point that arose in *Probuild*, at paragraph 91, where the Court held that, "viewed correctly, DDI contended the adjudicator did not find that it was entitled to an extension of time, but, rather did not accept Probuild was entitled to claim the number of days sought for liquidated damages.
275. Consistent, therefore, with the reasoning in *Probuild*, given the existence of the reserve clause, and by application of the prevention principle, to which I am entitled to have regard, I find that the onus was on the respondent to demonstrate its entitlement to liquidated damages by way of set off, and it did not discharge this onus.
276. I therefore reject the set off for liquidated damages of $189,589.53.

XI. Set-offs claimed by the respondent

277. At paragraph 31 of the application, the claimant said that the respondent had sought in a letter dated 4 September 2017, to include for the first time a claim for setoffs of liquidated damages and extra over costs.
278. At paragraph 32.1, the claimant emphasised that the respondent had not raised its set-off claims in the payment schedule, or otherwise prior to the date by which it ought to have paid the amount certified in the payment schedule.
279. At paragraph 8 of its waiver submissions, the claimant repeated its application submissions, and at paragraph 9 said that the matters raised by the respondent for the first time before me were unequivocally outside the scope of what I may consider in the adjudication.
280. My request for the claimant's waiver submissions were confined to the waiver point, so I am not prepared to consider any submissions that went wider than that request.
281. However, at paragraph 32.7 of the application, the claimant said that even if liquidated damages and extra over cost were payable (which it denied), it submitted that the respondent had adopted a flawed process in attempting to set off the liquidated damages and extra over costs against the certified amount.
282. The respondent provided no submissions in reply, but I need to analyse the claimant's submissions to determine, whether they are sustainable.
283. Essentially, in paragraph 32, the claimant argued that:
    (i) clause 37 of the contract required 2 certificates to be issued, with the second certificate assessing any monies due from the claimant to the respondent;
    (ii) the second certificate was required if the respondent wanted to set off against the value appearing on the first certificate;
    (iii) the first and second certificate were to be issued concurrently within 28 days of the progress payment being submitted by the claimant;
    (iv) the claimant argued that the set off liquidated damages and extra over costs were not set out in the certificate issued concurrently with the first certificate for the July payment claim. It argued the second certificate relating to the July payment claim was set out in a document on 4 September 2017;
    (v) it argued that therefore, the prescribed contractual process for setting off any amounts had not been followed in respect of the July payment claim and could not

be brought to account to set off against the certified amount in the payment schedule; and

(vi) the contract provided no other mechanism for setting off amounts claimed to be payable by the claimant to the respondent against the amounts appearing on the first certificate, and the respondent had a strict obligation to pay the amount paid on the first certificate, where a second certificate was not issued concurrently. It cited the case of *Main Roads Construction Pty Ltd v Samurai Enterprises Pty Ltd* [2005] VSC 388 ("*Main Roads*") as authority.

284. *Main Roads* was a case involving summary judgement in which the proprietor in defence against the summary judgement application raised a cross claim. Accordingly, it dealt with the issue of as to whether the proprietor was entitled to obtain leave to defend, which thereby would defeat a summary judgement application.
285. The contract in that case was an AS4000-1997, which is the contract in this adjudication and the clause 37 is identical.
286. In *Main Roads*, Habersberger J considered the contract and a series of authorities including *Algons Engineering Pty Ltd v Abigroup contractors Pty Ltd* (1997) 14 BCL 215, and at paragraph 30, whilst discussing the judgement of Rolfe J, he extracted Rolfe J's rejection of the defendant's right to rely on a common law right of setoffs or equitable set off which had held on page 230:

> *"I do not see that there is any unjustness in requiring the parties to abide by the terms of their contract, particularly when in so doing the Court is not precluding the defendant, ultimately, from raising the amount sought to be set off as a defence to the final claim and allowing the defendant to rely upon its entitlement to such set off under the contract, but in due course. It was submitted on behalf the defendant that if it had a defence that defence can be available immediately. I think the answer to that submission is that on a proper construction of the contract, and in the circumstances which have occurred, it does not have a present right to raise that defence. The defence will be available at a later point, the right to bring it being deferred by the terms of the contract."*

287. At paragraph 42, Habersberger J held that:

> *"It seems to me that the reference in the first paragraph to the superintendent certifying an amount due and payable to the principal is clearly a reference to the procedure set out in clause 37.2. Further, the reference in the second paragraph to the principal having 'set off liquidated damages' is also reference to that procedure. Thus, the contract when read as a whole clearly does not, in my opinion, recognise any right of set-off other than in accordance with the procedure set out in clause 37.2."*

288. This is the essence of the claimant's argument. The payment claim was served on 21 July 2017, and 6 days later the respondent delivered a payment schedule certifying an amount payable $376,474.80 excluding GST. That fell within the 21 days of the payment claim, which by my calculations expired on 11 August 2017.
289. It was only on 4 September 2017 that the respondent provided a certificate under clause 37.2 (a), and that was in relation to payment claim 6, and at the same time it provided a certificate under clause 37.2 (b), which could be described as the second certificate.
290. This 4 September 2017 certificate was outside the 21 days for payment claim number 5, and in any event purported to respond to payment claim 6. Accordingly, I find that there was no second certificate regarding payment claim 5, which means the respondent was not able to set off any sums of money against the $376,474.80 excluding GST that it had certified. This is the position under the contract.
291. As I mentioned previously, the respondent did not provide any arguments to counter those of the claimant, particularly under paragraphs 8.5 through to 8.10 of the response.
292. At paragraph 8.7, the respondent submitted that *Cooper and Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 was particularly apposite to this adjudication, in which it explained that I am required to consider the merits of the claimed set off.

293. I agree that I am obliged to do so, and as stated in paragraph 8.8 of the response, I must consider the merits of the respondent's competing claims, to determine the merits of the claimant's claim.
294. The respondent has relied upon its entitlement to set off pursuant to the letter dated 4 September 2017, and pointed to no other set off rights, apart from those identified under the contract in that letter.
295. The covering email to that letter of 4 September 2017, provided for the first and second certificates, as I have mentioned above, so it appears to me that the respondent is relying upon its contractual rights of set-off dealt with in the 4 September 2017 certificates.
296. The respondent has referred to no other means of identifying an entitlement to set off, apart from those under the contract, and in this instance, that cannot occur for payment claim 5, because no second certificate was issued with the "certificate" of 27 July 2017, in the payment schedule.
297. Whilst I do not have any correspondence in evidence from the respondent supporting the payment schedule for payment claim 5, similar to the 4 September 2017 email which attached the payment schedule and classified it as a clause 37.2 (a) certificate, I draw the inference that the payment schedule was being considered by the respondent as the first certificate.
298. I have therefore considered the merits of the set off claims by the respondent in this adjudication, and find that it had no entitlement to set off any amounts because of its failure to issue the second certificate at the same time as the first certificate on 27 July 2017.
299. I have already dealt with the issue of liquidated damages by way of set off above. But even if I am incorrect that liquidated damages could not be raised as a set off in payment claim 5, the failure to issue a second certificate precluded the respondent from raising the liquidated damages and work taken out claims in payment claim 5.
300. Accordingly, the respondent is unable to raise any setoffs against payment claim 5 in this adjudication.
301. I must now deal with the merits of the claimant's claim, because I need to be satisfied that that the claimant has discharged its legal and evidentiary onus in relation to its claims.

XII. The amount to be paid

302. I am obliged to calculate the amount to which the claimant was entitled, and the claimant had divided up its payment claim into:
    (i) A Contract Works claim;
    (ii) Variation claims.
303. To keep track of the claim items, I created a spreadsheet annexed as LM1, which identified each claim, the contending amounts the parties valued for each claim, and the adjudicated amount that I decided.
304. It comprised 2 sheets:
    (i) The summary sheet with all amounts identified; and
    (ii) A detailed Contract Works claim sheet, which had each line item claimed. I reviewed the [*redacted*] Scope of Work document [Document C1217-06-ESW-001_1] ("SOW") and cross checked each line item in the payment claim, with the work described in the SOW, to ensure that it fell within the work to be carried out. I used the descriptions in the SOW to fully describe the line items.
305. This spreadsheet was used to calculate the amount to be paid.

Contact Works claim $450,679.84

306. The payment claim was provided by the claimant behind Annexure 4, and I find it was sent under cover of an email sent on 21 July 2017. In the material that I was given, there were only two spreadsheets provided being a summary sheet of the items under the contract plus reference to the variations which were on a separate sheet which was also provided.
307. The covering email indicated there was also an OSPS day works reconciliation dated 18 July 2017, but that was not provided to me in the application.
308. The claimant submitted, under heading F [*CLAIMANT'S*] ENTITLEMENT TO PAYMENT, that systems 19 – 21, 25, 26, 27, 28 and 46 were claimable, and described this claim as "partially certified but not paid" in the amount of $450,679.84.
309. It then deducted the payment made by the respondent on 26 September 2017 of $86,179.78.
310. Consequently, it submitted that its Net Contract Works claim was $364,500.06.
311. The largest component of this claim was "Prelims", amounting to $349,446.65. I could not understand where this line item came from, as it was not in the 1 February 2017 Quote, which made up the contract sum, which was agreed.
312. Under paragraph 30 of its submissions, in Item 1 of its table, it provided further details of its claim [page 11] to which it referred to Annexure 7.
313. Its claim for this aspect of work was based on its assessment of the completed percentages of works as at 21 July 2017 [based on a walk-around by [E], and it then referred to the "Project NPC dated 21 July 2017 for substantiation of the accuracy of the extent and value of the Contract Works claim [paragraph 7 of the submissions relating to item 1].
314. Annexure 7 was divided up into "Contract Works claim correspondence" and "Contract Works claim NPC document". Unfortunately, the claimant did not explain, nor cross reference documents within this Annexure to its submissions with any meaningful detail.
315. The claimant provided no supporting statutory declarations, nor any guidance as to the evidence it attached at annexure 7.2 "*Contract Works Claim NPC Document*", to explain how it derived its calculations of the percentages of completed work claimed.
316. I appreciate that the parties to the contract understand these claim documents, but the claimant needs to appreciate that the independent adjudicator needs to understand how the claim is made up.
317. Clause 37.1 of the contract entitles the claimant to make progress claims, which are, "*to be given in writing to the Superintendent and include details of the value of WUC done and may include details of other monies then due to the Contractor pursuant to the provisions of the contract.*"
318. I looked at the material in Annexure 7 to understand the make-up of the claim.
319. Unfortunately, at Annexure 7.1, headed *CONTRACT WORKS CLAIM CORRESPONDENCE,* the claimant chose to provide the respondent's payment schedule dated 4 September 2017, which was in response to payment claim number 6.
320. No correspondence relating to payment claim number 5 was attached in the application at Annexure 7.1. All the documents behind this tab related to the payment schedule 6 and progress claim number 7 and payment schedule 7. This adjudication dealt with payment claim number 5, so it was important to confine any analysis of this dispute to the respondent's payment schedule 5.
321. Fortunately, behind Tab5 in the application, behind the attached payment claim in Tab 4, the claimant attached the respondent's payment schedule, but only 2 pages of it, excluding the attachment which explained how the respondent had calculated the contract works claim.
322. I was able to find this attachment, in the response, attached behind the payment schedule 5, behind tab 4 of the statutory declaration of [W] behind the tab headed "July". The scheduled amount for the contract claim was $376,474.80 and the attached assessment dated 21 July 2017, expanded upon the calculations.

323. It was not possible for me to understand the make-up of the contract works claim in any meaningful way. No doubt the claimant understood its document, which appeared to be extracted from software that it used to manage this project.
324. Some of its earlier spreadsheets listed project management costs, labour and material costs and gross profit/loss, and then referred to burn rates and forecast rates, materials analysis. It also had a *Key Project Indicators* page which had a 63.1% complete at 29/06/17, and then a series of Gross profit and Manning data entries.
325. There were also *Labour Activity Assessments,* which captured "Total Predicted Hrs based on burn rate", which appeared to focus on the Variations, but insofar as the Contract works were concerned, there was nothing meaningful that I could discern from the documents.
326. There were also some graphs showing *Labour Hrs Allowed vs Actual, Total Costs vs Invoiced to date, Planned Profit vs Predicted/Forecast Profit, Labour % Spent vs Work Completed % and Burn rate.*
327. As I have said, the claimant did not explain these documents in any ways, to allow me to make sense of them, and it bears the onus of doing so. Nevertheless, I had regard to the respondent's evidence supporting its payment schedule 5, to glean an understanding of this claimed item
328. I refer to the statutory debt reduction [K], who paragraph 39 through to 44 of his statutory declaration stated that he assessed the claim and provided the progress claim number 5 response because [W] was on leave.
329. This was corroborated by the statutory declaration of [V], who stated that he was the superintendent for the project [paragraph 18] until [W] formally took over on 28 August 2017 [paragraph 16]. [V] confirmed, at paragraph 29, that [W] went on leave on 7 July 2017 such that the assessment of payment claim 5 was undertaken by [K].
330. At paragraph 42.4 of [K']s statutory declaration, he explained that prior to PC 5, the claimant has made no objection to the respondent's assessment of the completion of works performed in respect of each system and that the methodology used in assessing PC 5 was the same as with all previous progress claims.
331. At paragraph 42.1 he said that the respondent's certification was based on actual percentages of completed works for a particular system, and that the claim for preparatory works could not amount to anything as much as 45% of the works done for that system.
332. Based on the claimant's reference in Annexure 7 document, I find that the claimant has failed to substantiate its claim for the reasons I have identified above.
333. However, in the adjudication application submissions, the claimant referred to the scheduled amount of $376,474.80 excluding GST that had been certified by the respondent on 27 July 2017. I looked at the payment schedule behind Tab 5 of the application, and the schedule had the scheduled amount of $376,474.80 against the claim for $450,679.84 for contract works
334. In paragraph 21 of the respondent's waiver reply submissions, it said that it did not resile or depart from its certification of PC5.
335. I am satisfied that [K] had properly assessed the contract works claim, which had the scheduled the amount of $376,474.80 for this aspect of the work, such that the respondent considered that this amount of work was payable.
336. Accordingly, I find that the claimant is entitled to $376,474.80 excluding GST admitted by the respondent for the contract works claim, and this amount is taken to Annexure LM1.

Variation claims $268,907.39

337. This aspect of the dispute comprised these variations which were disputed:
    (i) VO 1 $88,311.83
    (ii) VO 4 $64,611.63
    (iii) VO 7 $918.65
    (iv) VO 14 $43,051.10
    (v) VO 15 $43,920

The application described the following variations as certified but not paid

(i)	VO 17	$3324.60
(ii)	VO 18	$11,100
(iii)	VO 19	$4535.50
(iv)	VO 20	$1200
(v)	VO 21	$5894.08
(vi)	VO 22	$2040
	Totalling	**$268,907.39**

Payment schedule reasons

338. To understand the make-up of the payment schedule to each variation, I have had regard to the tab headed "July" behind tab 4 of MJW to obtain the payment schedule 5 comments.
339. For each variation, the scheduled amount was $0.00, which for VO's 1, 4, 7 & 8 the respondent referred to previous correspondence, which was attached by the claimant to each of the variations claimed in Annexures 8, 9 and 10 in the application. The claimant did not attach any correspondence for VO8, and in the application in the table under paragraph 30, at item 6, it advised that it was not pursuing VO8 in this application.
340. In each variation claimed above, the respondent added the words, "*Costs are not accepted by CEA*."
341. These words were also used for VO14 and VO15, but the respondent stated that the variation claims were rejected as they were part of the Scope of Work identified in the [*redacted*] Specification clause 8.1.
342. From variations 17 onwards, the comment throughout the schedule was, "*Not approved in this claim, still being assessed….*" by the respondent.

Claimant's design obligations

343. Each variation claimed requires analysis, which takes place below. However, the respondent, in paragraphs 8.21 to 8.31 asserted that the claimant had a design responsibility. These centred around the claimant's design obligations identified in clause 8.7 A, and its obligations to supply design documents under clause 8.7 B.
344. The respondent's argument was that the claimant's design obligations meant that, for a project of this complexity, it was not possible to identify every element of support or bracket required in laying or suspending literally [*detail of the nature and quantity of materials redacted*] and that an assessment of these requirements had to be made on site, and where necessary, they were to be designed and fitted by the claimant.
345. At paragraph 8.30, for example, the respondent stated that for the claimant to argue that if a [*design features redacted*] did not appear in a drawing, then it gave rise to a variation, not only flew in the face of reality of the sorts of projects, but also contrary to the express language of the contract.
346. These submissions appeared to be in response to paragraph 26 to 28 of the application. At paragraph 26 of the application, the claimant said that the respondent had rejected a number of its variation claims based on the assertion that the claimant had assumed substantial design risk under the contract.
347. At paragraph 27, the claimant argued that it was engaged on a construct – only basis. The claimant took issue with the respondent's assertion that it had design obligations and argued that it was a construct–only contractor, and was entitled to design variations.

348. It appears that the allegations of the design responsibilities emerged in correspondence between [W] and the claimant during the correspondence trail involving the variations. Design reasons were not identified in the payment schedule for any of the variations claimed, but of course the payment schedule referred to other correspondence. I have already outlined the payment schedule 5 objections in the analysis above, and I was unable to glean any objection based on the claimant's design obligations, in the 2-page schedule.
349. Furthermore, I note from paragraph 14 of [K's] statutory declaration that he was involved in the pre-contract negotiations up to the award stage.
350. At paragraph 17.1 he said that the claimant was employed to be the [*redacted*] subcontractor for the project (my underlining), and that those works including the supply, installation and commissioning works associated with the [*redacted*] works on site. He makes no mention of design obligations, and a large part of his statutory declaration dealt with the claimant's alleged under-resourcing and the taking out of part of the works from the claimant.
351. [V] made no comment about the claimant's design obligations, although he said, at paragraph 11, that he was involved at the outset and took an active role in assembling the tender materials.
352. I note, therefore, that neither of the respondent's witnesses, who were closely connected with the tender negotiations made any comment about the claimant's design obligations, which I find were not identified in any of the tender materials identified by the respondent.
353. [V's] statutory declaration mainly involved his assessments of the claimant's claims, and the alleged under-resourcing by the claimant of the project.
354. [W] in his statutory declaration said, at paragraph 18 of his statutory declaration, "*It is important also to realise that there is a necessary element of on-site discretion and design that comes with a complex installation of [redacted] has undertaken in this project*."
355. He added at paragraph 20 that "*It is not usual practice, nor is it feasible, for every aspect of the installation to be the subject of specific instruction or specification."* He further explained that is why the contract identified that the claimant would have a design obligation to address the sorts of issues.
356. It appears from [W], although he cannot swear to the issue, that the design obligations were to identify these necessary *on-site discretion and design* activities.
357. It is difficult to attribute much weight to his evidence, as he is providing opinion evidence and swearing to the issue, rather than deposing to facts. He was not involved in what the parties objectively negotiated, so whatever his opinion about the design obligations cannot assist me, as they reflect an opinion, after the fact. The design obligations, if there are any, together with the extent of them, must be provided in the contract.
358. Given his involvement, if there had been design obligations as identified by the contract, I would have expected him, and [V], the previous superintendent to refer to the facts of the supply of design documents by the claimant, for the respondent's superintendent's review. That is what clause 8.7A of the contract required, and there is no evidence of this ever occurring.
359. However, given that the payment schedule did not raise design obligations as a reason for non-payment, the genesis of the design dispute, as I have said arose afterwards in correspondence. In any event, the parties considered these design obligations were an issue to be resolved, as both raised them in submissions, and I do so now.
360. In considering the claimant's overall contractual design obligations because of the existence of clause 8.7 A and clause 8.7 B, it is necessary to interpret the entire contract based on an assessment of what the parties objectively agreed. For example, in the case of, *Codelfa*[1] at page 350, Mason J held:

[1] *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337

> *"In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."*

361. Both parties provided submissions about the genesis of the contract by reference to the tender negotiations, and the respondent provided the only sworn evidence about these precontract negotiations.
362. However, evidence of negotiations preceding a contract is generally not admissible as evidence of the objective intention of the parties.[2]
363. *Codelfa*, however, is authority for several exceptions to that rule, and it held that prior negotiations are admissible to establish the objective background facts, [*my underlining*] which are known to both parties, and the subject matter of the contract.[3]
364. As far as the tender negotiations are concerned, the request for quotation at Annexure 1 of the application was for the [*works details redacted*] supply and AS4000-1997 was attached to the request.
365. I find that AS4000 1997 required, at paragraph 2.1, that the claimant to carry out and complete *WUC* in accordance with the contract and directions authorised by the contract. *WUC* makes no mention of design.
366. The tender provided at Annexure 2 provided was in response to the request and referred to the specification, scope of works and drawings.
367. I find that the objective background facts (allowed by *Codelfa*) are that the contract price for the works was negotiated and based on a construct-only basis. Nevertheless, clause 8.7A and 8.7B form part of the contract, as they were added to the General conditions, to which I will have regard.
368. As mentioned at paragraph 5 in the claimant's submissions, under paragraph 28 of the application, the claimant argued there is no evidence of being requested to be involved in design development, provide design documents prior to and during the performance of the *WUC*.
369. Franklins[4] is authority that evidence of post contract conduct is not admissible to aid in the construction of the contract, so I cannot have regard to these submissions to aid in the contract construction.
370. At paragraph 8.25, the respondent said that the contract as it stands must be given its ordinary meaning, and I am not to attempt to divine the intention of the parties in circumstances where I'm not required to do so.
371. I agree with the respondent, but my reference to the tender negotiations and history up until the signing of the contract, based largely on the respondent's own witnesses, was to obtain the objective facts that design was not part of the claimant's obligations at that time.
372. Unfortunately, the respondent did not point to any provisions, apart from clause 8.7A and 8.7B explaining the extent of the claimant's design obligations. At paragraph 8.25, it merely said that, there was an element of design responsibility that the claimant was to take on for which it was to receive remuneration.
373. Furthermore, at paragraph 8.27, that at a practical level, the claimant was undertaking an element of design. It is not clear at all to me what is meant by an *element of design responsibility*, because the contract should identify the existence of and the extent of design responsibility, and this is where I have some considerable difficulty.

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[2] *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 cited in Christensen SA and WD Duncan: *The construction and performance of commercial contracts* (2014], The Federation Press, Leichardt New South Wales
[3] Christensen SA and WD Duncan *supra*, paragraph 2.3.6.1 at page 32
[4] *Franklins Pty Ltd v Metcash Ltd* (2009) 76 NSWLR 603 cited Christensen SA and WD Duncan *supra*, paragraph 2.3.6.2, page 33

374. At paragraph 8.29 of the response, it suggested that that it was not possible to identify every element of support bracket, and that an assessment must be made to an extent on-site and if elements of support are required, then *they are to be designed and fitted by the contractor.*
375. This seems to be the high-water mark of the respondent's submissions regarding design, or perhaps more accurately *an element of design*, but unfortunately it does not take the matter any further, because I find this is a construction contract, with drawings identifying the work to be carried out by the claimant under the WUC.
376. Clause 36.1 which deals with variations, identifies many activities which constitute a *variation* including increasing any part of work, changing its character or quality, changing its levels, lines, positions or dimensions, or carry out additional work.
377. Such an express clause appears to me to be in direct contradiction to the respondent's notion of *element of design* requiring the claimant, after assessing the elements of support, to design and fit them, presumably at no cost to the respondent.
378. Such a vague obligation, to my mind cannot cut across the express variation clause identified above.
379. However, these additional design clauses were added, and I must make sense of them because they form part of the contract. I am required to give effect to all parts of the contract.
380. On my reading of AS4000-1997, nowhere else does it make mention at all of design in the WUC, which the claimant was responsible to complete.
381. Clause 8.7A provides as follows:
"The Contractor shall:
    (a) *ensure that a qualified, experienced and competent person at all times supervises and coordinates:*
        i. the design and specification of the WUC and the works; and
        ii. the carrying out of WUC;
    (b) *complete and supply to the superintendent the contractor's design documents in sufficient time to allow the superintendent to review and (if the superintendent elects) comment on them before the WC to which they relate commences; and*
    (c) *ensure that it (and shall use its reasonable endeavours to ensure that an involved in the contract is design documents) certifies in writing (prior to, and as a prerequisite to achieving, practical completion) to the purchaser the contractor's design obligations carried out by its comply with the contract."*
382. In the context of a AS4000-1997, there are no other express references to design documents in the General conditions. In Part A, item 15 with reference to the principal supplied documents, there is a list of a whole series of schedules and specifications.
383. With reference to general condition clause 8.3, which refers to contractor supplied documents, there is no evidence provided of the claimant ever providing these.
384. Turning to Schedule A – the Schedule of Prices [appendix 3.5 of the claimant's application] states that "This contract is for the supply of all labour, materials, and equipment necessary to install, terminate and test [*redacted*]…"
385. Schedule B refers in similar terms to, "This contract is for the supply of all labour, materials and equipment necessary to install, terminate and test [*redacted*] works for the…"
386. The General [*redacted*] Specification [appendix 3.7 of the application] sets out the requirements for [*redacted*] systems including the supply, installation and commissioning readiness of the [*redacted*] works…"
387. The general specification [appendix 3.8] does make reference:

(i) at paragraph 3 to Design Requirements, but I find this is in the context of equipment where it states at clause 3.1 "Equipment shall be designed and selected to meet the requirements of the scope of work and any other relevant specifications, codes, standards and legislation, in particular relating to OHS. Particular consideration shall be given to the environment in which the equipment is required to operate."

(ii) Paragraph 4 makes reference to general requirements where again there is reference to equipment as follows, "all equipment shall be established and proven design… Design and selection of all equipment shall make provision for safe and convenient operation, maintenance and handling. All equipment shall be designed to minimise hazards….

(iii) Paragraph 4.6 there is reference to Alternative Design Options and Design Code Compliance, in which it stated that alternative design options would be considered by the respondent on a case by case basis provided that the proposed options meet the general design and performance philosophies and the technical requirements of the specification.

(iv) Paragraph 6.4 was headed "Information to Be Submitted for Design Approval", and it referred to a tabulated summary of documentation required post contract award in Appendix A.

(v) I have looked at Appendix A, and it appeared to me to be a generalised reference to plant and equipment, where the note number 1 which relates to the electronic format of documents with the tender, made reference to "RFQ", which I note from the abbreviations at paragraph 2.2 means the Request for Quotation.

(vi) The request for quotation [At appendix 1] did not require any documents to be provided by the claimant and the RFQ stated, "We would be interested to receive your proposal to undertake the [*redacted*] supply, and installation, for the above-mentioned project." There is no reference at all to any design documents

388. The [*redacted*] **Installation Scope of Work** at appendix 3.9 of the application, was the last document in the series of contract documents in the bundle. I have searched for elements of design within it and found the following:

(i) *at paragraph 1 there is reference to, "The [redacted] shall be designed to operate automatically…"*
I take that to mean the design carried out by the respondent, perhaps in conjunction with the principal, to ensure this is [*building type redacted*]. It cannot mean that the claimant has a design obligation emerging from this statement.

(ii) *At paragraph 1.1* ***Scope****, it provided*
"The scope of works has been prepared for the construction phase of the [redacted] project. Its purpose is to transfer knowledge from the design to the construction phase.

The works are to be executed in accordance with the project general specification… And to the approved construction plans and drawings….
The contractor shall have the sole responsibility for each and every item of expense necessary to complete the Works as detailed in the drawings and specifications."

389. In my view, this can only mean that the design is complete, and the stage for which the claimant is responsible, is to construct what has been designed by others. It does not suggest that there is some design to be carried out by the claimant.

390. *At paragraph 1.3* ***Subsystems Breakdown*** *it stated, "The design has been divided into subsystems and the work package structure, including the ITP's, has inherited this structure. It then provides a table 1.3 – one with the Sub System Design Codes.*

391. Again, it appears from the meaning of this paragraph that the design has already been completed, and divided the work up into sub-systems, which designated design codes. This connotes the design has been complete by others, and cannot suggest that the claimant is to carry out some design.

392. At paragraph 1.4 **Construction Activity Types,** there is reference to all sorts of typical construction activities, none of which refers to design.
393. **At paragraph 1.5 Work Packages**, provides, "The design is also delivered using packaging based on the systems breakdown in the scope of works described in section 2 are presented using this structure."
394. **Paragraph 2 Work included**, "Work packages are to include the relevant construction plans".
395. Neither of these last 2 paragraphs, in the important Scope of Work document assists in sheeting home a design responsibility to the claimant.
396. I am of the view that clause 8.7A does not identify the extent of the claimant's alleged design obligations, and the reference to the claimant providing an experienced person responsible for supervising and co-ordinating the design and specification of the WUC and the Works appears meaningless, if it is requiring the claimant to carry out design.
397. There is no evidence of any design requirements in the WUC, so I cannot realistically find that this aspect of the clause means anything, apart from, as suggested by the claimant at paragraph 11 of the application submissions on page 8, to turn the respondent's design into a constructed product.
398. The clause also requires the experienced person to supervise the carrying out of the WUC, and I find that this clause can operate, without any strained interpretation of its meaning.
399. As to the requirement of providing the contractor's design documents, there is no evidence of any, and everything else in the contract points to it being a construct only contract.
400. There is no definition of the Contractor's design documents, so I am unable to find that clause 8.7A imposes any meaningful design obligation on the claimant.
401. Insofar as clause 8.7B is concerned, whilst it identifies an obligation on the claimant to supply the Contractor's Design Documents to the superintendent, there are no such design documents identified anywhere in the contract which I can find.
402. The respondent did not point to any specific documents in this context, such that its best submission is that the claimant was obligated to *an element of design* about which it gave no further meaningful information. I cannot accept that such a vague notion was a contractual obligation, particularly in the face of the specific variation clause referred to above.
403. **I find therefore, that the claimant does not have design obligations under the contract.** Accordingly, I therefore find against the respondent on its submissions that the claimant accepted an element of design obligation. It may be that the parties have other evidence about the design obligations, but they are not before me.
404. I was obliged to make this finding because the parties in the application and response raised it as a live issue.
405. Deeper analysis is now required under each variation, but this design framework analysis eliminated the need to repeat anything about the claimant's design obligations in considering each claim.
406. I now turn to each variation, and it is useful to restate that the claimant bears the legal and evidentiary onus for each variation.
407. But before doing so, it appears that in each case regarding the variations claimed, the claimant adopted the following methodology:
    (i) it provided drawings demonstrating the changes;
    (ii) it provided its cost breakdown;
    (iii) it then provided substantiating correspondence.
408. The claimant's cost breakdown contained in its *Variation and Change Advice* essentially identified a whole series of materials which were listed in some detail, together with the labour required to carry out this work plus some living away allowances accommodation etc.
409. However, in relation to VO 14 and VO 15, and VO's 17 to 22, the claimant also added day works sheets.

410. I have decided to analyse the claimant's variations on the following basis, because it provides a framework for assessment of the claims:
    (i) If the work identified falls within one of the categories identified in clause 36.1, then the claimant has prima facie demonstrated an entitlement to claim;
    (ii) Then the payment schedule reasons are to be considered for non-payment, including any documents referenced in the schedule;
    (iii) If the claimant has discharged its onus on the balance of probabilities [as required by s33(1)(b) of the Act], then I consider whether it has satisfied quantum on the balance of probabilities, which is also required by that section.
    (iv) In this context, I note, that although the respondent complained about quantum, under "Alternative valuation," it did not proffer alternative quantum, nor did it complain about the rates used by the claimant. It focussed on the assertion that material supply was part of the claimant's obligation.
411. I have identified a common theme for VO 1, VO 4, VO 7 and VO 8, all of which relate to the provision of additional [*redacted*] arising out of drawing changes.
412. In each claim, the responses from the respondent adopted the following broad format ("[W's] overall objections"):
    (i) the scope of work required the supply and installation of [*redacted*];
    (ii) a [*redacted*] schedule was provided at tender;
    (iii) tender drawings showed the [*redacted*] route;
    (iv) the claimant's tender letter identified that it had included for the supply and installation of both [*redacted*]and [*redacted*], and there were no specific exclusions listed by the claimant;
    (v) the respondent's RFQ stated that the claimant was to cover compliance in every respect;
    (vi) Schedule A required the supply of all labour, materials and equipment, as defined in the relevant scope of works, drawings and specifications;
    (vii) the [*redacted*] drawings issued to the claimant following contract award were the diagrammatic representation of the system descriptions in the scope of work.
413. I considered it useful to analyse these broad objections before considering each individual variation, because, after dealing with these common themes, it allowed me to then focus on the unique aspects of each variation.

Respondent's broad objections

<u>Scope of work required supply and installation of</u> [*redacted*]

414. The respondent's letters focussed on the specific aspects of the scope relating to the area of work for which the claimant was claiming.
415. For example, in VO1, the respondent referred to Systems 35 and 38, and the paragraphs relating to that scope of work, C1217-06-ESW-001.
416. In each case, the particular paragraph relating to a subsystem for which the claimant claimed a variation, the scope identified the need to supply and install the [*redacted*], and also identified the route to be taken.
417. I am satisfied that the [*redacted*] routes were identified in the scope of work.
418. I note that C1217-06-ESW-001 was listed in paragraph 4 of the Formal Instrument of Agreement ("FIA"), as a contract document, so I am satisfied that it formed part of the contract.

[*redacted*] <u>schedule provided at tender</u>

419. The respondent, at tab 2 behind [W's] statutory declaration, provided the detailed [*redacted*] *schedule*, which [W] said, at paragraph 10 of his statutory declaration, had not been attached to the claimant's contract documents provided in the application.
420. He said that the [*redacted*] schedule formed part of the contract documents. I looked at the FIA, and I did not find the [*redacted*] schedule C1217-05-ECA-996 listed in paragraph 4 of the FIA.

421. I did not see the [*redacted*] *schedule* listed on the respondent's RFQ.
422. The respondent's response contained no submissions about the [*redacted*] schedule, nor that it formed part of the contract.
423. I am therefore not satisfied that the [*redacted*] schedule formed part of the contract.
424. However, the claimant in response to the various letters from [W] conceded that it was supplied with a [*redacted*] schedule at tender time, but stated that it did not provide certain details. I will analyse each response on that issue under each variation.
425. The concession by the claimant about receiving the [*redacted*] schedule does not, to my mind, convert it into a contract document.

Tender drawings showed the [*redacted*] route

426. [W] asserted that tender drawings depicted the [*redacted*] route and he provided copies of tender drawings.
427. I am satisfied that the [*redacted*] route was depicted on the tender drawings, and the claimant accepted that drawings were supplied at tender time, but did not accept that it provided the detail about which the claimant was claiming a variation.

Tender letter accepting the inclusions and provided no exclusions

428. [W's] correspondence regularly stated:
"[Claimant's] tender letter number NT/17/06 dated 1/2/17;
(a) inclusions – allowances been made for the supply and installation of [*redacted*] *and supplementary supports as Per required system.*
(b) no specific exclusions relating to [*redacted*] *were listed."*
429. The claimant's regular response to this assertion was, "*Please see clause 5.1 of the contract, this advises there were only going to be minor deviations from the drawings provided at tender time hence why there is no specific exclusions".*
430. I have reviewed the contract, and note that the claimant must have been referring to the General [*redacted*] Specification document number C1217 – 04 – ESP – 001 which provided as follows:
*"**5.1 General***
[*Redacted*] *shall be installed at the levels shown on the drawings. The routing shown on the drawings represent the desired finished arrangement. Minor deviations to* [*redacted*] *shall be made following approval by* [*the respondent*]*."*
431. I understand the claimant's point that there was no need to have any exclusions in its tender if the [*redacted*] had to be re-routed because of minor deviations to [*redacted*].

The respondent's RFQ

432. [W's] correspondence regularly identified this as a reason for non-payment and I note at paragraph 3 of the RFQ the following words are found:
"your offer should cover compliance in every respect with the specification and all non-conformances both technical and commercial shall be clearly identified".
433. Again, the claimant's regular response was, "*Please see clause 5.1 of the contract, this advises there were only going to be minor deviations from the drawings provided at tender time hence why there is no specific exclusions".*
434. I understand the claimant's position that there would be no need to provide any qualifications to its tender, if only minor deviations of the route had to occur because of [*redacted*] reasons.

Schedule A - the contract was for the supply of all labour, materials and equipment necessary…

435. [W's] correspondence regularly identified this as a reason for non-payment.
436. Again, the claimant's regular response was, "*Please see clause 5.1 of the contract, this advises there were only going to be minor deviations from the drawings provided at tender time hence why there is no specific exclusions".*

437. I understand the claimant's position that there would be no need to provide any qualifications to its tender, if only minor deviations of the route had to occur because of interference reasons.

[*Redacted*] <u>drawings were a diagrammatic representation of the scope of works</u>

438. [W's] correspondence regularly identified this as a reason for non-payment.
439. Again, the claimant's regular response was, "*Please see clause 5.1 of the contract, this advises there were only going to be minor deviations from the drawings provided at tender time hence why there is no specific exclusions".*
440. I understand the claimant's position that there would be no need to provide any qualifications to its tender, if only minor deviations of the route had to occur because of interference reasons.

<u>Analysis of [W's] overall objections</u>

441. I considered it useful to carry out an analysis that the broad stage about these overall objections because they were relied upon by the respondent in the response in which the respondent simply regurgitated what [W] had said in his letters.
442. The respondent did provide differing submissions about the import of those letters, which I will consider under each variation below.
443. Nevertheless, the respondent's approach was that the specification and drawings viewed as a whole meant that the claimant knew the nature of and length of [*redacted*], the [*redacted*]and had undertaken to carry out the work on that basis.
444. It argued that the claim was part of the known and agreed scope such that no variations had occurred and that furthermore, in the event of deficiencies and documentation, the claimant had a design responsibility.
445. I have already found against the respondent in relation to design responsibility, so the contest appears to be that the scope, drawings and the tender documents, when read together, meant that the claimant knew the extent of the [*redacted*] work, such that no variation was claimable.
446. I am not prepared to accept that this argument prevents the claimant from claiming a variation in circumstances where the *WUC* was varied (the "*variation principle*").
447. Neither side provided me with authority regarding the proper analysis for variations. I consulted the seminal text of Hudson[5] , and paragraph **5–024(b) Lump Sum Contracts** [pages 785-786] and **5–030 Scope of Contractual Variations Provisions** [page 791] to provide support for the *variation principle* that I have identified.
448. Insofar as the respondent's reasons for non-payment are concerned, it bears the onus of demonstrating that it is entitled to reject the variations, and as I say it provided no authority to support its position.
449. Because of the importance of this point, I have extracted part of the author's important statements as follows:

5–024(b) Lump Sum Contracts

"The first question to be decided in considering any claim for a variation based on a consultants or Employer's instruction is whether or not the work comprised in the instruction is in fact a variation, that is to say, whether, as defined above, it differs from the work which the Contractor is already obliged to carry out for the contract Price. This will not simply involve an examination the work now instructs in the light of the earlier description the contract drawings and specifications. Thus, it has already been seen that the Contractor's basic obligation in a priced contract may well include other ancillary work or processes, which although not expressly described in the documents, are "indispensable" or

[5] *Hudson's Building and Engineering Contracts: Atkin Chambers, (2010) Thomson Reuters, London* pages 785 to 786

unavoidably necessary under the "inclusive price principle" of the proper completion of the work which has been described. …

Additionally, it has been seen that the inclusive price principle in the absolute nature of the Contractor's completion obligation may require contingently necessary, although undescribed, work, often in the areas of temporary works and methods of working, to be carried out within the overall contract price. Ultimately, whether work described in contract documents such as a specification or bills including ancillary work is a question of contractual interpretation." **(my emphasis)**

5–030 Scope of Contractual Variations Provisions

"As has been seen, the general rule is that a Contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the Employer has expressly or impliedly requested the work knowing it to be such. The Contractor, therefore, is unlikely to be in difficulty in advancing a variation claim unless either:

(a) the Employer does not know of and so has not authorised the variation; or

(b) the contract has been so worded as to deny legal effect to any request authorisation by or on behalf of the Employer or their Architect which is relied on by the Contractor."

450. I am therefore required to interpret the contract to see if the "inclusive price principle" applies. I turned firstly to the FIA which does not state that the price is all-inclusive.
451. Clause 8 is an *entire agreement clause* which states that:

"This Contract constitutes the entire agreement between the parties in respect of the Works and sets out a full statement of contractual rights and liabilities of the parties in relation to the Works and no negotiations between them nor any document agreed or signed by them prior to the date of this Contract in relation to the Works is of any contractual effect."

452. Therefore, I am unable to consider the effect of the claimant's tender letter as having any bearing on the contract, because it did not form part of the contract documents, so it is devoid of any contractual effect.
453. In addition, the respondent's RFQ was part of the pre-contract negotiations and is devoid of any contractual effect.
454. Furthermore, I have found that the [*redacted*] schedule does not form part of the contract, so it is devoid of any contractual effect.
455. I then turn to the respondent's allegations regarding the *scope of work* requiring the claimant to supply and install the [*redacted*]. In answer to that submission, the claimant referred to clause 5.1, which is the [*redacted*] Installation Specification document number C1217–04–ESP–001, and that minor deviations from the layout could be allowed in the event of interference.
456. Paragraph 4 of the FIA provides the list of documents in descending order of priority, and the General [*redacted*] Specification is above the scope of work, so where there is a conflict, the General [*redacted*] Specification must prevail.
457. Accordingly, the contract recognises that the claimant needed to install the [*redacted*], and provide for minor deviations in the event of clearance, but I do not see that it demonstrates that it falls within the "*inclusive price principle*" identified by Hudson.
458. This leaves the:
    (i) Tender drawings showing the [*redacted*] route,
    (ii) Schedule A requiring the supplier or labour and materials and equipment; and
    (iii) the [*redacted*]drawings being a diagrammatic representation of the system descriptions in the scope of work.
459. The tender drawings and the [*redacted*] drawings being a diagrammatic representation, does not suggest that the contract falls within the *inclusive price principle*, as they are dealing with the extent of the [*redacted*].

460. This leaves Schedule A, which states, "*This contract is for the supply of all labour, materials and equipment necessary to install, terminate and test* [*redacted*] *works… as defined in the relevant scope of work documents, drawings and specifications*."
461. The General Conditions of Contract ("GCC") is listed as 4(d) in the FIA, which is above the schedules, so in circumstances of conflict, I find the GCC prevail, and the GCC include a variation clause which governs the parties' relationship, and allows the claimant to claim extra costs for variations.
462. The variation clause, if it applies, must, as a matter of logic, preclude the contract from being subject to the *inclusive price principle* because it contemplates payment for changes to the WUC.
463. This analysis, to my mind, apart from further details regarding each variation, means that if the claimant can demonstrate that the activity falls within clause 36.1, it has discharged its onus regarding a variation. Barring any objection that has not been canvassed in the respondent's objections above, I find that the respondent's reasons for non-payment are not justified.
464. Nevertheless, it must still be clear that a variation has occurred, and the claimant must discharge this onus, as well as its onus with respect to quantum.

Individual variations claimed

465. I now turn to each individual variation.

VO 1 $88,311.83

466. Under item 2 on page 11 of the application the claimant identified that it had submitted this variation on 29 March 2017 seeking payment for extra [*redacted*]that was required underneath the [*redacted*].
467. It referred to Annexure 8 for its substantiating documents.
468. The claimant's correspondence attached behind annexure 8.4 of the application identifies extra [*redacted*] required for the underneath of the [*redacted*] because of the issue of new drawing numbers:
    (i) C1362 – 05 – EDA – 004 – A
    (ii) C1362 – 05 – EDA – 005 – A
    (iii) C1362 – 05 – EDA – 006 – A
    (iv) C1362 – 05 – EDA – 007 – A
    (v) C1362 – 05 – EDA – 008 – A
    (vi) C1362 – 05 – EDA – 009 – A
    (vii) C1362 – 05 – EDA – 010 – A
469. The claimant argued that it was entitled to payment for extra [*redacted*] required underneath the [*redacted*] at the project.
470. At paragraph 12 of the application submissions (pages 13 and 14) the claimant said that the provision of drawings was a direction to increase and perform additional WUC, and that it had quantified its claim based on industry standards and otherwise reasonable rates, together with cost price of materials and a reasonable amount for profit and overheads.
471. At paragraph 11 on page 12 it identified a whole lot more revisions of the drawings referred to above, beyond Revision A, up to, in some cases revision 2.
472. Whilst the respondent's objections have been canvassed and dealt with above, I note that the respondent:
    (i) did not deny that it had issued revised drawings on or about 31 March 2017;
    (ii) also, did not deny that the [*redacted*] were of a higher [*redacted*] rating; nor
    (iii) that additional [*redacted*] and associated support structures were identified on the drawings; nor
    (iv) that the claimant did not have to reorder and reinstall materials.
473. In the circumstances, I am satisfied that the work fell within clause 36.1 as:
    (i) an increase in work [36.1 (a)];
    (ii) it changed the character or quality of the work [36.1 (b];

(iii) changed the levels, lines, positions or dimensions of the work me: [36.1 (c)];
(iv) required the claimant to carry out additional work [36.1 (d)]; and
(v) required the claimant to demolish or and remove work no longer required [36.1 (d)].

474. Accordingly, the claimant has satisfied its onus regarding entitlement.
475. Insofar as quantum is concerned, I find the claimant provided a breakdown of costs in its variation and I note that the claimant submitted that the costs were based on industry standards and otherwise reasonable rates for installation, cost price of materials and reasonable amount for profit and overheads.
476. It only provided global amounts for materials and labour, although it had identified the quantities in relation to each, and no rates were identified in this variation claim.
477. However, when I looked at VO 4, the rates for each item was then identified and they appeared reasonable (and were not contested by the respondent), and I used these rates to calculate VO 1. I calculated a lower material cost, because there not rates for some items that I could use. My labour costs calculation using the VO4 rates, exceeded the claimant's labour claim, so I accepted the claimant's labour claim amount.
478. The respondent argued, at paragraph 15.1.6 of the response that the amount claimed was exorbitant and that materials are part of the scope agreed to be supplied, but this does not provide me with any alternative valuation mechanisms that I can consider.
479. Furthermore, I cannot understand how the fact that the claimant was responsible to supply materials under the contract, which is correct, somehow means that it is obliged to provide materials at its cost in the case of a variation.
480. I note that the $120 per hour for a qualified [*redacted*] was agreed in schedule C, and that rate was to include overhead, profit and site conditions, so I did not allow for any additional profit and overheads, which I note in any event the claimant did not claim.
481. My calculation for this VO1, which is found in Sheet 3 of the LM1 spreadsheet is **$71,353.47,** and it was taken to the summary sheet 1 as well.

VO 4 $64,611.63

482. Under item 3 on page 14 of the application the claimant identified that it had submitted this variation on 3 May 2017 seeking payment for extra [*redacted*] that was required because of a series of new drawings
483. It referred to Annexure 9 for its substantiating documents.
484. The claimant argued that the drawings that were issued on 31 March 2017, and one on 17 March 2017 were not drawings that were issued at tender, so it had not had the opportunity to price this work in its contract price, as it was not part of the tender package.
485. The respondent's schedule made reference to only one of [W's] letters dated 13 June 2017. I note that the adjudication response identified a letter from [W] dated 17 May 2017, but that document was not identified in the payment schedule, so I am unable to have regard to it, because it was not identified in the payment schedule reasons.
486. In any event, it was superseded by the later letter, so it is not material.
487. This 13 June 2017 letter commenced with the contractor's design obligations, which I have already rejected.
488. It then referred to the claimant's tender letter, which I have also rejected because it was not part of the contract documents.
489. The letter then went on to refer to schedule A via point 7 of his letter that the claimant was to include all labour, materials and equipment, and I have already rejected that as a basis for precluding the claim from being a variation, because the GCC prevails, and the GCC contains a variation clause.
490. His other objections I have already dealt with in my overall analysis above, but there were some additional points he raised.
491. [W] referred to a cross-section drawing C1217–05–EDA–125 which he said was issued at tender time clearly showing a [*redacted*] to be installed in a culvert.

492. Furthermore, at Point 3 of his letter he referred to the tender drawing C1217 05–GGA-001 showing the [*redacted*] route with the notes about the new [*redacted*], and at point 4 he again referred to the cross-section drawing C1217–05–EDA–125 showing the cross-section of the culvert and the [*redacted*].
493. I note the basis of the claimant's argument was that some drawings which were issued after the contract has not been provided to the claimant at tender time, but the claimant did not engage with the respondent on this cross-section drawing and the reference to the tender drawing showing the [*redacted*] route.
494. [W] also mentioned, at paragraph 60 of his statutory declaration, that the claimant had the opportunity to inspect the site and declined to do and he said that if the claimant had done so it would have noticed the culvert and could have seen how it could accommodate the [*redacted*] and [*redacted*].
495. I note the claimant did not engage with [W] on this point either.
496. Furthermore, the claimant's claim cost breakdown for this claim amounted to $107,686.05 and yet as [W] said at paragraph 56 of his statutory declaration, the claimant only claimed $64,611.63 being the claimant's estimate of 60% of the nominated value of the variation.
497. I am not satisfied of the claimant's entitlement to this claim because it should have been aware of the existence of the culvert and the [*redacted*] route, and although new drawings were issued, the claimant has not demonstrated that this was additional work by overcoming the existence of the cross-section plus the overall layout which identified the [*redacted*] route.
498. I appreciate that I have found that the contract is not one that follows the "inclusive price principle", but this is not to say that the claimant is entitled to any claim it makes. It needs to demonstrate that it is a variation, and in my view it has not done so in this case, by not engaging with [W] about his reasons that I have not dismissed.
499. Furthermore, it has not explained how it derived its quantum, because to advance a claim to only 60% of what its calculation derived, is not clear to me.
500. Accordingly, I reject the claimant's VO 4 claim, and this is carried to "LM1".

VO 7 $918.65

501. Under item 5 on page 15 of the application the claimant identified that it had submitted this variation on 3 May 2017 seeking payment for extra [*redacted*] that was required because of a series of new drawings
502. It referred to Annexure 10 for its substantiating documents.
503. I have reviewed the letter called up in the payment schedule dated 13 June 2016 from [W], and each objection he made to this claim was based on the objections that I have already rejected.
504. The claimant has asserted that the variation emanates from 2 new drawings which were issued, and I am satisfied that the work fell within one of the classes in clause 36.1, and the claimant has demonstrated the actual work that it carried out and the costs in its cost breakdown, which the respondent in the payment schedule did not dispute.
505. Accordingly, I am satisfied the claimant is entitled to this variation and the sum of $918.65 has been transferred to "LM1".

VO 14 $43,051.10

506. Under item 7 on page 17 of the application the claimant identified that it had submitted this variation on 9 May 2017 seeking payment for a variation to [*redacted*].
507. It referred to Annexure 11 for its substantiating documents.
508. The essential argument in the payment schedule was that the worked form part of the scope of work as outlined in the General [*redacted*] Specification section 8.1, and that costs were not accepted by the respondent.
509. No correspondence was referred to in the payment schedule, however, I note that [W] at paragraph 78 of his statutory declaration said that no formal notice or quantification of this variation had been given prior to it being identified in progress claim number 5.

510. It is not clear whether [W] is indicating that the respondent has not had the opportunity to deal with this claim, because it had the opportunity in its payment schedule to do so.
511. Accordingly, I am confining anything says in his statutory declaration to the reason that the work formed part of the claimant scope of work, as it would not be appropriate to allow anything wider than that.
512. The claimant submitted that site instruction 13 of 9 May 2017 instructing the claimant to [*redacted*], constituted the variation.
513. The claimant submitted that on or about 4 May 2017 it had substantially completed the installation of [*redacted*] and it was just that there was insufficient space on [*redacted*] 13 and 14 to install the [*redacted*] and [*redacted*].
514. The claimant said that the respondent had stated in an email dated 9 May 2017 that the claimant had not met clause 8.1 of the specification regarding [*redacted*].
515. In addition, the respondent's response stated, at paragraph 15.4.2 that from the [*redacted*] schedule and other specifications the claimant knew that it had [*redacted*] designated X and Y with a [*redacted*].
516. It added at paragraph 15.4.3 that given the distances between the [*redacted*], only a [*redacted*] was capable of being used, and that any rework carried out by the claimant was because of it not identifying the need to have install the [*redacted*].
517. At paragraph 15.4.4, the respondent stated that in accordance with [W's] comments, the work was classified as "rework" such that it could not be classified as a variation.
518. The primary reference upon which the respondent can rely is specification 8.1, because I have already found that the [*redacted*] schedule did not form part of the contract.
519. Turning to paragraph 8.1, I note it provides as follows:
*"**8.1** [redacted]*
520. I note the reference to the [*redacted*] schedule in this specification, but the specification did not attach the [*redacted*] schedule in any of its appendices, and the FIA did not reference the [*redacted*] schedule, as I've previously found.
521. Given that the [*redacted*] schedule is not a contract document, it is left to the drawings to identify the [*redacted*], and the respondent has not pointed to any drawings that demonstrate this [*redacted*].
522. In this regard, paragraph 7 of the claimant's submissions on page 17 are apposite where the claimant said, "*The drawings provided by CEA at tender, however, did not show the requirement for a separate* [*redacted*] *or a* [*redacted*]."
523. I therefore find that there were no drawings showing the separation between the [*redacted*], which meant that when the site instruction 13 was issued, this constituted a variation in writing for additional work to be carried out, which falls within clause 36.1(d) of the contract, and the removal of material and work as falling within clause 36.1(e).
524. I am therefore satisfied that the claimant has demonstrated its onus of entitlement, and turning to valuation, I note that in the adjudication response, the respondent has not suggested that the quantum was exorbitant, as mentioned in some of the other variations, and makes no comment at all about the quantum.
525. The claimant's quantum breakdown was provided with a whole series of day works sheets (which it provided) demonstrating the labour hours used to carry out this work together with the materials used.
526. The claim was sufficiently itemised for me to determine that the rate used the labour hours was $120, which I have noted in previous variations has been used, and as the agreed rate in Schedule C for a qualified [*redacted*] inclusive of overhead, profit and site conditions.
527. Furthermore, the materials used identified rates, about which the respondent did not raise any objection, and appeared reasonable.
528. Accordingly, I'm satisfied that the claimant is entitled to $43,051.10 for this variation and this is transferred across to "LM1".

VO 15 $43,920.00

529. Under item 8 on page 18 of the application the claimant identified that this was for work of the kind the subject of VO 14 for the period between 18 May 2017 and 16 June 2017 and it provided further day worksheets.
530. It referred to Annexure 12 for its substantiating documents.
531. This work related to the separation between [*redacted*] referred to in VO 14 above, and was for a different period.
532. Given that I have found the claimant is entitled to VO 14, and having regard to the claim breakdown with the most important rate of $120 an hour for an [*redacted*], and the supplied timesheets, and without any controverting submissions from the respondent in paragraph 15.5, I am satisfied that the claimant is entitled to this amount.
533. The claimant is entitled to $43,920 for this variation and this is transferred across to "LM1".

VO 17 $3,324.60, VO 18 $11,100, VO 19 $4535.50, VO 20 $1,200, VO 21 $5894.08, VO 22 $2040

534. Under item 9 on page 18 of the application the claimant identified that this variation was approved by the respondent on 4 September 2017 it had submitted this variation on 29 March 2017 seeking payment for extra [*redacted*]that was required underneath the [*redacted*].
535. It referred to Annexure 13 for its substantiating documents.
536. The payment schedule for this and the following variation items stated that they were not approved because they were still being assessed by the respondent.
537. However, at paragraph 15.6.2 of the response, the respondent conceded that it subsequently approved those claims in progress claim 6 because they were not contested, subject of course to the respondent set off rights.
538. Accordingly, I'm satisfied that the claim is for VO 17 through to VO 22 are no longer in contest and I have taken these amounts to the spreadsheet in "LM1." I used this spreadsheet to calculate the amount to be paid to the claimant.
539. Under s43(2)(b) of the Act, I am able to amend my determination if there is a material arithmetic error, and although I had identified the amount of $86,179.78 as having been paid, I omitted to deduct the amount from the amount to be paid to the claimant, which has now been done in the amended LM1.
540. **I find the amount to be paid to the claimant is $477,632.42 excluding GST, to which GST must be added.**

XIII. Due date for payment

541. I have already found the **due date for payment is 4 September 2017**, about which the parties had no contest. This is the date, on or before which the amount must be paid for the purposes of s33(1)(b)(ii) of the Act.
542. The respondent requested, which was not controverted in principle by the claimant, that a date in the future for certainty and compliance with s41(1) of the Act, had to be identified.
543. Neither party provided me with any submissions or binding authority on the requirements to establish that date, and the Act provided no requirements to be met.
544. I am permitted under s43(2)9a) of the Act to correct an accidental omission.
545. Given that the due date for payment is well past, I find that the amount is immediately payable, but decide that it must be paid within 3 business days of this amended decision date of 15 December 2017.

XIV. Rate of interest

546. The claimant submitted that I could award the contractual rate of interest of 18% [Item 30 of Annexure Part A of the contract], as provided by s35 of the Act.

547. s35 (1)(a) allowed me to determine the interest for any overdue payments.
548. The due date the payment for payment claim is 4 September 2016.
549. I have been invited by the claimant in paragraph 73 to calculate the interest on the overdue payments, and time commences on 5 September 2017.
550. I understand that the claimant received part payment on 28 September 2017 of $86,179.78, and it elected not to pursue VO 5 and VO 8.
551. However, I have found that it is entitled to **$477,632.42 from 5 September 2017,** the day after the due date for payment, and my calculation is 18% on that amount for the period 5 September 2017 up to 29 November 2017.
552. I calculate that period as 12 weeks and one day = 85 days.
553. Interest equals 18% * 85/365 * $477,632.42 = **$20,021.30.**
554. **I find the amount of interest is $20,021.30 payable on the overdue amount**.
555. **However, additional interest at 19% is payable from 29 November 22017 until the respondent pays the adjudicated amount**.

XV. <u>The costs of the adjudication</u>

556. The default provision contained in s36(1) of the Act makes the parties liable to bear their own costs, including the costs that they are liable to pay the adjudicator.
557. s46(4) of the Act provides that the parties are jointly and severally liable to pay the costs of the adjudicator in equal shares, but this can be altered if I am satisfied that a party has incurred costs of the adjudication because of unfounded submissions by a party, in which case I may decide that the other party pay some or all of those costs.
558. The claimant has partially succeeded in its *payment dispute* regarding payment claim 5, and a significant amount of adjudication time was spent on the jurisdictional *waiver* objection raised by the respondent, which was unsuccessful.
559. Nevertheless, the claimant did not clearly explain how it derived some of its claims, nor sufficiently substantiate some of them, which made it difficult for me, and no doubt also for the respondent in drafting its response.
560. Accordingly, I see no compelling reason to deviate from the default position of the parties sharing my fees equally and I find that the respondent is liable to pay 50% of my fees and the claimant 50%, which are part of the costs of the adjudication under s36(3) of the Act.

Chris Lenz

Adjudicator 29 November 2017

ATTACHMENT LM1 FOLLOWING