CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

DETERMINATION

Adjudication Identification Number:	**07.20.01**
Adjudicator:	**DS ELLIS**
Address	Level 25, Allendale Square 77 St Georges Tce Perth Western Australia
Phone Number	(08) 9220 0511
Fax Number	(08) 9220 0572
Applicant's Name:	**[redacted]**
ABN:	
ACN:	
Address:	
Tel;	
Respondent's Name:	**[redacted]**
ABN:	
ACN:	
Address:	
Tel;	
Date of Adjudication Application:	**15 June 2020**

I determine that:

1 The respondent is liable to pay the applicant the sum of $[*redacted*] (plus GST) together with interest on [*that*] sum [*redacted*] from 20 May 2020 until today at the rate of 6.5% per annum.

2 The amount identified in paragraph 1 above is to be paid within 7 days of date of this determination.

My reasons are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.

Date: 20 July 2020

DS Ellis
Registered Adjudicator no 07

Schedule 1: Reasons for Determination

[Redacted] ("applicant")

v

[Redacted] ("respondent")

Summary

1 The applicant seeks a determination that the respondent pay it [*redacted*] plus GST on that sum, which is the unpaid balance of the applicant's progress claim dated 5 March 2020.[1]

2 The claim was made under a written subcontract (contract)[2] between the applicant and the respondent dated 31 July 2019 pursuant to which the applicant agreed to construct [*details of the works redacted*]. The respondent was the main contractor on the works which related to the [*site details redacted*], in the Northern Territory.

3 The contract provided for a 5-year defects liability period for the [*work details redacted*] work. In Appendix 4 to the contract an amount of $[*redacted*] was attributed to the 5-Year Defects Liability Period.

4 On 26 November 2019, the respondent directed the applicant 'to remove from the Scope of Works the requirement of the extended 5-year defects liability period' (Direction).[3] It contended that this had the effect of reducing the contract price so that it was not liable to pay the amount claimed. The respondent contended, in the alternative, that the [*amount*] was only payable at the expiration of the 5-year defects liability period, in December 2024.

5 I consider that:

(a) the Direction was not effective to vary the contract, so that the respondent is liable to pay the whole of the amount claimed by the applicant; and

(b) the amount attributed to the 5-year defects liability period was claimable on completion of the [*redacted*] works.

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[1] Attachment GF05 to the statutory declaration of [GF] made on 12 June 2020 (GF declaration)

[2] Attachment GF1 to GF declaration

[3] Attachment GF7 to GF declaration

The respondent should pay the amount claimed, and interest.

Preliminary and procedural matters

6 I was appointed adjudicator in respect of this matter by a letter from the Institute of Arbitrators and Mediators dated 18 June 2020.

7 The application comprised:

(a) a formal application dated 15 June 2020;

(b) written submissions;

(c) statutory declaration of [*GF*] made on 12 June 2020, together with annexures GF1 to GF9; and

(d) copies of legal authorities referred to in the submissions.

8 On 20 June 2020, I wrote to the parties informing them of my appointment.

9 [*Redacted*], an in-house solicitor representing the applicant, informed me by email of 22 June 2020 that the application was served on the respondent on 15 June 2020.

10 I received the response of the respondent on 6 July 2020. The response comprised a response/submissions and various legal authorities relied on by the respondent.

Jurisdiction

11 There was no dispute that I had jurisdiction to determine the application. I am satisfied that:

(a) the contract was a construction contract;

(b) the application was prepared and served in accordance with s 28 of the Act; and

(c) it is possible to fairly make a determination of the matter within the prescribed time.

12 There was no suggestion that the matter had been the subject of another application or that another arbitrator, court, or other person or body dealing with the matter had made an order, judgment or finding out the dispute the subject of the application.

The issues

13 Two issues arise:

(a) was the Direction effective to vary the contract so as to delete the 5-year defects liability period?

(b) if the Direction was not effective to delete the 5-year defects liability period, was the amount attributed to the defects liability in Appendix 4 to the contract only claimable and payable at the end of the 5-year defects liability period?

Factual background

14 In addition to the matters described at paragraphs 1 to 4 above, the following background material was not in dispute.

15 The [*redacted*] and the [*redacted*] were separable portions of the work under the contract.

16 [*GF*] gave evidence that the [*redacted*] works for [one portion of the contract works] was completed on 16 September 2019, although there was some minor rectification work which was completed on 4 December 2019.[4]

17 The applicant applied for completion by letter dated 25 November 2019.[5]

18 The very next day, on 26 November 2019, a representative of the respondent, sent the Direction to the applicant in the form of a letter, which said:

> With reference to Clause 20 of the Subcontract, please be advised [*the respondent*] directs [*the applicant*] to remove from the Scope of Works the requirement of the extended 5-year defects liability period.
>
> Using Appendix – Subcontract Schedule of Rates Breakdown, [*the respondent*] values the reduction of the 5-year defects as $715,580.83.

19 On 2 December 2019, the respondent wrote to the applicant regarding completion of Separable Portion 2 – [*redacted*]. The letter said the requirements for Completion of the [*Separable Portion 2*] had not yet been achieved.

20 A dispute procedure was initiated in respect of the Direction.[6]

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[4] GF Declaration at

[5] See the respondent's letter of 2 December 2019, GF6.

[6] GF7.

21 On 2 March 2020, the respondent certified that Completion had been achieved.[7] The respondent wrote:

> The Contractor is of the position that the requirements for completion under Clause 22.4 had not been met by 25th of November 2019.
>
> Notwithstanding the requirements under Clause 22.4 to notify the Contract within 10 business days of reaching Completion had also not been met, the Contractor believes the date of Completion not be the 5th of December 2019.
>
> Notwithstanding your failure to resubmit a notice of completion please consider this your Certificate of Completion - the date of Completion being 5 December 2019. As per the Variation Direction of 26 November 2019, the Defects Liability Period line item from the Subcontract has been removed.'

22 The applicant made a claim for payment under the contract on 5 March 2020. It sought a total of $[*redacted*] (excluding GST). The claim included other work as well as the claim in respect of the defects liability period.

23 On 11 March 2020, the respondent informed the applicant that it accessed the claim at $[*redacted*] and disputed the balance of the claim because, it said, the contract had been varied to delete the work the subject of the balance of the claim. A payment dispute arose at this time. The dispute related to the component of the claim attributable to the 5-year defects liability period.

24 The application for adjudication was made on 15 June 2020.

25 The applicant proceeded on the basis that, having regard to the provisions of GC22 and Item 20 of the contract, the due date for payment would have been 20 May 2020.

Construction of contracts

26 The issues between the parties were essentially issues of the construction, or interpretation, of the contract.

27 The principles of construing contracts are, in general terms, well settled. They are conveniently summarised in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[8].

> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood

[7] GF4.

[8] [2015] HCA 37 (2015) 256 CLR 104

those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

[48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

[49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.

[50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

[51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

[52] These observations are not intended to state any departure from the law as set out in *Codelfa Construction* and *Electricity Generation*.

Was the Direction an effective variation

28 The first issue which arises is whether the Direction was a variation permitted by the contract.

The contract

29 The contract is comprised of general conditions (GC), amongst other documents. GC 2 defines the contract as meaning the documents identified in item 18 of Appendix 1 to the GC, in the order in which they are listed in that item. Relevantly, the order is:

(a) special conditions (SC);

(b) General Conditions;

(c) Appendix 3; and

(d) Appendix 4.

30 GC 2 contains a list of defined terms. 'Variation is defined:

> **Variation** Includes a change in the scope, quantity (including increase, decrease or omission), character or quality of any material or Works under the Subcontract

31 'Works' is a term defined in clause 2 of the contract.

> **Works** includes all of the work to be performed in accordance with and under the Subcontract, including variations under the Subcontract.

32 There is also a definition of 'WUS', which is a common acronym for 'work under scope':

> **WUS** means the work which the Subcontractor is or may be required to carry out and complete under the Subcontract and includes variations, remedial work, design (if applicable), plant and temporary works.

33 Appendix 3 is titled 'Scope of Work'. It provides:

> Scope of Works is as follows:
>
> **Separable Portion 1 – [*redacted*]**–
>
> …
>
> **Separable Portion2 – [*redacted*]**– Carry out all necessary [*redacted*] works in accordance to the contract documents, project specifications and schedule of rates for both [*redacted*]– as outlined on drawing 58000-TDL-13-DR-EP-03-321.

There follows a series of bullet points giving directions about how the work is to be carried out eg 'Apply safe working practices'. The following pages of Appendix 3 contain a long list of drawings, divided between [*the 2 separable portions*]. I have not been provided with copies of these drawings. I assume that, combined with any applicable standards, generally accepted building practices and building expertise and, perhaps some technical directions from the respondent, they contain the information required to actually construct [*separable portion 2*] as required by the respondent under the contract.

34 The Subcontract Price is defined in clause 2 and contemplates that the price can be a combination of a lump sum price and a price identified by multiplying a unit rate by the quantity of work done.

35 Appendix 4 is titled 'Subcontract Schedule of Rates Breakdown'. It consists of two tables. The table dealing with [*separable portion 2*] contains a list of items. In relation to the 5-year Defects Liability Period it provides:

[*Rates and work description table redacted*]

36 By way of contrast, one of the items for *[the separable portion 1*] works is as follows.

[Rates and work description table redacted]

37 I understand the expression 'LS' in the entry for the 5 Year Defects Liability to mean that the item is a 'Lump Sum' item, that is, the whole of the item is paid, or none of it.

38 Defects liability is dealt with in the Special Conditions. SC2 is headed 'Defects Warranty'.

39 SC2.2 requires the applicant to perform the Works in accordance with the amended Specification and identifies standards of quality and workmanship.

40 SC2.3 provides:

> (a) The Defects Liability Period shall be a period of 5 years from the Date of Practical Completion of the Works under the [*redacted*] Sub Contract.
>
> (b) Subject to clause 2.3, and only during the Defects Liability Period, [*the applicant*] will rectify any Defect in the Works which are caused by a breach of the Materials Warranty of the Workmanship Warranty.

The expressions 'Materials Warranty' and 'Workmanship Warranty' are not defined terms. It appears that they refer to the standards of quality and workmanship identified in SC2.2. The obligation to repair only subsists during the Defects Liability Period and is 'subject to clause 2.3'. This appears to be a reference to clause 2.4 which excludes 'minor technical non-conformances'. SC 2.5 also excludes defects caused by various matters, including defects contributed to by work performed by others.

41 Defects liability is also dealt with in the General Conditions. Clause 32 provides that the Defects Liability Period commences at 4pm on the Date of Completion and will be in place for the period identified in Item 30 of Appendix 1. Item 30 provides two defect liability periods – 12 calendar months for [*the separable portion 1 works*] and 60 calendar months for [*the separable portion 2 works*]. In both cases, the period of time runs from the date of 'practical completion of the subcontract', rather than from the relevant separable portion of the contract. 'Practical completion' is not a defined term of the contract.

42 'Defect' is defined more broadly in the General Conditions[9] than in the Special Conditions. In the GC it includes any non-compliance or flaw. It does not contain the exclusions mentioned in the special conditions. The defects liability provisions in the general conditions also refer to the periods of time identified in Item 30.

43 GC32 provides that the applicant is required to carry out rectification causing as little inconvenience 'to the occupants or users of the Works' as is reasonably possible' and in accordance with directions. The respondent may direct the applicant to remedy a defect. If the applicant does not remedy a defect or if it is not remedied in accordance with the direction, the respondent may certify the cost incurred by the respondent in remedying the defect as money due and payable to the respondent.

44 Last, but not least, GC20, which deals with variations. It commences:

> The Subcontractor will not vary the Works except as Directed in writing by the Contractor or the Contractor's Representative.
>
> The Contractor's Representative may Direct the Subcontractor to vary the Works at any time before Completion.

[9] At GC 2.

45 The later subclauses of GC20 deal directions which the applicant considers are variations and pricing variations. GC20.4 provides:

> No Variation will vitiate, render invalid or constitute a repudiation of the Subcontract on the ground of the extent of the Works are added to, reduced or omitted.

Discussion

46 The essence of the applicant's argument was:

(a) the contract permits the respondent to vary the 'Works';

(b) the change or purported change to the 5-year defects liability period was not a variation to the 'Works';

(c) consequently, the Direction was ineffective to vary the contract;

(d) having completed the contract, the applicant was entitled to payment of the whole of the contract price, including the disputed [*amount*].

47 The applicant referred to the definitions of 'Works' and 'WUS'. It noted that the power to vary in GC20 referred to the 'Works', not 'WUS'. It suggested that the definition of 'Works' was apt to refer to the physical work required to be done, while the definition of 'WUS' included the 'contractual superstructure' around the physical works (such as providing manuals and warranties). It argued that 'Works' did not extend to ancillary obligations, such as the obligation to remedy defects. It concluded that the power to vary did not extent to enable a change to the contract to delete the Defect Liability Period.

48 The respondent argued that:

(a) the power to vary extended beyond changes to the 'physical works' and included changes to the 'WUS';[10] and

(b) the defects liability obligation fell within the definition of 'Works' (and WUS)[11].

I will consider these arguments in turn.

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[10] At section 10 of its response.

[11] At section 11 of its response.

Extent of the variation power

49 The respondent argued that the power to vary conferred by the contract was broader that the power to vary the 'Works' and that it included the power to vary the WUS.

50 The respondent pointed out that the definition of 'Variation' was an inclusive one, so that it was not limited by the words after 'includes' in the definition of that term.

51 The respondent contended that, because the definition of WUS includes 'variations', it must be possible to vary the WUS.

52 It also raised GC 6.6 which begins, 'Where otherwise that by reasons of a Direction to vary WUS …', which suggests that there may be a Direction to vary the WUS.

53 I do not accept these arguments.

54 The parties used two defined expressions in the contract, 'Works' and 'WUS'.[12] It is clear that the there is considerable overlap in the scope of those two expressions: the definition of 'Works' includes 'all of the work to be performed in accordance with the' contract; the definition of 'WUS' means 'the work which the Subcontractor is or may be required to carry out and complete under the Subcontract …'. Both definitions include 'variations'. The two definitions are, however, different. The definition of 'WUS' is broader. It expressly includes remedial work, design, plant and temporary work. 'Works' does not.

55 The two terms 'Works' and 'WUS' are used are various places in the contract, sometimes within the same clause. The definition of 'Completion' is an example.[13] It provides that 'Completion' is a stage in the carrying out of the *WUS*, when the *Works* are complete, except for certain minor defects. GC5, which deals with commencement and completion is another example. It requires the applicant to bring the *Works* to Completion by the Date of Completion, but to proceed with the WUS with due expedition and without delay. I proceed on the basis that the choice of one term, rather than the other, was deliberate. On this basis, the use of the expression 'Works' in the definition of 'Variation', rather than 'WUS', suggests that a Variation does not extend to a variation of the WUS.

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[12] The contract also uses the uncapitalized expression 'works', from time to time, for example in GC220.

[13] GC2.

56 I note that the definition of Variation is an inclusive definition, so the words do not serve to limit the ordinary meaning of the expression 'variation'. In my opinion, the ordinary meaning of variation is directed to a change in what it is that the contractor needs to build under the contract. A change to the nature and extent obligation to repair works does not alter what it is that the contractor has to build. I do not consider the specific words of inclusion in the definition of 'Variation' assist the respondent either. They all relate to 'any material or Works' under the subcontract.

57 General Condition 22 is also relevant, of course. It refers to a power to vary the *Works*, not the *WUS*. GC22 is not a definition. The argument that the definition of 'Variation' is inclusive, is not available. I consider that the intention of the parties was that the respondent could vary the Works, but not the WUS. The parties said so, twice.[14]

58 While GC6 contemplates that a direction might vary the WUS, GC 6 is not primarily concerned with variations. It is concerned with changes which do not result from Variations. The passing reference to 'WUS' in GC 6 does not outweigh the choice of 'Works' rather than 'WUS' in GC 20 and in the definition of 'Variation' in GC 2.

59 The presence of 'variation' in the definition of WUS does not assist the respondent either. As discussed above, 'WUS' is a broader concept than 'Works'. There is an express power to vary the Works. A variation to the Works will necessarily lead to a variation to the WUS. It does not mean that those parts of the WUS which are not 'Works' can be varied.

The extent of 'Works'

60 The respondent argued that the 5-year defects liability period fell within the meaning of the expression, 'Works', so the power to vary the 'Works' conferred by GC20, conferred a power to vary the 5-year defects liability period, including by deletion.

61 The respondent referred to the passage in Appendix 3 which requires the applicant to 'carry out all necessary … works in accordance to the contract documents, project specifications and schedule of rates for [*Separable Portion 2 of the works*] as outlined on drawing 58000-TDL-13-DR-EP-03-321.' It contended that the reference to the

[14] GC20.1 and 20.4 also use the expression 'Works', rather than 'WUS'. 'WUS' is not used in GC20.

schedule of rates in the Appendix 3 had the consequence that the 5-year Defects Liability Period was part of the 'Works'.

62 The respondent also argued that performance of the Defect Rectification Work contemplated the performance of 'physical work' ie people attending at site with equipment and machinery and carrying out physical activity. It said this meant that it involved work, in the ordinary sense of that word, with the consequence that it involved 'Works' as defined.

63 I do not accept these arguments.

64 I do not think the reference to the schedule of rates in Appendix 3 has the effect of making the 5-year defects liability period part of the Works. The schedule of rates identified how much the applicant would be paid for the items (to use a neutral expression) listed in Appendix 4. Appendix 4 did not define what it was that the applicant had to do. [Redacted]. The liability for defects and the period of that liability were referred to in the body of the contract, particularly SC 2.

65 There was a dispute about whether the 5-year defects liability period was merely an 'inchoate liability'. This was not a particularly helpful controversy. It was not known, at the time the contract was made whether there would be anything actually done on site under the 5-year defects liability obligation, although the parties must have thought that there was a risk work would be required. However, any work that needed to be carried out under the 5-year defects liability would not be 'Work' because GC 32 provides that the defects liability period runs from the date of Completion, that is the date on which the respondent certifies that the WUS, which includes the Works, has been finished. If the Works have been completed, activities undertaken afterwards cannot be part of the Works (or the WUS). Physical activities which the applicant might (or might not) have to carry out to fulfil its defects liability obligations do not form part of the Works. The respondent contended that 'Completion' under the contract is something less than all the works actually having been finished. However, the present issue concerns the allocation of possible repair activities within defined terms under the contract. I do not accept the respondent's argument at section 19 of the response.

66 I consider that the obligation to carry out defect rectification work, either for the extended period of 5 years or, indeed, for a shorter period, does not form part of the 'Works' as defined in the contract.

67 It follows that the respondent cannot vary the contract by deleting the 5-year defect liability from the contract. I conclude that the Direction was not within the scope of GC20 and was not an effective variation. This means, of course, that the applicant must still carryout defects remedy work for the extended 5 year period.

Date of payment

68 The respondent contended that the amount identified in respect of the 5-year liability period was payable at the expiration of the 5-year defect liability period. The respondent said that this proposition was supported by the 'unambiguous operation of clauses 6.1, and 22.1 of the Subcontract or Item 1.10 of the 'assumptions and conclusions section within the Schedule of Rates itself'. If this submission is correct, the amount claimed is not yet due.

69 The definition of 'Subcontract Price' in GC 2 offers three alternatives: lump sum; schedule of rates; and where the Contractor accepted a lump sum and rates, the aggregate of the lump sum and schedule of rates figures. Where the contractor accepts rates, the Subcontract Price is defined to means 'the sum of the products ascertained by multiplying the rates by the corresponding quantities in a Priced Bill or Quantities or Schedule of Rates'.

70 Item 10 of Appendix 1 states that, for the purposes of the definition of 'Subcontract Price in GC2:

> Subcontract Type: Schedule of Rates only
>
> Total Subcontract Value: The Sum of the Scheduled Rates multiplied by quantities approved by the Contractor'

71 The respondent referred to GC6.1, which imposes the obligation to pay for the Works. It provides:

> The Contractor will pay the Subcontractor for the Works:
>
> …
>
> (b) where the Contractor accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Subcontract by the rate accepted by the Contractor for the section or item.

72 The respondent contended that this showed that the Subcontract contemplated that payment would only be made for works actually performed.

73 It contended that GC22.1 also reflected this intention. GC22.1 provides, where the subcontractor accepted a schedule of rates, the payment made will be the respondent's assessment of the value of the 'WUS performed during the period covered by the Payment Claim' calculated by reference to 'quantity of work satisfactorily carried out under the Subcontract during the period covered by the Payment Claim by the rates in Appendix 4.

74 Item 1.10 of the 'Assumptions and Exclusions' portion of Annexure 4 was also relied on by the respondent:

> This is a Schedule of Rates Quotation. Payment is to be based on actual works completed within a shift, including but not limited to [*redacted*] to accommodate the [*redacted*] and any temporary works.

75 I do not accept that these provisions lead to the consequence that the amount identified in respect of the 5-year defects liability period is only payable at the end of that period.

76 It is significant, firstly, that the payment provisions identified by the respondent are inconsistent with the nature of the 5-year defect liability obligation. The amount payable for that item in Appendix 3 is identified as a lump sum. Thus, the amount payable does not depend on the amount of remedial work actually carried out by the applicant. The applicant does not, for example, get paid more, if it has three attempts at remedying a defect in the [*Separable Portion 2 of the works*]. The passages from GC 6.1, GC 22.1 and Item 1.10 do not account for contingencies of this nature. The respondent's position appears to be that, if repair work was done during a particular shift, some payment would be made for it. Further, there is a very real sense in which actual repair work has no additional value to the respondent. A portion of [*redacted*] on which the applicant has carried out work bringing the [*redacted*] to useability has not increased in value because of the repair work.

77 The relevant item in Appendix 4 specifically says that the amount for the defects liability period is claimable 'on completion of [S*eparable Portion 2 of the works*]. This clearly refers to physical completion of that part of the works, rather than to the expiry of the 5 year defects liability period or after any physical work that might (or might not) be required to fulfil the defects liability obligation has been carried out. In the context the payment mechanisms based on a schedule of rates do not sit well with the nature of the defect liability obligation, the fact that the parties have made specific provision about the date for payment for the 5-year defects liability period is

significant. It persuades me that effect should be given to the plain language of the relevant item in Appendix 3. I consider that this best gives effect to the contract as a whole.[15]

78 I conclude that the amount identified in respect of the 5-year defects liability period is not payable at the end of that period.

79 I also note that security for the performance by the contractor of its obligations under the contract is dealt with under GC8. Item 15 of Appendix 1 provides for security to be given by bank guarantee. General Condition 8.3(b) provides for return the security on Completion and expiry of the defects liability period. If the amount identified in respect of the 5-year defects liability period was only payable at the expiry of the 5-year period, the respondent would, in effect, have additional security for the performance of the applicant's defect liability obligation.

Other matters

80 The contract did not contain a written provision dealing with interest within s 21 of the Act. Consequently, interest must be calculated at the rate payable under the *Supreme Court Act, 1979* (NT). The applicant calculated that the rate was 6.5%. The respondent did not dispute that rate.

81 The applicant asked for a determination that the respondent pay the whole of my costs. I do not consider that the conduct of the respondent falls within s 36(2) of the Act. I do not consider that it is appropriate for a determination to be made that the respondent pay more than half the costs of the adjudication.

Conclusion

82 For the reasons given above I consider that:

(a) the Direction was not effective to vary the contract by removing the 5-year extended liability period; and

(b) the amount of $[*redacted*] attributable to the 5-year defects liability period is not payable on completion of the 5-year period but on completion of [S*eparable Portion 2 of the works*], which has occurred.

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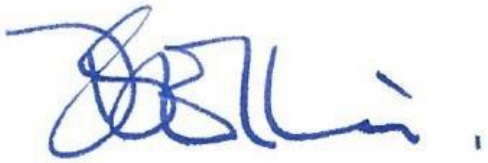
[15] *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 R 109 (Gibbs J)

83 Consequently, the respondent is liable to pay the applicant, the balance of the price under the contract, being $[*redacted*], together with GST on that sum and interest on [that sum] from 20 May 2020 to the date of adjudication. The adjudicated amount should be paid within 14 days of the date of this determination.

Date: 20 July 2020



DS Ellis
Adjudicator

Schedule 2: Confidential Information

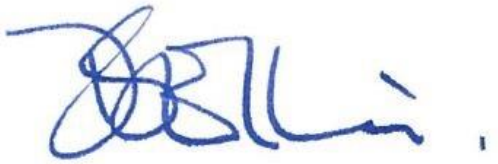
The following information is confidential:

(1) The names of the parties and their representatives;

(2) The location of the works; and

(3) Details of the claim, including the amount sought.

Date: 20 July 2020



DS Ellis
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