DETERMINATION NO. 39.14.01

Adjudicator's Determination

pursuant to the

***Construction Contracts (Security of Payments) Act 2004* (NT)**

[redacted]

Applicant

and

[redacted]

Respondent

I, David Baldry, determine on 13 May 2014:-

A. in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act* that the amount to be paid by the respondent to the applicant is NIL inclusive of GST.

B. in accordance with s. 36(2) of the *Construction Contracts (Security of Payments) Act*, that:-

(1) the applicant pay the respondent $8,000 and that that amount be payable on 13 May 2014; and

(2) interest accrue on such amount from and including 14 May 2103 at 8.5% per annum, the daily interest rate being $1.86 per day.

CONTACT DETAILS:

Applicant:
[Redacted]

Respondent:
[Redacted]

Prescribed Appointer:
Northern Territory Law Society
Address:
Suite 2, Ground Floor Beagle House
38 Mitchell Street
Darwin NT 0800

T: 08 8981 5104
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APPOINTMENT AS ADJUDICATOR

1. On 11 April 2014 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the "Act"), and, on 15 April 2014, I was appointed adjudicator by The Northern Territory Law Society to determine this application. The Northern Territory Law Society is a prescribed appointed under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment, and I do not consider that any conflict of interest would prevent me from acting as the adjudicator.

DOCUMENTS RECEIVED BY ADJUDICATOR

2. I received and have considered:
   (a) the application dated 9 April 2014 supported by a statutory declaration made by [redacted] on 10 April 2014 and documents annexed to such declaration, which included, as one of its attachments, a payment claim in the form of a tax invoice from the Applicant to [redacted] No. 2144 dated 20 January 2014;
   (b) the response received by me on 30 April 2014 at 4:27 pm supported by:
      (i) a statutory declaration made by [redacted] on 30 April 2014 and the documents annexed to such declaration;
      (ii) a statutory declaration made by [redacted] on 30 April 2014 and the documents annexed to such declaration;
      (iii) a statutory declaration made by [redacted] on 30 April 2014 and the documents annexed to such declaration;
      (iv) a statement by [redacted] dated 24 April 2014 and the documents annexed to such statement; and
      (v) an expert report by [redacted] dated 29 April 2014 and the documents annexed to such expert report;
   (c) supplementary submissions by the applicant received by me on 7 May 2014 supported by a statutory declaration made by [redacted] on 7 May 2014;
   (d) supplementary submissions by the respondent received by me on 7 May 2014;

(e) further supplementary submissions by the applicant received by me on 8 May 2014 supported by a statutory declaration made by [redacted] on 8 May 2014; and

(f) supplementary submissions by the respondent received by me on 8 May 2014 together with a letter from [redacted] dated 8 May 2014.

3. On 15 April 2014 I asked the parties to advise when the Applicant served the application upon the respondent and they both advised that it was served on 11 April 2014 and I therefore find that:

(a) the application and supporting documents were served on the respondent on 11 April 2014;

(b) there having been three (3) public holidays under the Public Holidays Act, NT occurring in the period between 11 April 2014 and 30 April 2014, namely Good Friday on 18 April 2014, Easter Monday on 21 April 2014 and Anzac Day on 25 April 2014, the 10 business day period under s. 29 of the Act for service of the response on the applicant and upon me after service of the application, required the response to be served on the applicant and me by 5:00 pm on 30 April 2014; and

(c) the response was served within the required period.

OUTLINE OF SUBCONTRACT

4. The Subcontract was in writing between the respondent, as contractor, and the applicant, as subcontractor, consisting of a single document, being a Western Australian precedent for a subcontract, together a single page special conditions page 99, 26 schedules and 3 annexures marked 1A, 1B and 1C.

5. A copy of the Subcontract was annexed to the application. I find that the applicant intended it to have been marked as annexure 2 (even though it was not marked as such on the copy provided to me). It was unsigned and undated.

6. The respondent included in the response an undated copy of the subcontract[1]:

(a) which had been signed by [redacted] on behalf of the respondent and by [redacted] on behalf of the applicant on page 10; and

1 Statutory declaration by [redacted] made on 30 April 2014 [7] annexure 4

(b) the aforesaid 3 annexures to same had all been signed by [redacted] on behalf of the applicant and dated 18 October 2012.

7. I have not performed a complete proof read of both of those copies of the subcontract, but, as the respondent did not make any submissions to the effect that, apart from the aforesaid signings and dating annotations, they differed, I have assumed that there are no other differences between the two copies.

8. The exact date upon which the subcontract was entered into is uncertain. The applicant has submitted that the contract was entered into in August 2012. The Respondent has submitted that it was entered into in or about September 2012[2]. I find that it was entered into in or about August or September 2012 and that it is unnecessary for me to determine the exact date upon which it was entered into.

9. In essence, the applicant and the respondent agree and I find, that the scope of works[3] required the applicant to provide all labour, materials, plant and equipment to carry out screening (to a maximum particle size of 20 mm free of all organic debris (i.e. root mass)) of a single mound of topsoil at the [redacted] construction site at [redacted] ("Construction Site"), previously stripped by others from the surface of the Construction Site land.

10. The scope of works also estimated the quantity of topsoil to be screened to be 27,000m3.

11. The subcontract was originally a fixed price contract of $325,000 for performing all the screening works[4].

12. One of the respondent's declarants has stated that that price was calculated by multiplying the agreed rate of $12.50 per cubic metre of screened topsoil by 26,000 cubic metres referred to in special condition 1 of the subcontract[5].

13. Special condition 1 of the subcontract stated *"All works are to be re-measured at $12.50 per meter cubed."* There is therefore no estimate of 26,000 cubic metres of topsoil referred to in special condition 1.

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2 Applicant's submissions [5], respondent's submissions [3.2, 11(a)]

3 Schedule 11 of the subcontract

4 Item 6 of Schedule 1

5 Statutory declaration [redacted] dated 30 April 2014 [4]

14. However, nothing turns on that discrepancy, because the applicant and the respondent agree and I find, that the effect of special condition 1 was to change the subcontract, from being a fixed price contract, to being a contract whereby the price payable to the applicant for the topsoil screening works was to be calculated by multiplying the agreed rate of $12.50 per cubic metre by the volume of re-measured screened topsoil.

15. The parties agree and I find that the subcontract did not state how the screened topsoil was to be re-measured.

16. The applicant and the respondent also agree, and I find, that soon after the subcontract was entered into the agreed rate was changed from $12.50 per cubic metre to $15.00 per cubic metre plus GST and that that varied rate was to apply to all topsoil screened.

17. One of the respondent's declarants has annexed a copy of an email dated 9 November 2012 recording that agreement[6].

18. I will refer to other terms of the subcontract in the section below headed jurisdiction.

OUTLINE OF PROGRESS CLAIMS BEFORE PAYMENT CLAIM, PAYMENTS MADE AND DISPUTE OVER UNPAID BALANCE

19. The applicant submitted three (3) progress claims before its payment claim numbered 2144 in the form of tax invoices numbered:

    (a) 2100 which claimed a total of $183,382.50, inclusive of GST;

    (b) 2105 which claimed a total of $486,150, inclusive of GST; and

    (c) 2110 which claimed a total of $102,688, inclusive of GST.

20. I find that the copies of all of those progress claims attached to the application[7] are not identical to the progress claims numbered with those invoice numbers delivered to the respondent and instead find that the correct copies of those invoices were only those which were included with the response[8].

21. Even so I also find that the claims for works performed in the copies of those progress claims in application were stated in the same manner as in the copies of those progress claims in the response.

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6 Statutory declaration [redacted] dated 30 April 2014 [36] annexure 12

7 Annexures 7, 8 and 10

8 Statutory declaration [redacted] dated 30 April 2014 [14] annexures 1, 2 and 3

First progress claim in Tax Invoice 2100

22. The copy of invoice number 2100 dated 12 November 2012 included with the application makes the unlikely statement on its face that it had been paid in full. The copy of invoice 2100 included with the response is identical to the applicant's copy excepting that it does not state that it has been paid in full. I also find it was delivered to the respondent on 28 November 2012 because the applicant provided no proof of its delivery to the respondent, but the respondent has done so, i.e. an email from the applicant to the respondent attaching the invoice dated that date.

23. Invoice 2100 charged for 9005 cubic metres of screened topsoil performed in the period from 26 September 2012 to 23 October 2012 at the rate of $15 per cubic metre and for spraygrass (charged at $3 per cubic metre of spray grass) and load truck (at an hourly rate of $375 per hour) variations.

24. While the subcontract sets out procedures to be followed in relation to variations in cl. 10.2 the parties agree and I find, that those procedures were not followed and the parties waived their contractual rights in that regard.

First payment to applicant

25. I accept the respondent's evidence that the respondent paid the applicant $183,382.50 on 14 January 2013[9].

26. The respondent has submitted, relying on cl. 16.10 of the subcontract that that payment and a later payment were made on account and without admission as to the correctness of the value of the work claimed in any progress claim invoices. I make further reference to that contention in paragraph 90 below.

Second progress claim in Tax Invoice 2105

27. The copy of invoice number 2105 dated 1 April 2013 included with the application makes the unlikely statement on its face that a part payment of the amount claimed in it of $197, 522.75 had already been paid. The copy of invoice 2105 included with the response is identical to the applicant's copy excepting that:

    (a) It is dated 19 December 2012 and I find that that is the correct date upon which it was rendered; and

9 Statutory declaration [redacted] dated 30 April 2014 [16]

(b) it does not state that that payment had been made.

28. Invoice 2105 charged for 25,350 cubic metres of screened topsoil performed in the period from 24 October 2012 to 30 November 2012 at the agreed rate and for further spraygrass and load truck variations.

Third progress claim in Tax Invoice 2110

29. The copy of invoice number 2110 included with the application is dated 1 April 2013. I find that was not the correct date of same and that it was dated 13 February 2013, as stated in the copy of that invoice included with the response.

30. Invoice 2110 charged for dust suppression (at $3 per cubic metre), spraygrass (at $3 per cubic metre), water truck (at $140 per hour plus GST) and a variation for water truck spotter (at $80 per hour plus GST). While only the last of those claims is referred to as being a variation. I find that they must have all been variations because none of them were for screening of topsoil.

Second payment to applicant

31. I accept the respondent's evidence and I find, that on 22 April 2013 the applicant acknowledged it had received a further payment of $197,522.75 from the respondent[10]. The exact date of payment has not been established by the evidence before me, but I do not consider that that is of any importance insofar as this adjudication is concerned.

32. On 25 February 2013 the applicant served a notice of dispute on the respondent claiming the whole of such unpaid balance and also attaching, for the first time its progress claim in tax invoice no. 2110[11].

33. Therefore, as at 25 February 2013 the total unpaid amount of all the above progress claims was $391,315.25 and it is important to note that that is also the amount claimed in the payment claim the subject of this adjudication.

34. The dispute in relation to the unpaid balance involved:-

(a) the applicant contending it was entitled to be paid in full for all unpaid variations in its progress claims;

(b) the applicant contending that the volumes of screened topsoil it had stated in its progress claims were correct;

10 Statutory declaration [redacted] dated 30 April 2014 [19 to 23] annexures 5, 6 7 and 8

11 Statutory declaration [redacted] dated 30 April 2014 [10 to 12] annexure 1

(c) the respondent contending that they significantly overstated such volumes;

(d) the applicant contending that its method of remeasuring the screened topsoil, i.e. adding together its daily tallies provided to the respondent of the number of front-end loader's bucket loads collected, such bucket having a maximum carrying volume capacity of 4 cubic metres; and

(e) the respondent contending that its remeasuring method of surveying the mound of screened topsoil and areas where some of it had been spread in a number of swales (land depressions) in the Construction Site was more accurate and should be used in preference to the applicant's remeasuring method.

35. Representatives of the parties met to try to negotiate a settlement.

36. By letter dated 29 April 2013 sent to the applicant on 30 April 2013, the respondent set out details of its review of the three progress claims and offered to pay the applicant $66,398 in final settlement. That offer was made as a commercial offer because it included some additional volumes to those the respondent considered were the actual remeasured volumes[12].

37. On 30 April 2013 the applicant rejected that offer[13].

38. I will refer to the subcontract's requirements for making progress claims and when they fell due for payment in the section below headed jurisdiction.

OUTLINE OF PAYMENT CLAIM

39. The applicant's only payment claim the subject of this adjudication application was made in the form of a tax invoice numbered 2144 dated 20 January 2014[14], which claimed $391,315.25 inclusive of GST for:

(a) Top soil screened from 24/10/2012 to 30/11/2012

Total topsoil screened = 25,350 m3 @ $15 (excl)	$418,275.00

(b) Variation 1:

Spraygrass: Re-spray 8050 m2 @ $3.00	$24,150.00
Spraygrass: Entrance 2100 m2 @ $3.00	$6,300.00
Spraygrass: Drains 9100 m2 @ $3.00	$27,300.00

12 Statutory declaration [redacted] dated 30 April 2014 [25 to 32] annexure 10

13 Statutory declaration [redacted] dated 30 April 2014 [32] annexure 11

14 Annexure 1 to application

(c) Variation 2:

Load Moxy Truck: 27 hrs @ $375.00	$10,125.00
Dust Supression: 17,500 m2 @ $3.00	$52,500.00
Spraygrass: 3500 m2 @ $3.00	$10,500.00
Watertruck: 164 hrs @ $140.00	$25,256.00

(d) Variation:

Watertruck: 164 hrs @ $80.00 (Spotter as requested by [redacted])	$14,432.00
LESS payment made on 22/04/2013	$197,522.75
BALANCE DUE:	**$391,315.25**

40. The copy of invoice 2144 included in the application also stated *"This invoice replaces #2105 and #2110"*, those being numbers of the aforesaid last two progress claim invoices.

41. It therefore repeated the same claims as those made in the progress claim tax invoices nos. 2105 and 2110 in the one payment claim and made no new claims.

42. I accept the respondent's submission that the copy of payment claim number 2144 annexed to the application is not a true copy of the tax invoice numbered 2144 delivered to the respondent and I find that:

(a) a true copy of payment claim number 2144 delivered to the respondent is included with the response; and

(b) it was delivered to the respondent on 21 January 2014[15].

43. I consider that the respondent's evidence in this regard is to be preferred over that of the applicant's because the respondent was the only party which attached a copy of an email from the applicant to the respondent stating that it attached payment claim invoice 2144.

44. The version of the payment claim delivered to the respondent differs from the version annexed to the application in the following ways:

(a) it is signed by the same person on both of the two pages of the payment claim;

(b) immediately under both signatures the handwritten date "21/1/14" appears;

15 Statutory declaration [redacted] dated 30 April 2014 [48] annexure 18

(c) in the cell headed “Details” under “SUBCONTRACT REFERENCE: [redacted]” the following is stated:

“PREVIOUS INVOICE 2105 - $486,150.00

PREVIOUS INVOICE 2110 - $102,688.00

PAYMENT MADE (INV 2105 22/04/13 - $197,522.75

INV 2105”

(d) it then repeats what was stated in the same place in the copy of the payment claim annexed to the application;

(e) on the next line of that cell adjacent to the heading “Variation1” the words “(INV 2105” appear;

(f) it then repeats what was stated in relation to variation 1 in the copy of the payment claim annexed to the application in the same cell on the first two lines of the copy of the payment claim;

(g) in the details cell on page 2 next to the heading “Variation 2 the words “(INV 2105)” appear;

(h) it then repeats what was stated in relation to variation 2 in the copy of the payment claim annexed to the application;

(i) it then includes the heading “INV 2110 – Amount claimed on 12/11/2013”;

(j) it then repeats the same dust supression, spraygrass and water truck claims as stated in the payment claim annexed to the application;

(k) it then includes the words “INV 2110” next to the heading “Variation”;

(l) it then repeats the watertruck spotter claim stated in the payment claim annexed to the application;

(m) the summary payment cell includes a subtotal of “$588,838.00” and a paid to date amount of “$197,522.75”, the balance due figure of $391,315.25 being the same as in the payment claim annexed to the application.

45. I will consider the effect of the applicant’s failure to attach a true copy of the payment claim to the application in the section below headed jurisdiction.

JURISDICTION

Bases of jurisdictional considerations in Act and general statement of my findings under s. 33(1) of the Act

46. By s 33(1)(a)(i) to (iv) I must dismiss an adjudication application, without making a determination of its merits, if:

    (i) the contract concerned is not a construction contract; or

    (ii) the application has not been prepared and served in accordance with section 28; or

    (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

    (iv) satisfied it is not possible to fairly make a determination:

        (A) because of the complexity of the matter; or

        (B) because the prescribed time or any extension of it is not sufficient for another reason .

47. In relation to s 33(1)(a)(i) I am satisfied that, pursuant to s. 5(1)(a) of the Act, the subcontract was a construction contract for the performance of construction work, pursuant to s. 6(1)(f)(i) and (v), on a site in the Northern Territory, because:

    (a) the works were civil works, as defined in s. 4 of the Act, were earthworks and may also be able to be considered to be landscaping; and

    (b) were performed at [redacted], which is in the Northern Territory.

48. The applicant and the respondent also submitted that I should make that finding, albeit that they differed regarding the appropriate way to classify the works as construction works, as defined by the Act.

49. In relation to s 33(1)(a)(ii) I find that the application was not prepared and served in accordance with s. 28 of the Act and should therefore be dismissed. My reasons for that finding are set out in more detail below in this section of the determination.

50. In relation to s 33(1)(a)(iii) neither party has asserted that an arbitrator or other person or a court or other body dealing with a matter arising under this construction contract has made an order, judgment or other finding about the dispute that is the subject of the application and I therefore find that this section of the Act does not apply.

51. In relation to s 33(1)(a)(iv) I am satisfied that I can make a fair determination, because:

(a) the complexity of the matter would not prevent me from doing so; and

(b) the prescribed time is a sufficient period for me to make my determination.

Reasons for finding in relation to s 33(1)(a)(ii)

52. Was the application prepared and served in accordance with s 28?

53. S. 28(1) of the Act is in the following terms:

> ***"28. Applying for Adjudication***
>
> *(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises, or, if applicable, within the period provided by s.39(2)(b):*
>
> *(a) prepare a written application for adjudication; and*
>
> *……..*[serve it in accordance with the balance of s.28(1)]*".*

54. So the first requirement of s 28(1) is that a written application be prepared and served within 90 days after a payment dispute arises. The occurrence of a payment dispute as defined by s 8 of the Act is thus critical to the application. This is also the effect of s 27 giving the right to bring an application in these words:

> *"If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless:*
>
> *(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or*
>
> *(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract."*

55. By s 8, a payment dispute arises, relevantly, where a "payment claim" has not been paid in full by the due date for payment or the claim has been rejected or wholly or partly disputed.

56. A "payment claim" is defined in s. 4 to mean:

> a claim made 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; or
>
> (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

57. If there is a written provision in the contract about how a claim for payment is to be made, the claim must follow those written provisions to be a valid payment claim. If there is no such written provision, the requirements of Division 4 of the Schedule to the Act as to the manner of making payment claims are implied into the contract by s 19 which says:

> *"The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment."*

58. Both parties agree and I find, that the subcontract contains provisions setting out how claims for payment were to be made. The clauses that did so are cls. 16.1 and 16.11. Therefore, the implied provisions in Division 4 of the Schedule to the Act do not apply.

59. Cl. 16.1 is in the following terms:

> *"16. Payment*
>
> ***16.1 Progress Claims***
>
> *(a) Subject to:*
>
> *(i) the provisions of the Subcontract;*
>
> *(ii) the Subcontractor having complied with clauses 7.3, 7.5, 8.7, 10.8, 10.14, 10.25, 10.27, 10.28, 16.9,, 16.17(i) and 17.7(b);*
>
> *(iii) the Subcontractor demonstrating compliance with clause 2.6, where applicable, having regard to the stage of the Works;*

(iv) the Subcontractor having provided access to its quality system as required by clause 10.15;

(v) the Subcontractor having provided the Workplace Health and Safety Plan as required by clause 10.27;

(vi) the Subcontractor having provided proof of insurances in accordance with clause 7.5; and

(vii) the Subcontractor having provided an accurately completed Emissions Report:

(A) immediately prior to the first progress claim; and

(B) for each subsequent progress claim, as updated since the last progress claim,

*the Subcontractor is entitled to make a claim for payment (**'progress claim'**):*

(viii) on the date stated in Item 24 of Schedule 1 until the Date of Substantial Completion;

(ix) on the last day of the month immediately following the Date of Substantial Completion; and

(x) within the time prescribed by clause 16.11.

(b) The progress claim must [emphasis added] *be submitted to the Contractor's Representative and must* [emphasis added]*:*

(i) be in the name of the Subcontractor;

(ii) bear the relevant Subcontract reference or number;

(iii) comply with any invoicing requirements under the Head Contract;

(iv) clearly designate the Subcontractor's bank references and account details;

(v) clearly indicate all credits for sums due by the Subcontractor to the Contractor; and

(vi) show details of the value of the work carried out in performance of the Subcontract supported by evidence of the amount claimed together with such information as the Contractor's Representative may reasonably require.

If the Subcontractor submits a progress claim before the date for submission of that claim, such early submission will be taken to be submitted on the date the Subcontractor should have submitted the claim in accordance with clause 16.1. A late progress claim will be deemed to have been made on the next date for making a progress claim."

60. Cl. 16.11 is in the following terms:

"16.11 Final Payment Claim

After:

(a) the expiry of the Defects Liability Period;

(b) the Subcontractor has rectified all Defects that existed on, or became apparent during the Defects Liability Period;

(c) the Subcontractor has provided the Contractor's Representative with a statutory declaration in the form set out in Schedule 3;

(d) the Subcontractor has provided the Contractor's Representative with a monthly report in accordance with clause 10.25; and

(e) any outstanding claims or disputes between the Subcontractor and the Contractor under the Subcontract have been settled or otherwise finally resolved,

or within 5 working days of a request by the Contractor's Representative to do so, the Subcontractor shall submit to the Contractor's Representative a final payment claim endorsed 'Final Payment Claim'.

The Final Payment Claim must [emphasis added] *provide a detailed statement of all moneys which the Subcontractor claims to be due to it from the Contractor in connection with the Works or the Subcontract, supported by evidence of the amount claimed together with such information as the Contractor's Representative may reasonably require.*

If the Subcontractor submits a Final Payment Claim before the date for submission of that claim, such early submission will be taken to be submitted on the date the Subcontractor should have submitted the claim in accordance with clause 16.11."

61. If there is a written provision in the contract about responding to payment claims and time for payment those provisions apply. If there are no such written provisions, the requirements of Division 5 of the Schedule to the Act as to the manner of responding to payment claims and time for payment are implied into the contract by s 20.

62. Both parties agree and I find, that the subcontract contained provisions about responding to payment claims and time for payment. Those provisions were contained in cls. 16.2 to 16.5 and 16.12 to 16.16.

63. Therefore, the implied provisions in Division 5 of the Schedule to the Act do not apply.

64. For present purposes I consider I need only state the provisions of cl. 16.3, which states:

"16.3 Time for Payment

Within 25 Business Days of the Contractor's Representative receiving a progress claim under clause 16.1, the Contractor must pay the Subcontractor or the Subcontractor shall pay to the Contractor (as the case may be), the amount shown as being payable by the Contractor to the Subcontractor or by the Subcontractor to the Contractor (as the case may be), in the Payment Certificate in relation to that payment claim."

Applicant's jurisdictional case stated in application

65. In the application the applicant[16] submitted that the application was prepared and served in accordance with s. 28 of the Act, because:-

(a) The payment claim invoice no. 2144 set out all the information that must be provided according to cl. 16(b) of the subcontract.

16 Applicant's submissions in application [16 to 31]

(b) In particular, whilst cl. 16.2(b)(iii) of the subcontract required that progress claims must comply with any invoicing requirements under the Head Contract, as the respondent had not informed the applicant of any such requirements or raised any concerns it had with the form of any of the progress claim invoices rendered by the applicant, the respondent was estopped from denying that the form of the progress claims rendered was acceptable or, alternatively, it would be unconscionable for the respondent to contend otherwise[17]

(c) Further, as required by cls. 16.2(b)(v) and (vi) of the subcontract, payment claim invoice no. 2144 set out all amounts claimed and paid under the subcontract since the beginning under invoices 2100, 2105, 2110 and that that approach to preparing payment claims *"has been approved by the Court of Appeal in K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd (2011) 29 NTLR 1 at [124], as argued in the article [In]security of Payment (2010) 1 NTLJ 165 by C Ford. The clause referred to in K & J Burns Electrical at [124] is in similar terms to clause 16.2(b) in this contract set out above."*[18] The applicant then said "*[The respondent] has not used this as a reason not to pay invoice 2144 and hence treatment of this issue here is brief. If [the respondent] relies on the issue in its response, [the applicant] seeks an opportunity of replying on that issue."*[19]

(d) It was dated and delivered to the respondent on 20 January 2014[20].

(e) Cl. 16.3 of the subcontract required progress claims to be paid within 25 business days of receipt by the respondent.

(f) It was therefore due to be paid by 3 March 2014.

(g) The respondent did pay any of the amount claimed in it by the due date of 3 March 2014.

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17 I note that this and a contention that the respondent was estopped from denying that the applicant's method of remeasuring the topsoil was the method agreed between the parties for doing so were the only references in the applicant's submissions in the application, which made reference to an estoppel occurring or to a circumstance where it would have allegedly been unconscionable for the respondent to make a particular submission in relation to the performance of the contract.

18 Applicant's submissions in application [29]

19 Applicant's submissions in application [30]

20 Applicant's submissions in application [20]

(h) So a payment dispute as defined in s. 8 of the Act arose on that date.

(i) The application was made within the 90 days after that date as required under s. 28(1) of the Act.

Respondent's jurisdictional case stated in response

66. In the response the respondent[21] submitted that the application was not prepared and served in accordance with s. 28 of the Act. Therefore I should dismiss the application for want of jurisdiction, because:-

(a) The payment claim attached to the application was not the payment claim served on the respondent. So the application did not comply with s. 28(2) of the Act and should be dismissed for want of jurisdiction.

(b) The application did not comply with s. 28(1) of the Act, because it was not made within 90 days of the payment dispute occurring under s. 8 of the Act, that having happened when previous tax invoices 2105 and 2110, making the same claims as invoice 2144, were not paid by their due dates.

(c) Tax invoice 2105 was dated and delivered on 19 December 2012.

(d) The date by when tax invoice 2105 was due to be paid (i.e. 25 business days after the date of delivery) was by 1 February 2013.

(e) As tax invoice 2105 was not paid in full by 1 February 2013, that is when the payment dispute occurred in relation to the unpaid portion of the claims made in tax invoice 2105.

(f) Tax invoice 2110 was dated 12 February 2013 and delivered on 25 February 2013.

(g) The date by when tax invoice 2105 was due to be paid (i.e. 25 business days after the date of delivery) was by 3 April 2013.

(h) As no part of the amount claimed in tax invoice 2105 was paid by 3 April 2013, that is when the payment dispute arose in relation to the whole of the amount claimed in tax invoice 2110.

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21 Respondent's submissions in response, section 5 [30 to 86]

(i) Both of those claim dispute dates were in excess of 90 days prior to the application being served upon the respondent and the prescribed appointer.

(j) When properly construed, the terms of the subcontract only permitted the making of progress claims as a whole of contract rolling repeat claim in a final claim.

(k) Invoice 2144 was not a final payment claim because:

(i) it did not include the whole of contract information pertaining to the first progress claim in invoice 2100 and the payment made by the respondent in respect of same;

(ii) it was not made within the 5 working day period in cl. 16.11, i.e. after having been requested by the respondent's representative, that request having been made on 12 February 2013[22];

My finding in relation to s. 28(2)(b)(ii) of the Act

67. S. 28(2)(b)(ii) of the Act provides as follows:

> *"(2) The application must:*
>
> *(a) ……*
>
> *(b) state the details of or have attached to it:*
>
> *(i) any payment claim that has given rise to the payment dispute; and*
>
> *(c) ……"*

68. The failure of the applicant to attach a correct copy of the payment claim invoice 2144 to the application may be a breach of the requirements of s. 28(2)(b)(ii) of the Act, which is expressed in mandatory terms.

69. However, a breach of that section of the Act may not have occurred, because the application in any event *"stated details of it* [i.e the payment claim]*"*, in that it is arguable that all of the essential information pertaining to the claims made in the delivered payment claim was set out in the incorrect copy of the payment claim attached to the application.

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22 Respondent's submissions in response [71] and statutory declaration by [redacted] dated 30 April 2014 [63] and annexure 25

70. Neither party made submissions to me in relation to the effect of that phrase in s. 28(2)(b)(ii) of the Act in the particular circumstances of this case.

71. In any event, as I have found that I am wanting in jurisdiction for other reasons set out below I do not consider I need to make a finding in relation to this section of the Act.

Additional Submissions

72. On 6 May 2014 I received a letter from the applicant enclosing a further set of submissions and a statutory declaration from the applicant. The same day I received a letter from the respondent stating that it considered them to be an attempt by the applicant to supplement the submissions made in the application and, assuming I had not asked the applicant to provide such further submissions, the appropriate thing for me to would be to ignore the applicant's further submissions.

73. After receipt of that correspondence, on 6 May 2014 I sent an email to the parties which stated that:

(a) the said submissions and statutory declaration were sent to me without me having requested the applicant, pursuant to s. 34(2)(a) of the Act to make any further submissions in relation to the matters dealt with in same;

(b) I considered them to constitute an attempt by the applicant to make submissions in reply to certain of the respondent's submissions made in the response;

(c) I had read those submissions and statutory declaration, but did not consider that I needed to take any of the information in them into account in order for me to have sufficient information to make my determination and I therefore intended to disregard them; but

(d) in any event, I requested the parties, pursuant to s. 34(2)(a) of the Act to provide me with further submissions by 2:00 pm on 7 May 2014, dealing with the following:

"1. Irrespective of:-

(a) whether the applicant's payment claim invoice 2144 ("Payment Claim"), when first delivered to the respondent, was in the form included:-

(i) in the application as annexure 1; or

(ii) in the form included in the response attached to an email sent by [redacted] *to* [redacted] *on 21 January 2014 at 2:29 pm, together with a copy of the applicant's letter to the respondent dated 21 January 2014, copies of which have been annexed to* [redacted]*'s statutory declaration made on 30 April 2104 at annexure 18; or*

(b) whether the making of a repeat payment claim is expressly permitted by clause 16.1(b)(v) and (vi) of the subcontract,

and, if one assumes that the Payment Claim was not a Final Payment Claim made pursuant to the terms of clause 16.11 of the subcontract,

When do the parties submit, in accordance with the terms of the subcontract, was the last date upon which the Payment Claim could have been made?

2. If you conclude that that date was before 20 January 2014, please also submit whether you consider that I lack jurisdiction to determine this adjudication on the merits for that reason and why you consider that that is the case."

74. On 7 May 2014 both parties provided me with further submissions.

75. The applicant's further submissions delivered on that day submitted that:

(a) Cl. 16.1(a)(viii) of the subcontract states that payment claims may be made from the date set out in Item 24 of Schedule 1 until the Date of Substantial Completion.

(b) Cl. 16.1(a)(ix) states payment claims may be made on the last day of the month immediately following the Date of Substantial Completion.

(c) No Date of Substantial Completion has been established under the subcontract in accordance with clause 17 and, therefore the applicant was entitled to submit payment claim invoice 2144 on the date it was submitted.

(d) Alternatively, after the subcontract was entered into the parties *"ignored the written terms of the subcontract"* and *"The parties are in agreement, or have disputed (or it is clear on the face of the material), that they jointly ignored the following provisions of the subcontract:*

a. clauses 1.7, 10.2, 10.4, 10.5 as to variations. None of the variations agreed by the parties followed this process;

b. the Commencement Date in Schedule 1 Item 2. Work commenced on 26 September 2012 and no amendment was made to the Commencement Date in Schedule 1;

c. *the Date for Substantial Completion in Schedule 1 Item 3. Work did not finish on this date and neither party has made any issue of that fact since;*

d. *the Subcontract Sum in Schedule 1 Item 6. Despite the variation procedure not being followed, neither party has relied on this sum at any stage;*

e. *the Key Personnel in Schedule 1 Item 11.* [The Respondent] *has not made any complaint at any time that* [redacted] *was replaced without its written consent under cl 5.5;*

f. *the Amount of Retention in Schedule 1 Item 12.* [The Respondent] *has not retained any sum from payment.*

g. *the Bank Guarantees referred to in Schedule 1 Item 13. No bank guarantees were ever requested by* [the Respondent]*;*

h. *the Release of Retention in Schedule 1 Item 14.* [The Respondent] *has not retained any sum from payment;*

i. *the Design Obligation in Schedule 1 Item 16. No option was selected, no doubt because* [the applicant] *did not have a design obligation;*

j. *the Variation percentages in Schedule 1 Item 17. The variation process set out in the subcontract was not followed or insisted upon by either party;*

k. *the Warranty Deed Poll in Schedule 1 Item 19 and in Schedule 5.* [The Respondent] *has not asked* [the applicant] *to enter into a Warranty Deed Poll despite "YES" being the default selection;*

l. *the Standard of Work and Materials in Schedule 1 Item 21. No standard was set by the Scope of Works (assuming this to be the Technical Scope of Works in Schedule 11);*

m. *the time for progress claims under Schedule 1 Item 24.* [The Respondent] *never made any complaint of payment claims not being made on this date, nor did it ever raise the issue of timing of payment under cl 16.1;*

n. *the Liquidated Damages in Schedule 1 Item 28.* [The Respondent] *has neither claimed nor suggested a claim for liquidated damages at any time;*

o. *the Supplier Warranty Deed Poll in Schedule 6;*

p. *the Agreement to Issue Receipt Created Tax Invoices in Schedule 7;*

q. *the Form of Bank Guarantee in Schedule 8;*

r. the Drawings in Schedule 9;

s. the Specification in Schedule 10;

t. the Site Workplace Health and Safety Plan referred to in Schedule 13. [The Respondent] *never requested this plan from* [the applicant] *nor complained when it was not provided;*

u. the Environmental Management Requirements in Schedule 14;

v. the Site and Works Management in Schedule 15;

w. the Programme referred to in Schedule 16. [The Respondent] *did not issue a programme to* [the applicant]*;*

x. the Policy, Procedures and Management Plans in Schedule 17. [The Respondent] *did not make these known to* [the applicant] *or provide* [the applicant] *with a copy.*

y. the Quality Assurance Plan referred to in Schedule 18. [The Respondent] *did not make this known to* [the applicant] *or provide* [the applicant] *with a copy.*

z. Examination and Testing in Schedule 19. [The Respondent] *did not make known and Project Plans relevant to this issue or provide* [the applicant] *with a copy.*

aa. the Head Contract Provisions in Schedule 20. [The Respondent] *did not make these known to* [the applicant] *or provide* [the applicant] *with a copy.*

bb. the Moral Rights Consent in Schedule 22. [The Respondent] *did not request such a consent from* [the applicant] *or its employees.*

cc. the Monthly Emissions Report in Schedule 23. [The Respondent] *did not request such a report from* [the applicant].

dd. the Key Personnel in Schedule 25. No names were provided.

ee. the Project Agreement in Schedule 26.0"

(e) Because the respondent made no mention of cl. 16.1(a) or the time for making payment claims or the Date of (or for) Substantial Completion in response to invoice 2110 it cannot now insist on strict compliance with the terms of the subcontract after ignoring the vast majority of its requirements.

(f) The applicant then cited the following cases dealing with the law of waiver and estoppel it had already cited in the appendix to the applicant's submissions in the application:

- Olsson AJ in the Court of Appeal in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 at [247].
- *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264 per McLure JA (Roberts-Smith JA agreeing) at [40]-[41] and Buss JJA at [62]-[64];
- *Concrete Constructions Group v Litevale Pty Ltd* [2002] NSWSC 670 at [60]-[67] (Mason P);
- *Miccon Hire Pty Ltd (in liquidation) v Birla Mt Gordon Pty Ltd* [2013] QSC 139 at [32] (de Jersey CJ);
- *Walter Construction v Walker Corporation* [2001] NSWSC 283 at [166]-[176] (Hunter J)

(g) Cl. 1.7 of the subcontract does not prevent that outcome.

(h) The result of the parties' conduct in performance of the work and ignoring the terms of the contract is that the time for making progress claims is at large and cls .16.1(a)(viii) and (ix) do not regulate the time for making payment claims.

76. The statutory declaration provided with the applicant's supplementary submissions delivered to me on 7 May 2014 simply asserted that factual matters stated in such submissions were to the best of the declarant's knowledge true and correct without providing any further evidence to support the contentions made in the accompanying further submissions by the applicant.

77. Cl. 1.7 of the subcontract was in the following terms:

> ***"1.7 Variations and Waivers in Writing***
>
> *A party may exercise a right, power or remedy at its discretion and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or any other right, power or remedy. Except where a provision of this Subcontract expressly requires a party to exercise any right, power or remedy within a specified time, delay in exercising a right, power or remedy does not prevent its exercise.*
>
> *A provision of a right created under the Subcontract may not be:*
>
> *(i) waived except in writing signed by the party granting the waiver; or*

(ii) varied except in writing signed by the parties."

78. The applicant's further submissions delivered on 7 May 2014 submitted that:

(a) Clause 1.1 of the Subcontract defines the "Date of Substantial Completion" as follows:

> *"**Date of Substantial Completion** means the date on which the Contractor's Representative is reasonably satisfied that Substantial Completion has been achieved."*

(b) Substantial Completion is defined to mean:

> *"The state of the Works when the Contractor's Representative is reasonably satisfied that:*
>
> *(a) They are complete and the Subcontractor has complied with its obligations under the Subcontract except minor Defects which cannot be promptly rectified and which will not, by either their existence or rectification, inconvenience the use of the Works by any person; and*
>
> *(b) Without limiting paragraph (a), the requirements of clause 17.5 have been complied with*."

(c) As the requirements of clause 17.5 were not relevant to the applicant's works, and alternatively, it was agreed that the applicant was to cease work on 30 November 2012 and it did so[23], 30 November 2012 was the Date of Substantial Completion.

(d) As Cl. 16.1(ix) states that, other than a final payment claim, the last date upon which a payment claim can be made is on the *"last day of the month immediately following the Date of Substantial Completion"* the last date upon which the Payment Claim (other than a final payment claim) could have been made in accordance with the terms of the Subcontract was on 31 December 2012.

(e) As payment claim invoice 2144 was dated 20 January 2014, it was made later than 31 December 2012.

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23 Applicant's submissions in application [7], statutory declaration by [redacted] dated 10 April 2014 [11] statutory declaration by [redacted] dated 30 April 2014 [42] annexure 14, and statutory declaration by [redacted] dated30 April 2014 [28]

(f) The requirements for the making of progress claims in clause 16.1 are stated to be in mandatory terms.

(g) It was held by Southwood J in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd*[24] that a payment claim is not required to comply strictly with the requirements of the relevant construction contract in order to be a valid payment claim for the purposes of the Act. His Honour adhered to that view in the Court of Appeal decision referred to by the Applicant in its Response of *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*[25]. His Honour also stated his view that it is not a jurisdictional requirement for the purposes of a determination by the Adjudicator under section 33(1)(a) of the Act that the Payment Claim comply strictly with the requirements of the relevant construction contract.

(h) However, that was not the view of the majority in *K&J Burns*, with Kelly J and Olsson AJ directly disagreeing with the views expressed by Southwood J. It is submitted that the view of the majority in K&J Burns correctly states the law on this point. The definition of payment claim in s 4 of the Act requires a payment claim to strictly comply with the express terms of the contract. Accordingly, any claim made for payment of an amount for work performed by virtue of a construction contract must, to comply with the jurisdictional requirements of sections 8 and 33(1)(a) of the Act, have been made in accordance with the terms of the relevant construction contract.

(i) Both Kelly J and Olsson AJ held that section 33(1)(a) requires the Adjudicator to determine what is presented to and was a payment claim complies with the requirements of the contract in question. It is relevant to set out the observations of each in full, as they are directly on point. At [147]-[153] in *K&J Burns*, Kelly J stated:

> *[147] If it had been necessary to deal with the other grounds of appeal, I would also be forced to disagree with Southwood J's finding that the adjudicator misconstrued the definition of "payment claim" in s 4 of the Act.*

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24 [2008] NTSC 42 at [66] and [67]

25 (2011) 163 NTR 17 at [47]-[50]

Southwood J expresses the view that the definition of payment claim in s 4 of the Act does not require that a payment claim must strictly comply with the express terms of the contract and that, accordingly, a payment claim is any claim made for payment of an amount for work performed by virtue of a construction contract.

[148] In my respectful opinion, this analysis confuses two very different questions — what the adjudicator is required to do by the Act, and the separate question of what kind of error will render an adjudicator's decision void and thereby amenable to review by the Supreme Court.

[149] So far as the adjudicator is concerned, in order to determine whether a payment dispute has arisen (and, if so, when) he is required to determine whether what is presented to him as a payment claim complies with the requirements of the contract in question (or whether it is payable under the contract even if noncompliant, for example because of the absence of a prescribed notice of dispute).

[150] Southwood J has cited his own decision in Transcon as supporting the proposition that a payment claim need not conform to the requirements of the contract to be a valid payment claim under the Act. In my view Transcon does not support that proposition. The point in Transcon was whether an error by the adjudicator in deciding that question would render his determination void: Southwood J held that it would not. That is a very different question from whether the adjudicator is obliged to accept as a payment claim, for all purposes, anything that purports to be a claim for payment for work performed under a construction contract, regardless of the requirements of the contract.

[151] It simply cannot be right that an adjudicator must accept as a valid payment claim anything which happens to be a claim for payment for an amount of work performed by virtue of a construction contract, regardless of the requirements of the particular contract for making such claims, and I respectfully agree with the reasons of Olsson AJ at [231]–[239] for rejecting the argument to this effect put forward by the respondent.

[152] Apart from anything else, if that were the case, it would be impossible for the adjudicator to work out when a payment dispute arose for the contract would not provide a time for payment of non-conforming payment claims. (Or rather, the adjudicator would be compelled to say no payment dispute had arisen.)

[153] It is true that, as Southwood J has pointed out, there may be payment disputes about contractually noncompliant payment claims in the special circumstance where the contract provides, either by implication of the terms in the Schedule, or expressly, that an amount is payable despite a claim being noncompliant — because (as in the implied terms) the principal is obliged to give notice of non-conformity within a fixed time or pay — or for some other reason expressed in the contract. However, that does not mean that an adjudicator is obliged to accept as a payment claim anything that claims payment for work done under a construction contract, regardless of compliance with the contract. It simply reinforces the fact that, under the territory legislation, the key concept is not that of "payment claim", as in the NSW Act, but that of "payment dispute" — that is when (if at all) was the amount claimed payable under the contract?

(j) Olsson AJ expressly rejected the argument that all the claimant needs to do is submit a claim which purports to be made under the relevant construction contract, stating (at [232] and following:

> *[232] It is tantamount to asserting that any specific contractual provisions regulating how and when monies are to become payable under a construction contract are irrelevant to the question of when a party to that contract may raise what can properly be categorised as a payment claim, with a view to generating a payment dispute. That is the statute confers jurisdiction on an adjudicator to adjudicate a claim in any case in which a claim is made for payment of monies in relation to a construction contract, there being no requirement to even prima facie relate a payment claim to any specific contractual pre-requisites for such payment.*
> ***...***
> *[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract.*
>
> *[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.*
>
> *[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract. that is in the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of cl 12.2 of the subcontract.*
> (emphasis added)

(k) His Honour then made the following observations:

> *[241] Indeed, as was pointed out on the hearing of the appeal, compliance with the implied statutory provisions to which s 19 directs its attention, where applicable, is expressed by that section to be mandatory. It would be strange if, despite such a requirement, compliance with contractual conditions pre-requisite to the raising of a valid payment claim were held to be non-essential to the proper characterisation of a valid payment claim, for the purposes of the statute.*
> *…*
> *[243] If, in fact, a prescription is so strict in its terms that noncompliance might result in very serious disadvantage to a claimant, there is no real anomaly in such a scenario, because that result would be what the parties specifically contracted for. Objective compliance is not infrequently what commercial contracts are expressly designed to require and achieve.*
> *[244] How that could fairly be said to undermine the relevant statutory scheme is impossible to perceive. In any event, an adjudicator would be bound to determine liability to make payments strictly in accordance with the contract. He or she would not be entitled, under the statute, simply to drive a coach and four through express contractual stipulations.*
> *….*

[250] The issue to be addressed in this case in considering such a question was whether objective noncompliance with the contract stipulations, pre-requisite to the raising of valid payment claims in respect of the six unpaid invoices, had the practical effect that no relevant payment claims, within the meaning of the statute, had been presented to GRD prior to receipt of the SI and, thus, no payment disputes had previously been generated in respect of them. I consider that the inevitable conclusion must be that this was the situation.

[251] To borrow an expression employed by Mr Wyvill SC, the invoices simply did not pass the requisite threshold test to constitute payment claims of the type envisaged by the statute, because, being noncompliant with cl 12.2(d) of the subcontract, they were not, relevantly, payment claims under that construction contract, as envisaged by the statute. The "jurisdictional fact" upon the presence of which the jurisdiction of the adjudicator was conditioned, was therefore clearly demonstrated in relation to the payment dispute arising from the delivery of the SI and the non-payment of the monies claimed in it.

[252] The essential thrust of Mr Wyvill's submissions in that regard, as I have earlier outlined them, is compelling. They should be upheld.

[253] As to this general issue I respectfully agree with the approach expressed by Kelly J in [147]–[153] of her reasons in relation to this appeal. (emphasis added)

(l) So as the requirements of cl. 16.1 is in mandatory terms I should uphold its terms and find I lack jurisdiction to determine this application on the merits.

79. After reading the applicants further submissions delivered on 7 May 2014 I sent the following email to the parties:

"Amongst other things, the applicant's further submissions provided to me today assert that the parties by their conduct waived the strict requirements of the subcontract and, in particular, waived the requirements of the contract in relation to the times for making progress claims.

Whilst I have not as yet formed a final view in this regard, if one accepts the respondent's contention that under the strict terms of the subcontract the last date for providing a payment claim, other than a final payment claim was on 31 December 2012, that would also mean that invoice 2110 (whether I find it was delivered to the respondent on the date it was dated on 1 April 2013, as per the copy attached to the application, or was delivered on 13 February 2013, as per the copy attached to the response and in accordance with the evidence of its delivery in the response) was also made too late.

I therefore request that both parties:-

1. *assume that the last day for making a progress claim under the strict terms of the subcontract was on 31 December 2012; and*

2. *provide further submissions in relation to whether the there has been a waiver of that requirement due to invoice 2110 having been delivered after that date and considered by the respondent.*

I also request that the respondent make general submissions in relation to waiver in reply to the applicant's submissions in that regard.

Please provide these further submissions by 12 noon tomorrow and acknowledge receipt of this email.

Please also acknowledge receipt of this email.

Kind Regards,"

80. Both parties provided me with further submissions on 8 May 2014.

81. The applicant's submissions delivered on that day (together with a statutory declaration by [redacted] declared on 8 May 2014) submitted that the respondent waived any requirement to make payment claims by the Date of Substantial Completion in that:-

    (a) it elected (relying on the principles stated in *The Commonwealth v Verwayen*[26] and *Update Constructions Pty Ltd v Rozelle Child Care Centre Pty Ltd*[27] between inconsistent rights not to take that position by continuing to have settlement discussions with the applicant after 31 December 2012 (knowing that a further claim would be made), and

    (b) it is estopped from now resiling from the representation by conduct that it would not take the position that 31 December 2012 (or any other date) was the final date for making a claim for payment under the subcontract.

82. The respondent's submissions delivered on that day submitted that:-

    (a) Invoice 2110 was submitted as a final payment claim and was, therefore, not made too late.

    (b) Merely because there is no certified date of substantial completion, does not mean that one is not able to be ascertained by reference to the evidence.

    (c) The evidence establishes that the applicant completed its work on 30 November 2012, at the request of the Respondent. Both parties acted on that request and that is the date of substantial completion in accordance with the Subcontract.

    (d) The Applicant's assertion that *"the written subcontract was signed and then ignored"* was unsupported by any evidence and was made in a last ditch attempt to persuade the adjudicator that he has jurisdiction to determine the merits of the Application.

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26 (1990) 170 CLR 394 at 421-423

27 (1990) 20 NSWLR 251 at 276-7 per Priestley J

(e) Courts do not lightly infer an intention to waive contractual rights.

(f) It is unclear what kind of waiver or estoppel the applicant is asserting to have occurred.

(g) The Applicant does not point to any specific representation by the Respondent, and so does not appear to rely on the first form of waiver identified in *Verwayen* of an election between two alternative and inconsistent rights.

(h) In support of this allegation of general waiver the Applicant lists 31 examples of provisions in the Subcontract which it asserts the parties "jointly ignored". This assertion should be dismissed for the following reasons.

(i) First, and yet again, it must be pointed out that the applicant does not refer to any evidence in support of this broad allegation. There is no evidence to support a finding that the parties jointly ignored the subcontract and proceeded on some other basis. [redacted] declares in the statutory declaration at the end of the applicant's further submissions that the allegations in paragraph 6 of the further submissions are correct. Simply saying so, even on oath, does not make it so.

(j) Second, the provisions which the applicant asserts were 'jointly ignored' have no relevance at all to the issues raised in the adjudication application. None of these provisions which were claimed to have been ignored were identified as being relevant to the issues in dispute on the adjudication application. For example, at no point did the applicant refer to liquidated damages, design obligations, the provision of drawings, workplace health and safety requirements, the replacement of key personnel or the release of retentions.

(k) None of these provisions in the subcontract are relevant to the allegation that a specific provision in the contract, namely the times by which progress claims were to be submitted, was waived. The allegation that many other provisions in the contract were ignored or not required to be complied with has no bearing on whether the respondent waived the time for making payment set out in clause 16.1(a). It is preposterous to suggest that completely unrelated provisions of the contract to the issues in dispute in which the adjudicator is required to determine could have any bearing on this question.

(l) The applicant has applied a "shotgun" approach. The respondent disputes that these provisions were ignored, jointly or otherwise. None of those provisions are relevant to what the adjudicator is required to determine, nor has the applicant attempted to explain how such provisions are relevant, save for the general allegation that the subcontract was signed and then ignored.

(m) Third, if as [redacted] asserts "the parties ignored the written terms of the Subcontract" then the applicant is now alleging that the parties proceeded on the basis of an arrangement other than the construction contract upon which the adjudication application was made.

(n) The applicant submitted in its adjudication application that it made the payment claim 2144 in reliance on clause 16 of the Subcontract.[28] It is clear from the balance of the applicant's submissions in the application that it relies on the claim having been made in accordance with clause 16, and it is only upon it being drawn to its attention that it has failed to make that claim in compliance with the time requirements under clause 16.1(a) for the making of progress claims that it now baldly asserts, without reference to any evidence, that those time requirements have been unilaterally waived by the respondent. There is no evidence to support that assertion, nor does the applicant purport to refer to any evidence to support that allegation.

(o) This new allegation that the parties ignored the terms of the subcontract directly contradicts the applicant's express position that the application was made on the basis of that written subcontract, which was at Annexure 2 to [redacted]'s statutory declaration. If the adjudicator were to determine that the subcontract was ignored and the parties proceeded on some other basis, the adjudicator is bound to determine that there is no construction contract able to be identified and must dismiss the Application for lack of jurisdiction as required by section 33(1)(a).

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28 Applicant's submissions in adjudication application [paragraphs 18, 19 and 20]

Did the subcontract permit the making of repeat payment claims and, if so, when and how?

83. I find that payment claim invoice no. 2144 (as per the copy attached to the response) was clearly a repeat payment claim, because it simply re-stated the claims in invoice nos. 2105 and 2110.

84. I also find:-

(a) In agreement with the respondent's submission in this regard, but contrary to the applicant's submission, that payment claim invoice no. 2144 did not *"set out all of the amounts claimed and paid under the contract since the beginning under invoices 2100, 2105 and 2110."*[29] That is so, because it did not include any details of the claims made in payment claim 2100 or the first payment referable to that claim in the sum of $183,382.50.

(b) Payment claim invoice no. 2144 was therefore not that type of a repeat claim, which Kelly J referred to in *K & J Burns Electrical v GRD Group Pty Ltd & Anor* as a "*"rolling claim". That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim."* [30]

85. I also find that

(a) cl. 16.1(b)(v) of the subcontract, which mandatorily requires progress claims to *"clearly indicate all credits for sums due by the Subcontractor to the Contractor"*, does not deal with payments by the respondent to the applicant; and

(b) cl. 16((b)(vi) of the subcontract, which mandatorily requires progress claims to *"show details of the value of work carried out in performance of the Subcontract supported by ……"* does not expressly require progress claims to be made as rolling payment claims or any other variety of repeat claims. It simply requires details of work performed the subject of the claim to be included in the progress claim.

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29 Applicant's submissions in application [28]

30 Ibid at [122]

86. I also find that cl. 16((b)(vi) of the subcontract is not in similar terms to the relevant part of the payment claim cl. 12.2 in *K & J Burns Electrical v GRD Group Pty Ltd & Anor*[31]. In that case payment claim cl. 12.2.(d) mandatorily required that payment claims set *"… out the total value of work completed in accordance with the sub-contract to the date of the claim, the amount previously paid to the subcontractor and the amount then claimed."* That sub-clause was clearly requiring provision of repeat claims in the nature of a rolling payment claim.

87. I also find the final payment claim cl. 16.11(d) in the subcontract did expressly require provision of a rolling payment claim repeat claim because the words "states the final Subcontract value…" requires a statement of all amounts claimed for works performed throughout the subcontract together with details of all payments made to the applicant.

88. I find that, whilst, on the balance of probabilities, the applicant intended progress claim invoice no. 2110 to be a final payment claim invoice, because it was provided soon after the respondent asked that a final payment claim invoice be provided, it did not contain the information that the strict requirements of the subcontract for the making of final payment claims required, because it was not a rolling payment claim repeat claim, it only claiming for some never previously claimed variations without providing details of any other previous claims made in progress claims or payments made to the applicant.

89. I therefore find that neither progress claim 2110 nor progress claim invoice no. 2144 contained the information required in the second last un-numbered subparagraph of cl. 16.11(d).

90. I also find, on the balance of probabilities, that the respondent did not waive the progress claim and final payment claim content requirements in cls. 16.1(b)(vi) or 16.11(d) because:

    (a) there is no written or oral evidence before me that the parties agreed to waive those requirements, other than evidence that the respondent did not inform the applicant that it did not consider the invoices so complied; and

    (b) cl. 16.10(c) and (d) provide that *"Any payment whatsoever by the Contractor to the Subcontractor will be a payment on account and will not be:-*

31 Ibid at [175]

"(c) an admission that the Subcontractor has complied with its obligations under the Subcontract; nor

(d) a waiver of any of the Subcontractor's obligations or the Contractor's rights under the Subcontract."

91. I therefore find that I lack jurisdiction under s. 33(1)(a)(ii) to determine this application on its merits, because:

(a) payment claim invoice no. 2144 did comply with the provisions of the subcontract by including the information required for a progress claim or a final payment claim;

(b) as payment claim invoice no. 2144 was not a final payment claim and was not permitted to be a repeat claim the only permissible claim dispute dates under s. 8 of the Act for the claims made in it were the dispute dates relative to invoice nos. 2105 and 2110; and

(c) as those dispute dates were both more than 90 days prior to the date the application was delivered, the application was delivered too late.

My findings regarding whether the progress claim was made in time

92. I find that, according to the terms of the subcontract:-

(a) The payment claim invoice 2144 was not a final payment claim because:

(i) I consider on the balance of probabilities, that tax invoice 2110 was intended by the applicant to be the final payment claim;

(ii) it is axiomatic that there can only be one final payment claim, so if the applicant intended tax invoice 2110 to be its final payment claim, it could not have intended payment claim 2144 to be a final payment claim;

(iii) the applicant delivered payment claim 2144, because it mistakenly believed that the terms of subcontract required progress claims to be made as repeat claims;

(iv) in any event, payment claim invoice 2144 was delivered to the respondent on 21 January 2014, which was almost a year after the respondent asked the applicant to deliver a final payment claim and cl. 16.11 required a final payment claim to be delivered within 5 working days after such a request being made (as the respondent asked the applicant to deliver its final payment claim on 12 February 2013, the 5 working day period in cl. 16.11 expired on 19 February 2013).

(b) It was not necessary for the respondent to notify the applicant of the Date of Substantial Completion for such an event to have occurred, if the evidence indicates that the contract works have been substantially completed.

(c) As both parties agree in their submissions that the applicant ceased to perform the works and left the Construction Site on 30 November 2012, that was the Date of Substantial Completion.

(d) The last date upon which the Applicant could deliver a progress claim, which was not a final payment claim, was on the last day of the month following the Date of Substantial Completion, i.e. 31 December 2012.

(e) The payment claim invoice 2144 was therefore delivered too late.

(f) Unless I also find the parties waived the requirements for the time to deliver progress claims under the terms of the subcontract, I should find, pursuant to s. 33(1)(a)(ii) of the Act, that I lack jurisdiction to determine this application on its merits, because payment claim invoice no. 2144 was delivered too late as a progress claim, which was not a final payment claim.

(g) As I also find below that the parties did not waive such contractual requirements, I so find that I lack such jurisdiction.

My findings concerning whether the parties waived the time requirements for delivery of progress claims

93. I do not consider that the parties waived the time requirements for delivery of progress claims.

94. I make that finding for all the same reasons as submitted above by the respondent.

95. In particular, I consider that the applicant made unsupported submissions in this regard in the submissions it delivered to me on 7 May 2014. I consider it did so as a desperate measure to try and sure up a defect in its evidence concerning the time requirements for delivering progress claims. Those submissions were substantively unsupported, because they were only generally confirmed as being factually correct in the statutory declaration made by [redacted] on 7 May 2014.

COSTS

96. The respondent has submitted that I should, pursuant to s. 36(2) of the Act, order that the applicant pay all of the costs of the adjudication, as follows:

    (a) the respondent's share of my fees;

    (b) legal fees payable by the respondent to [redacted] for preparing the response in the sum of $28,600 inclusive of GST[32];

    (c) fees payable to [redacted] in the sum of $5,500 inclusive of GST for preparing the expert report by [redacted][33]; and

    (d) legal fees in the sum of $6,000 inclusive of GST payable to [redacted] for preparing the two additional sets of submissions by the respondent to me.

97. S. 36 (2) of the Act provides that *"if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs."*

98. I do not consider that the applicant at any time throughout the course of the adjudication acted in a frivolous or vexatious manner, but I do consider that the first set of the applicant's supplementary submissions concerning waiver were unfounded because they were not supported with any detailed evidence.

99. I therefore determine that the applicant should pay a portion of my fees and part of the $6,000 fees payable by the respondent to [redacted] for preparing the two sets of supplementary submissions.

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32 letter from [redacted]to the respondent dated 30 April 2014 included in the response

33 letter from [redacted] to the respondent dated 30 April 2014 included in the response

100. It is difficult to be exact about the amount I should decide should be paid by the applicant to the respondent, because it is difficult to attribute an exact portion of my fees to the time spent by me dealing with the first set of the applicant's supplementary submissions and what portion of the $6,000 of legal fees payable by the respondent I should attribute to dealing with waiver in the respondent's second set of supplementary submissions. I therefore estimate that an appropriate amount to require the applicant to pay the respondent relative to that work would be $8,000 and consider it should be payable on the date of my determination.

101. Otherwise, in relation to my fees and the other fees incurred by the parties, I adopt the standard position in s 36(1) of the Act that the parties to a payment dispute bear their own costs in relation to an adjudication (including the costs the parties are liable to pay under s 46 – i.e. the adjudicator's fees).

102. Interest will accrue on such amount of $8,000 in accordance with the provisions of Regulation 9 of the *Construction Contracts (Security of Payments) Regulations* (the "Regulations").

103. Regulation 9 provides:

> *"For sections 35(1)(b) and 41(2) of the Act and clause 7 of the Schedule to the Act, the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act."*

104. Section 85 of the *Supreme Court Act* provides that:

> *85 Interest on judgments*
>
> *"Except as provided by any law in force in the Territory, a judgment debt carries interest, from the date of the judgment:*
>
> *(a) at such rate as is fixed by the Rules; and*
>
> *(b) until a rate is so fixed, at 8% per annum."*

105. Rule 59.02(3) of the Supreme Court Rules sets the rate of interest at that applying in the Federal Court as follows:

> *"59.02 Date of effect*
>
> *(1) A judgment given or order made by the Court shall bear the date of and take effect on and from the day it is given or made, unless the Court otherwise orders.*
>
> *(2) Any other judgment shall bear the date of and shall take effect on and from the day it is authenticated in accordance with Order 60.*

(3) Subject to subrule (4), a judgment debt carries interest from the date of judgment at the rate per annum fixed for section 52(2)(a) of the Federal Court of Australia Act 1976 (Cth) from time to time.

(4) Where immediately before 1 September 1987 a judgment debt carried interest, the rate of interest per annum payable on that judgment debt on and from that date until 1 July 1988 is the rate of interest applying to Ten Year Commonwealth Bonds on 1 July 1987.

(5) For the purposes of this rule, the rate of interest applying to Ten Year Commonwealth Bonds on a particular date is the rate advised by the Northern Territory Treasury as applying on that date."

106. S. 52(2)(a) of the Federal Court of Australia Act and r. 39.06 of the Federal Court Rule require that the applicable interest rate be the last published cash rate or rates published by the Reserve Bank of Australia prior to the relevant 6 months period or periods commencing on 1 January and 1 July plus 6%.

107. The cash rate published on 4 December 2013 was 2.5% and therefore the applicable interest rate is 8.5% per annum.

DETERMINATION

A. In accordance with s 38(1) of the Act, I determine that the amount to be paid by the respondent to the applicant is NIL

B. In accordance with s. 36(2) of the Act, I determine that:-

(3) the applicant pay the respondent $8,000 and that that amount be payable on 13 May 2014; and

(4) interest accrue on such amount from and including 14 May 2103 at 8.5% per annum, the daily interest rate being $1.86 per day.

(5) I draw the parties' attention to the slip rule in s 43(2) if I have made some correctible error.

Dated: 13 May 2014

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David Baldry
Registered Adjudicator