

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) ("**The Act**")

BETWEEN:

(**"Applicant"**)

and

(**"Respondent"**)

REASONS FOR DECISION

1. On 11 June 2014 the Applicant served its Application, dated 11 June 2014, on the Housing Industry Association ("**HIA**") as prescribed appointer under the Act. The Respondent confirms it was also served a copy of the Application on 11 June 2014. By letter from HIA dated 13 June 2014, I was appointed adjudicator to determine the payment dispute between the parties. I received the letter and Application on the same day.
2. On 18 June 2014 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.
3. On 25 June 2014 I received the Respondent's Response. On 4 July 2014 I received a request from the Applicant to make further submissions under section 34(2) of the Act. The Applicant's request followed the recent decision of Southwood J in *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 at [42] which compels an adjudicator to request additional submissions if a party to the adjudication makes such a request.

4. Having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar on 4 July 2014 and sought additional time in which to make my decision under section 34(3)(a). On 7 July 2014 the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 25 July 2014 to determine the payment dispute. There were no objections from the parties.

5. On 16 July 2014 I wrote to the parties advising them that the Construction Registrar had granted a time extension up to and including 25 July 2014 for my determination. I also sought submissions on four questions as set out below:

“To ensure procedural fairness and natural justice is delivered and that I consider all the evidence when making a decision, as determined by His Honour Justice Barr in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 at [42], I request written submissions from the parties on the following:

1. *The Irwinconsult Condition Report of May 2014, which according to the report summary on page 63, has apparently not been provided to the Applicant;*
2. *The building status and defects, taken by photograph on 14 February 2014 after the Applicant had demobilised from site and the corresponding WTD Constructions quotation of 20 June 2014;*
3. *The Respondent’s Payment Certificates of 24 June 2014, submitted with the Response and while the payment dispute is being adjudicated; and*
4. *The precise drawings used for the footings on buildings 43 to 49, which appear to be steel rectangular hollow section stumps with a sheet metal surround, and buildings 72 to 75, which appear to be placed concrete strip footings. The available drawings for footings,*

provided with the bundle of drawings by the Respondent, lists the footing options on drawings H127-S02 through to H127-S16.

Please ensure that any submissions directed to me are also provided to all parties in this matter. Submissions are required on or before 12:00noon CST 21 July 2014."

6. On 21 July 2014, and in time, I received submissions from both the Applicant and the Respondent to the four questions on which I sought some additional information. However, later that same day, 21 July 2014, I received an email from the Respondent asking me to disregard the Applicant's submissions as they were served on the Respondent some 35 minutes late. The Respondent also raised issues that the Applicant's further submissions contained new material that the Respondent had not had the opportunity to consider and, as such, it sought until Noon, 23 July 2014, to make further submissions.
7. On 22 July 2014 I received further submissions for the Applicant submitting that its further submissions were not late to the Adjudicator and that the Applicant was only required to provide a copy to the Respondent as a matter of courtesy by way of letting it know what had been sent to the Adjudicator. The Applicant also addressed the Respondent's submissions regarding the Final Certificates sent by the Respondent.
8. On 22 July 2014 I wrote by email to the parties as follows:

"Thank you for your further submissions on the four questions on which I sought some additional information.

As you would know under section 34(2) of the Construction Contracts (Security of Payments) Act an Adjudicator has broad powers to inform him or herself on the payment dispute.

An Adjudicator is not a Court of Record and is not bound by the Rules of Evidence.

In addition, the recent judicial review of the Adjudicator's decision by Southwood J in M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor [2014] NTSC 25 at [42] and similarly by Barr J in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 at [42] compels adjudicators to ensure they afford each party the opportunity to make further submissions if they so wish.

In relation to this matter, I thank the Applicant for its submissions below on new matters raised by the Respondent and I will allow the Respondent to make submissions on this material.

In so doing, the Respondent is strictly limited to only new matters raised by the Applicant on which the Respondent has not made any prior submissions.

I request the submissions by 5:30pm CST on 23 July 2014. I will not require any further submissions beyond this time.

Thank you for your assistance.”

9. On 23 July 2014, and in time, I received the Respondent's further submissions to the Applicant's submissions of 21 July 2014.

Introduction

10. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to install footings and to assemble, erect and fit-out 23 prefabricated buildings, provided by the Respondent, at the Respondent's [property] in the Northern Territory.
11. The Applicant claims it is entitled to be paid its Payment Claim dated 31 March 2014 in the sum of \$195,076.85 (including GST), but correctly calculates as \$196,076.85 (including GST), for the Respondent terminating the contract on 27 February 2014. The components of the Applicant's claim comprise:
 - (a) Work invoiced but not paid - \$76,468.39 (including GST);

- (b) Retention holdings to be returned - \$36,678.58 (including GST);
 - (c) Removal of Building Materials from Site - \$2,200.00 (including GST);
 - (d) Works completed but not invoiced - \$66,394.24 (including GST); and
 - (e) Variations completed but not invoiced - \$14,335.64 (including GST).
12. On 11 April 2014, the Respondent part paid the Payment Claim for item (e) above, the Variations, in the sum of \$14,335.64 (including GST). This reduced the Applicant's Payment Claim to \$181,741.21 (including GST).
 13. The Applicant also seeks interest on its claim at 8.5% from 11 April 2014 until the date of determination.
 14. The Applicant does not seek Costs of the Adjudication.
 15. The Respondent submits that I should dismiss the Application because it has not been properly made under the provisions of section 28 of the Act. If this is not the case, in the first alternative, the Respondent submits that invoice 001/14, sent by the Applicant for payment on 25 January 2014, is out of time under the 90 days allowable for a payment claim to be available for adjudication. In the second alternative, the Respondent submits that the payment claim made on 31 March 2014 by Letter of Demand is intended by the Applicant to be a Final Payment Claim, section 37 of the Act is therefore engaged and the Respondent has assessed the payment to be made for the Applicant's claim is \$29,865.21 (including GST) in full and final settlement as final payment of the claim.
 16. The Respondent agrees with the Applicant that interest is payable at 8.5% on any overdue payment of the Applicant's claims.
 17. The Respondent also does not seek Costs of the Adjudication.

Procedural Background

The Application

18. The Application is dated 11 June 2014 and comprises a general submission and 10 listed attachments. The attachments, *inter alia*, include:
- (a) a copy of the construction contract;
 - (b) a copy of the payment claim; and
 - (c) supporting evidence including statutory declarations, letter of demand and correspondence between the parties relied upon in the general submission.
19. The Payment Claim was submitted to the Respondent on 31 March 2014. The Respondent part paid the claim on 11 April 2014. On 24 June 2014 the Respondent then treated the remainder of the Payment Claim in part as a “Progress Payment Claim” and then as a “Final Progress Payment Claim” certifying the claim in a series of certificates with a payment to be made of \$29,865.21 (including GST) in full and final settlement.
20. The Application was served pursuant to section 28 of the Act.

The Response

21. The Response is dated 25 June 2014 and comprises a general submission and 5 listed attachments. The attachments, *inter alia*, include:
- (a) copies of the construction contract, including Annexure B;
 - (b) copies of prior payment claims and remittance statements;
 - (c) design reports and consultants’ reports;
 - (d) letter and email correspondence;
 - (e) site photographs and meeting minutes;

- (f) statutory declarations;
- (g) approved for construction drawings of the “Bunnings Smart Space Living Solutions” amended by Project Building Certifiers Pty Ltd; and
- (h) a quotation from a third party construction company to rectify defects and complete the partially erected buildings.

22. The Response was served pursuant to section 29 of the Act.

Adjudicator’s Jurisdiction and the Act

23. The following sections of the Act apply to the contract for the purposes of the Adjudicator’s jurisdiction.

24. Section 4 of the Act – **Site in the Territory** – the site is [*site details omitted*], a suburb of Darwin in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

25. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract in the terms set out in the contract documents. I am satisfied that the contract is a construction contract for the purposes of the Act.

26. Section 6 of the Act – **Construction Work** – the work is to install footings and erect and build prefabricated buildings, inclusive of all services, and section 6(1)(c) of the Act specifically provides for this type of building. I am satisfied that the work is construction work for the purposes of the Act.

27. Section 4 of the Act - **Payment Claim** – means 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; 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.*

28. The Applicant contends that there are no provisions in the contract for the making of a payment claim and therefore section 19 of the Act engages the implied provisions of Division 4 of the Act to the extent of the making of a payment claim.
29. The Respondent disagrees and says that there are provisions in clause 19 of the Preliminaries of Annexure B of the Contract that sets out how a claim is to be made and how and by when that claim is to be certified by the Superintendent and then paid.

The making of a Payment Claim under the contract

30. The Respondent also makes, at paragraphs 50 through to 59 of the Response, a detailed analysis of the interaction between the Preliminaries clause 19 of Annexure B and the General Conditions ("GC") of contract. The general conditions of contract are a standard form set of terms from the HIA, described as "*Medium Works Commercial Contract Conditions*". At paragraph 57 of the Response the Respondent suggests amendments that resolve the conflict between clause 19 of Annexure B and GC 21 "*Certificates and Payment*" and GC 28 "*Final Certificate*". Effectively, the amendments insert the Superintendent as the Client's representative (the Respondent) and improves the certificate and payment response times from 7 days (in the original GC 21 and GC 28) to the 14 days set out in the preliminaries clause 19.
31. Given that the Annexure B in the contract document is, in fact, the tender submitted by the Applicant dated 4 April 2013 and that the document is referenced in the schedule of the contract at items 8 as forming part of the terms of the contract, it then becomes necessary to establish the order of precedence in which the documents form the contract to deal with any ambiguity and inconsistency of the terms.

32. In order to clarify this issue, the contract at GC 4 sets out an order of precedence at GC 4.4 and a direction at GC 4.3 which says:

“Client to direct 4.3 In the event of an ambiguity, inconsistency or discrepancy being discovered in or between the contract documents, the Client must within 2 days direct the Builder as to the interpretation and construction to be followed.

Order of precedence 4.4 If no such direction is given, there is deemed to be a direction to the Builder to use the order of precedence stated in Item 9 to resolve the ambiguity, inconsistency or discrepancy.”

33. There was no direction from the Respondent and, turning to Item 9 in the Schedule, it also has not been completed by the parties, however there is a footnote which says:

“(if nothing stated: the order of precedence, from higher to lower, is any special conditions to the contract, the Medium Works Contract Conditions, the specifications then the drawings)”.

34. The Tender Document of 4 April 2013 submitted by the Applicant held conditions that the parties clearly had intended to be bound by and, looking at the contract as a whole, it logically follows that the parties had intended these conditions to form specific and special requirements of the contract and how the contract would operate; in particular, transport, use of facilities such as power, water and ablutions, environmental protection and payment conditions and the like. The question is:

Are these conditions special conditions that the parties had intended to be bound by such that the general conditions would be amended to the extent of the incorporation of the special conditions?

35. In reaching a landing on this point I turned to the decision of Mason J in *Codelfa Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 more recently considered by the High Court in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45. Essentially, the words of the conditions set out in the tender document are easily understood and it is reasonable to conclude that the parties had intended to be bound by them. The circumstances surrounding those conditions are such that they form specific and special requirements particular to the contract and the conditions, when incorporated into the contract, give the contract the business efficacy intended between the parties.
36. I am satisfied that the tender conditions form special conditions for the contract and would be placed highest in the order of precedence. I am also satisfied that the amendments to GC 21 and GC 28, submitted by the Respondent at paragraph 57 of the Response, would generally form the “*Certificate and Payments*” and the “*Final Certificate*” conditions of the contract and fulfil what the parties had intended.
37. The tender condition 19 clearly sets out how claims for progress payments are to be made and when and how they are to be certified and paid. I am satisfied that the contract contains a mechanism for the making of a payment claim under section 8 of the Act and that the implied provisions of the Act are not engaged.

The Applicant’s Payment Claim as a Final Payment Claim

38. The Respondent at paragraphs 60 through to 64 submits that the payment claim, made by the Applicant on 31 March 2014 by Letter of Demand, is more accurately construed as a “Final Payment Claim” and as such the

mechanisms in GC 27 and GC 28 of the contract commence operation owing to the termination of the contract by the Respondent on 27 February 2014.

39. I disagree with the Respondent on this point. The GC 27 is quite clear in that the Applicant must first give “...*the Client a written final payment claim endorsed ‘final payment claim’ [emphasis added] being a progress claim together with all other claims...*”. The Applicant has not endorsed its payment claim as a final payment claim and the Respondent cannot try to change the Applicant’s claim in an attempt to engage a bar to any other claims by the Applicant and so advance its (the Respondent’s) position.
40. On this point I am satisfied that the Applicant’s payment claim was made under special condition 19 and the amended GC 21 of the contract as a progress claim and that the Applicant may have further claims that are not the subject of this adjudication.

The Final Certificates provided by the Superintendent during the Adjudication

41. The Respondent, through its Superintendent, has submitted one progress certificate and three final certificates on 24 June 2014 for the four invoices in the Applicant’s payment claim of 31 March 2014 and while the adjudication is in progress. In so doing, the Respondent relies on the provisions of GC 27 and GC 28 of the contract to issue those certificates and says that section 37 of the Act is engaged and the certificates are “...*Evidentiary value of certificates of completion and amounts payable...*”. The Respondent also says that the certificates are “...*final certificates in respect of final claims, pursuant to s.37(2)(a), the adjudicator should treat the amounts certified in them as being conclusive...*”.
42. I do not support this position:
- (a) First, the Applicant’s payment claim was not a final claim and GC 27 of the contract cannot be engaged;

- (b) Second, the three certificates provided by the Respondent's Superintendent are headed "Final Progress Claim Certificate" and are provided under GC 28 of the contract using a mechanism that is not yet available to the Superintendent, and have been used in such a way that the Respondent is attempting to bar any further claims by the Applicant; and
 - (c) Third, the Respondent, by heading the certificates "Final Progress Claim Certificates", has attempted to 'get a bet each way' and submits at paragraph 74 of the Response that, if I find that the Applicant's payment claim is not a final claim, then the certificates should be treated under section 37(2)(b) as progress certificates and given the appropriate evidentiary weight.
43. On this point I am satisfied that the certificates issued by the Respondent's Superintendent are not final certificates and that the payment claim made by the Applicant on 31 March 2014 is a progress claim for the purposes of the contract and a valid payment claim for the purposes of the Act.
44. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
- (a) *when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or*
 - (b) *when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
 - (c) *when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.*
45. The Applicant made a valid payment claim on 31 March 2014 in the sum of \$195,076.85 (including GST), correctly calculated as \$196,076.85 (including GST). There were five invoices in the claim as follows:

- (a) 001/14 dated 25 January 2014 in the sum of \$76,468.39 (including GST);
 - (b) 104/13 dated 31 March 2014 in the sum of \$36,678.58 (including GST);
 - (c) 105/13 dated 31 March 2014 in the sum of \$2,200.00 (including GST);
 - (d) 002/14 dated 31 March 2014 in the sum of \$66,394.24 (including GST); and
 - (e) 003/14 dated 31 March 2014 in the sum of \$14,335.64 (including GST).
46. On 11 April 2014 the Respondent part paid the payment claim, in the sum of \$14,335.64 (including GST), being the variational claim made by the Applicant and referred to at paragraph 45 (e) above.
47. On 24 June 2014 the Respondent issued four certificates; one headed "Progress Payment Certificate" for the Applicant's invoice 001/14 dated 25 January 2014 and three headed "Final Progress Claim Certificate" each for the remaining three invoices, dated 31 March 2014, authorising a further payment of \$29,685.21 (including GST).
48. At paragraph 8 of the Application the Applicant submits that a payment dispute arose on 8 April 2014 when the Respondent failed to respond to and pay the payment claim.
49. The Respondent submits at paragraphs 65 and 66 of the Response that:
- "65. There is no dispute between the parties that no payment certificates, referable to any of the invoices attached to the purported payment*

claim dated 31 March 2014, were delivered to the applicant before the application for adjudication was served upon the respondent.

66. *It should be noted however, that the failure to have done so within 7 or 14 days after the payment claim invoices were delivered does not result in the respondent having breached any term of the Contract because the requirement to do so was merely permissive.”*
50. The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 at para 20 Barr J said:
- “In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non- payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the “payment dispute” does not arise until the due date for payment.”*
51. In this matter a payment dispute arose between the Applicant and the Respondent on 28 April 2014, that is, in accordance with the special conditions set out on clause 19 incorporated into GC 21 of the contract. While the Respondent part paid the Applicant’s payment claim on 11 April 2014, it had until 28 April 2014 to pay, reject or dispute the remaining \$181,741.21 (including GST) of the Applicant’s payment claim.
52. I am satisfied that there is a payment dispute for the purposes of section 8 of the Act in which the Applicant has applied for an adjudication of the dispute under section 27 of the Act. That dispute arose on 28 April 2014.
53. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents, the Application dated 11 June 2014 was served on the Respondent and the Prescribed Appointer, HIA, on 11 June 2014.

54. In its Response the Respondent submits that the Applicant has failed to serve all of the Application because it failed to attach all the documents of the contract in the Application attachments. The Respondent submits that, because it has not been served with the whole of the contract document in the Application which, under section 28(2) of the Act:

“(2) The application must:

(a).....

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii)....,

it does not meet the provisions of section 28(2) of the Act and must therefore be dismissed under section 33(1)(a) of the Act.

55. The provisions of section 28 are mandatory provisions and this has been determined by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuilt Pty Ltd* [2008] NTSC 46 at 35 and 36. However, section 28(2) of the Act clearly states, “...*must... state* [emphasis added] *or have attached to it*” and the Applicant has stated and referred to the contract in the Application and has included relevant extracts of the document in the Application.
56. I do not share the view of the Respondent on this point. Failure by an applicant to submit all the documents of a contract could not invalidate an application properly made under the Act. It may, however, prejudice an applicant’s claims in the adjudication itself.
57. If the Respondent’s position were correct, any application could easily be described as ‘invalid’ by a respondent claiming that an applicant must provide information which the Respondent subjectively thinks appropriate so as to fulfil the requirements of section 28 of the Act. To support such a view would

likely destroy the section 3 Object of the Act. While this position may be tactically advantageous to a respondent, it is also the case that an adjudicator has broad powers under section 34 of the Act to seek further information as he or she requires to make a determination. Under section 34(1)(b) an Adjudicator:

“...is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate...”.

58. I have not had to call forward Annexure B, being the relevant document to this payment dispute, as there were two copies given to me in the Response as attachments to the three statutory declarations.
59. In any event, under section 34(1)(a)(i) the Adjudicator must act informally and if possible make a determination on the basis of “...*the application and its attachments...*”. If an applicant does not attach all the information on which it seeks to rely, it would likely be to the applicant’s detriment.
60. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.
61. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent’s documents in the Response dated 25 June 2014, served on the Applicant and the Adjudicator on 25 June 2014. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and by Regulation 7.
62. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claims

63. The claims made by the Applicant in their application are as follows:

- (a) Invoice 001/14 - Work invoiced but not paid - \$76,468.39 (including GST);
- (b) Invoice 104/13 - Retention holdings to be returned - \$36,678.58 (including GST);
- (c) Invoice 105/13 - Removal of Building Materials from Site - \$2,200.00 (including GST);
- (d) Invoice 002/14 - Works completed but not invoiced - \$66,394.24 (including GST); and
- (e) Invoice 003/14 - Variations completed but not invoiced - \$14,335.64 (including GST).

64. The Variations claim, Invoice 003/14 (and referred to above in paragraph 62 (e)) was paid by the Respondent on 11 April 2014.

65. On 24 June 2014 the Respondent then issued 4 certificates authorising a further payment of \$29,865.21 (including GST) which also described counterclaims as follows:

Progress Payment Certificate No.4

- (a) Invoice 001/14 – Rectification costs by [*builders name omitted*] as per quote attributed to this invoice \$91,114.40 (including GST) giving a shortfall of \$8,149.52 (including GST). The calculation for this is as follows:
 - (i) Invoice 001/14 in the sum of \$76,468.39 (including GST) plus the Retention component in Invoice 104/13 of \$8,496.49 (including GST), with a total owing to the Applicant of \$84,964.88 (including GST)

Minus

- (ii) the [*builder's*] quote component for the rectification works of \$91,114.40 (including GST)

Leaving

- (iii) a sum of \$8,149.52 (including GST) owing by the Applicant to the Respondent for the [*rectification*] works.

Final Progress Payment Certificate No.5

- (b) Invoice 002/14 – Rectification costs by [*name omitted*] as per quote attributed to this invoice \$49,061.60 (including GST) plus \$7,500 (including GST) of Project Management fees plus the \$8,149.52 (including GST) owing from Invoice 001/14 giving a surplus of \$1,683.12 (including GST). The calculation for this is as follows:

- (i) Invoice 002/14 in the sum of \$66,394.24 (including GST) owing to the Applicant

Minus

- (ii) the [*builder's*] quote component for the rectification works of \$49,061.60 (including GST)

Minus

- (iii) the [*name omitted*] Consultant's project management costs of \$7,500.00 (including GST)

Minus

- (iv) the \$8,149.52 (including GST) owing from Invoice 001/14

Leaving

- (v) a sum of \$1,683.12 (including GST) owing to the Applicant for payment of their Invoice 002/14.

Final Progress Payment Certificate No.6 – Retention Monies

- (c) Invoice 104/13 – Retention monies held \$28,182.09 (including GST) payable to the Applicant; and

Final Progress payment Certificate No.7 - Demobilisation

- (d) Invoice 105/13 – Certified as “Nil” owing to the Applicant.

66. In all, a total counterclaim deducted for [rectification] works, [name omitted] Consultant’s project management cost and demobilisation of \$149,876.00 (including GST).

Invoice 001/14 dated 25 January 2014 - \$76,468.39 (including GST)

67. The Applicant contends that invoice 001/14 is not a payment claim under the Act because it is not signed and as there were no terms for making a payment claim in the contract, the implied provisions of Division 4 of the Schedule were implied into the contract. One requirement of those implied provisions, under section 5(h), is that the payment claim must be signed and, as the claim was not signed, it is not a payment claim under the Act. The Applicant also contends that, if this is not the case, then the claim may be excised from the payment claim and the balance of the claim can be adjudicated as determined in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 (“*A J Lucas v Mac-Attack*”).
68. The Respondent submits that invoice 001/14 is out of time under section 28(1) of the Act and as such may not be adjudicated in this payment dispute. It submits that, although the invoice was sent to the Superintendent on 25 January 2014 at 3:59pm, the date of service should be taken as 28 January 2014 owing to the Australia Day long weekend. I do not support this view. Construction projects generally work a 6 day week, 10 hour day. The invoice was sent to the Superintendent on 25 January 2014 and I am satisfied it was served on the Respondent on 25 January 2014.

69. The Respondent also submits that, using the special conditions of clause 19 incorporated into the GCs, the dispute date would have arisen on the 28th day after the date the invoice was sent to the Respondent. As previously reasoned in paragraphs 30 through to 37 above, the tender conditions are special conditions and clause 19 is incorporated into the contract GCs. Following that reasoning, the date for payment was on or before 22 February 2014 and the dispute arose on 23 February 2014 when the Respondent failed to pay the claim.
70. Under section 28(1) the Applicant has 90 days within which to prepare and serve its application. In this instance, the date for service of an application for adjudication of this claim would be calculated as on or before 23 May 2014. As the Application was served on 11 June 2014, this claim may not be adjudicated as part of the payment claim because it is out of time for a claim to be adjudicated under the Act.
71. The Applicant submits in the alternative that, if invoice 001/14 is found to be out of time for adjudication, it may be excised from the payment claim and the balance adjudicated as determined in *A J Lucas v Mac-Attack*.
72. Following the reasoning of Mildren J in *A J Lucas v Mac-Attack* at 12, there is no power given under the Act where an adjudicator may extend the 90 day time limit. Following the reasoning of Southwood J at 39, section 8 of the Act does not contemplate the re-triggering of a payment dispute by resubmission of or reformulation of payment claims. The time limit under section 28(1) of the Act fell due for Invoice 001/14 on 23 May 2014. I am therefore satisfied that invoice 001/14 cannot be adjudicated as part of the payment claim as it is out of time under the 90 day time limit in section 28(1) of the Act.

Invoice 002/14 dated 31 March 2014 - \$66,394.24 (including GST)

73. The Applicant contends that invoice 002/14 is not a payment claim for the same reasons set out in paragraph 67 above. The reasoning in paragraphs

30 through to 37 above show that the special condition 19 is incorporated into the GCs of the contract for the making of and responding to a payment claim.

74. The Applicant claims \$66,394.24 (including GST) for work it completed prior to termination of the contract by the Respondent on 27 February 2014.

75. The Respondent acknowledges the total of the works completed by the Applicant, but then deducts the sum of \$64,711.12 for back charges as follows:

(a) WTD Constructions rectification works for units 43 to 49 in the sum of \$21,298.20 (including GST) and units 67 to 75 in the sum of \$42,482.44(including GST) being a total of \$49,061.60 (including GST);

(b) [Name omitted] Consultants project management costs of \$7,500.00 (including GST); and

(c) the sum of \$8,149.52 (including GST) being the sum due from the assessment of invoice 001/14 which falls outside the jurisdiction of the adjudication,

the Respondent confirms in its payment certificate that the back charges are for defect rectification, including water damage and mould, which is also the subject of an insurance claim made by the Applicant to its works insurer, a report of which dated 22 March 2014 is contained in the Applicant's further submissions.

76. The Respondent in its further submissions addresses this issue stating in the statutory declaration by Mr [name omitted] that "*...I consider that it would cost a lot more than \$16,020 to repair about 270 square metres of water damaged gyprock sheets and insulation...*". The Respondent also addressed many of the defects in the same way in [name omitted]'s statutory declaration stating, in short, that the [name omitted] Insurance assessment was either flawed or inconsistent with the [name omitted] engineering assessment.

77. The issue in this claim is whether or not the Applicant was given a fair, reasonable and honest opportunity by the Superintendent, acting on behalf of the Respondent, to make good the defects in the building works either before or after the Respondent terminated the contract on 27 February 2014.
78. Termination of the contract by the Respondent is a serious matter and *prima facie* it falls to the Respondent to show proof on a balance of probabilities that it had due cause and that there was no likelihood that the Applicant could or would perform the works under the contract. The Respondent served the Applicant with a "Show Cause Notice" dated 14 February 2014, which followed an earlier show cause notice dated 12 July 2013. That notice was issued some 7 months earlier and it appears from the correspondence that the defects in the works were progressed during that period and that the Applicant agreed to rectify the defects at its cost.
79. It also appears that the Respondent issued a "Stop Work Direction" on or about 24 June 2013 which remained in force until 19 September 2013 when the Applicant was able to continue the rectification works. By 10 December 2013 the work seemed to be back on track and the Respondent resumed payment of the Applicant's claims. However, on 31 January 2014, following a site inspection by the Respondent, further defects were identified. A course of rectification was agreed on 11 February 2014.
80. On 13 February 2014 the Applicant sent a "Notice of Suspension" under GC 17 for non payment and also indicated it would require a further 20 weeks to complete the Works. On the following day, 14 February 2014, the Respondent issued a "Show Cause Notice" under GC 30.3 claiming the Applicant had breached the contract under GC 16.2 in not completing the works by the practical completion date, and under 15.7 for failure to reach the standard of workmanship required, and requested the Applicant to respond by 26 February 2014. The Applicant responded on 25 February 2014 setting out detailed reasons for the issues between them. On 27 February 2014 the

Respondent terminated the contract under GC 30.4 on the basis that the Applicant had failed to show reasonable cause in its response.

81. When reading down the various correspondence, it appears to me that this dispute could have easily been avoided. I am of the view that the contract was unreasonably terminated, particularly given that the parties had agreed on a defect rectification program on 11 February 2014, that a third party insurer was involved in that program due to part of the defects being a result of storm damage that had occurred on 1 February 2014, and that the Applicant had agreed to rectify the defects at its cost and the Respondent concurred with this approach. Some 16 days later the Respondent terminated the contract.
82. The contract GC 15.7 operates in favour of the Applicant (Builder) and the Respondent, in suggesting that this condition had been breached, relies upon a subjective opinion rather than there being a fundamental breach causing termination of the contract. The Practical Completion GC 16.2 holds obligations to be fulfilled by both parties in the contract. The continual suspension of the works by both parties, the agreement reached on 11 February 2014 and the willingness of the Applicant to agree to pay the cost of repairs to any defective work repairs, would place the Respondent in a difficult position when trying to rely on strict time performance, at such a late stage, as a fundamental breach cause enabling termination of the contract. There are no liquidated damages in the contract which would normally be a remedy for failure to achieve practical completion on time in the contract and I am of the view that time had likely run at large in this contract.
83. Despite the Applicant agreeing to attend to and rectify the defects at its cost, the Respondent, after terminating the contract, engaged another competitor contractor, namely *[name omitted]*, to undertake the defect rectification, and also back-charged the Applicant for the *[name omitted]* Consultant's costs of managing this work in the sum of \$64,711.12 (including GST). This was done without giving the Applicant the opportunity to make good on the

defects in its work up to and inclusive of the date of termination of the contract.

84. In so doing the Respondent denied the Applicant the opportunity of rectifying the defects in its work and sought to claim the cost of another contractor to rectify the defects and the management cost of that contractor, against the Applicant.
85. I am satisfied that the Applicant's claim stands and that the cost of the back charges from the Respondent fails. Of its own volition the Respondent chose to engage a third party contractor to do work which the Applicant was ready, willing and able to do and at its own cost.
86. I award this claim in the sum of \$66,394.24 to the Applicant.

Invoice 104/13 dated 31 March 2014 - \$36,678.58 (including GST)

87. The Applicant claims return of its retention monies in the sum of \$36,678.58 due to the contract being terminated by the Respondent on 27 February 2014. The Applicant submits that the retention monies are security provided by the Applicant to secure the Applicant's performance of the works.
88. The Respondent agrees with the Applicant on this claim and submits that the retention monies available for adjudication total \$28,182.09 (including GST) and that invoice 001/14 was out of time to be adjudicated in the payment dispute.
89. I agree with the Respondent with respect to this claim. As previously reasoned at paragraphs 67 through to 72 above, invoice 001/14 dated 25 January 2014 is out of time for adjudication in this payment dispute and the retention applicable to that invoice must follow that invoice.
90. I am satisfied that the Applicant's claim stands in the sum of \$28,182.09 (including GST) and I award that sum to the Applicant.

Invoice 105/13 dated 31 March 2014 - \$2,200.00 (including GST)

91. The Applicant claims the sum of \$2,200.00 (including GST) for having to demobilise its belongings from the site. The Applicant contends that the Respondent wrongfully terminated the contract on 27 February 2014 and then directed the Applicant to remove its belongings from site and that the Respondent should pay for that direction.
92. The Respondent submits that the claim made by the Applicant is a claim in damages and that there is no provision in the contract for making such a claim.
93. I agree with the Respondent on this point. A direction given under the contract would be given under GC 13 however, given that the contract was concurrently terminated with the giving of the direction on 27 February 2014, it is unlikely that any direction provisions would survive termination of the contract. The only remedy available to the Applicant would be an equitable remedy in damages on which an adjudicator holds no jurisdiction.
94. I am satisfied that the Applicant's claim fails for lack of jurisdiction.

Interest on the claims

95. In reconciling the claims, the amount the Respondent is to pay the Applicant is \$94,576.33 (including GST).
96. The interest rate set out in the contract schedule at item 17 and applicable to GC 29 "Interest" is written as 0%.
97. I therefore award no interest on the Determination pursuant to section 35 of the Act.

Summary

98. In summary of the material findings, I determine:
- (a) the contract to be a construction contract under the Act;
 - (b) the work to be construction work under the Act;
 - (c) the site to be a site in the Northern Territory under the Act;
 - (d) the claim to be a valid payment claim under the Act;
 - (e) the dispute to be a payment dispute under the Act;
 - (f) the Works invoice 001/14 to be out of time for adjudication;
 - (g) the Works completed invoice 002/14 to stand in the sum of \$66394.24 (including GST);
 - (h) the Retention invoice 104/13 to stand in the sum of 28,182.09 (including GST);
 - (i) the Demobilisation invoice 105/13 to fail for lack of jurisdiction; and
 - (j) There is no Interest awarded in the Determination.
99. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **\$94,576.33 (including GST)**.
100. This sum is to be paid to the Applicant by the Respondent on or before **15 August 2014**.

Costs

101. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

102. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

103. The following information is confidential:

- (a) the identity of the parties;
- (b) the identity of the principal; and
- (c) the location and nature of the works.

DATED: 25 July 2014



Rod Perkins
Adjudicator No. 26