

REASONS FOR DECISION : Mr P Lohrisch. Commercial & Consumer Tribunal at Brisbane. 8th April 2008

Introduction

1. This is an application by a builder (the applicant) brought against its subcontract carpenter (the respondent) for, essentially, the restitution of monies paid by the applicant to the respondent under the compulsion of an adjudication order (and consequent court order), under the *Building and Construction Industry Payments Act 2004* ("the BCIP Act").
2. Pursuant to section 100 of the BCIP Act, such an adjudication order has no effect upon the parties asserting their rights under the contract between them, nor from this Tribunal arriving at decisions and otherwise making orders which might be viewed as inconsistent with the result of the adjudication.

Applicant's claim

3. The amount paid by the applicant to the respondent pursuant to the adjudication order was \$16,215.90. How this amount is calculated is explained in the applicant's amended statement of claim filed 24 November 2006. In the applicant's amended statement of claim, the applicant claims adjustment (with resulting restitution) against the adjudicated sum as follows -
 1. Contractual adjustment on account of daily rate of \$550.00 per day per person (inclusive of GST) for the fix out being a total of \$10,285.00 (8.5 days at \$550.00 per day by two persons), rather than (as the respondent asserts, and as was the basis for the adjudication order), a square metre rate for the two houses calculated at \$17,182.00.
 2. Further adjustments on account of adjudicator's fees and interest awarded by the adjudicator.
Total adjustment claimed by way of restitution (1 and 2 above). \$9,595.48
 3. Adjustment on account of plumbing works performed by the applicant for the respondent, at the respondent's property. \$4,805.01
 4. Adjustment on account of cost of rectification of the respondent's works at the Haswell Street properties in Emerald. \$1,815.30
 5. Adjustment on account of monies paid by the respondent to the applicant for the plumbing works ` \$1,968.19
4. Generally then, the issues for determination are:
 1. The nature of the contract between these parties in respect of the Haswell Street properties.
 2. The extent of the respondent's liability for the plumbing works.
 3. Rectification work.

Matthew Duncanson's evidence

5. Matthew Duncanson is the proprietor of the applicant and a licensed builder. His statement is exhibit 5.
6. Matthew Duncanson explained that his involvement with the respondent arose through his parents, Ray and Ann Duncanson who owned a building company which had utilised the services of Kevin Jackson of the respondent to complete carpentry work.
7. Matthew Duncanson said that, in March 2004, he was awarded a tender for a job with the Queensland University in Emerald which required contract carpenters. He said that he had contacted Kevin Jackson, and that he agreed to carry out the carpentry work for the job for a day rate of \$450.00 per day plus GST, with reimbursement of all travel expenses from Hervey Bay and full board provided. He said that Kevin Jackson's company, the respondent Krysko Pty Ltd, completed the job and issued the invoices which were paid.
8. Matthew Duncanson then said that Kevin Jackson contacted him later in the year and asked him to complete plumbing work on a house he was building for himself in Hervey Bay. He said that he agreed to complete this work based on the cost of materials, a day labour rate, and travel and accommodation. He said that his company, the applicant Ram Contractors Queensland Pty Ltd, completed this work in late October 2004. He said that this time he asked Kevin Jackson if he would be able to complete frame and fix out work on two houses he was building in late 2005 at Haswell Street, Emerald. He said that Kevin Jackson agreed to do this work through his company, the respondent. He said that Kevin Jackson told him he was not able at that time to pay for the plumbing work, and, accordingly, it was agreed that the amount owed on account of the plumbing work would come off the bill for the work completed on the Haswell Street houses the following year. He said that because of this agreement he did not give an invoice at the time.
9. Matthew Duncanson said that in mid-2005 he had contacted Kevin Jackson in respect of the Haswell Street work with Kevin Jackson advising that he would bring two carpenters with him, his son, Jim Jackson, and Darren Johnson, a carpenter, with whom Matthew Duncanson had no previous dealings.
10. Matthew Duncanson said that, at this time, Kevin Jackson had mentioned the figure of \$25.00 per square metre for the frame. However, Matthew Duncanson said that he told him that himself and another carpenter would also be working on the frame, and that a square metre rate would not be possible, and that he believed that a day rate would constitute the rate for the entire project. Matthew Duncanson said that, until that time, he had assumed that Kevin Jackson and the others would be working on a day rate, as Kevin Jackson had done previously, and that at no time in the past had he paid Kevin Jackson a square metre rate. Matthew Duncanson said that Kevin Jackson had advised that they would sort out a rate once they got to Emerald.

11. Kevin Jackson and the others arrived on 11 September 2005 and commenced work on the frames with Matthew Duncanson and his carpenter on 12 September 2005. Darren Johnson apparently injured himself after three days on the job, and was unable to continue working and went home to Hervey Bay. The frames were completed on 23 September 2005 and a discussion then ensued with Kevin Jackson in relation to payment. Matthew Duncanson said that at no time during this discussion was there any reference to a square metre rate, and that Kevin and Jim Jackson had advised him that \$550.00 per day per person (including GST) was a fair rate for the frame completion. He said that he agreed and was prepared to pay this rate and that Krysko issued an invoice for this amount which was paid.
12. Matthew Duncanson said that a couple of weeks before the fix out was to commence, Kevin Jackson advised him that Jim Jackson was unable to come back for the fix out and Darren Johnson would be coming. They arrived on 22 October 2005, completing a small framing job on a commercial job for the applicant. Matthew Duncanson said it was agreed that this work would be completed under the agreed day rate. That work took approximately three hours.
13. They then started on the Haswell Street properties which were being supervised by Matthew Duncanson's father, Ray Duncanson.
14. Matthew Duncanson said that during the course of the fix out, his father, Ray, advised him that there were problems with the quality of the work and also that Darren Johnson had asked the areas of the house, as he and Kevin Jackson were charging a square metre rate. He said that he advised his father that no such agreement had been reached as wardrobe fix out was not required and that the style of construction (large, open-plan homes) did not warrant a square metre rate.
15. Matthew Duncanson said that he arrived on site on 31 October 2005 to inspect the fix out work which had been completed. By this date, Kevin Jackson and Darren Johnson had worked 8.5 days completing this work. He said that he and his father went through the various defects in the works carried out and had asked Kevin Jackson and Darren Johnson if they were going to fix all the problems, to which they had replied that there was nothing wrong with their work. Matthew Duncanson said that he and his father then advised them that they would have to get someone to fix the defects, and that they would have to pay for it. He said they then left the job and went outside and across the road, later coming back and presenting invoices based on a square metre rate. They were then informed that the invoices were not correct, and that no payment would be made until rectification had been carried out. One thousand dollars was advanced as part payment so that Kevin Jackson could pay his motel bill.
16. Matthew Duncanson said that he then, in accordance with his agreement with Kevin Jackson as to the plumbing works, issued tax invoice number 52, dated 1 November 2005, in the sum of \$4,805.01. No payment was made in respect of this invoice by the respondent until September 2006, when the sum of \$1,068.19 was paid.
17. Matthew Duncanson said that the defective works that he had inspected were as follows –
 1. a number of architraves and jambs were substantially out of plumb, ranging from 5.0mm to 15.0mm, and that quite a large number had to be thrown out and replaced. A photograph was provided of the architraves and jambs disposed of.
 2. weatherboards had been incorrectly nailed, door handles had been hung at incorrect heights and a door was missing on a wardrobe.
18. Matthew Duncanson said that he had been advised by his father that there were problems with the quality of Darren Johnson's work in the fix-out, being more particularly an internal door which had been cut to attempt to make it fit into a frame hung out of plumb, architraves and jambs out of plumb (ranging from 5mm to 15mm) and weatherboards that had been incorrectly nailed and door handles hung at incorrect heights.
19. Matthew Duncanson said that he and his father then organised for another carpenter, Jason Norris, to work for a day replacing the architraves and James, and rectifying the missing door and door handles. Additionally, Unique Painting Co Pty Ltd had been engaged to patch the unacceptable gaps in the weather boards. Unique Painting were then engaged for the painting of the houses, and had charged \$35.00 per hour for the painting, including the patching which was required.
20. Particulars of the rectification work were then as follows:
 - (a) Replacement of three damaged internal doors (2040 x 520) x 3 - \$3.48.75 (an invoice was produced for the purchase of these doors);
 - (b) Replacement for damaged architraves and stops – 14 architraves used and three stops
 - architraves 14 x 5.4LM at \$2.35 per LM - \$177.66 (excluding GST)
 - stops 3 x 5.4LM at \$0.81 per LM - \$3.12 (excluding GST) (tax invoices were produced evidencing the cost of material).
 - (c) Patching of gaps in external weatherboards – painting (8 hours at \$35 per hour – 1 man) - \$280.00.
 - (d) Labour – replacing and realigning doors, replacing architraves, stops and jambs – carpentry (9.5 hours at \$70.00 per hour – 2 men) - \$665.00 (a tax invoice for these works was produced from Jason Norris).

TOTAL \$1,484.53
Plus GST \$148.45
TOTAL \$1,632.98

21. Matthew Duncanson stated that the monies owed by Krysko Pty Ltd is represented by the following -

Calculation of monies owed to Krysko Pty Ltd
Fix out – 8.5 days at \$550.00 per day plus GST by two men \$10,285.00
Less monies paid 31 October 2006 \$1,000.00
Less rectification works (including GST) \$1,632.98
Less plumbing works completed (invoice 52) \$4,805.01
Past payment received from materials in December 2006 \$1,968.19
TOTAL \$4,815.20

22. He said further that monies paid to Krysko Pty Ltd were \$19,880.48 which meant that the respondent had been overpaid by \$15,065.28 which is the amount claimed in the applicant's submissions.

Ray Duncanson's evidence

23. Ray Duncanson is the father of Matthew Duncanson. His statement is exhibit 11. Ray Duncanson was responsible for the supervision of the fix-out works at the subject houses. Ray Duncanson confirmed his long-standing business relationship with the respondent and Kevin Jackson, having engaged Kevin Jackson to complete contract carpentry work on numerous occasions over the past 15 years. Ray Duncanson confirmed that he was not initially involved in discussions with the respondent in relation to the amount agreed upon, but had been advised that the respondent had charged a day rate of \$550.00 per carpenter, plus GST, for the completion of the frames. He had therefore presumed that the same rate would apply to the fix-out.
24. Ray Duncanson confirmed having undertaken the supervision of the fix-out works. He had assumed that Darren Johnson had been employed by the respondent, as the respondent had been engaged to perform these works.
25. Ray Duncanson said that, during the fix-out, Darren Johnson had asked him for the square metre areas of the house for the purposes of charging, at which time he had informed Darren Johnson that his understanding was that the job was to be paid for on a day rate, and that the square metre rate was not in accordance with industry standards, as it did not involve wardrobe fix-out, and was not appropriate due to the style of the construction, namely large open plan.
26. Ray Duncanson confirmed that a number of issues arose with the work performed by Darren Johnson, one incident being that Darren Johnson had used a saw to cut an edge off an internal door to attempt to have it fit the frame which was itself defective, and by so doing had ruined the door. He said that this was unacceptable workmanship.
27. Ray Duncanson confirmed having inspected the respondent's works with his son and finding the problems nominated in his son's evidence. He said that, when he had expressed his dissatisfaction with the quality of the work to Kevin Jackson, Kevin Jackson had told him that it was not a good job, but that it wasn't that bad. Ray Duncanson confirmed that they had organised another carpenter, Jason Norris, to come to the job and complete the rectification work, the work having been performed over a period of two days. He said that three new internal doors were required to be ordered which he hung himself. Ray Duncanson confirmed that the painter was on site carrying out necessary patching work for eight hours.

Jason Norris's evidence

28. Mr Norris's statement is Exhibit 14 in these proceedings. Mr Norris was the rectifying builder. Mr Norris said that his carpentry contracting business had been employed by the applicant from approximately September 2005 until January 2006, and that, through this period, he had performed building construction and renovation works for various projects. In particular, he was involved to rectify works at two homes in Emerald. He said that he had agreed to perform the rectification work after inspecting the finished carpentry which, in his opinion, was in an unacceptable condition.
29. Mr Norris said that he was appalled at the finishes which were supposed to be accepted by the applicant. He said that the main problem areas were architraves and skirting, door handles set at different heights, doors binding when trying to close, and that these problems were mainly centred in built-in robes in bedrooms and linen cupboards, in one house in particular. He said that, to rectify these faults, required re-hanging of doors and re-hanging skirting and architraves to achieve appropriate finishes required. He identified two photos introduced into evidence with the statement of Matthew Duncanson as to the discarded architraves and door jambs, and the door handles and doors, upon which he had performed rectification works. He confirmed that his invoice for \$731.50 was for this rectification work, and that the cost was reasonable, being done on an hourly rate.
30. It is interesting to note that during his cross-examination of Mr Norris, Mr Kevin Jackson admitted that some doors were out of plumb. Mr Norris confirmed in cross-examination that doors were too short, and that doors were not meeting the stops properly. Mr Norris denied that the architraves and jambs were level, and had otherwise been left in an appropriate state by the respondent.

Kevin Jackson's evidence

31. Kevin Jackson is the proprietor of the respondent. His statement is Exhibit 12.
32. In his statement, he said that he had been contacted by Matthew Duncanson of the applicant to perform carpentry services at two homes at Haswell Street, Emerald. He said that, prior to arriving in Emerald, Matthew Duncanson had confirmed the price at \$45 per square metre (\$25.00 for the frame and \$20.00 for the fix-out, providing two carpenters were available to complete the fix-out).

33. He said the frames were completed between 11 and 23 September, with Matthew Duncanson being invoiced, and the invoice being paid in full with a discount for the assistance provided by Matthew Duncanson and his labourer.
34. Kevin Jackson said that, in addition to himself, Darren Johnson and Jim Jackson (Kevin Jackson's son) provided their services in completing the works. He said that, at the time of payment for the frame, it was confirmed that the fix-out price was \$20 per square metre, if Darren Johnson came back to complete the fix-out.
35. Kevin Jackson said the fix-out was completed between 23 and 31 October by both himself and Darren Johnson. He said that, upon completion of the works, Matthew Duncanson had refused to pay or discuss the reasons for non-payment. Kevin Jackson referred to being present on 31 October with Matthew and Ray Duncanson, and to his involvement with Ray Duncanson over 10 years, and the fact that Ray Duncanson had never had a problem with his workmanship.
36. Kevin Jackson referred to sending invoices when he had arrived home (2 November 2005) requesting payment within 10 days, the invoice totalling \$17,622.00 for the fix-out on both homes, and an amended invoice dated 28 November 2005 by the respondent to the applicant in the same amount, namely \$17,622.00.
37. Kevin Jackson's statement then referred to what has already been referred to as the plumbing works which he said had been quoted at approximately \$1,600.00 for materials, with labour being excluded in appreciation of him having travelled to Emerald to complete other work for Matthew Duncanson. In cross-examination Kevin Jackson confirmed that the respondent had carried out work for the applicant in March 2004 at the Agricultural College, and that the rate agreed for that work was a daily rate of \$450.00 per person plus expenses. He agreed further that that was a reasonable sum for that work at that time, and was the equivalent of the hourly rate at Hervey Bay. He confirmed further that they had been paid straight away for that work.
38. As to the plumbing work, (somewhat inconsistent with paragraph 1 of the defence), Kevin Jackson said that Matthew Duncanson had agreed, prior to the commencement of the plumbing works, to perform the works for the cost of materials only, and that he had done that because of the previous assistance rendered by the respondent in March 2004 at the Agricultural College. I should note that paragraph one of the defence indicates that there was no such agreement prior to the plumbing works commencing, but that Matthew Duncanson had stated after completion of the job that he would not charge any labour for his services in return for the previous favour referred to above.
39. Kevin Jackson disagreed that Matthew Duncanson was on site for the plumbing works for three and half days, stating that he was only on site for two days plus three hours for the performance of those works. He agreed that, whatever was the nature and extent of the deduction for those plumbing works, it was to be taken out of the respondent's payment for the works in respect of the Haswell Street houses. I should note that it is common ground that the sum of \$1,168.19 for materials used in the plumbing works has been paid by the respondent to the applicant.
40. As to the difference in the invoices for the frame and the fix-out for the Haswell Street houses, Kevin Jackson said that the former invoice had been prepared by his son, and that the square metre rate did not appear on that invoice, as it had on the subsequent invoice, because the size of the houses was known by all concerned. He disagreed that the square metre rate was absent from the former invoice, because the agreement had been that the respondent would be paid a daily rate.
41. As to an alleged sharing arrangement in respect of the frame, referred to in a statement by Jim Jackson, Kevin Jackson agreed that Matthew Duncanson was on site during the framing works for ten and a half hours per day (other than being away from time to time for materials), and that Matthew Duncanson's carpenter was also on site, but perhaps only for nine to nine and a half hours per day. He confirmed that, as a result, there had been agreement as to a sharing arrangement in respect of the frame based upon a square metre rate. He said that he had done Matthew Duncanson a favour in giving him one quarter of the agreed contract rate as recompense for Matthew Duncanson and his carpenter having given them a hand.
42. As to the cladding, Kevin Jackson admitted during cross-examination that he was not happy with the outside cladding. However, he said there were no other defects. I should note that Kevin Jackson had previously admitted during this cross-examination of Mr Norris that some of the doors were out of plumb.
43. Kevin Jackson said that he had told Matthew Duncanson that Darren Johnson was independent of him, and that there should be two separate invoices. Notwithstanding, he agreed that his final invoice was, not only on behalf of the respondent, but included Darren Johnson's works. He also confirmed, in this regard, paragraph 1 of his statement which referred to the respondent as being the contracting party.
44. Kevin Johnson said that Matthew Duncanson had said nothing about the rate when the fix-out works were being completed, but referred only to the work being not good enough, and not paying him for that reason. He agreed that he possibly would have gone back to rectify the defects if he had been paid. I should note that this is somewhat inconsistent with Kevin Jackson's other statements that he believed that there were no defects. Further, Kevin Jackson's statement refers to there being no reasons given at all by Matthew Duncanson as to why he did not pay them on their invoices for the fix-out work.

Jim Jackson's evidence

45. The statement of Jim Jackson is Exhibit 13.
46. Jim Jackson confirmed having worked with his father and Darren Johnson on the house frames for the Haswell Street houses.
47. He said that, three weeks prior to arriving in Emerald (he was employed elsewhere) on 11 September, he had been informed by his father, Kevin Jackson, that Matthew Duncanson had agreed to the price of \$45.00 per square metre plus GST for the framing and fix-out works (\$25.00 plus GST for the frame and \$20.00 plus GST for the fix-out). He said that his understanding was that that rate was conditional upon two carpenters being available to finish the fix-out. He said that he himself was unable to return for the fix-out, because he was on leave from his employment, and had to return to that employment after the frame had been constructed.
48. Jim Jackson said that he had been informed by his father that Matthew Duncanson had allowed time for himself and his labourer to assist with the frame, with the agreement then being that the price was to be split four ways, being one share to Matthew Duncanson and his labourer, and the remaining three shares being allocated to Darren Johnson, Kevin Jackson and Jim Jackson, thus offering Matthew Duncanson a 25% reduction, effectively, on the frame price.
49. He said that Darren Johnson was injured after three days on site, and had returned to Hervey Bay. He said the frame price was then calculated by working out the \$25.00 per square metre price, and then reducing it to a day rate, as a way of paying Darren Johnson for the time spent working on the frame. Jim Jackson provided those calculations in his statement (Exhibit 13) which, more or less, computed to a daily rate of \$500.00 plus GST.
50. Jim Jackson said that the abovementioned calculation was subject of discussion between himself, Kevin Jackson and Matthew Duncanson upon completion of the frame. He said that he had been asked by his father to undertake the calculations. He agreed that they were quite detailed. He said that Matthew Duncanson seemed happy with the calculations in the end, and that, in that context, Matthew Duncanson had been "cut off" from saying what he had worked out, the agreement being simply upon the basis as discussed which meant a total amount, on account for the works of Darren Johnson, Jim Jackson and Kevin Jackson, of \$14,850.00 inclusive of GST. He said that, as a result of that agreement, he had simply prepared the invoice making no reference to the calculation and discussion, but only to the amount agreed. He said that that amount was then paid by Matthew Duncanson. He disagreed that the square metre rate had been worked backwards from the agreed daily rate of \$550.00, although agreed that the amount invoiced can be worked back to that figure, more or less.
51. Jim Jackson said that, on 23 September 2005, in discussions, Matthew Duncanson had said that he was happy to pay what Kevin Jackson and Darren Johnson were currently being paid in Hervey Bay. He said that, at this time, Kevin Jackson was asked what it was going to cost to finish the fix-out. He said that, in response, Kevin Jackson had informed Matthew Duncanson that, if Darren Johnson and himself came back to complete the fix-out, the price would be the rate of \$20.00 per square metre, as per the initial agreement, but that, if Kevin Jackson himself only came back, he would only charge \$15.00 per square metre. Jim Jackson said that Matthew Duncanson acknowledged that, but had expressly wanted two carpenters to return for the fix-out.
52. As to Matthew Duncanson's statement, at paragraph 9, where he referred to this meeting, Jim Jackson said that the description of that meeting was quite short, and had left out much of the conversation and discussion. He said that he had never worked on a daily rate. He said that he was aware that, prior to travelling to Emerald, his father had been on the phone with Matthew Duncanson discussing rates, and that there had been uncertainty, from time to time, as to whether or not agreement could be reached and the respondent would perform the works. He said that he had always worked on a square metre rate, and had never worked on a daily rate, and that, if he was building a house, he would not work on a daily rate. In respect of the prior Emerald job performed by the respondent, he said that Matthew Duncanson had been concerned about how long it would take Kevin Jackson on his own to perform the fix-out work which is why he had opted for two men to perform the works at the higher square metre rate. He said it was also incorrect, as referred to in Matthew Duncanson's statement, that he, Jim Jackson, was expected to return for the fix-out, as Matthew Duncanson had known that he was employed elsewhere, and was only assisting his father whilst on leave, and would not be able to return for the fix-out.

Applicant's submissions

1. *The Applicant's Claim arises out of a series of verbal agreements between the Applicant and the Respondent for the performance of building work and also out of an adjudication under the Building & Construction Industry Payments Act 2004 ("BCIP Act which resulted in the Applicant being required to pay to the Respondent the sum of \$17,215.79.*

Adjudication

2. *In relation to one of the agreements in dispute between the parties relating to the fix-out of houses at Lots 43 and 44 Haswell Street, Emerald ("the Haswell Street houses"), the Respondent obtained a decision from an Adjudicator pursuant to the BCIP Act requiring the Applicant pay to the Respondent the sum of \$14,957.31, together with interest in the sum of \$608.48, the Adjudicator's fee in the sum of \$1,320.00 and the ANA's fee in the sum of \$330.00, being a total of \$17,215.79 (refer to the Adjudicator's Certificate — Exhibit 3).*
3. *In relation to the adjudication, the following matters are relevant to these proceedings:*
 - (a) *The Applicant's Payment Schedule (Exhibit 7) delivered in response to the Respondent's Payment Claim (Exhibit 6) stated that the Respondent was only entitled to be paid the sum of \$10,285.00 (\$9,350.00 plus OST) in respect of the work carried out by the Respondent for the Applicant in relation to the fix-out and that the Applicant was*

entitled to deduct from that sum the sum of \$1,000.00 (\$909.09 plus GST), being the amount of a part-payment made by the Applicant to the Respondent for this work and also the sum of \$1,650.27, being in respect of defects in the works. The Applicant has maintained this position from the outset of the dispute between the Applicant and the Respondent and in these proceedings.

- (b) On page 4 of the Adjudicator's Decision (Exhibit 1), the Adjudicator states that he did not consider the Applicant's Adjudication Response due to the Response not being delivered within the time period allowed under the BGIP Act. It appears, therefore, that the only material delivered by the Applicant in respect of the adjudication to which the Adjudicator had regard was the Payment Schedule. Given that the Payment Schedule contained limited details and no submissions, it is not surprising that the Adjudicator found in favour of the Respondent who had delivered submissions in accordance with the BCIP Act to the Adjudicator. However it occurred, the Adjudicator's decision was not based on an assessment of submissions made by both parties.
- (c) The Respondent, in its Defence filed in these proceedings, places weight on the outcome of the adjudication (paragraphs 23-28 inclusive). The scheme of the BCIP Act is that the determination and adjudication pursuant to the Act is an interim determination only and that either party to the adjudication can seek to institute civil proceedings in relation to the matters disputed in the adjudication. Section 100 of the BCIP Act makes it clear that the outcome of the adjudication does not affect either party's rights under the construction contract or any civil proceedings issued in relation to the construction contract.
- (d) Section 100(3) of the BCIP Act makes it clear, however, that the Tribunal must allow for any amount paid pursuant to an adjudication determination under the BCIP Act in any order it makes in proceedings before it and may make orders for restitution of any amounts so paid and any other orders it considers appropriate, having regard to its decision.
- (e) In short, the Tribunal is to make its determination unaffected by the outcome of the Adjudicator's decision, save that it must take into account, in making its decision, monies paid pursuant to the adjudication and it can order restitution if it determines that some or all of monies paid pursuant to the adjudication should not have been paid.

Agreement between the Applicant and the Respondent relating to Central Queensland University in Emerald (Agricultural College)

4. Evidence was given by Mail Duncanson on behalf of the Applicant and Kevin Jackson on behalf of the Respondent in relation to this agreement which related to the Respondent undertaking carpentry work for the Applicant. It was common ground by both witnesses that the Respondent was paid at a day rate of \$450.00 per day plus OST, together with reimbursement of all travel expenses and full board. Mr Jackson agreed, in cross-examination, that the daily rate paid by the Applicant to the Respondent was the market or "going" rate.
5. The agreement is relevant in that it is evidence of a prior arrangement between the Applicant and the Respondent for work to be carried out by the Respondent for the Applicant at an agreed daily rate. The only other¹ relevance of the agreement was that Mr Jackson maintained that it was carried out as a "favour for the Applicant and relied on that assertion to support his version as to the subsequent agreement (referred to below) in relation to the undertaking of plumbing work by the Applicant for Mr and Mrs Jackson.

Plumbing work carried out by Applicant for Mr and Mrs Jackson

6. The terms of this verbal agreement are disputed by the Applicant and the Respondent. Mr Kevin Jackson's evidence during cross-examination was that the Applicant agreed, at the outset, to undertake this work at no cost for labour and would only claim for material costs at the time the Respondent completed the framing and fix-out of the Haswell Street houses and that the material cost would be the subject of an adjustment between the Applicant and the Respondent in relation to monies to be paid by the Applicant to the Respondent in relation to the Haswell Street houses. Mr Jackson made no reference to this in his statement (Exhibit 12) and detailed his version of this agreement during cross-examination. The version given by Mr Jackson during cross-examination is, however, quite at odds with the version contained in the Respondent's Defence (paragraph 1), which specifically pleads that there was an initial oral agreement providing for payment for the plumbing work (labour and materials) and that on completion of the job, the agreement was varied to the extent that Matt Duncanson would not charge for any labour in return for the "favour" previously performed by the Respondent in relation to the Agricultural college. The pleading did not refer to the term of the agreement asserted by Mr Jackson in cross-examination that the Applicant would only claim for the cost of materials after the Haswell Street houses had been completed and that these costs would be adjusted in relation to monies to be paid to the Applicant by the Respondent in relation to the Haswell Street houses.
7. In cross-examination, Mr Jackson admitted that the Defence had been prepared pursuant to his instructions. He was not, however, able to provide any satisfactory explanation as to the significant differences in the Defence and in Mr Jackson's evidence as to the terms of this agreement.
8. It is submitted as follows:
 - (a) This is a dispute based on verbal agreements. In those circumstances, the credibility of the witnesses giving evidence before the Tribunal is extremely important.
 - (b) Mr Jackson cannot be regarded as a credible witness and has provided inconsistent versions in relation to this agreement.
 - (c) Jackson's explanation as to why the Applicant was not entitled to claim for the labour costs of the plumbing works (as a result of the "favour") provided by the Applicant to the Respondent in relation to the Emerald Agricultural College job, is also: not credible. Mr Jackson concedes that the Respondent was paid market rate for that job and it is not plausible to suggest that as a result of the "favour" of the Respondent agreeing to undertake work for the

Applicant in relation to the Agricultural college job the Applicant agreed not to charge any monies whatsoever in relation to the labour carried out for the plumbing work.

- (d) Mr Mall Duncanson's evidence, as contained in paragraph 6 of his statement in relation to this agreement, is credible and the Applicant's conduct in subsequently rendering an account for labour and materials to the Respondent after the completion of the carpentry work to be carried out by the Respondent in relation to the Haswell Street houses, is consistent with Mr Duncanson's version of the agreement Mr Duncanson was not cross-examined in relation to his version of the agreement.
 - (e) Mr Kevin Jackson, in cross-examination, maintained that the Applicant was on site for 2½ days undertaking the plumbing work. The invoice rendered by the Applicant to the Respondent in relation to this work ("MD-4" to the statement of Matthew Duncanson) claims labour costs for 3½ days at \$500.00 per day. The assertion that the Applicant was on site for 2 days only was not put to Matthew Duncanson in cross-examination.
9. According to the Defence, Mrs Jackson was also present when this agreement was reached. Mrs Jackson did not give any evidence in relation to the terms of the agreement and the Tribunal is entitled to take an adverse view of the Respondent's evidence in light of the failure by Mrs Jackson to give evidence.
10. It is submitted, in light of the above, that the Applicant's version as to the terms of this agreement should be preferred over the Respondent's version and that the Tribunal should find that the Applicant was entitled to claim the sum of \$4,805.01 from the Respondent in relation to this work.

Agreement in relation to Haswell Street houses

11. The Applicant and Respondent gave evidence as to different versions of this agreement. The agreement was verbal and it is submitted that the Tribunal in determining which version it prefers, should take into account the credibility of the witnesses and the likelihood of the competing versions constituting the true terms of the agreement.
12. The Respondent's case is that there was a verbal agreement between the Applicant and the Respondent that the carpentry work in relation to the frame for the Haswell Street houses was to be charged at a rate of \$25.00 per square metre and the carpentry fix-out for the houses was to be charged at a rate of \$20.00 per square metre. The only witness on behalf of the Respondent to give evidence as to the terms of the agreement in relation to the frame carpentry work was Mr Kevin Jackson. Mr Jim Jackson acknowledged that he was not present when that agreement was made and his evidence in relation to that agreement is only based on what he was told by his father, Mr Kevin Jackson.
13. It is submitted that Mr Kevin Jackson's evidence as to the terms of the agreement as the basis on which the Respondent was to be paid by the Applicant in relation to the frame carpentry work for the Haswell Street houses should be rejected, for two reasons:
- (a) For the reasons referred to above, Mr Jackson is not and should not be regarded as a credible witness;
 - (b) The invoice for this work from the Respondent to the Applicant ("MD-3 to Mr Matt Duncanson's statement) makes no reference to the costs being determined on a square metreage basis. The invoice simply refers to a lump sum of \$13,500.00 (which is consistent with Mr Matt Duncanson's version of the amount of the payment being agreed to be on the basis of a daily rate of \$500.00 plus GST per day per man). Mr Jackson agreed, in cross-examination, that it would be the practice of the Respondent, in circumstances where the Respondent was claiming for work on the square metreage basis, to detail the rate and the number of square metres in respect of which work was carried out in any invoice rendered by the Respondent for this work. Mr Jackson agreed that the invoice for the framing stage had issued in accordance with his instructions and that he had sighted the invoice before it issued and yet he was not able to provide any satisfactory explanation as to why the invoice did not contain these details, apart from asserting that the square metres involved had already been agreed by the Applicant and the Respondent.

It is submitted that the Tribunal should reject this explanation as it is implausible.

14. Mr Jim Jackson, who, whilst not a party to this agreement, gave evidence that he prepared the invoice. He tried to explain the absence of detail in the invoice as to the rate and square metreage claimed, stating that the reason the detail was not stated in the invoice was that there had already been discussion and agreement between Matt Duncanson, Kevin Jackson and Jim Jackson as to the square metreage rate and its conversion to a daily rate of \$500.00 plus GST per man per day- Mr Jackson set out the calculation he says was undertaken in his statement. Mr Jackson's evidence that there had been an agreement based on a square metreage rate should be rejected for the following reasons:
- (a) It is implausible that there would be no reference whatsoever to such a detailed calculation in the invoice;
 - (b) The calculation is based on a reduction of the amount to be paid by one-quarter on the basis that Mr Duncanson and his carpenter were also carrying out this work with the Respondent's workers. Mr Duncanson's evidence was that he had worked essentially full-time in relation to carrying out the carpentry work (at least 10½ hours per day). The carpenter employed by Mr Duncanson also worked full-time apart from being absent for one day. The Tribunal should conclude that it is unlikely, in those circumstances, that Mr Duncanson would have agreed to treat adjustment for the work carried out by Mr Duncanson and the carpenter in relation to the frame and carpentry. It is submitted that the Tribunal should exercise caution in giving any weight to Mr Jim Jackson's evidence, given that he is Kevin Jackson's son, and also that he was, at the relevant time, nominee of the Respondent.
15. Mr Mall Duncanson gave evidence as to why he would not have agreed to a square metreage rate for the fix-out. He explained that a payment based on a square metreage rate for a fix-out was not justified as the houses had large

areas of open space (that is, space where no fix-out work would be undertaken). He also explained it would not be appropriate because the wardrobe fix-out was to be undertaken by others. It is submitted that these are plausible explanations and provide cogent reasons why Mr Duncanson would not have agreed to work being carried out for the fix-out at a square metreage rate.

16. The fact that work had previously been undertaken by the Respondent for the Applicant (the Agricultural College job) at a daily rate also supports the argument that it is more likely that the Applicant and Respondent agreed that both the framing and the fix-out for the Haswell Street houses was to be carried out at an agreed daily rate per man in the sum of \$500.00 plus GST.

Claim for Defects

17. Both Matt Duncanson and his father, Ray Duncanson, provided evidence in their statements as to defects in the work carried out by the Respondent for the Applicant relating to the Haswell Street houses. Mr Matt Duncanson was not cross-examined in relation to his evidence in relation to the defects and the costs incurred in rectifying the defects. The cross-examination of Mr Ray Duncanson in relation to the defective work did not produce any evidence that would cast doubt on Mr Duncanson's evidence.
18. Mr Jason Norris also gave evidence as to the defects (apart from the rectification of the external weatherboards which was undertaken by others). Mr Norris agreed with the matters raised in Mr Matt Duncanson's statement as to the nature of the defects and he indicated that the cost of rectifying the defects in relation to the doors, architraves, stops and jamba which he undertook, was reasonable. Mr Norris is a qualified carpenter of some years' experience. He attended at the Tribunal pursuant to a summons. He has no present personal or business relationship with the Applicant and last carried out work for the Applicant two years' ago. It is submitted that Mr Norris' evidence should be accepted in full. No evidence was adduced by the Respondent to contradict the evidence of the Applicant in relation to the defects and the cost of rectifying same.

No accord and satisfaction

19. In paragraph 1.6 of the Respondent's Defence, the Respondent pleads that the payment made by the Respondent's solicitors to the Applicant by letter dated 12 January 2007 (Exhibit 8) was in full and final satisfaction of the Applicant's claim for the plumbing work carried out for Mr and Mrs Jackson. The letter from the Applicant to the Respondent of 19 January 2007 (Exhibit 9) makes it clear that the cheque was not accepted in full and final settlement. The relevant decision in relation to this issue is *Amos -v- Citibank* (copy of which is **attached** for the Tribunal's convenience).
20. Based on that decision, in particular page 5 of the decision, it is clear that the acceptance of the cheque by the Applicant could not be construed as in accord and satisfaction of the Applicant's claim against the Respondent in circumstances where the Applicant made it clear that the cheque was not accepted on that basis.

Summary

21. It is submitted that the Tribunal should find in accordance with the calculations contained in paragraphs 21 and 22 of Mr Duncanson's statement and find that of the monies paid by the Applicant to the Respondent pursuant to the adjudication, the sum of \$15,065.28 should not have been paid and that the Respondent should be ordered to pay this sum to the Applicant.
22. The Applicant also seeks an order that the Respondent pays the Applicant interest on the sum of \$15,065.28 at the rate of 10% per annum pursuant to Section 77(2)(c) of the Queensland Building Services Authority Act 1991. The Applicant submits that interest should be calculated from the date the Applicant paid to the Respondent the sum as determined by the Adjudicator.
23. In relation to costs, the Applicant submits that a determination as to the appropriate costs order should be made after the Tribunal hands down its decision and the parties have had the opportunity of making submissions as to the appropriate costs order to the Tribunal.

Respondent's submissions

1. For matters explained in this submission the parties involved are Matthew Duncanson or applicant. The respondent Krysko Pty Ltd as Kevin Jackson or as written in first person as 'I' meaning Kevin Jackson.
2. The respondent denies all claims presented in the applicant statement of claim. The respondent submits that applicant has made false and misleading statements, changed the nature of verbal agreements to firstly avoid paying an amount due for work completed and invoiced and secondly in an attempt to reduce the amount payable. The respondent in this protracted dispute has suffered significant financial hardship, emotional stress, and loss of significant friendship/working partner as a result of the actions of the applicant.
3. The respondent in its defence claims:
 - (a) That the decision by the adjudicators pursuant to the BCIP Act. The respondents defence claim (paragraphs 23 — 28) references the adjudicator's decision.
 - (b) The respondent denies any outstanding debt in relation to plumbing works conducted by the applicant as the only debt acknowledged by the respondent was paid in full on the 12 January 2007.
 - (c) The respondent denies any allegation of defective work and believes the applicant has failed to prove the existence of such.

4. The following submission attempts to highlight the omissions, erroneous and false statements made in the applicants claim and show that Matthew Duncanson has invented, exaggerated claims in order not to pay for works conducted and then sue to recover monies paid. The credibility and motivation of applicant's actions to be questioned. The respondents at all times have provided a consistent argument in an attempt to recover monies for work performed.

AGREEMENT IN RELATION TO HAS WELL STREET HOUSES

5. The respondent denies the applicant payment schedule is an accurate account of the price negotiations prior to and throughout the construction of the two homes. The applicant at all times was aware that the carpentry work to be carried out was priced at \$45 m² (\$25 for frame + \$20 for fixout), This was the condition for Darren Johnson (DJ Carpentry) to travel to emerald to fulfil Matthew request that more than one carpenter was required to complete works in a timely manner.
 - (a) The applicant's statement (para 7) fails to mention this request except states that the respondent said he was bring two other carpenters Darren Johnson and Jim Jackson. Incorrect Jim Jackson had only agreed to travel to emerald at my request a week before as he was employed elsewhere. On initial discussion I agreed to ask Darren Johnson if he was interested I n travelling.
 - (b) The applicant's statement (para7) Matthew was aware that Darren Johnson a carpenter I worked with in Hervey Bay not a subcontractor or employee.
 - (c) The applicant's statement (para 8) Matthew agreed to organize and pay for meals and accommodation for frame and fixout.
 - (d) The applicant's statement (para 8) Matthew admits a discussion regarding a \$25m² rate for the frame, I submit that at this instance Mathew was informed the rate \$45m² for which \$25 frame price + \$20m² for fixout. It is inconceivable that in discussing the price for the frame the price for whole job would not have been provided and discussed.
6. Mr. Jim Jackson in his testimony spoke of a phone call I had received from Mr. Ray Duncanson challenging the price Matthew was submitted for his houses he expressed his anger and dismay that I was overcharging Matthew, At this time I stated that Matthew had requested another carpenter Darren Johnson had accepted but only at the rate in which we were charging in Hervey Bay.
 - (a) I expressed to Mr. Ray Duncanson that I was only going to emerald to help Matthew out and I had plenty of work in Hervey Bay and did nit need this.
 - (b) I requested to talk to Matthew and approx 10 mins latter Matthew called back he was directly asked if he wanted us to do the job for the price of \$45m² rate and restated yes that he wanted us to do the job.
 - (c) Mr. Ray Duncanson in his statement (para4) states that he as not initially involved in to the agreed price it is the respondents opinion that he was well aware of the price charged.
7. The applicant's statement (para 8) Matthew states that himself and another carpenter Mr. Shane Peel would be working on the frame and that a m² rate as it would not work.
 - (a) Kevin Jackson disputed this at the hearing; Kevin had offered to Matthew that we would split the price allowing himself and employee to one share (act of man) of the frame at the time this would have equated to 1/3 of the \$25m² rate.
 - (b) Thus version was supported by testimony from Mr. Jim Jackson and in a statement provided by him, while not present at the time of conversation he agreed that this was the method used in calculating the frame price, which was paid willingly and not disputed (reference defence claim para 6 and Jim Jackson's statement).
 - (c) Matthew and Mr. Shane Peel performed labouring and hammer hand duties; Matthew organized materials and crane hire etc.
8. The respondent and Mr. Jim Jackson provided evidence at the hearing and in statements provided in regards to the discussion held with Matthew at the time the invoice (md-3) was written.
 - (a) Darren Johnson having travelled to Emerald completed only 3 days work before being hospitalized for a knee infection as a result of a concrete nail ricocheting into to his knee.
 - (b) The event that Darren Johnson having to leave meant that the price could not be split 4 ways (1/4 each share Kevin Jackson, Darren Johnson and Jim Jackson and the remaining share being Matthew and Shane Peel as per agreement).
 - (c) The workings for the frame price are provide in defence claim para 6 and statement provided by Jim Jackson was calculated by Jim Jackson under the direction of Kevin Jackson as per the agreement he had with Matthew
 - (d) The respondent and Jim Jackson claim that the price was explained to Matthew and workings shown the end result that the m² rate was divided by the days worked and multiplied by the days each party worked to allow payment to Darren Johnson for the time he spent working on the frame.
 - (e) The respondent fully believes that Matthew was aware how the frame price was achieved resulting in an amount \$550 inc gst a day per man. In his statement (para9) it was a fair rate for frame completion and made restitution for the amount. The invoice was then written on the bonnet of the car for the full amount including the amount for Darren Johnson who returned home injured and unable to issue his own invoice.
 - (f) The adjudicator in his decision pursuant to the BCIP Act stated (page 2) "That the respondent (Matthew) does not in its payment schedule dispute that this calculation was the basis of the payment and I accept this" The adjudicator also accepted (page 3) "that a derived daily rate may have formed an agreed basis for payment but it was not the basis for calculating the contract sum."

9. The applicant at the hearing made reference to the lack of detail on the invoice (md-3) stating that such a complicated calculation should require more detail, and then drew reference to the work completed in emerald (invoices md-1 and md-2) where the respondent had completed work on a day rate. The respondent would like to make a point of the following:
- (a) The job at Emerald Agriculture College was a renovation of two building providing offices and the price was negotiated at a day rate \$450 plus accommodation and travel expenses. (Please note that my wife had accompanied me on one of the two trips to emerald.
 - (b) The respondent that a day rate was fair and the only effective way to price such a job without visiting the site and qualifying the work involved.
 - (c) The work was completed at the emerald agricultural college, without dispute without and claim of defective work or need to rectify work conducted. The applicant was enormously grateful for me traveling to emerald.
 - (d) The applicants drew reference to the lack of detail in the invoice prepared for the frame and that it was reasonable to assume it was calculated on a day rate, In response I would like to point out:
 - (i) Matthew provided with a detailed explanation both orally and shown written workings
 - (ii) If price was calculated at a day rate it is more plausible that the invoice would have had the days x man written on as the previous invoices for work completed on a day rate (agricultural college) invoices supplied md-1 and md-2
 - (iii) The invoice was written in small standard invoice book on the bonnet of the car on site after being away from home for two weeks. In hindsight the invoice/or a new invoice should have been provided but the amount of calculations were not in dispute and happily agreed to by Matthew as stated (para 9).

PRICE FOR THE FIXOUT

10. The respondent and Jim Jackson at the hearing supplied evidence that at the time the invoice was written for the frame was paid the discussion then lead to the fixout which included discussion of dates, length of time and price and people involved in the fixout. Evidence supplied by the respondent and Jim Jackson that Matthew asked, "What it was going to cost to finish the fixout?" Kevin replied That if Darren and Kevin came back it was as per agreement of \$20 m2 but Kevin offered if he came back alone he would charge only \$15 m2 (paragraph 10 respondents defence). Matthew acknowledged this without complaint or question Kevin did state that it was a high price but it was the price being charged by himself and Darren Johnson in Hervey Bay.
- (a) Matthew statement (para 9) makes no mention of the particulars of this discussion and claims that "Kevin advised that the fixout would be at the same rate" and that Kevin himself and Jim Jackson would travel back to complete fixout" both claims are disputed in evidence provided by Jim Jackson and the respondent. Mathew statement is false and misleading and in no way reflects the conversation that took place.
 - (b) Matthew declined the offer of a lower price in favour of two carpenters return to complete the fixout. As stated in respondents defence claim (para 10) and statements provided.
11. The Applicant and Mr. Ray Duncanson instatements provided and at the hearing stated that the m2 rate for the fixout was inappropriate because there were no wardrobe fixout. And the house was open plan and this somehow constituted an industry standard. In all the respondents experience he has never heard such rubbish. The respondent asserts:
- (a) That a m2 rate is the industry standard.
 - (i) The only exception would be an itemized price for individual items involved for example: no. Of doors hung, lineal metres of skirting, lineal metres of architrave, wardrobe shelving can calc on a lineal or m2 rate, separate prices for front door locks and passage sets to other doors, separate prices for sliding doors to hung doors and soffits usually priced on lineal metre rate and wall cladding on either m2 rate or lineal meter rate. This would be standard practice of larger construction companies were prices are linked to their estimating software packages and building large no of similar homes.
 - (ii) That over 99% of new homes would be of open plan living and a more open plan would only lower the m2rate not exclude as a reasonable measure to calculate a price.
 - (iii) The statement that there was no wardrobe fixout is incorrect, there was no wardrobe shelving but the wardrobes all had swinging doors, architrave and skirting as identifies in md-6 and md-7.
 - (iv) That the m2 rate takes into account all items it would not be discarded if there were one shell in a wardrobe of 4 shelves or none.
 - (v) The m2 rate while no wardrobe shelving was applicable there was exterior wall cladding and large patio ceilings that were included.
 - (b) The respondent refutes the claim that the m2 rate was not in any way an appropriate way to calculate the price for the fixout. The applicant if unhappy with the m2 rate made no attempt to reduce or express that he thought was too high. The applicant was provided a price for the houses at Haswell Street and break up for frame and fixout. If the price did not suit he could have acquired other carpentry services.
12. The respondent at all times has expressed that the price for the house was calculated on m2 rate. Mr. Jim Jackson has supplied evidence to that fact, Mr. Darren Johnson has refused provide a statement following a subsequent fall out over this job. However Ray Duncanson was kind enough to supply his mindset.
- (a) Mr. Ray Duncanson statement (para 6) states that Darren Johnson asked him for the m2 of the houses as he was charging a m2 rate for the fixout. This alone verifies that all three carpenters were of the view at all times the house frame and fixout was priced on a m2 rate not a day rate.

- (b) Both the respondent and Darren Johnson also supplied invoices at the end of the job quoting rates of \$20 m2 for the fixout.
- (c) Darren Johnson and the respondent worked very long days while doing the fixout Darren alone stayed back to 9.00pm fitting door locks, this would not fit into any day rate as suggested by the applicant.
13. The respondent claims that the applicant was aware of the price prior to anyone travelling to Emerald; it was then expressed to him at the end of the frame stage with an independent witness. The respondent has never denied the price was a good price (fixout price was a very good price), The respondent had offered to it for less if he was the only carpenter that was declined. The applicant never questioned the price never attempted to barter it down he just refused to pay. The adjudicator's decision subject to BCTP Act should be considered in any determination of this case. The actions and statements of the applicant throughout the period should cast significant doubt over his credibility and honesty.

ALLEGED DEFECTIVE WORK

14. The respondent denies the existence of any defective work at the Haswell street properties claimed by the applicant, In denying the alleged defects where is no way I would agree to be charged for someone else to redo work. The respondent is aware that the applicant had concerns over some of the work but the greater the effort made to appease the applicant the more ridiculous the requests of the applicant became. It is the respondent's view that it became the price not the work that was the applicant biggest problem. The respondent believes his actions on the final day illustrate the fact that every effort was made to fix outstanding issues and that of the applicant was premeditated and was not going to settle matters.
15. The respondent does not deny that Darren Johnson damaged a door that required replacing and Darren offered to substitute the cost against work performed at the sheds this was rejected they still seeked restitution for the door. Mr. Ray Duncanson as stated in Matthew statement (para 12) and Ray Duncanson statement (para5) acted, as supervisor for the fixout period, during the fixout Ray Duncanson had expressed no problems with the work completed other than the door that Darren damaged.
- (a) Matthew statement (para 15) Matthew states he believed the door was being ripped down in an attempt to fit it into a door frame he had hung out of plumb. This statement is incorrect the frame opening was too small to accept the three doors and the mullion supplied, Darren widened the door way allowing a new door to be pinned to the hinge on arrival. This is evidenced in the photographed supplied by Matthew md-6.
16. The applicant failed to get any independent assessment of work carried out. Nor attempted to have the BSA inspect the work. The evidence of defective work was provided by Matthew being the first homes he had built as a builder (plumber by trade) Matthew's father Mr. Ray Duncanson builder the respondent had worked for over a long period of time and never had a problem with the quality of work performed and Jason Norris a carpenter employed by Matthew to replace unnecessarily work completed.
17. The applicant's statement paragraph 16 states that a large no of architraves and jambs substantially out of plumb 5-15mm, there is no evidence of such claims and the respondent denies this. The respondent would like to explain for the benefit of the CCT and Matthew how a door is hung:
- (a) The jambs are cut and nailed together it is then placed in the opening and temporarily fixed to the hinge side
- (b) The top of the door jamb is then tacked
- (c) The door is inserted and pinned in the hinges
- (d) The door is closed to identify the gap between the jamb and the door generally wedges are used at hinges to open or close the gap to make even at this point in time
- (e) If the door is stand alone a level and straight edge is used to check if the door is plumb, however if the door is abutting a wall at ninety degrees the jamb is measured from the internal corner top and bottom to maintain an even gap for the architrave.
- (f) This point the hinge jamb would be nailed off and the straightened with a straight edge and then checked to make sure the gap is even with the door in 90% + of case the hinge jamb will not be completely straight especially if purchased as a prehung door.
- (g) The head of the jamb and lock jamb are then nailed and then straightened to maintain an even gap around the door edge. The jambs are checked to make sure they are sitting square with frame and then doorstops and architrave can be affixed.
18. This to rectify a door hung out of plumb 15mm and the architraves was fitting parallel to the adjoining wall it would not be able to be fixed by removing and replacing architraves. The wall itself would have to be moved that would incur additional plastering costs to patch cornice set internal corners. Matthew does not include any of these items in rectification work and the actions as stated they took would have not improved the appearance of any work performed by the respondent, I believe the allegations are over exaggerated.
19. The evidence supplied by Mr. Norris has to be questioned,
- (a) He lacks the relevant experience and skill to provide an independent assessment of the work performed and was not employed to do so (licensed carpenter for less than 3 years at the time).
- (b) The date of the invoice (md-11) stated the work was carried out on the 5/11/2005 this is 5 days after the respondent left Emerald the invoice states the fax no as a Brisbane phone no.

- (c) This the carpenter within 5 days of the respondent leaving Emerald arrived in Emerald from Brisbane with an apprentice (9-10 hr drive) to complete work within 9.5 hrs and presumably travel 9-10 hrs backs to Brisbane.
 - (d) Matthew had previously stated that he had trouble in securing the services of carpenters but in less than week he had a carpenter from Brisbane working in Emerald, I question at what time Mr. Norris was contacted to travel to Emerald.
 - (e) This provides that the respondent had no time to acquire an independent assessment of work performed (as stated attempt made in respondents defence para15) nor did the applicant have any interest obtaining an independent review.
 - (f) Mr. Norris and his apprentice as stated (Mathews statement paragraph 16) travelled from Brisbane up and back and worked over 2 days (Ray Duncansons statement paragraph 8) to complete the alleged rectification work for \$665+GST. With traveling time alone+ fuel he would be lucky to cover the wage costs of his apprentice. I am surprised to see Mr. Norris still in business. May be Matthew should have acquired his services earlier.
 - (g) Mr. Norris in his statement that the main problem areas were architraves & skirting, Door handles set at different heights. Doors binding when trying to close. Mainly in the in the built in robes and linen cupboards.
 - (i) Matthew in his statement makes no claims for replacement of skirting
 - (ii) Evidence of only one door handle being set at the wrong height Mr. Norris claims door handles were at the wrong height was one or two or more
 - (iii) Matthew and Ray in their respective statements make no mention of doors binding as did Mr. Norris
 - (iv) There is no statement to how many doors Mr. Norris replaced or quantify specifically the work performed by Mr Norris or Matthew.
 - (v) Mr. Josh Norris in his testimony at the hearing stated he replaced the weatherboards at the front of the property
 - 1. Yet in no statements from Matthew or Ray Duncanson nor in the costing of alleged defective work is there any mention of weatherboards being replaced.
 - 2. There were no weatherboards to be identified in md-5 pictures of the skip bin.
 - 3. Mr. Norris was asked as to why he had to replace he stated that there were unacceptable gaps against the stops. I wonder if Mr. Norris is aware manufactures literature requires a gap and recommends gap sealant to be used to effectively seal the end of weatherboards.
 - (vi) Mr. Norris statement date 28 of January 2007 If he cannot remember what activities he performed for Ram Constructions and Matthew Duncanson. Than approximately 12 months on how can his testimony be trusted to be accurate.
20. The applicant other evidence of rectification works include the photographs identified as md-5 md-6 and md-7
- (a) Matthew statement paragraph 16 claims that on inspection of work carried out he found a number of architraves and jambs out of plumb that were required to be thrown out and replaced.
 - (b) Matthew supplies Md-5 the photograph of a skip bin filled with pine off cuts architrave and skirting.
 - (c) On close inspection of the photograph it is difficult to find any more than half a dozen pieces of architraves with nails in them, and certainly not the 76 lineal metres (14x5 .4) that Matthew claimed was required paragraph 20 (b). Each door opening has 4 architraves on the sides and two pieces at the head or top. In any attempt to move a door jamb would require removal of all architraves and stops from door frame.
 - (d) While Matthew has supplied photographs of a skip bin there are no photographs of the alleged defective works of the doors or jambs or stops or architraves.
 - (e) The applicant claims that the exterior weatherboards had unacceptable gaps that had to be rectified (Mathews statement paragraph 19) and that the painters were engaged to patch the weatherboards (painters invoice referenced to md-10).
 - (i) There is no photographic evidence of the weatherboards
 - (ii) Mr. Norris claimed in his testimony that he replaced the boards at the front of the house.
 - (iii) The painters invoice as supplied md-10 makes no reference to any extra work involved
 - (iv) The respondents defence claim (paragraph 12.2) the weatherboards were installed as instructed by Matthew by nailing the board 20mm from the top to conceal the nail, Matthew would not allow the boards to be faced nailed. The boards manufactures literature requires boards maintain a gap at the stops ends to allow proper sealant to seal the ends this is the industry standard.
 - (v) Mr. Ray Duncanson who supervised the fixout was stated as saying "he would not fit these boards to a doghouse"
 - (f) The photographic evidence md-6 and md-7 referred to in Mathew statements (paragraph 18) showing the missing door and the door handle.
 - (i) The door handle at the incorrect height was not identified while I the respondent was in emerald otherwise it would have been rectified the handle is only face fixed (2 screws) and could have been adjusted. Mr. Norris supported this at the hearing when the respondent asked what was involved with moving a cupboard door handle. The door would have minimal to no damage and would not need replacing. If the face of the door were damaged I would accept the need to replace it.
 - (ii) Matthew claims in his statement para 17 that door handles had been fixed at incorrect heights md-7 illustrates that one door handle fixed at incorrect height

- (iii) The missing door has already been discussed and the opening was widened to a full size door Darren Johnson proposed that no charge for the job at the shed on the first morning should compensate for the price of the door.
- (iv) The third door as stated in Matthew statement of three doors required to be replaced there is no evidence or explanation of such.
- (g) I would like to draw attention to both the photographic evidence md-6 and md-7
- Firstly the architraves they are fitted parallel to the external gyprock corner and fitted flush with adjoining wall. The mitres also appear neat and flush. The quirk around the jamb appears even difficult to identify.
 - The doors appear to be hung plumb with even gaps around all doors. The top line of the double doors appears to be in perfect alignment.
- (h) The applicant in statement of claim paragraph 21 included an item for transport of doors for the amount \$44.00 this item has not been justified by receipt.
1. The applicant cannot provide an accurate or consistent figure for alleged rectification work:
 - (i) The applicant statement paragraph 20 and states the alleged costs of rectification as \$1632.98
 - (ii) The applicant in his statement of claim paragraph 21 states the alleged costs \$1815.30
21. The respondent has been a contract carpenter for 40+ years and never has he left a job unfinished or unpaid never been called to rectify work I draw attention to the letter Mr. Ray Duncanson wrote 16th January annexure "D" pursuant to the BCIP proceedings "I would like to say that Kevin Jackson and his son Jim Jackson have worked for me personally and on projects for a number of years and I have found them to be persons of high standards and trustworthy individuals" I have provided references from builders present and past for myself and Darren Johnson.
22. Mr. Ray Duncanson stated at the tribunal that he had never had a problem with the work I had performed for him over a 7 yr period. That he believed that Darren Johnson was responsible for the alleged defective (primarily the door he ripped down) work. Mr. Ray Duncanson made the statement that I was his employer the respondent should be responsible for his work. The respondent was not the employer of Darren Johnson we worked as partners but as individual contractors, both the respondent provides individual invoices for the fix out work carried out. Matthew in his statement para 7 states that Darren Johnson was the carpenter that the respondent worked with, not for or contracted to. I suggest that there was ill feeling towards Darren Johnson by both Ray and Matthew in regard to the price agreed to by Matthew, which created the ill feeling and criticism of his work.
23. The respondent in summary believes that there was no defective work. The applicant's photographs evidence provide no evidence of stated defective work. The lack of an independent assessment of defective work and substantial evidence the respondent should not be held liable for any alleged defects. The works if so conducted by Mr. Norris were at the request of Matthew Duncanson and he should bear the associated costs.
24. I question what motive I had to leave with the amount of money outstanding as it was in my best interest to stay and rectify any faults that Matthew had identified in which I attempted to do until the alleged defects became ridiculous. When a builder starts to measure the outside soffit to a brick sill to see if it is parallel its time for a straight jacket. Both the applicant and Darren Johnson were onsite for approx 1.5 hrs after the applicant had told us "to get off the f ing property" but at all times Matthew and his father Ray Duncanson refused to talk to us or discuss outstanding issues. The applicant had every opportunity to have this matter resolved he held all the cards, the fixout was finished, while he had not paid for the work Mr. Matthew Duncanson could have had us stand on our heads in order to get paid he held all the bargaining chips to get what he wanted yet refused to deal with us. At the time Daren and I vacated the properties we had exhausted all efforts to communicate with both Matthew and Ray Duncanson.

PLUMBING PAID IN FULL

25. The respondent directly refutes the applicant's claim (paragraphs 3-12 statement of claim) for the amount specified in his claim for plumbing work carried out by the applicant the respondents. The respondent propose that following the work on the two Haswell Street homes the applicant changed the agreement when he no longer required his services and changed the agreed amount to reduce his obligation for the fixout price
26. The respondent states in the defence claim (paragraph 1) there was no discussion in regards to the price prior to the plumbing work being completed, the respondent had all intentions of payment the amount requested by Matthew (the respondent believed that Matthew would do the right thing by him considering that past history). The respondent states that Krysko Pty Ltd had no involvement with the plumbing works and believes that Kevin Jackson personally engaged the services of Matthew Duncanson (refer to defence claim items A.B.)
27. The respondent contacted Matthew in approx 4 months after the emerald agriculture college job was completed for Mathew in mid October 2004 Matthew agreed to do the work on his way to Brisbane visit his father later in October 2004. On arrival Accommodation was offered to Matthew but declined (preferring to stay in town),
28. Matthew stayed for two and a half days to complete the works. Matthew in invoice md-4 invoiced claims he worked for 3.5 days however in being interviewed by his solicitor at the hearing Matthew stated he was there for 5.5 days.
29. Matthew then asked about the price on leaving quoted approx \$1800, the respondent then asked how much for labour he said no don't worry about that I appreciate the help that you gave me in Emerald, Matthew then not having a specific price for the materials stated that we would fix it up when I traveled to Emerald to construct his two houses. This was the only time in which price was discussed It is the respondents position that the offer of no labour charge

was an inducement for the respondent to travel back to Emerald to complete Matthew's two houses and an expression of appreciation for work performed.

30. The applicant statement (paragraph 14) or the applicant submission (paragraph 4) makes no statement in relation to the price, time taken to complete the job, or any reference to accommodation costs. The applicant invoice md-4 dated 1st of November 2005 some 12 months after the plumbing work was completed and one day after the respondent was told to "get of the f ing property" (Matthew quoted as defence claim paragraph 15) in Emerald.
31. The respondent suggests that the applicant has a habit of altering agreements to suit his own needs after the events have happened. The respondent on the 12th January 2007 paid the amount of \$1968.19 as full and final payment of only the debt recognized by the respondent as stated by Matthew on completion of the works.

IN CONCLUDING

32. I believe that the applicant strongest argument is my lack of legal skills in cross-examination and probably interviewing my own witness. I am 61 years old never been in court room other than previous tribunal hearing where my son in-law represented me (who is a police officer for fifteen years has made numerous court submissions and he felt overwhelmed by the experience) I have spent 40+ years as a contract carpenter never been called to rectify work, never not been paid for work I have performed and can count the no. of builders I have worked for in the last 20 years on two hands. I am not a legal wiz but I am a bloody good carpenter.
33. My son Jim Jackson evidence should not be tainted, he is a tradesman of the highest order and is held in high regard by his peers. He traveled to Emerald at my request and as a chance to catch up with Matthew. He is licensed carpenter, holds a bachelor of business degree and graduate diploma in finance and investment holds numerous building related licenses including 60t crane ticket, intermediate riggers ticket, and other machinery tickets, he is employed as a site forman for a gold coast commercial industrial builder and has been for over 4 years on projects ranging from \$2million to \$30million. He has no financial obligation or interest in the activities of Krysko Pty Ltd. He attended the hearing to inform the tribunal of the information in his statement taking unpaid leave from his employer to do so.
34. It is the respondents position that the adjudicator decision pursuant to the BCIP Act (based on the annexures that were included should stand. The actions of the applicant have been to change the nature of agreements after the respondent's obligations have been met. The respondent believes that it has addressed above enough issues that Matthew has omitted information and made statements that are incorrect. In order to firstly not pay the amount agreed to and latter to recover the money paid pursuant to the adjudication. The respondent believes no rectification work was necessary, that there were no defects in the frame works or fixout works performed by the respondent and does not recognize any outstanding plumbing bill. It is submitted that the tribunal find in favour of the respondent inline with the items stated in the respondents defence claim "The nature of the defence to each order sought by the applicant is: A-F

Applicant's submissions in reply to respondent's submissions

1. Numbered paragraph 5 of the Respondent's submissions asserts that the Applicant was aware that the carpentry work to be carried out was priced at \$45.00/m² and that "this was the condition for Darren Johnson (D J Carpentry) to travel to Emerald to fulfil [Applicant's] request that more than one carpenter was required to complete works in a timely manner. It is noted that Mr Johnson was not called by the Respondent to give evidence in relation to this mailer and has submitted that the principle in Jones v Dunkel would be applicable.
2. Aspects of the Respondent's submissions refer to mailers that were not evidence in the Tribunal proceedings and it is submitted that the Tribunal should disregard these parts of the Respondents submissions. These paragraphs include 6a, 6c, 8a, 9a, 11a, 15a and 17a-g inclusive of the Respondents submissions
3. Many of the matters raised by the Respondent in its submissions were not put to the Applicants witnesses and it is submitted that the rule in Browne v Dunn should apply. These include the matters referred to in paragraphs 11a and b, 15a, 17a-g inclusive, 18b, c, f, g and 19a-l inclusive of the Respondent's submissions.
4. In relation to numbered paragraph 7 of the Respondent's submissions, Mr Duncanson's evidence was that he took 3.5 days to complete the works.
5. In relation to numbered paragraph 31 of the Respondents submissions, the Applicant notes that the Applicant was afforded every opportunity by the Tribunal to fully present its evidence at the hearing, to call witnesses to give evidence in support of the Respondent's case, and to cross-examine witnesses called by the Respondent.

Decision

The contract

1. I prefer and accept Matthew Duncanson's evidence to that of Kevin Jackson for the respondent, to the effect that the respondent was engaged to perform the works subject of this claim, and that there was no separate arrangement with Darren Johnson for payment under a separate invoice. Indeed, I consider that Matthew Duncanson's evidence is corroborated, to an extent, by the adjudication documents and Kevin Jackson's own statement, despite Kevin Jackson's apparent denials in his oral evidence.
2. Further, I am satisfied on the evidence of Matthew Duncanson and Kevin Jackson (and to a lesser extent, Jim Jackson) that, prior to the respondent's Kevin Jackson, Jim Jackson and Darren Johnson travelling to Emerald for

the purposes of the framing works on the Haswell Street houses, a square metre rate for those works had been discussed.

3. Indeed, Matthew Duncanson's evidence not only confirmed this (his statement at paragraph 8), but also confirmed that Kevin Jackson had advised in initial discussions (prior to the framing works) that they would sort out a rate once they arrived. Further, Matthew Duncanson's statement does not refer to any specific daily rate in the initial discussions (for example, the \$550.00 per day per person rate), but merely to an assumption that Kevin Jackson would be working on a daily rate.
4. Kevin Jackson's evidence, on the other hand, was that a rate of \$45.00 per square metre had been agreed initially for the works, \$25.00 per square metre for the frame, and \$20.00 per square meter for the fix-out. That evidence, it seems to me, is consistent with Matthew Duncanson's concession that square metre rates had been discussed initially. Further, there was the evidence as to the involvement of Jim Jackson in the framing, the evidence of Jim Jackson being that he had never performed works on a daily rate, but always on a square metre rate. Further, Jim Jackson gave evidence as to his understanding that negotiations, from this father's point of view, were being undertaken on the basis of a square metre rate, and that there was some uncertainty as to whether agreement could be reached and the works proceed.
5. The framing works were performed and completed and discussions then took place on 23 September 2005 involving Matthew Duncanson, Kevin Jackson and Jim Jackson. Clearly, Matthew Duncanson and Jim Jackson's evidence as to the content of those discussions conflicted, although I suspect, as was consistent with the evidence of Jim Jackson, that much of that inconsistency arose, because of the lack of detail which appeared in the statement of Matthew Duncanson as to 23 September discussions.
6. Indeed, I considered that, upon comparing, in particular, the oral evidence of both Matthew Duncanson and Jim Jackson, I was considerably more comforted by the specificity and attention to detail of Jim Jackson's recall of events, and his evidence generally, than the evidence of Matthew Duncanson. Accordingly, I prefer and accept Jim Jackson's evidence to that of Matthew Duncanson, in particular as it relates generally to the content of the 23 September meeting, but more particularly that the agreement between Matthew Duncanson and Kevin Jackson at that meeting was that, for the fix-out works, the applicable rate would be \$20.00 per square metre (if two men were employed on site) and \$15.00 per square metre (if only Kevin Jackson was employed on site).
7. Indeed, what is apparent from Matthew Duncanson's statement is that the daily rate of \$550.00 per person only arose during the 23 September meeting, a matter somewhat inconsistent with Matthew Duncanson's suggestion that it was that rate that applied to both the framing and fix-out. What appears to be inherent from Matthew Duncanson's evidence is that the \$550.00 daily rate was applied, by agreement, retrospectively, as it were, to the framing work.
8. As was clear from Jim Jackson's evidence (which, as I have said, I prefer and accept), there was specific agreement between Matthew Duncanson and Kevin Jackson, respectively, on behalf of these parties that the fix-out works would be performed by two men (Kevin Jackson and Darren Johnson) at a rate of \$20.00 per square metre, and not at a daily rate, whether it be at \$550.00 per day per person or otherwise.
9. Accordingly, I am not satisfied that the applicant has made out his claim for restitution on account of an agreed daily rate of \$550.00 per person for the performance of the fix-out works, and that part of the applicant's claim is dismissed.

Plumbing works

10. Kevin Jackson asserted that Matthew Duncanson had said that he would forego, on Kevin Jackson's evidence, some two and one-half days' labour, because of his prior Emerald works undertaken "as a favour" (although paid) for the applicant. In fact, Kevin Jackson agreed in evidence that he had been paid a reasonable sum for those prior works, that is, at a daily rate of \$450.00.
11. In my view, Kevin Jackson's position on this matter was inconsistent, that is, between that asserted in the respondent's defence, and his evidence in cross-examination. In his oral evidence Kevin Jackson put this down to mere words, although it appears to me to be much more than that, as it impacts upon what was the contractual basis for the plumbing works, as opposed to what, effectively, amounted to a donation of the labour value of the plumbing works (or, in effect, at best, an unenforceable promise) after the contract had been agreed and completed.
12. Generally, I found Kevin Jackson's evidence on this matter to be somewhat lacking in detail, as well as being inconsistent (as I have noted), and I consider his evidence unreliable in this regard, unless corroborated, as it was in respect of the nature of the frame contract by the evidence of his son, Jim Jackson. Accordingly, in respect of this matter I prefer and accept the evidence of Matthew Duncanson to the effect that the plumbing works were performed subject to agreement that payment, (both as to labour and materials) was delayed, to be offset against the future works subject of these proceedings.
13. In addition to denying the terms of the agreement alleged by the applicant for the plumbing works, the respondent's defence asserted that, by payment of (acceptance of) the amount of \$1,987.19, the applicant had compromised any right to claim in respect of any balance alleged to be owing in respect of those works, namely on account of the labour content.
14. The relevant correspondence is at Exhibits 8, 9 and 10. What is clear from that correspondence is that –

- (i) the respondent, through its solicitors, tendered the amount of \$1,986.19 in full and final settlement of the plumbing claim; and
 - (ii) the applicant banked the cheque, but not before advising that the cheque was not accepted in full and final settlement of the claim.
 - (iii) the amount tendered and accepted represented the agreed cost of materials only.
15. As noted, it was never in dispute between these parties that the respondent was liable to pay to the applicant, on account of the plumbing works, the cost of materials, and that the cost of materials was in the amount tendered. Accordingly, the applicant's banking of the respondent's cheque, to my mind, merely constituted settlement of a valid indebtedness and no more, and could not, notwithstanding the respondent's letter, constitute valid consideration for the discharge of another amount (the labour content) which was in dispute. I should say that the situation could well have been different had the amount tendered (and banked), included an additional sum on account of the disputed labour content. In any event, as submitted by the applicant and in terms of *Amos v Citibank* [1996] QCA 129, the applicant made it clear that the respondent's cheque was not accepted in full and final settlement such as would constitute an accord and satisfaction. The respondent's defence to the applicant's claim, on the basis that the claim has been compromised, is rejected.

Rectification

16. Evidence as to the existence of defects was given by Matthew Duncanson, Ray Duncanson and Jason Norris on behalf of the applicant. What is also clear from the evidence is that Kevin Jackson for the respondent –
- (i) denied the existence of any defects upon completion of the fix-out; and
 - (ii) during the course of these proceedings, admitted that certain doors were out of plumb, and that he had been dissatisfied with the weatherboards.

These are, of course, two of the defects complained of by the applicant.

17. I prefer and accept the evidence of Messrs Matthew and Ray Duncanson and Jason Norris as to the existence of these defects in the respondent's work. In this regard, I further acknowledge that such defective workmanship was either wholly, or substantially, as a result of the work performed by Darren Johnson. However, that is, on my finding as to engagement of the respondent for these works, a matter for the respondent, as it was the respondent who nominated that person to assist for the purposes of the works. Accordingly, the respondent is liable for the defective workmanship of Darren Johnson. I should as well observe that I am unconvinced by Kevin Jackson's assertion, made upon the completion of the fix-out, and continued through to the hearing of this matter (I might say, in somewhat less than unequivocal terms), that there were no defects. Indeed, his conceded comment to his former colleague, Ray Duncanson, to the effect that it was not a good job, but wasn't that bad, was perhaps a reflection about the standard of the overall work, rather than the few specific matters to which the applicant's evidence relates.
18. Accordingly, I find that the respondent's works in the fix-out were defective, and that the respondent had, through Kevin Jackson, refused to rectify those works. The applicant then, as it was entitled to do, took steps to have the works rectified by others, in particular, Jason Norris and Unique Painting. In the latter regard, I accept Ray Duncanson's evidence to the effect that it took Unique Painting eight hours to patch the weatherboards at the contracted rate of \$35.00 per hour. I consider such a claim to be reasonable for the works performed. Further, I accept Jason Norris' evidence that the cost of his works at \$731.50 was reasonable in the circumstances, as particularised. Yet further, I accept Matthew Duncanson's and Ray Duncanson's evidence as to the cost of materials required to perform the rectification.
19. In summary then, I accept the total cost of rectification incurred by the applicant, and the damage the applicant suffered as a result of the respondent's defective workmanship, is in the amount claimed by the applicant, namely the sum of \$1,632.98, and I allow that amount to the applicant.

Summary

20. As noted, I have rejected the applicant's claim for adjustment of the amount ordered to be paid by the adjudicator and, hence, restitution.
21. The findings I have made in favour of the applicant relate to –
- (i) a deduction from the amount of \$2,218.82 (\$4,805.01 less \$1,986.19), on account of the balance owing for the plumbing work; and
 - (ii) a deduction of \$1,632.95 on account of the cost of rectification.
22. These amounts, in the context in which they arose, can appropriately be regarded as damages for breach of contract. As well, they were appropriate set offs against the amount otherwise owing by the applicant to the respondent. Accordingly, it is appropriate that, pursuant to section 77(2)(c) of the *Queensland Building Services Authority Act 1991*, interest at the regulated rate of 10% per annum be awarded on the total amount of \$4,451.77 from the date of payment of the adjudicated amount of \$16,215.79 by the applicant to the respondent, namely 8 May 2006. I calculate the interest to the date of this decision at \$853.76. The total then allowable to the applicant is \$5,305.53. I order that that amount be paid by the respondent to the applicant within 28 days of the date of this decision.

For the APPLICANT: Mr R Ensby
For the RESPONDENT: Mr K Jackson