AMENDED DETERMINATION NO. 16.08.06

Adjudicator's Determination

pursuant to the

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

Applicant

and

Respondent

I, Cameron Ford, determine on 3 December 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is $178,247.25 exclusive of GST being the amount owing of $176,166.31 plus interest of $2,080.93 under s 35(1)(a). Interest accrues on the sum of $178,100.87 as calculated above at the rate of 10% per annum, namely $48.79 per day until 31 December 2008, at which time the total interest for that month will be added to the sum of $178,100.87 and interest will accrue on the combined figure. The sum of $178,247.25 exclusive of GST is payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

On 11 February I amended this determination under s 43(2) of the Act to change the figure of $7,224.85 in paragraphs 5, 33 and 46.3 to $67,224.85, the lower figure being an accidental slip. This does not affect the determination sum.

Contact details:

Applicant: Respondent:

Appointment as adjudicator

1. On 13 November 2008 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointed under reg 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.

Documents received by adjudicator

2. I received and have considered the application supported by the documents 1 to 7 listed in the index to the application, together with the response and documents R1 and R2 attached thereto.

3. The response was delivered on 27 November 2008 making my determination due on 11 December 2008.

JURISDICTION

4. No suggestion was made that I do not have jurisdiction, and I find that I have jurisdiction because:

   (a) there was a construction contract to which the Act applies – s 27;

   (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;

   (c) the application was made in the time prescribed – s 28; and

   (d) the dispute was not the subject of an order, judgment or other finding – s 27(b).

THE APPLICATION

5. The applicant seeks $329,495.72 inclusive of GST plus interest, being the amount said to be outstanding in respect of a progress claim made on 6 October 2008 (the progress claim) calculated as follows:

Original contract sum	$3,770.000
Approved variations to 3 March 2008	$750,000
Additional variations from 3 March 2008	**$46,402.73**
12.5% builder's margin on those variations	**$99,550.34**
Early works approved variation	**$36,363,64**
Units 1 to 11 unit holders' variations	**$67,244.85**
Total claim for work completed	$4,769,541.56
Less retention	($50,000)
GST	$476,954.16
Total including GST	$5,246,495.72
Less payments received	($4,917,000.00
TOTAL	$329,495.72

I have placed in bold those claims which are contested by the respondent.

6. By way of background, the applicant was the contractor and the respondent the owner under a contract for the construction of 11 townhouses and associated works in a suburb of Darwin. A number of progress claims were made prior to the progress claim but a final claim has not been made because the defects liability period is still operative.

7. Before dealing with each of the contested claims in turn, I will mention two general defences of the respondent. In addition to particular defences to individual claims, the respondent says it is not liable because the quantity

surveyor has not issued a certificate under cl N4.1 for the progress claim, and that it has a set-off for liquidated damages. I will now deal with the applicant's claims.

Additional variations from 3 March 2008

8. In paragraphs 16 to 18 of its application, the applicant says essentially that variations were performed at the respondent's direction and at the request of the owner. Summaries of the variations were attached to the progress claim, attachments 2 and 5 respectively. Attachment 2 relating to variations performed at the respondent's directions totals $46,402.73, the amount of this part of the claim.

9. On its face, attachment 2 is consistent with the work to be done under the contract. In an email dated 6 June 2008 from GC, a person described by the applicant as "the Owner by its representative from [the architect's] office", she said:

> Additional variation claims have been submitted by [the applicant] who claims these as additions since 3 March 2008. Some of these variations are denied and some are accepted (see responses included in Item 2 – Additional Variations since 3 March 2008).

10. Under the heading "Summary" later in the email, it was said:

> The amounts owing by [the respondent] to [the applicant] are:

1.	Retention	$50,000.00
2.	Early Works	$40,000.00
3.	Variation Unit 1	$38,402.35
4.	Variation Units 2, 6, 8, 10 & 11	$22,307.07
5.	Further Variation Claims	$25,333.73
6.	Deduction for QS fee	- $6,080.00

11. Thus the respondent by its agent the architect appears to have accepted that it owes at least $25,333.73 to the applicant for this part of the claim.

12. To its response, the respondent annexes a draft assessment of work in progress prepared by a quantity surveyor, assessing the value of these variations at $22,577.82. The respondent says that the "variations were in several instances without the agreement of the respondent, and were excessive", and accepts liability only for the amount assessed by the quantity surveyor.

13. At this point it is necessary to consider the administration of the contract to determine the significance of the quantity surveyor's draft assessment. By cl A6.1, "the architect" is to administer the contract, with subsequent clauses providing the usual various mechanisms for administration. There is one notable exception to those mechanisms, namely cl N4.1 which says:

> The ~~architect~~ *quantity surveyor* must assess a claim for a progress payment and issue to the contractor and to the owner a certificate setting out any payment due to either the owner or the contractor within ~~10~~ *5* working days after receiving a claim for a progress payment.

14. "Architect" and "10" are in printed type as part of the standard form, but have been struck through by hand, with the words and number I have italicised being handwritten.

15. Curiously, that appears to be the only occasion in the contract where "architect" has been replaced with "quantity surveyor", with even the remaining four subclauses of cl N4 referring to "the architect". Those subclauses state what the architect must take into account when assessing a claim, the content of the certificate and the architect's obligations when seeking further information.

16. As far as I can determine, there is only one other reference to a quantity surveyor in the contract, and neither party directed attention elsewhere. That reference is in the special conditions appearing at the very end of the contract in my copy, which say in their entirety:

> 1. Should savings be made and substantiated in the works cost [sic] as scheduled by XX dated 11 December 2006, then the agreed savings

will be shared 50/50% between [the respondent] and [the applicant]. [The applicant] will use its best endeavours to reduce costs.

2. *Fortnightly* ~~Monthly~~ financial claims will be assessed by XX(Quantity Surveyors) within five (5) days of the claim and in accordance with the requirements of Bank West. XX's assessment will include assessment for time claims. Financial monthly statements shall be made monthly or fortnightly (15 days) at the contractor's discretion. Financial claims assessed by XX shall be in accordance with relevant clauses in the contract ABIC SW-1 2002 Simple Works Contract. [I interpolate that this is the form of contract used in this case].

3. This contract is subject to final approval by Bank West for the funding as per their offer and their satisfaction of this contract.

4. The architect or representative may alter the nominated architect in item 2 and the contractor shall not unreasonably withhold his agreement to the nominated architect.

5. The engineers, YZ, will be the supervising engineers on the project and may, from time to time, act as the architect's representative for the project. YZ's representative shall be the arbiter of any disagreements of a technical nature on the building project between the owners/architects and the contractor [the applicant].

Signed *etc*

"Monthly" in printed type was struck through by hand and "Fortnightly" handwritten.

17. It seems that a quantity surveyor may have been engaged, inter alia, to assess claims as part of the respondent's obligations to its financier. How should cl N4.1 be interpreted? The applicant says in par 3.6 that special condition 2 is:

> an acknowledgment of what is required by the Owner to satisfy its bank funding requirements, and not a substitution of the payment claim and certification obligations under clause N of the Contract. If this paragraph of the Special Condition has any impact on the 'standard' terms of the payment under clause N of the Contract, [the applicant] submits it is limited to:

(a) substituting the person certifying from the Architect to the Quantity Surveyor; and

(b) giving an election to [the applicant] to bring fortnightly or monthly claims.

18. The respondent says in par 1 that "[t]he obligation to pay arises under the contract only when a tax invoice *and* certificate of the quantity surveyor has been provided to the owner".

19. My task is to determine the objective intention of the parties, and to my mind the combination of the special condition and cl N4.1 means it is the quantity surveyor rather than the architect who is to assess claims for progress payments, and subclauses 2 to 4 of that clause should be read as referring to the quantity surveyor. I note the phrase "financial claims" in special condition 2 rather than the "progress claims" used in cl N4, but I consider that difference to be either an intention to extend the quantity surveyor's role to claims other than pure progress claims by the contractor from the owner, or to be a drafting error, special condition 2 obviously not having been expertly drafted.

20. It was necessary to go through that analysis to determine the significance of the quantity surveyor's draft assessment of work in progress. The quantity surveyor is more than an independent expert, or an expert engaged by one party in this application. The quantity surveyor is the person agreed by the parties to determine, inter alia, progress claims. I do not regard the draft assessment as a certificate under cl N4.1, nor does it pretend to be one. However, it appears to have been prepared taking into account the same factors as are required for the certificate. There is no evidence of similar quality from the applicant, it proffering only the progress claim.

21. That being the case, relying on the quantity surveyor's draft assessment entitled "Assessment of Work in Progress No 23" dated 27 November 2008 in particular Appendix O, I find on the balance of probabilities that the amount owing to the applicant for variations after 3 March 2008 is $22,577.82 plus GST.

12.5% builder's margin on those variations

22. The applicant asserts it is entitled to the usual margin on the variations after 3 March. The respondent says the applicant agreed not to claim margins when it agreed to accept $750,000 for variations to 3 March 2008. Both parties agree that that latter figure was a compromise between the amount claimed by the applicant and admitted by the respondent for variations to 3 March.

23. In par 21, the applicant says that at the time of its agreement to accept $750,000, it suggested to the quantity surveyor that "to squeeze the variation value for works up to" that date, it:

> may be prepared to not include its profit and overhead margin in the figure being required for submission to the bank. However, any offer that may have been construed from the comment was not accepted by the Owner, and has been withdrawn upon the failure of the Owner to properly and promptly pay [the applicant] the figure that had been required to be put to its bank.

24. The respondent says that this submission tacitly acknowledges the agreement not to charge a margin on further variations. I am inclined to agree. One has the sense that the words are being carefully chosen to avoid an admission. I do not say this in any pejorative sense, but there is no clear denial of an agreement and one is left with the impression that there was in fact an agreement in the terms alleged by the applicant.

25. Assisting the respondent is its architect's email of 6 June 2008 referred to previously. Paragraph 5 of that email says:

> In the summary presented by [the applicant], a claim for additional builder's margin has been put forward on the agreed variation of $750,000. This is absolutely not accepted as the $750,000 was a formal agreement between [the respondent] and [the applicant]. The $750,000 variation included a significant builder's margin.

26. A further email was sent on behalf of the respondent to the applicant on 7 October 2008, the day following receipt of the progress claim, in which it was stated in par 2:

> Your claim of an additional Builder's margin over variations cannot be considered as you agreed to complete the work for a total sum of $750,000 in March 2008 and was adamant that you didn't want the Builder's Margin.

27. These clear, unequivocal statements were not met with anything from the applicant, either by way of correspondence or evidence in this application. If there was correspondence it is not before me. Had there been a serious contrary contention from the applicant, one would have expected to see either correspondence following those emails or a clear statement in the application. It is not as if the applicant was only aware of the respondent's position after receiving the response.

28. In the end I am left with an effective concession (express or tacit) that there was an agreement that the applicant would not charge a margin on variations after 3 March 2008, together with allegations by the applicant that the agreement was not accepted and has been withdrawn.

29. There is simply no evidence of those allegations. There is no statement, signed or sworn, from anyone on behalf of the applicant to that effect, and I regard the evidential burden as falling on the applicant. While I do not regard this as conclusive or even as tipping the balance in favour of the respondent, I note that the quantity surveyor's assessment does not include an amount of margin on variations after 3 March 2008.

30. On the balance of probabilities I find that the applicant is not entitled to a builder's profit margin on the variations after 3 March 2008.

Early works approved variation

31. The respondent does not address this claim, which I take to be a tacit admission that it is liable. Even if that is not so, I rely on the quantity surveyor's draft assessment, R2 of the response, in which this claim is included at Appendix O. I apply the same reasoning to the assessment here as I did earlier.

32. On the balance of probabilities I find that the respondent is liable to the applicant for $36,363.64 for early works approved variations.

Units 1 to 11 unit holders' variations

33. Again the respondent does not address this part of the claim, again I make the same assumption, and again in any event I rely on the quantity surveyor's draft

assessment in which at Appendix O $65,432.70 is assessed for this claim. The applicant only seeks $67,244.85 to which I find on the balance of probabilities it is entitled. For completeness I make it clear that I find the applicant's submissions persuasive, especially in the absence of a response to this claim.

GENERAL DEFENCES

No QS certificate

34. As a general defence to the whole progress claim, the respondent says that cl N4.1 as cited above means that if no quantity surveyor's certificate has issued, it is not liable to pay any part of the claim.

35. Anticipating this defence, the applicant says in par 25 that the failure to issue a certificate is a breach of contract by the respondent, referring to *Perini Corp v Commonwealth* (1969) 2 NSWLR 530, and that the failure does not prevent a payment dispute under the Act from arising. "Clearly", continues the applicant, "an adjudicator ought not be prevented by a failure of the certifier … to issue a valid progress certificate, from pursuing his own assessment."

36. Relevant payment provisions are set out in cll N5, N6 and N8 which say:

> **Tax invoice**
>
> **N5.1** On receiving a certificate from the architect, the party to be paid must prepare a tax invoice (if applicable) equal in value to the certificate and present both documents to the other party for payment.
>
> **Certificates – obligation to pay**
>
> **N6.1** The amount stated as owing in any certificate must be paid within the period shown in item 4 of schedule 1 after delivery of the certificate and tax invoice (if applicable).
>
> [Interpolating, that period is 7 calendar days.]
>
> **If architect fails to issue certificate**

> **N8.1** If the architect fails to issue a certificate on time the contractor may issue a notice in writing requesting the architect to issue the certificate. If the architect fails to issue the certificate within 5 working days of the date of issue of the notice, the contractor may immediately suspend the necessary work under clause Q12.

37. Because a certificate has not issued, the applicant has not delivered a tax invoice. While it may theoretically be possible for a claimant to deliver a tax invoice for the amount of a progress claim where no certificate has issued, I do not have to decide that question as it has not occurred here.

38. Clause N4.1 quoted above requires the quantity surveyor to issue a certificate within 5 working days after receiving a progress claim. At the date of the application, 13 November, it was some 38 consecutive days since the progress claim was made.

39. I agree with the applicant that a delay of that magnitude is a breach of contract. A party cannot take advantage of its own wrongdoing to avoid liability. In this case the measure of damages is that which I have allowed in this application.

40. While the respondent did not rely on cl N8.1, I should mention it briefly. I do not think the apparent obligation on the contractor to give a notice on the failure of a certificate in order to suspend work is relevant to the time for payment. Suspension of work and payment are two different issues, each with their own conditions.

41. Determining the date for payment, the relevant dates are:

Date of claim	6 October
Date for certificate – cl N4.1	13 October (5 working days)
Date of invoice – putative	14 October (I would expect an immediate invoice, and both 13 and 14 October are working days)
Date for payment – cl N6.1	21 October (7 calendar days)

42. I reject the respondent's argument that the absence of a certificate absolves it of liability for the progress claim. The date for payment of the progress claim in the amount I have determined was therefore 21 October 2008.

Liquidated damages set-off

43. Finally, the respondent says it has a set-off for liquidated damages of $73,500 for the applicant's delay in reaching practical completion, initially the first week of November 2007 but extended by agreement to 7 December 2007. Clause M8 and M9 set out a procedure to be followed where liquidated damages are claimed. That procedure is essentially one of notice by the architect to the owner of its entitlement (M8.1), notice by the owner to the architect of its intention to enforce its entitlement (M8.2), notice by the architect to the contractor of the owner's decision (M9.1), and deduction by the architect of the damages from the next certificate (M9.3).

44. None of that procedure has been followed in this case and the respondent did not address those requirements. It is important that contractual procedures be followed to ensure rights are preserved and parties are able to regulate their positions. With the case of liquidated damages, the various notices give each party the chance to consider their position and to make representations as to why they should or should not be claimed.

45. Since the contractual provisions for claiming liquidated damages have not been followed, or there is no evidence of their having been followed, I find that the respondent is not entitled to set-off those damages at this stage. It is possible that the respondent could follow that contractual procedure in the future, a matter on which I express no opinion.

CONCLUSION

46. I have found on the balance of probabilities that the applicant is entitled to:

46.1 $22,577.82 for variations after 3 March 2008;

46.2 $36,363.64 for early works approved variations;

46.3 $67,244.85 for units 1 to 11 unit holders' variations.

46.4 nil for builder's profit margin on the variations after 3 March 2008,

a total of $66,186.31 plus GST.

47. To calculate the amount owing on the progress claim, it is simplest to deduct from it those amounts which I have not awarded. They are:

Variations after 3 March 2008	$46,402.73-$22,577.82	$23,824.91
12.5% builder's margin on those variations		$99,550.34
Total deduction from progress claim, ex GST		$123,375.25
Progress claim, ex GST ($329,495.72 x 10/11)		$299,541.56
Award for progress claim, ex GST		$176,166.31

48. I have found that the respondent is not entitled to a set-off for liquidated damages.

49. Interest is claimed on the amount owing at the contractual rate of 10% per annum in accordance with cl N15. Clauses N15.1 and 15.3 say:

> **Interest on overdue amounts**
>
> **N15.1** Each party must pay interest on any money that it owes the other but fails to pay on time. In the case of the owner, this includes any delay caused by the failure of the architect to issue a progress certificate on time.
>
> **N15.3** The interest is calculated daily, from the date the money should have been paid. The interest must be paid on the last day of each month. If interest due on the last day of a month is not paid, it is immediately capitalised and added to the money outstanding.

50. I do not read this clause as requiring interest to be paid from the date a progress certificate should have been issued under cl N4.1. Rather, I think it means that where a failure to issue a certifies on time causes a delay in

payment, interest will run from the time the payment should have been made. This period is the "delay caused by the failure".

51. Payment was due on 21 October 2008 (see par 41). Interest accrued from that date and should have been paid on 31 October 2008. On that date the interest then owing should have been added to the principal, and interest accrue on the combined figure. Those calculations are:

From 21 to 31 October

$176,166.31 x 10% x 10/365 = $482.65 + $176,166.31 = $176,648.96

From 1 to 30 November

$176,648.96 x 10% x 30/365 = $1,451.90 + $176,648.96 = $178,100.87

From 1 to 3 December

$178,100.87 x 10% x 3/365 = $146.38 + $178,100.87 = $178,247.25

Interest accrues at $48.79 per day until 31 December at which time the total interest for that month will be added to the sum of $178,100.87 and interest will accrue on the combined figure.

DETERMINATION

52. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $178,247.25 exclusive of GST being the amount owing of $176,166.31 plus interest of $2,080.93 under s 35(1)(a). Interest accrues on the sum of $178,100.87 as calculated above at the rate of 10% per annum, namely $48.79 per day until 31 December 2008, at which time the total interest for that month will be added to the sum of $178,100.87 and interest will accrue on the combined figure. The sum of $178,247.25 exclusive of GST is payable immediately.

53. Neither party sought payment of its costs. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).

54. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Amended Determination

55. On 18 December 2008 the applicant applied by letter under s 43(2) to change the figure of $7,244.85 in paragrpags 5 and 33 to $67,244.85. This appearing to be an accidental slip, and receiving no contrary submissions from the respondent, I have made those changes, inluding to par 46.3

56. The applicant also asked that interest be calculated on the GST inclusive sum rather then the GST exclusive sum. I invited brief submissions from the parties on whether that amendment fell within s 43(2) and if so, how interest should be calculated. I had taken the view in the determination that interest should not be awarded on GST as this amount is paid to the government upon its receipt, and no obligaton to pay arises until it is received. On that basis, the recipient suffers no loss in being kept out of the GST component, which loss interest is designed to compensate.

57. Having received submissions, I am of the view that a change to the interest calculation does not fall within s 43(2) which says:

> (2) Despite subsection (1)(a), the adjudicator may, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, correct any of the following in the determination:
>
> (a) an accidental slip or omission;
>
> (b) a material arithmetic error;
>
> (c) a material mistake in the description of any person, thing or matter.

58. I do not consider that the method of calculation of interest falls into any of those categories – it was not accidental, it is not an arithmetic error (which I take to be a mistake in the actual calculation, not in the basis for calculation), nor did it relate to a description.

59. I therefore decline to change the manner in which I have calculated interest. Even had the manner been reviewable under s 43(2), I would have adhered to my view that interest should not be charged on the GST component of amounts owing.

Dated: 11 February 2009

[signed]

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CAMERON FORD

Registered Adjudicator