THE CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT (NT)

DETERMINATION NO. 22.14.01

Adjudicator's Determination

pursuant to the

***Construction Contracts (Security of Payments) Act* (NT) ("the Act")**

between

Applicant

and

Respondent

Pursuant to s.33(1)(b) of the Act, I, Alistair Wyvill SC, the appointed adjudicator, determine on the balance of probabilities that the Respondent to the payment dispute is liable to make a payment to the Applicant of $128,415.75 and interest in the sum of $2,260.57 plus $33.88 per day from 1 April 2014 until payment. I determine that the sum of $128,415.75 and this interest is to be paid by 28 April 2014.

I am not satisfied in accordance with s.36(2) of the Act that either party has incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the other party. Sections 36(1), 46(4) and 46(5) of the Act therefore apply in relation to the costs of and incidental to this adjudication.

Dated this 7th day of April 2014

Alistair Wyvill SC

Particulars of Adjudication[1]

Name of Adjudicator	Alistair Wyvill SC
Adjudicator Registration Number	22
Date of Certificate of Registration	20 May 2009
Applicant's name	
Applicant's contact details	
Respondent's name	
Respondent's contact details	
Details of contract	Design and Construction of [omitted], Darwin, Northern Territory
Date of Payment Claim	31 January 2014
Date of service of Payment Claim	31 January 2014
Date Payment Dispute arose	14 February 2014
Date of Application for Adjudication	11 March 2014
Prescribed appointer	The Institute of Arbitrators & Mediators of Australia
Date prescribed appointer served	11 March 2014
Date Respondent served	12 March 2014
Date Adjudicator served	14 March 2014
Date of Respondent's written response served on the Applicant and the Adjudicator	26 March 2014
Date of Adjudicator's Determination (due 9 April 2014)	7 April 2014
Identification number of adjudicator's determination	22.14.01
Amount to be paid - s.38(1)(c)(i)	$128,415.75 and interest in the sum of $2,260.57 plus $33.88 per day from 1 April 2014 until payment
Date on or before which this sum must be paid - s.38(1)(c)(i)	28 April 2014
Security to be returned (if any) – s.38(1)(c)(ii)	None
Date on or before which any security must be returned (if any) – s.38(1)(c)(ii)	Not applicable
Decision under s.36(2)	None
Information determined as being not suitable for publication (if any) - s.38(1)(e)	None

[1] These particulars are a summary. In the event of any inconsistency between this schedule and the reasons below, the reasons should prevail.

Reasons for Adjudicator's Determination

Preliminary

1. This matter raises a number of complex legal and factual issues. The materials served on me occupy 6 arch lever files. The parties' submissions – which I have found very helpful - run to over 500 paragraphs in total and refer to a large number of authorities. It appears that a significant amount of money has been spent on legal fees by both parties. However, I note that the sum claimed is the comparatively modest amount of $152,153.57 inclusive of GST. Further, my determination can impact only the flow of cash under the contract and not on the parties' rights actionable by claim in the courts: s.47 of the Act. Any party aggrieved by my determination retains the full right to seek to re-litigate the merits of the matters the subject of my determination in a court of law and to reverse the financial impact of my determination. I am also conscious of the time I have already spent (and the cost of this to the parties) reading these materials and understanding and deciding the issues to which they give rise before attempting to reduce my reasons to writing and, further, the substantial additional costs the parties would incur (and the additional delay) if I was to attempt to deal at length with each point raised.

2. In these circumstances, to keep my costs as low as reasonably possible and to meet the 10 day prescribed time for delivery of my decision set out in s.33(1) of the Act, I propose to set out my reasons in summary form focusing principally on my reasons for accepting or rejecting what I consider to be the major points put to me by the parties which I must decide in order to discharge my function. However, I have considered carefully all the submissions put to me by the parties. If I have not referred to and dealt with a particular submission in these reasons, it is not because I have not considered it but because I have not considered it necessary to refer to it in these reasons in the circumstances as explained above. In relation to the authorities referred to by the parties, I am familiar with the decisions of NT Courts in relation to the Act and have applied the principles which they establish where they are applicable. In relation to decisions from the Eastern States, it should be noted that the differences between the schemes in force in those States and the Act are such that they are likely to be of little if any particular assistance. Again, if I do not refer to an authority – whether to apply it or to distinguish it – it is not necessarily because I did not undertake that process in reaching my decision.

3. I consider this approach best promotes the object of adjudications, that is, "to determine the (payment) dispute fairly and as rapidly, informally and inexpensively as possible": s.26 of the Act.

Jurisdiction

4. It is common ground that the Applicant and the Respondent are party to a contract entitled "PJ220-3 [*project details and location omitted*], Darwin, Northern Territory Head Contract HC-1 2003 Design and Construct" and dated 22 August 2011 ("the Contract") and that the Contract applies to the work and claims the subject of the adjudication application ("the Application"). That work, in my view, falls within the definition of "construction work" in s.6(1)(e) of the Act. The contrary was not suggested by the Respondent, nor did the Respondent submit that it was not bound by the Act.

5. The subject payment claim ("the Payment Claim") is dated 31 January 2014. The Respondent's Payment Statement in response acknowledges that it was received on that day. The Payment Claim makes 3 distinct claims:

   5.1. $20,211.74 (inclusive of GST) for additional termination costs ("Termination Costs Claim");

   5.2. $3,527.08 for interest due as a result of the late payment by the Respondent of the amount due under an earlier determination in favour of the Applicant under the Act ("Additional Interest Claim");

   5.3. $128,414.75 in relation to the two bank guarantees provided by the Applicant as security under clause 4 of the Contract and which the Respondent called in on 8 January 2014. It seems to me that the correct figure is in fact $128,415.75, being the total of the bank guarantees ("Bank Guarantees Claim").

6. The Respondent disputes that the Payment Claim is a valid payment claim within the meaning of the Act in relation the Additional Interest Claim and the Bank Guarantee claim and that, accordingly, in relation to those claims no "payment dispute" arose within the meaning of the Act.

7. Time for payment of the Payment Claim is 10 working days after the last day of the month. Accordingly, and subject to the Respondent's jurisdiction points, I find that the payment dispute arose on 14 February 2014.

8. The Application was served on the appointing authority, the Institute of Arbitrators & Mediators of Australia, on 11 March 2014. It is the appointing authority agreed to by the parties in the Contract.

9. By letter from the Institute of Arbitrators & Mediators of Australia dated 14 March 2014, received by me along with the Application on that date, I was appointed as adjudicator under the Act. I confirmed at that time that I was not aware of any fact or matter which would or might disqualify me from adjudicating the dispute or

prevent me from determining the matter within the time limits required by the Act. That remains the position.

10. I was advised by the Respondent, and accept, that a full copy of the Application including all supporting material was received by it on 12 March 2014.

11. On 26 May 2014, I received the Respondent's response which is within the time set out in s.29(1) of the Act. My determination was required therefore by 9 April 2014.

12. Assuming that the Payment Claim is valid and not a repeat of an earlier payment claim[2], the Application was served well within 90 days of the payment dispute arising.

13. On 29 March 2014, I sent an email to the parties and their solicitors seeking further submissions principally in relation to the Bank Guarantees Claim. I received the parties' further submissions in response to this request on 2 April 2014.

14. I consider that all parties have complied with the procedural requirements of the Act and with my directions in relation to the provision of submissions and materials to me. If I am wrong in this respect, in any event I would have elected to receive these submissions and materials under s.34(1)(b) of the Act.

15. I note that there is nothing before me which suggests that there is an arbitrator or other person or a court or other body dealing with a matter arising under the Contract who has made an order, judgment or other finding about the dispute that is the subject of this application within the meaning of s.27(b) of the Act. It appears to me that the earlier adjudication determination does not fall within this provision not least because it was not concerned with the present payment dispute.

16. Accordingly, for the purposes of s.31 of the Act, and subject to dealing with the jurisdictional arguments below, I am satisfied that:

    16.1. the Contract concerned is a construction contract within the meaning of the Act;

    16.2. the Application has been prepared and served in accordance with s.28 of the Act, including that the Application was served within 90 days of the payment dispute arising;

[2] The Commonwealth did not assert that it was. On the materials in my possession, it appears that it is not a repeat of an earlier payment claim, and I so find.

16.3. there is no arbitrator or other person or a court or other body dealing with a matter arising under the Contract who has made an order, judgment or other finding about the dispute that is the subject of this application;

16.4. this is not a matter where its complexity and/or the shortness of time prevents me from fairly making a determination under the Act.

Jurisdiction – the Additional Interest Claim

17. I do not have jurisdiction in relation to this claim. The interest payable on the earlier payment claim which was the subject of the earlier adjudication necessarily is part of the "payment dispute" which was the subject of that earlier determination. Section 43(1)(b) of the Act precludes the Applicant from making another application for adjudication of that payment dispute. It seems to me that that includes interest on the claims as well as the claims themselves.

18. The Applicant has the right to enforce this claim for interest by enforcing the earlier determination as a judgment for a debt in a court: see s.45(1). That is the means it should use to recover this sum.

Jurisdiction – the Bank Guarantees Claim

19. The Respondent submits that the Applicant has no entitlement under the Contract to include the amounts of the bank guarantees after they had been cashed in by the Respondent in a payment claim.

20. I reject this submission. For the reasons set out in paragraphs 39 to 42 below, I find that I have jurisdiction in relation to this claim.

Jurisdiction - conclusion

21. Accordingly, I am obliged by s.33(1)(b) of the Act to determine on the balance of probabilities whether any party to the payment dispute concerning the Termination Costs Claim and the Bank Guarantees Claim (but not the Additional Interest Claim) is liable to make a payment to the other. If so, I am then obliged to determine:

21.1. the amount to be paid and any interest payable on it under section 35; and

21.2. the date on or before which the amount must be paid.

Determination of Payment Dispute – Termination Costs Claim

22. Subject to its set off argument, the Respondent appears to accept the Applicant's entitlement to storage costs in the sum of $14,699.34 (being the sum of $17,499.34 in the table in the Applicant's submissions at [83] less $2,800 for freight increases). To this should be added a 5% margin.

23. I agree with the Respondent's submission that the claim for increased freight charges is not made out. As I understand it, these "charges" are provisional based on a cost which the Applicant anticipates it will incur. Anticipated changes in relation to these anticipated charges are necessarily hypothetical and in my view are not claimable under the Contract or the Act.

24. Subject to the Respondent's set off argument I determine on the balance of probabilities that the Respondent is liable to make a payment to the Applicant in the sum of $15,434.31 plus GST, being $16,977.74.

Set-off for liquidated and unliquidated damages, defective materials and inadequate storage

25. The Respondent submits that it is entitled to retain this sum on the basis of a claim to a set off for substantial liquidated and unliquidated damages for the Applicant's alleged delay in performing the works, for the supply of defective materials and for losses suffered to Respondent property by reason of inadequate storage. The Respondent appears to submit that it is sufficient if it establishes that the claims are made bona fide and are arguable.

26. I disagree. I think it is clear from s.33(1)(b) that I must make, on the balance of probabilities, my best assessment as to whether there is such a liability.

27. In relation to the claimed set-off, it is sufficient for me to note that in my view the Respondent has established on the balance of probabilities an entitlement to set off a sum in excess of $16,977.74 in relation to poor storage and handling of materials in the possession of the Applicant which belong to the Respondent. I accept broadly what is set out at [162] to [178] of the Respondent's Response in relation to the Applicant's liability to it under the Contract. Responsibility for the condition of the materials it is storing seems to me to be the concomitant of the Applicant's on-going entitlement to storage costs. I note that, although a complaint in general terms was made in this respect in paragraph 11 of the Respondent's letter of 20 January 2014, the Applicant has not attempted to refute this allegation in the Application.

28. Assuming that it extends to this claim (it is not clear to me that it does), I would reject the Applicant's issue estoppel submission. The Act makes specific provision for the effect of an adjudication determination on the rights of the parties: see Part 3 Division 4 of the Act. In these circumstances, it is not clear to me that equity or the common law would necessarily enlarge the impact of an adjudication determination on the parties' rights in a subsequent application beyond what is provided by the Act. Further, in my view, any such impact would be confined to the particular payment dispute the subject of the earlier adjudication. The fact that a setoff argument failed in relation to the determination of a particular payment dispute which arose at a particular time and in particular circumstances, says nothing about a similar argument raised at a later time and

in different circumstances. This is necessarily a new, different payment dispute and, for this additional reason, it is difficult to see how issue estoppel could ever be generated from an earlier, different payment dispute.

29. In these circumstances, I do not consider that the Applicant's success in the earlier adjudication has any impact on this Application save as provided by the Act, most particularly s.43(1)(b).

30. Given my findings in paragraphs 27 above, it is not necessary for me to consider the other setoff claims made by the Respondent.

Determination of Payment Dispute – the Bank Guarantees Claim

31. Clause 4 of the Contract says relevantly:

4. SECURITY

4.1 Form

The Contractor must provide security to [the Respondent]:

(a) in the form of Approved Security;

(b) in the amount set out in the Contract Particulars; and.

(c) within 14 days of the Award Date.

4.2 Release

[The Respondent] must

(a) within 14 days of the issue of a Notice of Completion for the Works or for each and every Stage, release from the security held under clause 4.1, 50% of the security required under clause 4.1;
(b) within 14 days of the expiration of the last Defects Liability Period (excluding any extensions under clause 9.11), release such amount of the security under clause 4.1 then held, as the Contract Administrator determines to be reasonable having regard to the work to which the remaining Defect Liability Periods apply, to ensure [the Respondent's] interests are not prejudiced; and
(c) release the balance of the security under clause 4.1 then held when:
(i) the last Defects Liability Period has expired; and
(ii) the Contractor has complied with all its obligations under the Contract.

32. There is no provision in the Contract which I have been able to locate (and I was not referred to any) which expressly describes the purpose of the security and particularly the precise nature of the Contractor's obligations the performance or discharge of which is to be the subject of the security.

33. In contrast, clause 5 of [*the contract*] states (emphasis added):

5. SECURITY, RETENTION MONEYS AND OTHER PERFORMANCE UNDERTAKINGS

5.1 PURPOSE

Security, retention moneys and performance undertakings shall, when the same or any of them are required, be provided and given for the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract.

34. Clause 5.1 of AS2124-1992 is in similar terms. In relation to the authorities relied upon by the Respondent, I note that the clause in *Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd* (1994) 12 BCL 64 stated that the security was "for (the construction manager's) due performance of this agreement" (cl.14 at p.67). In *Bains Harding Ltd v State Electricity Commission of Victoria* (VCA, 12/8/1997), clause 39.3 adopted a different approach and expressly permitted resort to the security for the payment of sums due to the respondent in certain circumstances. Clause 5.5 in the contract the subject of *Kennedy Taylor (Vic) Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2000) 16 BCL 374 was in similar terms. The points made by the Respondent in reliance on these and other authorities arise in the context of a valid, existing security over an undischarged obligation. The problem to which the drafting of cl.4 of the Contract gives rise is a more fundamental one – the ambit of the security itself and whether there is an undischarged obligation secured by it at all.

35. These standard form contracts and authorities also show that the obligation which is secured is not necessarily the same in every contract. This reflects the obvious point made in *Clough Engineering Limited v Oil and Natural Gas Corporation Limited* (2008) 249 ALR 458 at [75]-[85] and the cases referred to therein that, in every case, the contract must be read as a whole, to determine precisely what the parties have agreed.

36. In this instance, clearly the security was required under the Contract for a purpose. In the absence of an express statement as to what that purpose was, it is necessary to read the relevant terms of the Contract as a whole and in their context to ascertain what purpose ought to be implied.

37. In this respect, in my opinion clauses 4.2, 14.7 and 14.8 provide the greatest assistance. It seems clear to me that the security in cl.4.1 is required at least to secure the performance by the Contractor of "all its obligations under the Contract" in the circumstances referred to in cl.4.2, namely, leading up to and following the issue of a Notice of Completion for the Works, or a Stage of the Works, and during and (possibly) following the subsequent Defects Liability Period or Periods.

38. The difficult question is whether the security is also to be available to secure the performance by the Contractor of "all its obligations under the Contract" (or otherwise – as noted above, there does not appear to be anything which might be described as a standard ambit for a contractor's security) where there has been a Termination for Convenience under cl.14.7 (which necessarily means there will be no Notice of Completion for the Works, or a Stage of the Works, or any subsequent Defects Liability Period or Periods and, as a result, the entire mechanism for the release of security under cl.4.2 does not and cannot apply).

39. I have formed the view that the security is not available to secure the performance by the Contractor of "all its obligations under the Contract" (or otherwise) where there has been a Termination for Convenience under cl.14.7 for the following reasons:

39.1. A term as to the ambit of the security may be implied only in so far as it is necessary to do so in accordance with the test established by the authorities;

39.2. It is the Respondent's choice as to whether to trigger a Termination for Convenience under cl.14.7. If one of the consequences is that any security must be returned, no doubt that will be a matter the Respondent will take into account. However, there is no necessity to protect the Respondent from a consequence it may choose to avoid if it wishes;

39.3. It is not necessarily illogical, unreasonable or uncommercial to limit the security such that it does not apply to Termination for Convenience under sl.14.7. Under cl.4.2, the Contractor has the ability to attend to any defects in the Works and generally to manage the risk of its security being called upon or its return being delayed. Following Termination for Convenience under cl.14.7, the Contractor must return all documents in relation to the Works to the Respondent (cl.14.8(b)(ii)) and the Respondent may choose to complete the balance of the works (and remedy any defects) itself or via other contractors or not at all. The Contractor has no capacity to manage the risk of its security being called upon or its return being delayed. Had the matter been raised prior to the execution of the Contract, it is not out of the question that the Contractor might reasonably have refused to extend its security, or to limit or condition it, in the event that the Respondent elected to terminate for convenience under sl.14.7.

39.4. Further, as this last point illustrates, if the security was extended to apply following Termination for Convenience, it would beg the question as to how. Clause 4.2 sets out the parties' particular agreement where the Contract proceeds to completion in the ordinary way. Should clause 4.2 apply in a modified way in relation to Termination for Convenience, e.g., by requiring

the Respondent to release a proportion of the security upon termination? Generally, how long is the Respondent entitled to retain the security? In my view, in extending the security to Termination for Convenience, in effect a tribunal is then being asked to create, rather than imply, the agreement for the parties.

39.5. Finally, this construction also gains support from that fact that cl.14.8 limits the Contractor's rights "arising out of, or in any way in connection with" the Termination for Convenience to the amount payable under that clause. By not referring to the possibility that the Contractor may have a right to the return of its security in due course or that that security may be called up (giving the Contractor a right to a credit), the clause appears to assume that the security no longer exists.

40. In these circumstances, in my view, once the Respondent elected to proceed by way of Termination for Convenience under sl.14.7, the security provided under cl.4.1 no longer secured any obligation on the part of the Applicant under the Contract and the Respondent was bound to return the guarantees to the Applicant. It is a corollary of this that the Respondent had no authority to call them up. Accordingly, when the Respondent called upon the two bank guarantees on 8 January 2014 it breached an implied term of the contract not to deal with these securities in a manner which was not authorised by the contract. Such a term seems to me to meet the requirements for implication of a term into a contract. It is immaterial that the Contract is silent about when the unconditional bank guarantees may be called upon to meet the obligations or liabilities of the Applicant which are in fact secured by the guarantees. Once the Respondent elected to proceed by way of Termination for Convenience under sl.14.7 there were no obligations or liabilities of the Applicant secured by the guarantees.

41. By calling up the bank guarantees in breach of the Contract, the Respondent exposed itself to an action for damages for, and/or for restitution of, the debit to its accounts with the NAB which I can infer the Applicant suffered when the guarantees were called up. Such a claim would be a payment claim within the meaning of the Act as it is "a claim under a construction contract (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract": definition of payment claim in s.4 of the Act. The provision of security was a condition on which the Applicant undertook the work – it was not entitled to undertake it otherwise - and hence the security and claims arising out of it are "in relation to" the performance by the contractor of its obligations under the contract. I adopt the submissions of the second defendant recorded at [18] and [19] of *O'Donnell Griffin Pty Ltd -v- Davis & Ors* [2007] WASC 215. I also consider that this construction is supported by the inclusion of (c) in the definition of payment dispute in s.8 of the Act. It would be a bizarre outcome if "payment claim" was

construed narrowly such that a principal could avoid creating a payment dispute under the Act simply by converting a security into cash.

42. The payment claim of 31 January 2014 seeks the payment of this sum. I do not believe that it would be fruitful to consider whether the precise terms of the payment claim procedure in cl.12 of the Contract authorise this payment claim as, if they do not, it seems to me that s.10 of the Act would preclude that construction denying the validity of the payment claim. A payment dispute within the Act therefore arose in relation to this item of the payment claim when it was not paid by the Respondent 10 business days later on 14 February 2014.

43. Assuming the Respondent otherwise has valid setoffs against the Applicant, nevertheless they cannot be applied against this sum as that would permit the Respondent to profit from its own wrong: *Waterman v Gerling Australia Insurance Co Pty Ltd* (2005) 65 NSWLR 300 at [48]. The Respondent cannot use a breach of the Contract to give itself what in its practical effect is a security to which it was not entitled under the Contract. The Applicant should be put in the position it would have been had Respondent not called up the guarantees on 8 January 2014 but instead had returned them.

44. Accordingly, in relation to this part of the payment claim, a determination ought to be made in favour of the Applicant in the sum of $128,415.75 plus interest from 14 February 2014. I determine that this sum is to be paid by 28 April 2014.

45. Interest is payable by the Respondent under cl.12.13 of the Contract at the ATO's general interest charge rate applicable since 14 February 2014. Prior to 1 April 2014 that rate was 9.59%. After 1 April 2014, it was 9.63%. For the period from 14 February 2014 to 31 March 2014, the Respondent should pay interest of $1,518.30 (45 days at 9.59% per annum). From and including 1 April 2014, the Respondent should pay interest at the rate of $33.88 per day (daily rate for 9.63% per annum) until payment.

Request by the Applicant that the Respondent pay 100% of Adjudicator's Fees

46. The Applicant has sought, I assume under s.36(2) of the Act, that I direct that the Respondent pay 100% of my fees. I am not satisfied in accordance with s.36(2) of the Act that the Applicant has incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the Respondent. Sections 36(1), 46(4) and 46(5) of the Act therefore apply in relation to the costs of and incidental to this adjudication.

Information determined as being not suitable for publication - s.38(1)(e)

47. Neither party has sought any determination from me under s.38(1)(e) that information in relation to this application is confidential and not suitable for publication. It is not apparent to me that any of the matters set out above is

confidential. I therefore do not make any determination under s.38(1)(e) of the Act.

Dated this 7th day of April 2014

Alistair Wyvill SC