

CASE UPDATE AND IMPLICATIONS FOR CONSTRUCTION CONTRACTS

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What will we talk about?

1

Quantum Meruit – what you are entitled to if you are not contractually entitled to payment?

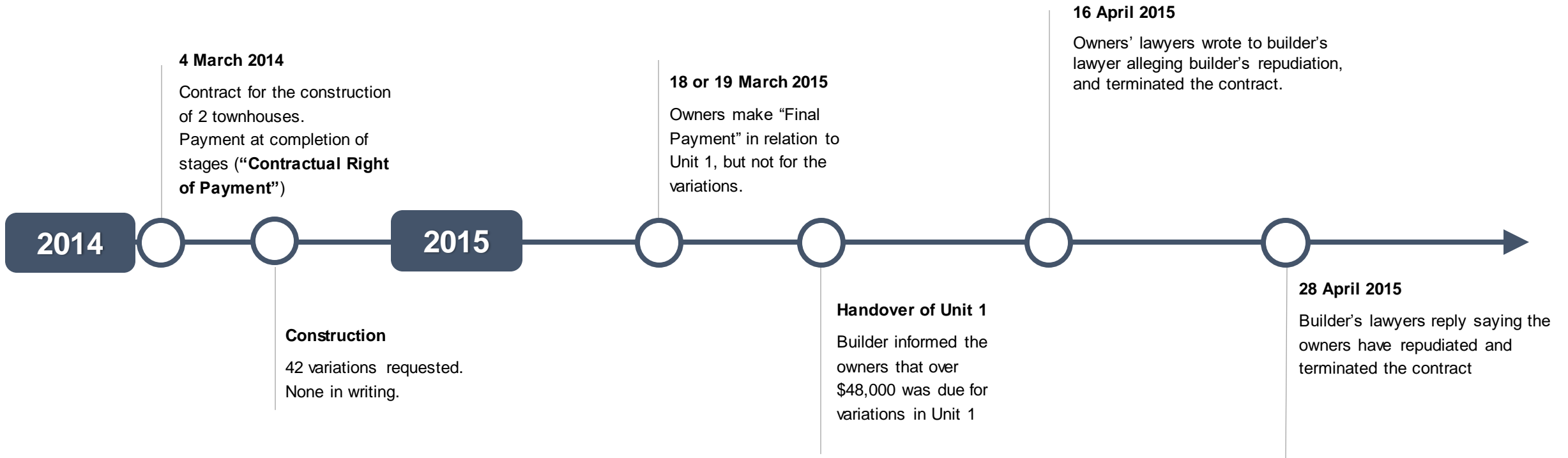
2

Variations – the Supreme Court's recent decision on variations and PC Sums; *Paraiso v CBS Build Pty Limited*

3

Pricing Variations – variations in the context of a BC4 residential building Contract

Background of the Case



What is *Quantum Meruit*?

“Reasonable value of work performed”

OR

“As much as she/he deserved”

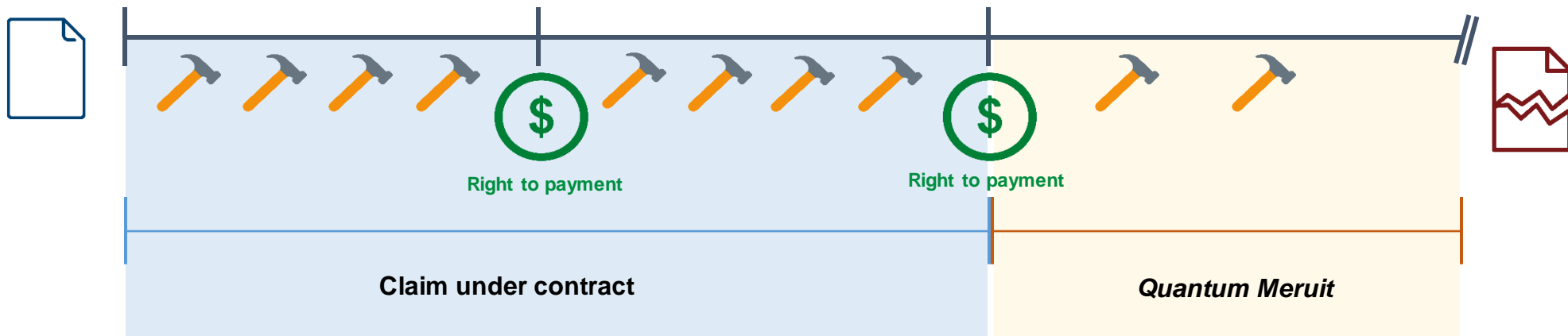
It is a “restitutionary claim”:

Restoring to someone the gains given to someone else

It is based on “common law”:

Collection of cases, rather than legislation

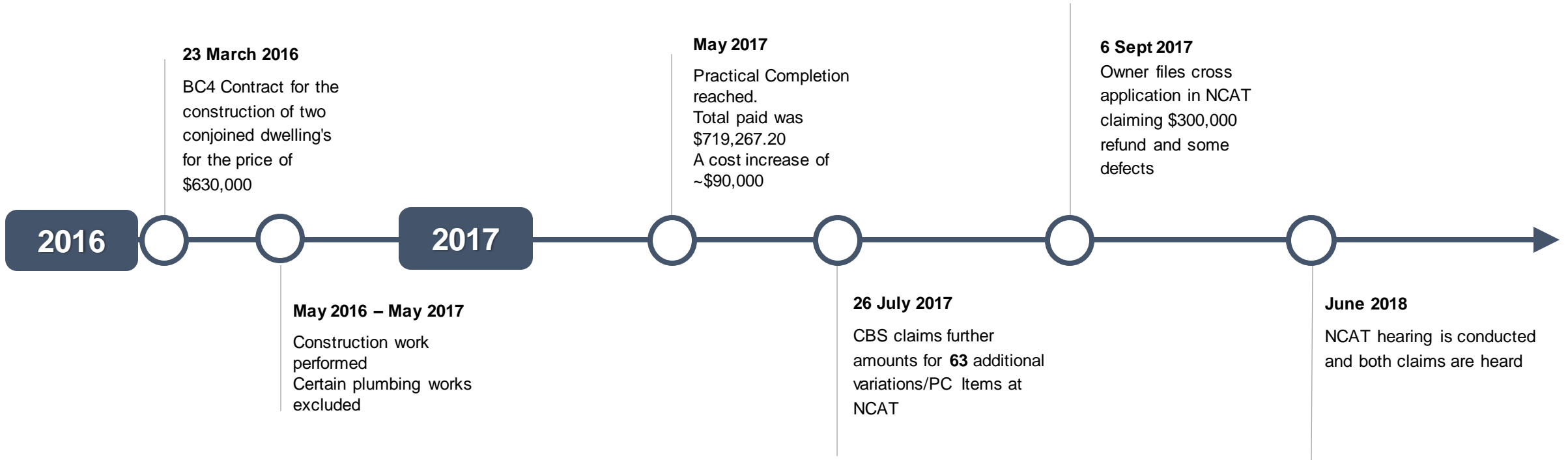
Contractual Right to Payment



 = Completion of a stage or Reference Date
Right to payment

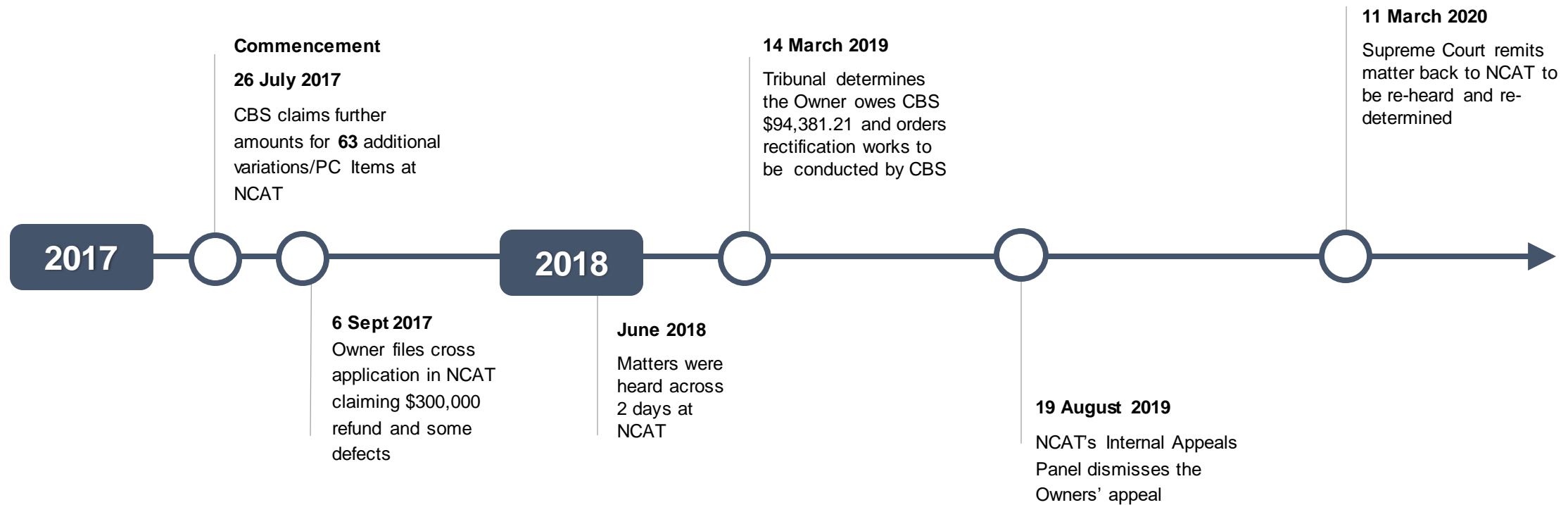
Quantum Meruit = Capped at Contract Price

Background of the Case



Paraiso v CBS Build Pty Limited

Litigation History



Summary of Appeal Grounds



If variations to the works under contract in the absence of written instructions signed by the parties created obligation to pay for the additional work



If the builder was entitled to charge 15% margin on amounts paid by the owner



If the builder was entitled to recover claims for variation payments under Quantum Meruit and whether NCAT should have had regard to contract terms as to pricing of variations



If there was no evidence of the costs incurred by the builder in respect of 19 of the variations and adjustment which were assessed by NCAT as payable



If the contract provided for a provisional sum for *plumbing work* and whether prime cost items for supply of bricks and foundation piers were inclusions

Paraiso v CBS Build Pty Limited



Residential Building (BC4)

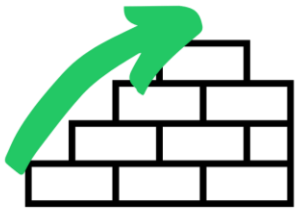


Lump sum contract for new houses, major residential renovations or small multi unit developments with no architect supervision.

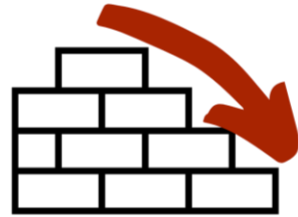


BC4, Cl 14. Variations – How to Deal with Changes to the Work

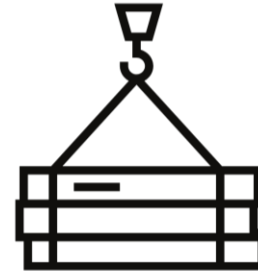
Variations are:



An increase in the Works



A decrease in or omissions from the Works



A change in the character or quality of any material or work such as may be necessary due to the existence of a latent condition



A change in the levels, lines, positions or dimensions of any part of the works.

Variation provision – clause 14 of the BC4

14. Variations – How to Deal with Changes to the Work

(b) For the sake of clarity a variation is established by:

- (i) written instructions from the Owner or the Owner's representative; and/or*
- (ii) the supply to the Builder of post contract details such as drawings; and/or*
- (iii) the discovery of an otherwise unknown or latent condition; and/or*
- (iv) an instruction issued by a relevant authority under clause 12 which alters the work done, the work to be done or requires adjustments to an existing situation or the work which was otherwise expected to be done.*

(c) The Builder is not obliged to vary the Contract works or carry out any extra work unless the Builder consents. Such consent will not be unreasonably withheld.

Variation provision – clause 14 of the BC4

14. Variations – How to Deal with Changes to the Work

*(d) (i) if the Builder agrees to undertake a variation requested or required by the Owner, **the variation is to be detailed in writing and signed by the Owner (or the Owner's agent) and the Builder.** Documents detailing the variation, including as appropriate, amended drawings or specifications, become contract documents.*

Builder to Advise Value of Variations

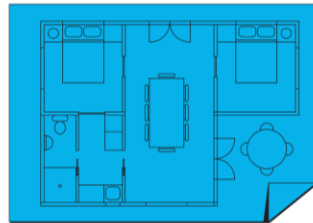
(e) The Builder, within a reasonable time of receipt of instructions to execute a variation (ie an instruction signed by the Owner or Owners agent), is to notify the Owner, in writing, of the value of the variation.

Variation provision – clause 14 of the BC4

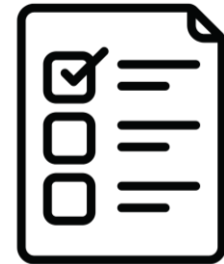
Contractually enforceable variations arise from



**1. A variation direction
executed by both
parties**



**2. Newly furnished
plans detailing variation
executed by the parties
and ideally notated as a
variation; or**



**3. The written details of
external conditions
such as, for example a
council requirement,
giving rise to a variation
signed by both parties**

Variation provision – clause 14 of the BC4



....oral instructions from the owner for a change to the work are **not capable of giving rise to a contractual variation under cl 14**. It follows that oral variation instructions are not capable of supporting an agreement, enforceable against the owner, as to a sum to be paid for the variation... It is not a provision that enables contractually binding variations to the contract works to be brought about without compliance with cl 14(d)(i).

...In that situation the builder's only recourse would be a claim in restitution for a quantum meruit, provided that the owner's request for the additional work, although not detailed in writing or signed, is clear and has been acted on by the builder and provided that other prerequisites for a restitution reclaim are satisfied...

Quantum Meruit



High Court of Australia has...held that contract rates are a ceiling upon reasonable remuneration where a builder's non-contractual quantum meruit claim arises from termination of a contract through fault of the owner.

*It must follow in logic and in principle that **contract rates will similarly be an upper limit on a quantum meruit claim that has arisen because the two parties did not sign written details of each variation**, as required by cll 2A(b) and 14(d)(i) of the present contract.*

Key Take-Aways



Courts will strictly enforce contractual requirements for documented variations



Keep detailed records for variations, including employee timesheets, subcontractor invoices setting out variation works



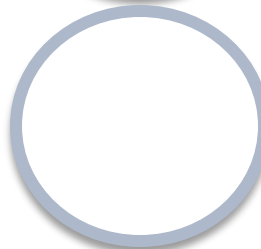
Risk of non-compliance is that you will not have a contractual entitlement to payment and must prove your claim in Quantum Meruit



Establish and streamline methods of communication with owners and communicate those to owners and your team on each project.



Comply with the requirements of the contract with respect of variation – always get agreement in writing before commencing variation works



Price your variations in accordance with contract rates.

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**Global Construction Disputes Report
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Thank you.

Any questions?

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