ADJUDICATOR'S DETERMINATION

Matter No. 81307

[Adjudicator's Ref No. 46.22.01]

IN THE MATTER of an

Adjudication pursuant to the

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

BETWEEN:

[Redacted] **(APPLICANT)**

[Redacted] **(RESPONDENT)**

ADJUDICATOR

Barry C Green LLB BSc(Hons) FRICS MAIQS CQS MCIArb PRIAdj

Registered Adjudicator No.46

13 Cassowary Chase

Wandi

WA 6167

Issued 15 February 2022

Correction 15 February 2022

ADJUDICATOR'S DETERMINATION

I, Barry Christopher Green, the duly appointed adjudicator, determine the Application for Adjudication and conclude that the:

1. The Respondent shall pay the Applicant the sum of **$212,382.60 inclusive of interest and GST**.

2. Each party must bear its own costs and the cost of the adjudication (refer to Costs of Adjudication) shall be shared between the parties equally. In respect of amounts already paid by the Parties:

    a. The parties have paid a total sum of $16,000.00 in respect of security (inclusive of GST) to the adjudicator. Each party has paid equal amounts and the final balance of the adjudicator's fees has also been paid.

    b. Pursuant to s.46(5) of the Act, I determine that the parties are jointly and severally liable to pay the costs of the adjudication in equal shares. The costs of the adjudication as set out in Schedule B.

3. There is no interest payable to be paid under the Contract by either party on overdue amounts.

4. The matters that are confidential and not suitable for publication are set out in Schedule B.

Signed…………………………………………………………

Date **15 February 2022**

Correction **15 February 2022**

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SCHEDULE A

1.0 BACKGROUND

1. The Applicant, and the Respondent, entered into a construction contract on 23 September 2020 (**Contract**).

2. The Contract works included for the provision of formwork and falsework installation, steel reinforcement installation, concrete placement and additional miscellaneous works as part of the [redacted] works at [redacted], Northern Territory (the work site).

3. The Applicant issued a payment claim to the Respondent on 25 November 2021 in the amount of $530,415.20 (including GST). The net amount claimed exclusive of GST was $482,195.64.

4. The Respondent issued a payment schedule in respect of the payment claim on 4 December 2021, in the amount of $144,330.23 (excluding GST). The net amount certified exclusive of GST was $131,209.30.

5. Section 8 of the Act relevantly provides that a payment dispute arises if a payment claim had been made under a contract and either the claim had been rejected, not paid in full or security had not been returned.

6. The Respondent partly disputed the payment claim as it did not pay the amount claimed in full.

7. At this point, for the purposes of s. 8 of the Act, a payment dispute arose between the parties.

2.0 APPOINTMENT OF ADJUDICATOR

8. The application was served on the Resolution Institute (formerly the Institute of Arbitrators and Mediators Australia) (**Prescribed Appointer**) on 10 January 2022.

9. The Prescribed Appointer appointed me to adjudicate the payment dispute and, under cover of a letter dated 13 January 2022, sent me an electronic copy of the application.

10. As registered adjudicator No.46, I accepted the appointment and notified the parties by letter dated 13 January 2022.

11. There was no disagreement to my appointment nor was there any disagreement with regards to the following:

- the Application was served on Prescribed Appointer on 10 January 2022;
- the Application was also served on the Respondent on 10 January 2022; and
- the Prescribed Appointer appointed the adjudicator to this matter on 13 January 2022.

3.0 SUBMISSIONS FROM THE PARTIES

12. The parties served the following documents on each other and on me for the purpose of having the payment dispute determined –

(a) The Applicant's written Application for Adjudication (**Application**) dated 10 January 2022 comprising the following documentation:

- Application for Adjudication;
- Annexure A – copy of payment claim and attachments;
- Annexure B – copy of payment schedule;
- Annexure C – copy of the Contract between the Parties;
- Annexure D – Statutory declaration of [SE];
- Annexure E – Statutory Declaration of [AW];
- Annexure F – Authorities relied on by the Applicant;
- Annexure G – Re-base program;
- Annexure H – Respondent's assessment of Applicant's claim for an Extension of Time claim.

(b) Response to Application for Adjudication received electronically from the Respondent comprising:

- Response submissions to Application for Adjudication (**Response**);
- Statutory Declaration of [LK];
- Statutory Declaration of [AT];
- Cases.

13. In making this decision, I have given due regard to the parties submissions and:

    (a) The provisions of the Act (including Prohibited and Implied provisions) and Regulations.

    (b) The provisions of the Contract under which the adjudication application has arisen.

4.0 JURISIDICTION IN THIS MATTER

14. Section 33(1)(a) of the Act states that an adjudicator must dismiss the application without making a determination of its merits if —

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

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

    (iia) *the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or*

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

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

    (A) *because of the complexity of the matter; or*
    (B) *because the prescribed time or any extension of it is not sufficient for another reason.*

15. I consider whether I have jurisdiction in this matter in paras 16-48 below.

4.1 Is the contract a 'Construction Contract'?

16. The Contract under which the payment dispute has arisen is described as being an agreement for the installation of formwork, falsework and steel reinforcement. The works also include concrete placement and finishing, forming openings and pits, installation of cast-in items and fixings and other miscellaneous construction related works.

17. S.6(1)(a) defines *construction work* as being, inter alia, construction of the whole or a part of any civil works, or a building or structure, that forms or will form part of land.

18. S.6(1)(f) of the Act prescribes that any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in s. 6(1)(a) including laying foundations and erecting, maintaining or dismantling temporary works is also *construction work.*

19. I note that the Respondent does not dispute that the Contract is a '*construction contract*' for the purposes of the Act.

20. In consideration of the above, I find the Contract under which the payment dispute has arisen is a *construction contract* for the purposes of the Act.

4.2 Has the Application been prepared and served correctly?

21. The Applicant served the Application for Adjudication on each party to the Contract, and the adjudicator.

22. Following request to the parties for security in respect of my fees and expenses, an equal amount of $8,000 was provided by both the Applicant and the Respondent. The total amount requested in security of my fees in this matter was $16,000.00.

23. S. 28(1) of the Act requires that an application for adjudication must be lodged and served within 65 working days, after the dispute arises.

24. On 25 November 2021, the Applicant issued payment claim 13 to the Respondent in the amount of $530,415.20 (including GST). The net amount claimed exclusive of GST was $482,195.64 (**Payment Claim**).

4.2.1 Is the payment claim a Payment Claim for the purposes of the Act?

25. S. 7A of the Act prescribes the meaning of '*payment claim*' as follows:

> ***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 under the contract; or

(b)…

(**Emphasis added**)

26. The Payment Claim is a claim made <u>under</u> the Contract for the payment of an amount in relation to the performance of construction work by the Applicant.

27. I therefore find that the Payment Claim issued by the Applicant to the Respondent on 25 November 2021 is a *payment claim* for the purposes of the Act.

4.2.2 When did the Payment Dispute arise for the purposes of the Act?

28. S. 8(a)(i) of the Act provides that a *payment dispute* arises if a *payment claim* is rejected or wholly or partly disputed.

29. Further, S. 8(a)(ii) prescribes that a payment dispute is also triggered if by the time when the amount claimed in a payment claim is due to be paid under the Contract, the amount has not been paid in full.

30. On 25 November 2021, the Applicant issued a Payment Claim to the Respondent. The Assessment Date for making the Payment Claim under the Contract is to be monthly, on the 25th day of the month (refer Item 26 of Schedule A to the Contract and relevant definitions provided in cl.1.1 of the Contract.).

31. The Respondent issued a payment schedule to the Applicant on 4 December 2021, certifying the *payment claim* in part, and it was at this point, a *payment dispute* arose for the purposes of the Act.

32. In summary, the Payment Claim was issued on 25 November 2021 and a Payment Dispute arose on 4 December 2021 (**Payment Dispute**).

33. In accordance with s. 28(1) of the Act, to apply to have the Payment Dispute adjudicated, an application for adjudication was required to be served on all parties to the matter within 65 working days after the dispute arose.

34. The application for adjudication was served on the parties and the Prescribed Appointer on 10 January 2022.

35. I therefore find that the application has been prepared and served in accordance with section 28 of the Act.

4.3 Does a Conflict of Interest exist?

36. In my letter to the parties dated 13 January 2022, I confirmed that I was not aware of any material interest in the Contract or the dispute that might give rise to a conflict of interest pursuant to s.31 of the Act.

37. Following receipt of the Response, I confirm that I am satisfied that there is no conflict of interest in this matter.

4.4 Is the Matter too complex to be determined?

38. In consideration of the documentation received, I am satisfied that I am able to fairly make a determination in the matter, and that the matter is not of a sufficiently complex nature requiring me to dismiss the application.

4.5 Does an Order, Judgment or other finding exist?

39. Also, in my letter dated 13 January 2022, I requested that the parties inform me immediately as to whether there had been any order, judgment or other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application.

40. Both the Applicant and Respondent have confirmed that there had not been any order, judgment or other finding about the dispute that is the subject of the application.

4.6 Response to Application for Adjudication

41. Pursuant to Section 29(1) of the Act, the Respondent was required to prepare a written response and serve it on all parties to this matter within 15 working days of receiving the Application for Adjudication.

42. The required date for submission of a Response in this matter was 1 February 2022.

43. The Response was served on the Applicant and myself on 1 February 2022.

44. I find that the Response has been served in time and in accordance with the requirements of section 29 of the Act.

4.7 Has a Payment Dispute arisen in respect of the Payment Claim?

45. The Applicant seeks adjudication of a payment dispute arising by reason of the Respondent's failure to pay the Payment Claim in full.

46. On 25 November 2021, the Applicant issued the Payment Claim to the Respondent.

47. On 4 December 2021, the Respondent issued a payment schedule which had the effect of rejecting, in part, the Payment Claim.

48. I am therefore satisfied that a Payment Dispute has arisen under the Contract, pursuant to s.8 of the Act, and that, I have jurisdiction to determine this matter on the balance of probabilities.

4.8 Other Jurisdictional Considerations

49. The Applicant, at [63] of the Application, acknowledges that the Respondent submitted a valid payment schedule on 4 December 2021 and, within the time for doing so under the Contract.

50. However, at [64], the Applicant contends that the Respondent has contravened the requirements of Schedule (Sic)1, Division 5, Section 6(2) of the Act as the payment schedule does not state the claim is being disputed, nor does it identify each item of the claim that is being disputed or any reasons for disputing them.

51. On the evidence, the payment schedule that was issued on 4 December 2021 by the Respondent comprised a single page noting the amount certified in respect of each of the amounts claimed by the Applicant. The 'reasons for assessment' refer to a payment summary sheet however, this does not appear to have been issued by the Respondent at the time.

52. Also, on 4 December 2021, the Applicant brought this to the Respondent's attention and on 5 December 2021, the Respondent replied "apologies, attached this time". The Respondent re-issued the same payment schedule without providing any reasons for the variance in amounts being certified.

53. In my opinion, there looks to be clear intent by the Respondent to issue the reasons for assessment and whilst the Respondent looks to have made a clerical error when issuing the payment schedule, it does not affect the outcome, that is, the amount certified is less than the amount claimed and therefore a payment dispute has arisen for the purposes of section 8 of the Act.

54. The Applicant submits, at [65] of the Application, that the Respondent has forfeited its right to make submission or offer new reasons for non-payment of the amounts claimed in the Payment Claim in its Response submissions.

55. Specifically, the Applicant submits that the Respondent failed to:

    a) pay the full amount claimed in the Payment Claim;

    b) give notice of dispute within 10 working days after receiving the payment in accordance with Schedule 1, Division 5, Subsection 6(2)(a) of the Act;

    c) failed to state the items being disputed;

    d) failed to identify each item that is being disputed; and

    e) failed to state for each of the disputed items the reasons for disputing them sufficiently in the payment schedule, and failed to respond to the Payment Claim.

56. The Applicant notes, at 66 of the Application, that there are no express provisions in the Act prohibiting the raising of new issues in adjudication, however, at law, the Respondent is prevented from introducing new reasons not included in its payment schedule and refers to the New South Wales authority of *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140.

57. The Respondent, at [3.6] of the Response, considers the Applicant's submissions irrelevant for several reasons.

58. Firstly, that Schedule 1, Division 5 are implied in a construction contract that does not have a written provision about the matter. The construction contract under which this Payment Dispute has arisen has two express provisions at Schedule B of the Contract.

59. Schedule B of the Contract provides:

a) that the Respondent is required to respond to a payment claim within 10 Business Days after receipt of the Payment Claim;[1] and

b) that the Respondent's payment is to be made in accordance with item 27(a) of Schedule A, which is 30 days from end of month.[2]

60. Secondly, the Respondent, at [3.10] of the Response, refers to Schedule B, clause 5(e)(v) which states:

> *If the Applicable Jurisdiction is the Northern Territory, each Payment Schedule is a response to a 'payment claim' for the purposes of the Act. Where [the Respondent]'s Payment Schedule states that [the Respondent] believes the claim should be rejected because the claim has not been made in accordance with the Subcontract or disputes the whole or part of the claim, the Payment Schedule is to be regarded as a 'notice of dispute' for the purposes of the Act.*

61. On the basis that the Contract contains express provisions regarding the issue of a payment schedule, I am satisfied that this has effect of displacing the implied provisions provided at Schedule 1, Division 5, Section 6 of the Act.

62. Lastly, the Applicant's reliance on the NSW authority of *Multiplex Constructions Pty Ltd*[3] is a decision made under the East Coast model. This decision affirms the requirements of s. 20 of the NSW Act which denies a Respondent the ability to include any reasons for withholding payment unless those reasons have already been included in the payment schedule.

63. However, the Northern Territory Act, under which this Payment Dispute has arisen is based on the West Coast model which has no corresponding provision. The Respondent relies on the decision of *James Engineering Pty Ltd v ABB Australia Pty Ltd and Anor* [2019] NTCA as good authority for this proposition.

[1] Clause 5(e)(i).
[2] Clause 5(g).
[3] *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140.

4.9 Request for Further Submissions

64. On 6 February 2022, I requested that the Applicant makes a further, written submission (**Information Request No.1**) in response to the items raised by the Respondent below in its Response:

    a) items 3.23 and 3.26 of the Response refers to the decision in *James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor* [2019] NTCA 7 as being authority for the proposition that a respondent can rely upon any reason for withholding payment in an adjudication response; and

    b) items 3.30 and 3.31 of the Response refers to the decisions in *ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor* [2018] NTSC 91 and *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 as being authorities for the proposition that an adjudicator who does not consider a Respondent's response will have denied the Respondent procedural fairness in the matter.

65. Specifically, I requested that the Applicant provided a short written submission as to why the authorities referred to above (which are relied upon by the Respondent) are not considered to be relevant and applicable to this matter.

66. Also, on 6 February 2022, I requested that the Applicant confirmed whether VO-14 had, in fact, now been certified and paid as advised by the Respondent at 5.63 and 5.64 of the Response (**Information Request No.2**).

67. On 7 February 2022, the Applicant confirmed in the affirmative that the claim no longer forms part of the payment dispute in this matter.

68. Also, on 7 February 2022, in response to Information Request No.1, the Applicant provided its further written submission as follows:

    CLAIMANT'S RESPONSE TO REQUEST No 1

    Cooper & Oxley Builders Pty Ltd v Steensma [2016] WASC 386

    Cooper & Oxley Builders Pty Ltd v Steensma was referred to Judicial review seeking a writ certiorari, claiming that the Adjudicator was obliged to consider a set off defence of Liquidated Damages (LDs) to a Payment Claim.

The court found that the Adjudicator had erroneously ruled that a set off amount for LDs amounted to a separate payment dispute which was outside his jurisdiction; see Page 148 of the Respondent's attachment labelled "Cases" at [17]:

> *"The adjudicator added that because of his finding that Cooper & Oxley's set off claim was a separate payment dispute which he did not have jurisdiction to determine…."*

The Court of Appeal concluded that the Adjudicator erred in not considering the set off amount in the Payment Schedule to reduce the amounts paid in response to a Payment Claim.

Therefore, the *Cooper & Oxley* case has no relevance to the issue the Respondent says to be an authority for, which is that the Adjudicator has to consider the 'new reasons' provided in an Adjudication Response where reasons for withholding the amounts claimed in a Payment Claim were not provided in a Payment Schedule.

ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor [2018]

The Claimant does not see the relevance of *ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor* [2018] to the present case either.

In that case, the Payment Schedule did contain five reasons for withholding payment, and the appeal was based on the failure of the Adjudicator to consider one of these reasons, which was again, a setoff amount for liquidated damages. Similarly to *Copper & Oxley*, the Adjudicator ruled that the counterclaim for LDs was a separate dispute outside his jurisdiction. The nature of the dispute is found on Page 164 of the Respondent's attachment labelled "Cases", at [10]:

> *"In short, Kelly J concluded that the Adjudicator misconstrued the nature of his functions under the NT Act and failed to deal with the merits of ABB's claimed set-off, <u>it having been raised as a defence to the Payment Claim.</u> This amounted to a jurisdictional error."*

It is evident that ABB Australia is irrelevant to the issue of whether the Respondent can provide new reasons in its Adjudication Response that were not provided in a Payment Schedule.

However, the Respondent's legal representatives focused on a single passage of this particular case [at 56], where the court compared various SOP Acts, and seemingly in passing said:

> *"On the other hand, the NT Act does not refer to or require a "payment schedule" and expressly requires the Adjudicator to take into account the adjudication response served under s 29 of the NT Act."*

The Respondent relies on this single paragraph to state that ABB Australia is an authority that supports that the issuance of a Payment Schedule and the giving of reasons for disputing a Payment Claim in the NT is not necessary, and that new reasons to dispute a Payment Claim can be raised in an Adjudication Response. These are certainly not the issues the court dealt with in the ABB Australia case.

Discussion

Although it is true that the words "*Payment Schedule*" do not appear in the NT Act as the court found in *ABB Australia*, in relation as to how and when a Respondent must respond to a Payment Claim, *Art 20* of the *NT Act* refers the Adjudicator firstly to the Contract, and if the Contract is silent on how a Respondent must respond to a Payment Claim, then to Schedule 1, Division 5 of the NT Act.

In the present case, the Contract between the parties is not silent on the issue. The Contract defines a Payment Schedule (Page 13 of the Contract) as "…the document to be issued by [the Respondent] in response to a Payment Claim in accordance with the provisions of Schedule B." Schedule B in the Contract mirrors the requirements of Schedule 1, Division 5 of the NT Act which requires

> *"…the Payment Schedule to be submitted 10 Business Days after the date of receipt of a validly submitted Payment Claim, to be in writing, dated and be addressed to the Subcontractor, to identify the Payment Claim to which the Payment Schedule relates, state the payment which, in the opinion of [the Respondent], is due to the Subcontractor, set out the calculations*

> *employed to arrive at the amount (including any amount [the Respondent] elects to deduct or set off in accordance with the Subcontract whether in respect of the Retention Sum or otherwise); and if the amount is more or less than the amount claimed in the Payment Claim, the reasons for the difference (and if it is less because [the Respondent] is withholding payment for any reason, the reasons for withholding payment)."*

The Contract, therefore, mandates that the Respondent provides reasons for withholding payment in its Payment Schedule.

The *NT Act* refers to the action of not paying the full amount claimed in a Payment Claim as a "Payment Dispute", and one which does not prevent the Respondent from providing an Adjudication Response in accordance with *Art 29* (as the court noted in *ABB Australia*). However, when reasons for withholding payment were not provided in a Payment Schedule, the Adjudication Response is limited to issues of jurisdiction and does not extend to providing "new reasons" for withholding payment that were not provided in the Payment Schedule. Refer Adjudication Decision NT 58.17.01 (Parties Redacted) by Mr Chris Lenz, at Paras 107 to 150, Exhibit G to the Claimant's Submissions, Pages 49 to 53.

Denial of procedural fairness

The Adjudicator relevantly asks specifically if the two cases quoted by the Respondent stand for the proposition that an Adjudicator who does not consider the new reasons provided in the Adjudication Response will have denied the Respondent procedural fairness in the matter.

Although the two cases quoted by the Respondent do not deal with Respondents who did not give any reasons for withholding payment in their Payment Schedules, the question of procedural fairness where the new reasons provided in an Adjudication Response to withhold payment are to be ignored by the Adjudicator is still highly relevant, and it needs to be addressed in the Adjudication Decision to avoid a possible challenge due to a jurisdictional error. The issue of procedural fairness has been addressed by the Claimant in detail at paragraphs 74, 75, 76, 77 and 78 of the Adjudication Application.

69. On 10 February 2022, the Respondent issued an email to myself and the Respondent requesting that it be invited to provide further submission:

(a) in response to the 'additional submission' regarding the Applicant's alleged entitled to variations for dayworks; and also,

(b) strictly in response to the Applicant's analysis of the authorities referenced in its further submissions.

70. By email on 10 February 2022, I consented to the Respondent making a further submission on the two specific items raised by the Respondent.

71. Also, on 10 February 2022, the Applicant issued the following email:

> Dear Mr Green,
>
> <u>In relation to the proposed "response" to the Applicant's submissions:</u>
>
> With all due respect, it is the Respondent who relied on the cases of Cooper & Oxley Builders Pty Ltd v Steensma [2016] WASC 386, and ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor [2018] in its submissions. Therefore the Respondent already had ample opportunity to say why these two cases are relevant to the proposition that the Respondent can provide an Adjudication Response with "new reasons" to withhold payments from the Applicant when the Payment Schedule provided none. Whether the Respondent made its case or failed to do so or not is irrelevant, the point is that the Respondent already made its submissions on the subject.
>
> The Adjudicator then asked of the Applicant to provide a short submission in relation to the Cooper & Oxley Builders and ABB Australia as quoted by the Respondent, and the Applicant did so.
>
> Therefore, the Adjudicator already has two complete submissions on the subject, one from each party.
>
> Moreover, and in its request of today, the Respondent is asking for the opportunity to respond to a perceived error in the Applicant's submissions (a paragraph of the Oxley case to do with liquidated damages set off) which is unrelated to the issue of whether "new reasons" can be included in an Adjudication Response, noting that had the Applicant been incorrect in its submissions that neither case supports the proposition that "new reasons"

to withhold payments can be provided in an Adjudication Response when the Payment Schedule provided none, that would have been the basis of the Respondent's application, and not whether the set-off amount for liquidated damages was in the payment schedule or elsewhere in the Oxley case.

The proposed 'third' submission should therefore be rejected on the basis of (a) that both the Respondent and the Applicant already provided submissions on the two cases in question, and (b) that the proposed submissions are unrelated to the issue of whether a respondent can provide "new reasons" in an Adjudication Response which were not provided in the Payment Schedule. The Respondent already misdirected the Adjudicator submitting that the two cases in question are an authority for this, without providing a shred of evidence that these two cases are even remotely related to the issue.

In relation to the "additional Submissions" made by the Applicant.

The Applicant recognises that procedural fairness dictates that the Respondent must be allowed to respond to its new submission, and does not oppose the orders made by the Adjudicator in that regard.

72. On 11 February 2022, the Respondent provided the following further submissions:

Issue no. 1 – Response to Additional Submission

1. The Claimant asserts that it is entitled to rely upon Appendix B, Table 5(a) of the Subcontract (Table 5(a)) as a source of its entitlement to claim variations.

2. Section 28(2)(c) of the Act provides that when applying for adjudication, any adjudication application must state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication. Any such adjudication application must be made within 65 working days after the dispute arises.[4]

[4] The Act, S. 28(1).

3. It follows that the Claimant cannot provide submissions adducing a new cause of action after the adjudication application has been lodged. Given the purpose of the Act and the rapid nature of the adjudication process, the mechanism for requesting further submissions can only be used for clarifying aspects of an adjudication application – not allowing further causes of action to be submitted.

4. The Adjudicator did not request any further submissions regarding the Claimant's entitlement under Table 5(a). Therefore, the Respondent respectfully submits that the Claimant's submissions regarding its entitlement under Table 5(a) have not been properly made and should not be considered by the Adjudicator.

5. The exact same issue has been considered in the context of the NSW version of the Act. Whilst the NSW version of the Act falls under the 'East Coast Model', the mechanisms regarding how further submissions may be requested and made are materially similar to those in the Act.

6. The equivalent section under the NSW Act was considered in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, where Einstein J held:[5]

> "Whether or not any of these problems may be addressed by the adjudicator requesting further written submissions from either party may become the subject of curial examination on another occasion. However it would seem unlikely that the legislature would have intended the provisions of section 21 (4) (a) and (b) to permit a radical departure from the statutory scheme described above. Rather it seems likely that these sub-sections are to be read as permitting no more than additional submissions which clarify earlier submissions: those earlier submissions being constrained in the manner above described."

7. Similarly, in *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, Sackar J expanded on the above issue and found that:[6]

[5] *John Holland Pty ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, [26] (emphasis original).
[6] *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879, [44].

> "The provision permitting an adjudicator to request further submissions from the parties (s 21(4)(a)) cannot simply be exercised by an adjudicator to transform a party's submissions which were not duly made (by reason of s 20(2B)) to submissions duly made and capable of being considered by the adjudicator."

8. Again, whilst the above authorities were considered in the context of the NSW versions of the Act, the Respondent submits they are persuasive in the context of the Act, given the similarities between the legislation in this regard.

9. In any event, it cannot be the case that the Claimant can include an entirely new cause of action by way of further submissions. If the Claimant were allowed to include substantive new reasons by way of further submissions, then the Claimant could essentially bypass the 65 working day period that it has under the Act to lodge its adjudication application and continually sneak in additional causes of action.

10. In light of the above, the Respondent respectfully submits that the Adjudicator decide that the Claimant's further submissions as to its entitlement under Table 5(a) have been improperly made and not be considered.

11. Should the Adjudicator decide that the submissions regarding the Claimant's entitlement under Table 5(a) have been properly made or should be considered, then the Adjudicator should find that the Claimant has no entitlement to claim variations under Appendix B, Table 5(a) of the Subcontract for the following reasons.

12. First, that clause is relevant to the valuation of variations "…if pursuant to Clause 15 of the Sub-Contract General Conditions, [the Respondent]'s Representative orders that any additional or substituted work shall be executed on a dayworks basis." It is not a source of entitlement to variation works. Table 5(a) is only enlivened if the Claimant is directed to carry out works pursuant to Clause 15.

13. There is no clause 15 in the Subcontract. The highest clause in the Subcontract is clause 12. Accordingly, it is impossible for Table 5(a) to ever operate given that it is conditional upon a direction from the Respondent under clause 15 (which could never be given).

14. Second, even if Table 5(a) could be enlivened somehow, it is still a necessary precondition to the Claimant having any entitlement that "[the Respondent]'s Representative orders that any additional or substituted work shall be executed on a dayworks basis." No such evidence has been provided.

15. The Respondent includes with these submissions evidence [redacted] that no such orders have been provided by the [the Respondent's] Representative (unsigned Statutory Declarations [redacted] have been provided).

16. Third, even if somehow the above two requirements were satisfied, as there is no clause 15, it is impossible to know how any such "order" should take place. The Subcontract deals with all other variations by way of a "Direction", rather than an "order". There is no power in the Subcontract for the Respondent to order variations by way of dayworks.

17. Even if such an order were given, the definition of Direction includes any "order". Accordingly, the issuance of an "order" would enliven the operation of clause 7.4(d). As set out in in the adjudication response, that clause requires that if the Claimant received a Direction (which includes an order), it must provide written notice that compliance with such a direction or order would constitute a Variation. If it fails to do so, then it acknowledges that it has no entitlement to any additional costs under the same clause.

18. Again, the Claimant has not provided any evidence of its compliance with clause 7.4(d).

19. In light of the above, the Respondent respectfully submits that the Claimant has no entitlement to claim any additional costs under Table (5)(a).

Issue no. 2 – Analysis of authorities

20. The crux of the Claimant's position is that *Cooper & Oxley*[7] and *ABB Australia*[8]/*James Engineering*[9] should not be relied upon because the facts of those cases can be distinguished as follows:

[7] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386.
[8] *ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor* [2018] NTSC 91.
[9] *James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor* [2019] NTCA 7.

(a) in those cases, the respondent provided a reason for withholding payment in its payment schedule, but the adjudicator failed to consider the reason in the adjudication response; and

(b) the Court did not address the issue of whether new reasons not included in a payment schedule can be raised in an adjudication response;

(c) the Act requires that an adjudicator consider the terms of the Subcontract. The Subcontract requires that the Respondent provide a payment schedule and because it has not done so, it cannot raise any reasons now other than those which affect the Adjudicator's jurisdiction. It says those issues were not considered in the above authorities.

21. The above interpretation is contrary to the exact findings in each authority so it is necessary to clarify each authority to avoid any incorrect information being provided to the adjudicator.

22. In *Cooper & Oxley*, Cooper & Oxley Builders Pty Ltd (respondent) entered into a contract with AM Land Pty Ltd (claimant). The claimant made two claims for progress payments under the contract which remained unpaid by the respondent. The respondent did not respond to the payment claims with a payment certificate pursuant to the contract.

23. Notwithstanding that it had not provided a payment certificate as required by the contract, in its adjudication response, the respondent asserted that it was entitled to set off liquidated damages and damages for rectification work against any amount claimed by the claimant under the contract.

24. The claimant applied to have the dispute adjudicated under the WA Act. The sections relevant to that judgment were materially identical to those in the Act.[10]

25. The adjudicator determined that each of the progress claims and the asserted set off gave rise to separate payment disputes under the Act and that he did not have the jurisdiction to adjudicate more than one payment dispute simultaneously.

[10] Above n 8.

26. The adjudicator therefore only considered the first payment claim and found in favour of the claimant.

27. Subsequently, the claimant referred the second payment claim to adjudication. The adjudicator determined the payment dispute in favour of the claimant and refused to consider the respondent's set offs on the basis that the defence put forward occurred after the date at which liability for the claimant's payment claim was to be determined.

28. The respondent commenced an application for certiorari to quash each adjudication determination on the grounds of jurisdictional error. The court held that the adjudicator had made a jurisdictional error in both determinations and granted the respondent's application for certiorari to quash both determinations.

29. Le Miere J held that in the first determination the adjudicator erred in deciding he could not concurrently consider the set off claim. Sections 27, 31(2)(b) and 32(1)(a)(ii) of the WA Act required the adjudicator to take into consideration the respondent's response, including the merits of a counterclaim or set off, in reaching a determination. Almost identical obligations exist at 29, 33(1)(b) and 34(1)(a)(ii) of the Act.

30. His Honour clarified that the respondent raised the set off as a defence to the payment claim and therefore, the adjudicator was required to consider the set offs as part of the adjudication response:

> "A respondent to an application for adjudication may use its counterclaim or set off as a defence to the claim made against it. The adjudicator is required to take into account the respondent's response, including the merits of any counterclaim or set off, in reaching his determination: Alliance v James [50] - [76]. The adjudicator erred by failing to consider Cooper & Oxley's claimed set off which it raised in its response as a defence to AM Land's claim."[11]
>
> 31. For the first adjudication determination, it was found that the adjudicator erred in finding he was precluded from considering the set off.

[11] Above n 7.

32. As for the second adjudication determination, his Honour clarified that the scope of section 31(2)(b) of the WA Act requires the adjudicator to determine whether any party to the dispute is liable to make a payment. This extends to all antecedent liabilities arising up until the date of determination. The respondent's set off defence was raised after the adjudication application but prior to determination. The adjudicator erred in failing to consider the set off.

33. Specifically, his Honour held at [33] and [34] that:

> “Section 31(2)(b) of the Act requires the adjudicator to determine whether any party to the payment dispute is liable to make a payment, not to determine whether any party was at some anterior time liable to make a payment. Furthermore, as counsel for Cooper & Oxley, Mr Ellis, submitted the legislature cannot have intended that an adjudicator should ignore an event which has occurred after the payment dispute first arose, such as payment of part or whole of the claim or compromise of the payment dispute. Nor should be imputed to the legislature an intention that evidence about liability which emerges after the date of the dispute is not to be considered by the adjudicator. In determining liability as at 4 January 2016 rather than at the time the determination was made on 24 February 2016, the adjudicator misunderstood his function under s 31(2)(b) of the Act and made a jurisdictional error. The adjudicator's error significantly affected the determination because it led the adjudicator to exclude or not take into account material relevant to determining the amount of Cooper & Oxley's setoff as at 24 February 2016. For example, the adjudicator had no regard to Cooper & Oxley's claim for liquidated damages which Cooper & Oxley asserted to be $891,488 as at the date of determination.
>
> The adjudicator erred by failing to have regard to Cooper & Oxley's defence in their response. The effect of s 27, s 31(2)(b) and s 32(1)(a)(ii) is that the adjudicator must have regard to the defence of set off put forward by Cooper & Oxley in its response. The adjudicator erred in disregarding parts of the response which he described as 'subsequent additional information'. That was information that had not been adverted to in the 11 December 2015 email notwithstanding that it put forward matters which Cooper & Oxley claim to be entitled to set off against AM Land's claim as at the date of determination. In doing so, the adjudicator

misunderstood his function and the nature and extent of his powers. This error was a jurisdictional error."

34. The reasoning in Cooper & Oxley was adopted by the NT Supreme Court in *ABB Australia* and that decision was upheld by the NT Court of Appeal in *James Engineering*.

35. Whilst it is true that in *James Engineering*/*ABB Australia* the respondent in those cases did provide reasons for withholding payment in its payment schedule, that factor was completely irrelevant to each courts' reasoning.

36. The NT Supreme Court and Court of Appeal both decided following *Cooper & Oxley* that an adjudicator must consider all aspects of an adjudication response and that the issuance of a payment schedule or not is irrelevant to that obligation.

37. Finally, whilst the contract states that the Respondent must provide reasons for withholding payment, there is no consequence if it fails to do so. Both the WA and NT[12] Acts contain provisions which imply terms that a respondent must provide reasons for withholding payment. Again, there are no consequences for a respondent if no reasons are provided.

38. That is because, any payment dispute crystalises upon when a respondent fails to provide payment, not when a notice of dispute in response to a payment claim (or a payment claim) is issued.13

39. *Cooper & Oxley* and *ABB Australia/James Engineering* make it pellucidly clear that an adjudicator is required to take into account any set off or reason for withholding payment that occurs prior to the filing of the adjudication response.

40. That requirement flows from section 34(1)(a) of the Act which requires an Adjudicator to take into account any response and affirmed in *James Engineering*:[13]

[12] The Act, Schedule 1, Division 5, Section 3(f) and (g).
[13] *James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor* [2019] NTCA 7, [34]; *ABB Australia,* [40] to [41]; [43] to [44].

> "Her Honour noted the similarities of the relevant statutory provisions, including the requirement for a respondent to provide its response within 10 days giving details of any rejection or dispute of the payment claim together with other prescribed information, the requirement that an adjudicator take into account any response so provided and determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and, if so, determine the amount to be paid, and the date on or before which the amount must be paid.
>
> Though the error in the present matter was of a different kind to that in Cooper & Oxley her Honour considered that both adjudicators misunderstood the nature of the contention being made by their respective respondents. That led both to fail to take into account a claimed defence by way of set-off to the claims of the respective applicants. In each case the respondent was seeking to raise its set-off claim as a shield and not a sword."

41. There is no restriction as to what part of a response cannot be considered by the adjudicator under the Act or the Subcontract. That interpretation is the crux of Cooper & Oxley and ABB Australia.

42. Therefore, the wording of the Subcontract relied upon by the Claimant or the Schedule 1, Division 5, Section 6(2) have no bearing upon what reasons for withholding payment or set off can be raised by the Respondent in the Adjudication Response.

73. In the timeframes prescribed by the Act, my view is that both parties have been afforded the opportunity to make extensive further submissions regarding the subject of 'new reasons', (and also, authorities relied upon by each party) so as to ensure that both parties are provided with procedural fairness and natural justice in this matter.

74. I have considered the further submissions put forward by each party in this matter.

75. The decision in *ABB/James Engineering Pty Ltd* is a Northern Territory decision and hence, is clearly relevant to this jurisdiction (notwithstanding the reasoning in the WA decision in *Cooper* having been adopted by the NT Court).

76. Further, whilst the decisions in both *James* and *Cooper and Oxley* largely concerns the subject of valid set-off, the core of those decisions turn on the requirement for the adjudicator to afford procedural fairness to the parties.

77. There is an inherent obligation placed upon an adjudicator to take into account any response put forward by the Respondent in an adjudication and for that reason, I accept the arguments put forward by the Respondent.

78. In my view, the Applicant's reference to previous NT adjudication matter 58.17.01 does not provide adequate logic to deny the Respondent the ability to provide its reasoning for withholding payment in this matter and in doing so, I feel that this would undermine the cornerstone of procedural fairness and natural justice to all parties in this matter.

79. The function of an adjudicator is to make a decision based on the materials provided by the parties to the dispute. Further, an adjudicator is to make a *bona fide* attempt to comply with the essential requirements of the Act, or if there has been a substantial denial of procedural fairness, an adjudication will be reviewable.[14]

80. The essential requirements of the Act, and procedural requirements of the adjudication process, are such that, *inter alia*, there must be an Application for Adjudication and a corresponding Response to the Application for adjudication.

81. It follows therefore that if the Respondent is denied the ability to provide a Response (or indeed is limited to providing a Response constrained only to jurisdictional submissions) then, it will be denied procedural fairness and the ability to put forward its reasoning for withholding payment.

82. In my view, this would be contrary to the object and intent of the Act which is to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts.

[14] *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 334 FLR 314, 18.

83. On that basis, and in absence of the NT Act containing an express provision denying the Respondent the ability to include any reasons for withholding payment unless those reasons have already been included in the payment schedule, and also, the express provisions of the Contract and the relevant authorities put forward by the Respondent, I shall proceed to consider both the Application and Response submissions (and associated reasoning and evidence) received in this matter.

4.10 The Application & Response

84. The line items included within the Payment Claim, which are the subject of the Payment Dispute, can be reconciled as follows:

Claim	Claim Description	Amount claimed	Amount certified	Amount in Dispute
VO14	Truss Sheeting at [site]	$10,987.50	-	$10,987.50
VO15	[Redacted] Infills	$58,909.09	-	$58,909.09
VO35	[Redacted] Infill Design Change	$4,428.50	-	$4,428.50
VO41	Later Delivery of Pour 6	$4,312.50	-	$4,312.50
VO79	Provision of Spotters	$8,118.75	-	$8,118.75
VO90	Disruption claim	$294,710.00	-	$294,710.00
	Total (ex GST)	$381,466.34	-	$381,466.34
	GST	$38,146.63	-	$38,146.63
	Total (inc GST)	$419,612.97	-	$419,612.97

85. I shall consider the merits of the Application in respect of the disputed variation claims which form the basis of the Payment Claim.

5.0 MERITS

5.1 Contract Provision for Varying the Works under the Contract

86. As item 86 of the Application, the Applicant submits that the variations relate to changes in scope encountered during the execution of the project and comprise a mixture of changes instructed by the Contractor during the execution of the scope of works which:

(a) are not recognised as changes;

(b) are works instructed as urgent and signed-off on day-sheets to be later rejected for alleged non-compliances with notification requirements, and

(c) alleged non-compliances with pre-conditions for entitlement to a claim.

87. It is necessary to analyse the appropriate mechanism under the Contract for varying the works to be performed.

88. Clause 7.4 of the Contract provides:

7.4 Variations

(a) [The Respondent] may at any time and from time to time direct the Subcontractor to vary the WUS by any one or more of the following (provided that the Variation requires work of a character and extent reasonably contemplated by, and capable of being carried out under, the provisions of the Subcontract):

(i) increase, decrease or omit any part of the WUS;

(ii) change the character or quality of any material or work;

(iii) change the levels, lines, positions or dimensions of any part of the WUS;

(iv) change in the sequence and timing of any activities comprising the WUS;

(v) execute additional work; and/or

(vi) demolish or remove material or work no longer required by [the Respondent] or the Client;

and any such Direction shall constitute a “Variation” for the purposes of this Subcontract.

…

(d) If the Subcontractor has received a Direction from [the Respondent] which is not stated to be a Variation but which the Subcontractor believes to be a Variation, then the Subcontractor shall so advise [the Respondent] by notice in writing prior to the Subcontractor commencing the implementation of that Direction. The Subcontractor agrees and acknowledges that its compliance with the provisions of this subclause 7.4(d) shall be a condition precedent to any entitlement it has (whether under the Subcontract or otherwise at

law) to recover any additional costs, any adjustment in the Subcontract Sum or an extension of time under clause 6.2 pursuant to the relevant Direction (and [the Respondent] shall not be liable in respect of any Claim by the Subcontractor in relation to the Direction in the event of such non- compliance)."

89. The Applicant, at item 88 of the Application, considers that all variations submitted were agreed to by the Respondent's site personnel but later rejected by its contract administration personnel for generally being non-compliant with conditions precedent to making a variation claim under the Contract.

90. At item 89 of the Application, the Applicant submits that this is likely due to a deficiency in the Contract which does not provide for the event of 'urgent' variations to be carried out 'immediately, or in a period shorter than 10 days.

91. The Applicant's reference to a period shorter than 10 days look to be in the context of clause 7.5(b)(i) of the Contract which obliges the Respondent to respond within 10 business days of having received a written notice of intention to claim from the Applicant.

92. In summary, the Applicant suggests that the prescribed timeframe for notification of (and response to) variations is not an adequate provision for dealing with 'urgent works' as they are required to be undertaken.

93. In a practical sense, the effect of adhering to the time requirements of clause 7.5 would require the Applicant to stand down each time a variation was requested. This in turn, would mean the Respondent would become increasingly frustrated by the Applicant's conduct and would inevitably have led to further delays.

94. The Applicant, at 93 of the Application provides details of how the works which relate to the variations have been recorded and submits that in order to comply with the approval process in clause 7.5, day sheets signed by the Respondent on the day (the works were undertaken) meet the following notification requirements by:

    a) notifying the Respondent of the occurrence of the event giving rise to a claim in compliance with Clause 7.5(b)(i)(A) and (B), which require the claimant to give notice within 2 and 5 days;

b) providing notice of the claimant's intention to lodge a claim also in compliance with Clause 7.5(b)(i)(A) and (B), which require the claimant to give notice that the claimant intends to make a claim within 2 and 5 days;

c) informing the Respondent of the nature of the claim in compliance with clause 7.5(b)(i)B), and within 5 days;

d) providing the entire quantum, calculated as "no of hours x $75.00 per hour" (Schedule B) in compliance with clause 7.5(b)(ii), which require the claimant to provide the quantum of the claim within 10 days;

e) the signature of the Respondent confirming the reception of all formal notices; and

f) the signature of the Respondent also constitutes the completion of the assessment that works have been carried out and notice of acceptance of the claim, in accordance with variations clause 7.4(h)(iv).

95. In the alternative, the Applicant pleads, at 96, that since the minimum time for review of a potential claim/variation is 10 days, I should find that the Contract does not contain any provisions for the carrying out of urgent variations instructed by the Respondent.

96. In that instance, the process implied into the Contract by the conduct of the parties is to formalize the agreement to carry out variations by the recording of the parties' agreement in day sheets prepared by the Applicant and subsequently signed off by the Respondent.

97. Essentially, the Applicant argues, at 98 of the Application, that by inference of the conduct by the parties, each signed day sheet formed an enforceable agreement that contains offer and acceptance, consideration and the certainty of cost in exchange for the work performed. For this proposition, the Applicant cites the decision in *Geebung Investments Pty Ltd v Varga Group Investment No 8 Pty Ltd* (1995) 7 BPR 14,441 14,570.

98. The Applicant considers, at 100 of the Application, that the re-assessment by the Respondent's commercial team modifying or abrogating non-convenient clauses to avoid payment after the works have been completed is unreasonable, frivolous, and amounts to vexatious conduct.

99. At items 101 to 107 of the Application, the Applicant relies on the doctrine of estoppel and the authority of *Commonwealth v Verwayen* (1990) 170 CLR 394 and the syllogistic construction that:

a) the Applicant complied with the directions issued by the Respondent to carry out the work in the variations in Payment Claim no.13; and

b) on the basis that the day-sheets signed by the Respondent's construction team on the same day, were sufficient evidence that a variation had been instructed by the Respondent; and

c) the Respondent's site construction team led the Applicant to believe that all the Applicant had to do to obtain compensation for the additional works instructed was to submit a request for variation and payment. The existence of this agreement was later denied by the Respondent's commercial team; and

c) the contract does not contain a mechanism for the Respondent to instruct urgent variations within 10 days, and the Applicant relied on the assumption, which the Respondent's construction personnel induced him to hold, that the signed day-sheets were sufficient proof that a variation had been ordered; and

d) the Respondent's construction team created the assumption that the Applicant would be compensated if it carried out the works and its commercial team is estopped from denying its correctness.

100. The Respondent argues, at item 5.9, that there is no process that was implied into the Subcontract that 'day sheets' constitute a variation, because:

(a) the Contract contains a detailed mechanism for claiming variations and there is no basis for the Applicant to have departed from it;

(b) the execution of a day sheet, is at best, a record that certain labour was on Site. It is not record of a direction to carry out variation works under clause 7.5(a);

(c) the Applicant has not provided any evidence which shows that the Respondent agreed to direct variations by way of signing day sheets; and

(d) the Applicant has not demonstrated a term has been implied into the contract by the conduct of the parties.

101. Regarding item (a) above, the Contract clearly provides a detailed mechanism for claiming variations. The Respondent has requested the Applicant to execute additional work which falls within the scope of clause 7.4(a).

102. The Applicant has completed the work directed by the Respondent and utilized the day sheet as method of recording time spent by its personnel and resources in executing the additional work and has provided day sheets to the Respondent for signature.

103. There is no argument presented by either party that the work, the subject of the variation, has not been undertaken and the production of a day sheet which has been signed by the Respondent supports that the work (or at least, hours expended in performing the work) has, in fact, been undertaken by the Applicant.

104. I accept that a day sheet is a record of labour and resources deployed and not a direction in itself to undertake the work however, I turn to the signing of the day sheets as being sufficient evidence of agreement that the work has been undertaken and that it was intended by the Respondent to pay for the additional work as a variation.

105. The contrary position would be that the Respondent would not sign day sheets for works which were within the contract scope and therefore, by signing the day sheets, the Respondent was aware and had intended that the additional works would be paid for as a variation to the contract scope which the Applicant has been engaged to perform.

106. In turn, the execution of the day sheets by the Respondent, in my view, meets the evidential requirements placed on the Applicant as raised by the Respondent above in item (c).

107. In summary, on the balance of probabilities, I am of the opinion that the conduct of the parties in directing the additional works, recording the labour and resource time deployed in executing the additional works and also, the Respondent acknowledging and signing for the completeness of those additional works means that those works must be valued and payment must pass to the Applicant for those additional works.

108. For the above reasons, I find that the additional works are a variation to the original contract scope and I shall now consider the facts and quantum associated within each variation claim.

5.2 Disputed Variation Claims

5.2.1 VO-14 Truss Sheeting [redacted]

109. Claim VO-014 relates to a claim for additional labour required as a result of discrepancies in design drawings issued to the Applicant by the Respondent.

110. The amount claimed by the Applicant in respect of claim VO-014 was $10,987.50 (exc GST).

111. At item 5.60 of the Response, the Respondent asserts that the Applicant had not satisfied the requirements of clause 7.4(d) of the Contract and therefore, was not entitled to any payment for the works.

112. Notwithstanding this, the Respondent confirms, at item 5.63, that the claim was approved in full on 23 December 2021 as a 'gesture of goodwill' and it was subsequently paid on 31 January 2022.

113. As part of Information Request No.2, I requested that the Applicant confirm that this, was in fact, correct and valid and no longer formed part of the payment dispute in this matter.

114. On 7 February 2022, the Applicant provided the following response in relation to my request:

> The Claimant issued its Application for Adjudication for Payment Claim No 13 on 10 January 2022 when VO-14 remained unpaid and in dispute.
>
> The Respondent had since advised that it has reconsidered its position and paid VO-014 (Truss Sheeting at NT Port) in full on 31 January 2022 as part of Payment Claim No.14, or one day before the Respondent issued its Adjudication Response.
>
> This claim therefore no longer forms part of the payment dispute in this matter.

ADDITIONAL SUBMISSION - Variations for Dayworks:

> The Claimant refers the Adjudicator to Pages 94 and 95 of the Contract, which are self-explanatory on the issue of dayworks which shall be paid on presentation of day sheets, provided these confirm the date, names of personnel, the start and finish time and the total quantum of hours worked.
>
> The Claimant (and the Respondent) submissions missed the fact that "Variations for Dayworks" are covered in the Contract, and that the Contract provides that there is no need for the Claimant to give notice of a variation or notice of claim in accordance with Clauses 7.4 and 7.5, nor price variations or seek approval before carrying out the works. The Contract actually provides for express payment for all daywork variations which have been referred to the Adjudicator. The Respondent therefore erred in assessing variations for dayworks in accordance with the provisions in Clauses 7.4 and 7.5, and dayworks variations must be assessed and paid instead in accordance with the provisions in Schedule B of the Contract…

115. The Applicant included a screenshot of Schedule B Table B5 and B6 of the Contract in support of its response to my request.

116. Acknowledging that the Applicant has claimed an amount for VO-014 in its Payment Claim, and that, the Respondent has now certified and paid that amount in full, I do not feel it necessary to reassess or revalue the claim (as the Applicant suggests).

117. I consider that there is no longer an amount in dispute relating to this variation claim and hence, it is therefore not necessary for me to making a finding or determination relevant to VO-14.

118. I find that there are no further amounts payable by the Respondent in respect of this claim.

5.2.2 VO-15 [Redacted] Infills

119. On 5 April 2021, the Applicant issued VO-15 – [Redacted] Infills which is for the difference in contract price for the 'Soffit Deck – Infill piece around each [redacted] ('infill') due to the following reasons:

    a) [redacted].

    b) [redacted].

    c) due to wide gaps posing a safety issue, the spacing of the timbers in the [redacted] infills was instructed on the site to be closer than what is shown on the tender drawings, so additional timber bearers were required.

    d) The Statutory Declaration of [AW] confirms that [AW] priced the works at tender. He states in Annexure E (at 27) of the Application that at the time of tender, [AW] was not sure of the size of the [redacted] on the drawings and he consulted with the Respondent's tender manager representative, [LP].

       [AW] also confirms that he had priced [redacted] infills at 10m2 but was then directed to change pricing to allow for a small [redacted] infill of 4m2 which is what was allowed for in the tender schedule.

120. The amount claimed by the Applicant in respect of VO-15 is $58,909.09 (exc GST).

121. On 20 July 2021, the Respondent issued its response rejecting variation VO-015 (correspondence ref. 6916-LTR-MCD-PK014-016). A copy is provided at Exhibit D to the variation claim.

122. The Respondent's letter, prima facie, relies on the scale and cost of the variation exceeding reasonable assessment preventing the Respondent the opportunity to scrutinise.

123. As an observation, the Respondent does not reject the variation on the basis of entitlement or whether the work has in fact been completed only that it does not agree with the quantum and how it has been calculated by the Applicant.

124. The Statutory Declaration of [SE] at Exhibit A of the Application states:

"When I had a look at the letter of rejection, I realized that [the Respondent] acknowledges that the variation is meritorious and justified due to the deficiencies in the contract drawings; however, even after making that admission [the Respondent] rejected the variation…".

125. In its Response, at 5.101, the Respondent contends that the Applicant has no entitlement to the amounts claimed for VO-15, because:

    (a) the Respondent has not directed the Claimant to change the nature or scope of the works;

    (b) the Claimant has failed to provide any notice under clause 7.4(d); and

    (c) the Claimant has failed to adequately substantiate the costs that it has allegedly incurred.

126. In respect of items (a) and (b) above, I have dealt with these contentions above in paras 86 to 108 inclusive.

127. In respect of item (c) above, the Applicant's basis of calculation is based upon the quantity of [redacted] infills increasing from 88m2 to 191m2 and the Applicant has provided details of the size of [redacted] infills to the Entry and existing bridges as part of the variation Claim submission dated 25 November 2021 which, when read in conjunction with the [AW] Statutory Declaration, I am satisfied that sufficient evidence has been provided to demonstrate the additional quantity increases.

128. Regarding the applicable unit rate, the Applicant has substituted the original contract rate of $720 each for the 'old [redacted] infill rate' in favour of a rate of $240.86/m2 which is based upon the actual number of man hours expended (248.7 man hours).

129. The Applicant, in the variation Claim provides its reasoning for its departure from the original contract rate as being caused by the size of the infills being larger than those tender for, the added requirement for underslung bearer being a new requirement and also, the requirement to use more timber that what was provided for on the drawing due to infill timber spacing requirements – all in all, making for a more labour intensive and complex type of construction.

130. In view of the above, I find that, on the balance of probabilities, the Applicant is entitled to be paid for the quantity increases and adjustment to the original contract unit rate for the [redacted] infill works. The total hours claimed by the Applicant is 613.51 hours x $75/hr (which is a contract hourly rate provided at Schedule B of the Contract) plus an amount of $12,895.20 in respect of materials utilised.

131. Accordingly, I determine the amount of **$58,909.09 (excluding GST)** is to be paid by the Respondent to the Applicant in respect of VO-15.

5.2.3 VO-35 [Redacted] Infill Design Change

132. On 19 May 2021, the Applicant asserts that the Respondent's construction personnel instructed the Applicant to install additional deck sheeting between gridline E and F, and to modify the design of [redacted] infills at grid line F.

133. VO-35 is variation claim which relates to previous variation claim VO-15.

134. The Applicant submits that it carried out the additional works on [redacted] infills on the basis it was a variation, and on the 19, 21, and 22 May 2021, the Respondent's site staff signed the necessary daywork sheets 156, 158 and 159 (Exhibit E to the Variations Claim in Annexure A), so a variation could be raised for the additional works.

135. On 21 June 2021, the Applicant submitted variation VO-35 in the amount of $4,428.50 (exc GST).

136. On 20 July 2021, the Respondent rejected variation VO-35 (Variations Claim-Exhibit F) on the basis that the Applicant had not satisfied the conditions precedent for the purposes of making a claim as set out in Clause 7.4(h)(i) and (ii); and Clause 7.5 of the contract, and that, Clause 7.5(b)(i)(A), required the claimant to provide "written notice of an event which gives rise to a claim within two business days".

137. The Statutory Declaration of [SE] disagrees that any notice was necessary because "…*[the Applicant] did not find an event that [the Respondent] was not aware of, [the Respondent] was fully aware of the event because it was [the Respondent] who instructed [the Applicant] to do the work.*"

138. Further [SE] states:

> *"And if any notice was necessary, the daywork sheets 156, 158 and 159 constitutes such notice, and the [Respondent's] signatures on the daywork sheets for the works in the variation constitutes acknowledgment of that notice and approval by [the Respondent] to carry out the works and certification that the works were carried out."*

139. The Respondent, at 5.121 of the Response, contends that the Applicant has no entitlement to the amounts claimed for VO-35, because:

    (a) the Respondent has not directed the Applicant to change the nature or scope of the works;

    (b) the Applicant has failed to notify the Respondent of the claim within the timeframes mandated under the Subcontract; and

    (c) the Applicant has not provided the requisite notice under clause 7.4(d).

140. This claim is a further design change relating to the [redacted] infill works which are the subject of VO15. I have already made a determination regarding VO-15 above and in that determination have dealt with the Respondent's reasoning regarding entitlement.

141. Notwithstanding that, the Respondent also raises the issue that the Applicant refers to correspondence issued to the Respondent on 19 May 2021 as constituting the direction to install the additional deck (which is the subject of this variation claim VO-35, and that, the correspondence relied upon has not been provided as evidence within its Application for Adjudication submission.

142. In this matter, I am not bound by the rules of evidence however, although the Applicant inadvertently has omitted to include the correspondence of 19 May 2021 which it says, gave rise to a direction, the alternative rely-upon evidence relating to this matter is the day sheets which have, in fact, been signed by the Respondent as the work having been undertaken.

143. For reasons already stated, I take the day sheets to be evidence of the direction having been given by the Respondent, and the signatures by the Respondent as

agreement that the labour hours claimed by the Applicant are approved as true and valid.

144. In view of the above, I find that, on the balance of probabilities, the Applicant is entitled to be paid for the further design change for the [redacted] infills. The total hours claimed by the Applicant is 59 hours x $75/hr (which is a contract hourly rate provided at Schedule B of the Contract).

145. Accordingly, I determine the amount of **$4,428.50 (excluding GST)** is to be paid by the Respondent to the Applicant in respect of VO-35.

5.2.4 VO-41 Late Delivery of Pour 6 B-Layer Rebar Causing Delay

146. On 21 June 2021, the Applicant issued VO-41 for payment of the standby hours associated with late delivery of steel reinforcement and concrete.

147. The amount claimed by the Applicant in respect of VO-41 is $4,315.50 (exc GST).

148. At item 66 of the Statutory Declaration of [SE], [SE] confirms that the contract scope allocation is such that the Applicant supplies labour and that all of the steel reinforcement bars and concrete is supplied by the Respondent.

149. [SE] confirms that the B-layer steel reinforcement bars which were to be supplied free issue by the Respondent were not available for the [redacted] works, and the Applicant's work crew had to stand down and sit and wait until the Respondent delivered new ones to the site.

150. The standby hours lost due to the late delivery the steel bars on time, were notified in the daywork sheets 178 and 179 which, in turn, are signed by the Respondent's construction team.

151. The Applicant contents that it is obvious that the Respondent was fully aware of the delay because it rushed to get the missing reinforcement bars and that, it is also apparent that the Respondent was aware that the Applicant would be making a claim when the daywork sheets were submitted.

152. It is also suggested that the Respondent accepted that the claim was a valid claim when it signed the daywork sheets.

153. The Respondent, at 5.142 of the Response, submits that the Applicant has no entitlement to the amounts claimed for VO-41, because:

(a) the Respondent has not directed the Applicant to change the nature or scope of the works;

(b) the Applicant has failed notify the Respondent of the claim within the timeframes mandated under the Subcontract; and

(c) the Applicant has not provided the required notice under clause 7.4(d).

154. For reasons set out above, the Respondent's submissions regarding direction and notification of the variation have already been considered and in this instance, the signing of day sheets provides a valid basis for the cost associated with VO-41.

155. The contract scope allocation of the Respondent providing all bulk steel reinforcement and concrete materials on a free issue basis to the Applicant would essentially mean that the risk of timely delivery is outwith the control and risk allocation borne by the Applicant at the time of entering into the Contract.

156. Applying that reasoning, it therefore seems illogical for the Applicant to bear the cost of standby labour caused by late material deliveries for which the Respondent remains responsible.

157. In view of the above, I find that, on the balance of probabilities, the Applicant is entitled to be paid for the standby labour hours associated with VO-41. The total hours claimed by the Applicant is 57.5 hours x $75/hr (which is a contract hourly rate provided at Schedule B of the Contract) which equates to $4,312.50.

158. Accordingly, I determine the amount of **$4,312.50 (excluding GST)** is to be paid by the Respondent to the Applicant in respect of VO-41.

5.2.5 VO-68 Stage W9 Delay Due to Respondent Constructing 300t Crane

159. The Respondent, at 5.144 to 5.154, of the Response provides submissions relating to VO-68 which appears to relate to Stage W9 Delays caused by the Respondent's 300t Crane.

160. However, I note from the Applicant's Application submissions and also, the Payment Claim that VO-068 does not appear as a variation which forms part of this Payment Dispute. To that extent, it is unclear as to why the Respondent has elected to make submissions regarding this variation claim.

161. Notwithstanding this, I make no determination in respect of VO-68.

5.2.6 VO-79 Provision of Spotters

162. The Applicant's claim in respect of VO-79 concerns the provision of spotters provided to the Respondent to assist with the supervisions and delivery of free issue concrete provided by the Respondent.

163. The amount claimed by the Applicant is $8,118.75 (exc GST).

164. Responsibility for the supply of concrete falls to the Respondent and as such, the Applicant argues that the provision of spotters should also be a cost borne by the Respondent.

163. The Statutory Declaration of [SE] submits that, in principle, the requirements in the contract are that the Respondent takes care of safety for "their" works on the site, and the Applicant takes care of the safety of its personnel working in their designated work area.

163. When it comes to spotters, the Contract provides that the Applicant must provide spotters to control the movement of personnel, vehicles, plant, and other pedestrian traffic when moving large plant items of equipment such as the concrete pump, excavator, and when the claimant's trucks enter or exit the work areas.

164. Prima facie, this dispute looks to have arisen as a result of the Respondent's request to the Applicant to provide spotters to supervise the delivery of the concrete, a task which the Applicant argues is outside of its contracted scope of works.

165. [SE] argues that the battery limit between the Applicant and Respondent's works is the concrete hopper or bucket where concrete is poured, and that it is only responsible for the concrete after it enters the hopper, which then goes into its pump.

166. [SE] also contends that the Respondent's request to provide spotters to supervise "their" concrete trucks as they delivered the concrete into the hopper is a variation to the agreed scope of works.

167. At, item 5.170 of the Response, the Respondent submits that there is a lack of particulars provided by the Applicant in support of its claims, and in any event, it was always within the Applicant's scope of work to provide spotters because:

   a) the Applicant is required to provide spotters for control of vehicles interacting with the Contract works;

   b) the Applicant is under an obligation to provide all labour and manage the delivery of materials associated with the subject works; and

   c) in the event there is an ambiguity as to the Applicant's obligations set out in Appendix A, it will be deemed to be the responsibility of the Applicant.

168. I refer to Appendix A (Scope of Subcontract Works) of the Contract which, at section A2.6.1 (General & Preliminary Requirements), sets out the items to be supplied and obligations to be performed by the Applicant.

169. A2.6.1(n) provide that the Applicant shall provide adequate spotters to control vehicle/plant/pedestrian interaction for the Subcontract Works in accordance with the pricing schedule.

170. In this instance, the Contract looks to prescribe a battery limit between the supply of concrete by the Respondent and the provision of spotters by the Applicant. This is logical battery limit given that the placement of concrete forms part of the Subcontract Works and therefore is within the contract scope to be performed by the Applicant.

171. On that basis, I find that the provision of spotters forms part of the Subcontract Works and should be provided by the Applicant. Therefore, in my opinion, there is no basis of entitlement for this claim.

172. Accordingly, I determine the amount of **$Nil** in respect of VO-79 as being due and payable by the Respondent to the Applicant.

5.2.7 VO-90 Disruption Claim

173. The Applicant's variation claim VO-90 is for an extension of time (**EOT**) for 43 days and costs for that period in the amount of $294,710.00 (exc GST). The costs sought by the Applicant are two-fold and relate to:

   a) disruption alleged to have been caused by the Respondent due to the late supply of soffits; and

   b) following the issue of a re-baseline program (**Re-Base Program**) by the Respondent on 1 October 2021, the Applicant alleges it was forced to mobilise additional labour to Site to comply with the Re-base Program and shorter periods of time between pour cycles.

174. Item 17 of Schedule A to the Contract provides that the Date for Practical Completion is 22 February 2022. Following this date, without an EOT award, the Applicant would be liable for liquidated damages which would accrue at a rate of $2,580.00 per day.

175. The amount claimed by the Applicant is comprised as follows:

Claim	Cost Type	Amount
W10	Disruption	36,938.00
	Demobilisation/Remobilisation	7,200.00
W11	Disruption	31,238.00
	Demobilisation/Remobilisation	17,200.00
W12	Disruption	19,463.00
	Demobilisation/Remobilisation	4,800.00
W13	Disruption	24,450.00
	Demobilisation/Remobilisation	4,800.00
	Overhead Costs	148,621.00
	Total	**294,710.00**
	Cost Categories	**Amount**
	Disruption	112,089.00
	Demobilisation/Remobilisation	34,000.00
	Overhead	148,621.00
	Total	**294,710.00**

176. In support of its claim, the Applicant relies on the Statutory Declaration of [SE] as evidence which states that:

a) as soon as the Applicant started works on site, it became obvious that there was a problem with the Respondent's construction plan as the execution of the works was taking much longer than expected;[15]

b) the construction methodology employed by the Respondent is one that is described as using [redacted];[16]

c) [redacted] Formwork is then installed on the edges and reinforcement, conduits and cast-in items are placed before finally pouring the concrete;[17]

[15] Application, item 151.
[16] ibid, 152.
[17] ibid, 153.

d) 10 days after the curing of concrete, the Applicant returns to strip the formwork and the Respondent removes the soffit and relocates it to the next pour areas.[18]

177. As an observation, I note that the battery limit (and interface) associated with the pour methodology occurs at the point where the Applicant removes the formwork. Thereafter, the work sequence is such that the Respondent is to remove and relocate the metal soffit before the pour cycle recommences in a different area.

178. The Statutory Declaration of [AW] confirms that the Applicant had made provision within its tender for continuous site presence and to move its work crew [redacted] adopting the pour methodology on a 9.6 (10 day) interval.[19]

179. The Applicant states, at item 155 and 156 of the Application, that the Respondent had problems with cranage and the relocation of soffits took much longer than expected (or allowed for by the Applicant in its tender).

180. In an attempt to mitigate the cost of idle and un-utilised labour (which it is obliged to do pursuant to clause 6.2(e) of the Contract), the Applicant took steps to redeploy its labour to worksites in nearby Darwin and others to Tindal (south of Katherine) approximately 300 kilometers, where the Applicant was working at the time.

181. In doing so, [SE] submits that the redeployed workforce lost time demobilising, travelling to the other worksites and remobilizing and considers that the Applicant incurred additional costs which could not have been anticipated at formation of the contract. Examples of additional costs incurred include:

a) Time lost (one day) on each site collecting tools, putting things away securely, moving equipment, and travelling from one location to the other;

b) the hiring of administration personnel to manage staff movements and manage the additional administration created by the demobilisation and mobilisation and expenses in travel, meals and accommodation; and

[18] ibid.
[19] Above n 15, 154.

c) the hiring of contracts management personnel to prepare the correspondence necessary to comply with the two days and five days intervals prescribed by the Contract and to draft the weekly reports with continuous updates of the progress of the delays.

182. At items 71 and 72 of the Statutory Declaration of [SE], [SE] states:

> "We were given a new re-base program on 1 October 2021, but construction is so far behind that this program will not be met either. The overall construction program is so far behind, that the works which were supposed to be completed at the end of 2021 will now run into 2023.
>
> All I have to say from my part is that [the Applicant] has done everything within our power to assist [the Respondent] to deliver this project, we bent over backwards to help them in any way we could to advance construction. We have met every single target timeframe asked of us, we tried to minimise variation costs by sending our crews away, and none of the delays are of our own making, so it is painful and unfair that most of our variations are assessed at "zero dollars" and we are not compensated for our efforts and goodwill."

183. At item 6.4 of the Response, the Respondent submits that the Applicant has no entitlement to *"…claim for any relied for delay or disruption that is not expressly provided for in Clause 6.2*" and that it is the Respondent's primary position that the wording of clause 6.2 is clear and unambiguous.

184. The Respondent's second position is that VO 090 is a claim for breach of contract and cannot be pursued under the Act and should the Adjudicator not accept either the primary or secondary position put forward, then the Adjudicator should decide that the value of VO 090 is $nil, because:

    (a) the Applicant has not established that it complied with the necessary preconditions to any claim under clause 7.4(d); and/or

    (b) the Applicant has not provided sufficient evidence to identify how the Respondent's alleged conduct caused it to incur the sum of $294,710.00.

185. Clause 6.2 of the Contract states:

6.2 Delay and Extensions of Time

(a) Where the Subcontractor becomes aware of anything which will cause delay to the WUS, it shall promptly give [the Respondent] written notice of that cause and the Subcontractor's estimate of the duration of any resultant delay to activities comprised in the WUS that is anticipated.

(b) Subject to this clause 6.2, **the Subcontractor shall be entitled to an extension to the date for Practical Completion ("EOT") if**:

(i) **the Subcontractor is or will be delayed in reaching Practical Completion by the Date for Practical Completion by a Qualifying Cause of Delay**; and

(ii) **within 5 Business Days of the date on which the Subcontractor should reasonably have become aware of the Qualifying Cause of Delay occurring, the Subcontractor gives [the Respondent] a written claim for an EOT** particularising:

(A) the facts and circumstances relevant to the delay, including the manner in which the Qualifying Cause of Delay has affected activities on the critical path identified in the latest Program;

(B) the action which the Subcontractor proposes be taken to avoid, minimise or mitigate any adverse effects of the delay; and

(C) the claimed EOT duration; and the satisfaction of such requirements are conditions precedent to the Subcontractor's entitlement to any EOT under the Subcontract in respect of the relevant delay (and where the requirements are not satisfied, [the Respondent] shall not be obliged to administer an EOT in respect of the relevant delay).

(c) **Where a Qualifying Cause of Delay causes ongoing delay, the Subcontractor shall give [the Respondent] notice of such ongoing delay every 10 Business Days for the duration of the effect of the Qualifying Cause of Delay until the Qualifying Cause of Delay ceases to have effect**.

(d) For the purposes of the assessment of any entitlement to an EOT, where more than one event causes concurrent delays and the cause of at least one of those events but not all of them is not a Qualifying Cause of Delay then to the extent that those delays are concurrent, the Subcontractor will not be entitled to an EOT.

(e) **The Subcontractor shall at all times use its best endeavours to prevent or mitigate any delay including pursuant to a Qualifying Cause of Delay**. In assessing each EOT, [the Respondent] shall have regard to whether the Subcontractor could have prevented or mitigated the effects of the relevant delay and shall adjust any EOT entitlement by a reasonable amount where this has not occurred.

(f) **[The Respondent] shall assess any Claim for an EOT submitted by the Subcontracto**r under this clause 6.2 **acting reasonably**. [The Respondent] shall give to the Subcontractor a written notification of the administration of any EOT assessed within 20 Business Days after the date the later of:

   (i) the date of [the Respondent]'s receipt of the Subcontractor's claim for an EOT;

   (ii) the date of [the Respondent]'s receipt of all necessary further particulars of the Subcontractor's claim for an EOT where [the Respondent] has, acting reasonably, notified the Subcontractor that the particulars of the claim submitted by the Subcontractor are inadequate for [the Respondent] to properly assess the claim;

   (iii) the date of the last day of any period agreed between the parties for [the Respondent]'s assessment of the Subcontractor's claim for an EOT; or

(iv) where there is a Corresponding Head Contract Claim relevant to the Claim, the date on which the quantum or extent of the relevant Corresponding Head Contract Relief is determined; provided always that the Subcontractor's sole remedy for breach of this requirement by [the Respondent] shall be damages and any failure by [the Respondent] to comply shall not set time or the Date for Practical Completion at large under the Subcontract nor shall such breach by [the Respondent] be construed to give rise to any requirement or instruction, express or implied, to accelerate the WUS.

(g) Notwithstanding that the Subcontractor is not entitled to or has not claimed an EOT, [the Respondent] may, in its sole discretion, at any time and from time to time before the Date of Final Completion, direct an EOT. Nothing in this Subcontract (or which can be implied therefrom) shall oblige [the Respondent] to exercise its discretion under this subclause either for the benefit of the Subcontractor or at all.

186. Clause 1.1 provides the definition of **Qualifying Cause of Delay** as meaning**:**

(a) any breach of the Subcontract by [the Respondent];

(b) a Variation;

(c) any suspension of the WUS instructed by [the Respondent] (otherwise than by reason of any breach, act or omission of the Subcontractor)

(d) any act of prevention by [the Respondent] other than those referred to in paragraphs (a) to (c) above (but the Subcontractor agrees and acknowledges that:

(i) this category of Qualifying Cause of Delay will not include any act or omission which is authorised by the Subcontract or which has resulted directly from a breach of the Subcontract by the Subcontractor in order to mitigate the consequences of such breach;

(ii) the Subcontractor takes the risk of any delay to the WUS resulting from any act or omission of [the Respondent] as referred to in subparagraph (d)(i) above;

(iii) this definition may be pleaded in bar to any assertion by the Subcontractor that an act or omission of [the Respondent] as referred to in subparagraph (d)(i) above will constitute preventive conduct by [the Respondent]);

(e) the occurrence of an event of Force Majeure;

(f) any other of the events of delay identified as such in the Subcontract Details.

187. Notwithstanding the explicit EOT process set out in clause 6.2, it is clear that the Applicant shall be entitled to an EOT if it is or will be delayed in reaching Practical Completion by the Date for Practical Completion by a Qualifying Cause of Delay.

188. The Respondent’s act of unilaterally issuing the Re-Base Program, and in doing so, extending the Date for Practical Completion of the Applicant’s works by approximately 7 months, is not any act or omission which is authorised by the Contract or which has resulted directly from a breach of the Contract by the Applicant in order to mitigate the consequences of such breach, and therefore, in its simplest form, has the effect of being an act which gives rise to a Qualifying Cause of Delay as being a precondition to an EOT.

189. In my view, the Respondent’s failure to issue a corresponding EOT for the time impact associated with issuing the Re-Base Program falls within subclause (d) of the definition of Qualifying Cause of Delay and therefore, is not a claim for damages arising from a breach of Contract as contended by the Respondent at item 6.5 of the Response submission.

190. It is also my view that as EOT relief is expressly provided in clause 6.2, the waiver and release provision contained at clause 6.3 is not triggered and therefore bears no relevance to the Respondent’s defence.

191. Clause 6.3 states:

"The Subcontractor waives (and releases [the Respondent] from liability for) all rights it has at law or in equity to claim any relief arising from any delay or disruption that is not expressly provided for in clauses 6.2 and [the Respondent] shall have no further liability to the Subcontractor with respect to such delay or disruption."

192. Clause 6.3 seeks to waive and release any right the Applicant may have at law or in equity to bring its claim (which is outside the jurisdiction of the Act applicable to this matter). Simply, this is claim brought under the Contract and not outside of it for breach.

193. The Applicant, at item 182 of the Application considers that Clause 6.2 of the contract requires the Respondent to assess the EOT claim in good faith.

194. This premise certainly seems to align with the statement made by the Respondent, in its correspondence 6916-LTR-MCD-PK014-111 of 23 December 2021, (in which it refers to a meeting also held on 23 December 2021) confirming that the Respondent may, at is discretion, pay preliminary costs for accepted EOTs where the demonstration of effect on the Date for Practical Completion has been shown.

195. Relevantly, this is contrary to the position now adopted by the Respondent, at item 6.19 of the Response submission, which contends that clause 7.4 does not provide any entitlement to delay or disruption and if it did, then clause 7.4(d) expressly provides that if the Applicant is given a Direction which is not stated to be a Variation, then the Applicant must provide written notice prior to complying with the Direction.

196. I refer to the Respondent's correspondence dated 23 December 2021 with subject "*Response to Extension of Time, Disruption and Constructive Acceleration Claim*" in which, at item 12F (page 3), refers to correspondence 6916-LTR-MCD-PK014-21 where reference is made to a previous offer having been made by the Respondent to the Applicant to "reconcile the reduced productivity caused for works prior to this claim".

197. Notwithstanding the Applicant rejected this offer, on its face, this statement purports to be an acknowledgement by the Respondent that the Applicant has, in fact, suffered productivity loss as a result of actions taken by the Respondent.

It is also acknowledged that the Respondent was willing to recompense the Applicant for its costs (in part at least).

198. On the balance of probabilities, I accept this as evidence that the Respondent has previously accepted liability for this and has sought to make an offer to the Applicant to put the Applicant back in the place it would have been but for the disruption impact caused by the Respondent.

199. The Applicant, at items 166 to 168 of the Application states the contract program in Appendix C (of the Contact) showed a completion date of February 2022 which, in turn, was superseded by the Re-Base Program issued by the Respondent on 1 October 2021.

200. The Re-Base Program sets a new completion date of 20 September 2022 or alternatively, represents a delay to the Date for Practical Completion of 7 months.

201. The EOT claim requested by the Applicant is for only 43 days out of the 7 months the project has been "officially" extended by the Respondent.

202. The Applicant argues that this is because the 43-day delay is all that can be fully quantified 'retrospectively' in the Applicant's time-slice analysis.

203. Further, at item 168 of the Application, the Applicant submits that the 43-day delay has been "…*measured, assessed, and valued retrospectively, or after the effects of the delay ceased to affect that part of the works and the delay could be measured and valued*".

204. The Applicant requests that I accept the proposition that the Respondent's instruction to implement the Respondent's re-base program of 1 October 2021 entitles the claimant to a variation in accordance with Clause 7.4, Variations which states:

"(a) [The Respondent] may at any time and from time to time direct the Subcontractor to vary the WUS by any one or more of the following (provided that the Variation requires work of a character and extent reasonably contemplated by, and capable of being carried out under, the provisions of the Subcontract):

(iv) change in the sequence and timing of any activities comprising the WUS"

205. Further, the direction to implement the Re-Base Program of 1 October 2021 constitutes a formal direction to change the sequence and activities in the contract's program, Appendix C which entitles the claimant to a variation for the change in scope.

206. For the reasons set out above, application of relevant contract provisions, analysis of the submissions by the Parties and the conduct of the Respondent, I am satisfied that the Applicant is entitled to an EOT with costs.

207. I shall now turn to assessing the EOT claim to determine, on balance, whether there is evidence to demonstrate whether the 43 days claimed is reasonable and accurate in view of the critical path delay impact to the Applicant's works under the Contract.

<u>Assessment of EOT Duration</u>

208. At item 161 of the Application, the Applicant sets out the method it has adopted to assess the critical path delay to its works as follows:

A. *Appendix C contains the "Delivery Schedule & Program Requirements" which state that the "subcontract works to be carried out and comply / a line with [the Respondent's] program LDPR – Target Program, Data date 5 September 2020, Printed 12 October 2020."*

B. *The master schedule (not supplied to the claimant), contains 7,680 activities (this can be gathered reading line item No 617 which lists "CON-MD-7680* [redacted]*, Supply by Others" as "activity 7,680").*

C. *From its 7,680-activity program, 628 activities (less than 10%) were extracted by the respondent and assigned to the claimant in the contract program contained in Appendix C (refer to line item 628, "Notice to PMCA of Anticipated Facility Completion", program Appendix C).*

D. *The claimant relied on the program in Schedule C of the contract to program its activities until October 2021.*

E. However, on 1 October 2021, the re-base program was implemented with a 7-month delay.

F. Using the 628 activities assigned to it, the claimant prepared "mini-programs" (time-slices) of some 34-day duration for each of the concrete pours 1 to 40, showing the applicable dates it needs to install formwork, fix steel, install conduits and cast-ins, pour concrete, and allow for curing and removal of formwork.

G. The Claimant baselined each concrete pour 1 to 40 using the commencement and end dates allocated by the respondent in the 628 activities (as planned) and tracks and reports the actual construction dates (the "as constructed" dates). These time slices have been provided in the exhibits to the EoT claim in VO-090.

H. When each deck 1 to 40 is completed, the claimant issues the "as built" mini-program (time slice) for each deck showing the respondent's planned vs the actual construction dates recorded by the claimant.

I. The length of the 43-day time extension has been arrived at using a simple arithmetical calculation of the difference between (a) the programmed completion date for the four decks in question (W10, W11, W12, and W13) and (b) the actual completion dates. I.e., if completion of a concrete pour was scheduled for the first day of the month but it took place on the 10th instead, the delay is 10 calendar days to the completion date and 8 workdays for the calculation of delay costs.

J. The cost for the 43-day delay has been calculated using the agreed rates. The 694 pages in the EoT submissions and statutory declarations provide all required information for the adjudicator to assess the value of the claim independently.

209. Further, at items 162 and 163 of the Application, the Applicant states:

"*When it comes to formalities, the method used by the claimant to quantify the delays and its entitlements under the contract is formally known as "Time Slice Windows Analysis", a widely accepted retrospective windows-based methodology to assess delays, which focuses on comparing the as-*

built vs the as-planned schedule (the mini-programs) to identify actual dates and quantify delays."

and

"*This method of assessing delays has been sanctioned by the Society of Construction Law Delay and Disruption Protocol 2nd Edition, 2017 Page 34 – "delay impacts are determined on a retrospective basis being the histrionic impact of the delay event on the critical path during the time slice up to the data date of the particular analysis", and is regularly accepted into evidence by the courts*."

210. In support of its EOT Claim, the Applicant has prepared a comprehensive 643 page document titled '*Extension of Time, Disruption and Constructive Acceleration Claim*' which is dated 25 November 2021 (**EOT Document**).

211. At item 4 of the EOT Document, the Applicant says that the subject of the claim is the delay in pouring decks, W10, W11, W12 and W13 which were delayed by several months as follows:

Activity ID	Activity Name	Programmed (Contract)	Programmed (Actual)
CON-MD-2450	[Redacted] Concrete Pour and Finish (Pour W10)	12-May-21	17-Sept-21
CON-MD-2590	[Redacted] Concrete Pour and Finish (Pour W11)	2-Jun-21	11-Oct-21
CON-MD-2730	[Redacted] Concrete Pour and Finish (Pour W12)	12-Jun-21	26-Oct-21
CON-MD-2870	[Redacted] Concrete Pour and Finish (Pour W13)	23-Jun-21	18-Nov-21

212. At item 24 of the EOT Document, the Applicant has calculated the delay effect of the Re-Base Program vis a vis the actual pour date as follows:

Activity ID	Activity Name	Program (Re-Base)	Prgm Days Between Pours	Actual Pour Date	Days Between Pours	Total Delay
CON-MD-2450	[Redacted] Concrete Pour and Finish (Pour W10)	13 Sept 2021		17 Sept 2021		4 days
CON-MD-2590	[Redacted] Concrete Pour and Finish (Pour W11)	20 Sept 2021	**7 days**	11 Oct 2021	**35 days**	21 days
CON-MD-2730	[Redacted] Concrete Pour and Finish (Pour W12)	25 Sept 2021	**5 days**	26 Oct 2021	**15 days**	31 days
CON-MD-2870	[Redacted] Concrete Pour and Finish (Pour W13)	6 Oct 2021	**11 days**	18 Nov 2021	**24 days**	43 days

213. The EOT Document is compelling and in my opinion, has been constructed in a logical format which provides adequate information for me to step into the shoes of the Respondent to make an assessment on its behalf.

214. Having reviewed the delay analysis methodology adopted by the Applicant, my observation is such that the Applicant has opted to apply a retrospective method which identifies the nett delay effect of the critical path delay within each window of time (based on as-constructed progress updates) and specifically, identifies the time when the delay commenced and continued (or ceased) relevant to that window.

215. Whilst there are many delay methods and techniques available to Applicant, the method adopted by the Applicant is well used by delay expert witnesses and industry commentators as being a robust technique for demonstrating critical path delay.

216. With this in mind, I am satisfied that the Applicant has undertaken the necessary forensic steps to calculate its entitlement to a 43 day EOT to the Date for Practical Completion.

Assessment of Disruption Costs Claim

217. As part of the EOT Document, the Applicant seeks reimbursement for the additional disruption cost caused to the W10, W11, W12 and W13 works.

218. Of the total costs claim of $294,710 sought by the Applicant, the disruptions costs are in the amount of $112,089.00.

219. Exhibits C, D, E and F of the EOT Document contain the additional ‘actual’ extra over hours for each trade and these hours have been multiplied by the hourly rate of $75 per hour to provide the following amounts by each stage:

Stage	Actual Manhours	Tender Manhours	Variance (extra over)
W10	1,192.50	700.00	492.50
W11	1,116.50	700.00	416.50
W12	959.50	700.00	259.50
W13	1,026.00	700.00	326.00
		Total (extra over manhours)	**1,494.50**
		Hourly Rate Cost	75
		Total Disruption Costs Claim	**112,087.50**

220. The measure of compensation arising from disruption is to put the contractor in the same position financially, as if the progress of works had not been disrupted.

221. However, in my opinion, the way in which the disruption costs claim have been calculated is global in nature and lacks causal links. Further, whilst the hours claimed are specific to each stage, the calculation does little to demonstrate whether the hours have been burnt.

222. Further, the disruptions costs calculation does not utilise on any known disruption calculation techniques (e.g. measured mile, project and industry studies based on research etc).

223. For a productivity-based claim to succeed, the specific causes of the disruption need to be determined, notified, particularised and evidenced, and the causal linkages demonstrated.

224. In my opinion, there is a lack of sufficient records to demonstrate actual effect and costs caused by the disruption events as claimed.

225. The Applicant does not admit any culpability for which it may be responsible such as poor management and productivity inefficiencies derived from the tender assumptions and not caused by the Respondent.

226. In view of the above, and on the balance of probabilities, I feel that there is insufficient evidence to compel me to make a finding on the disruptions costs claimed by the Applicant.

227. Accordingly, I find that the Applicant is not entitled to be paid disruption costs as claimed.

Assessment of Direct Costs Claim

228. As part of the EOT Document, the Applicant seeks reimbursement for the demobilization and remobilisation of its workforce to and from the W10, W11, W12 and W13 stages.

229. Of the total costs claim of $294,710.00 sought by the Applicant, the direct costs claim costs are in the amount of $32,000.00.

230. Exhibits G, H, I and J of the EOT Document sets out the operative name, relocated place of work and applies a day rate of $600 which is calculated as 8 hours multiplied by the rate of $75/hr. The rate used is a contract rate contained in Table B5(a) – Rates for Variation – Dayworks – Labour.

231. On review of the information provided by the Applicant in the EOT Document, I am satisfied that, on the balance of probabilities, the direct costs claim is justified and sufficiently evidenced.

232. Accordingly, I find that the Applicant is entitled to be paid for the direct costs component of VO-90 in the amount of $32,000.00.

Assessment of Overhead Costs Claim

233. As part of the EOT Document, the Applicant seeks reimbursement for the overhead costs associated with its EOT claim.

234. Of the total costs claim of $294,710 sought by the Applicant, the direct costs claim is in the amount of $148,621.00 which includes margin of 10% in respect of overheads and margin.

235. Regarding the margin of 10% being applied to the preliminaries costs, I note that the hourly rates used for valuation purposes are referenced in Table B5(a) of the Contract and these rates include for, amongst other things, insurances and profit:

Table B5 (a) - Rates for Variation – Dayworks - LABOUR

If pursuant to Clause 15 of the Sub-Contract General Conditions, MCD's Representative orders that any additional or substituted work shall be executed on a dayworks basis, then these rules shall apply to the valuation of such work.

Dayworks rates shall only be applied in respect of site activities, including installation and setting to work, undertaken on Site.

Labour employed on a dayworks basis shall be paid for the actual hours worked at the hourly rates included in Table B5. The rates are not subject to rise and fall and are inclusive of, but not limited to the following:

- bonus payments
- enhancement of rates for overtime and shift work
- daily travelling allowance including cost of transport provided by the Sub-Contractor for labour to and from the Site and for internal transport on the Site
- insurances
- statutory requirements
- small tools and test equipment
- protective clothing and safety equipment
- industrial training levy
- head office charges and profits
- Project inductions and all other training required to work within the construction and rail environments

Item No.	Item Description	Unit	Rate $/hr Normal time (GST excl)	Rate $/hr Night shift (GST excl)
2	All craft additional works – steel fix, form setter, concrete labour, labourer	Hr	75	N/A
3	BC Construction Manager	HR	100	N/A

236. I therefore find that the rate of $100 per hour utilized by the Applicant in the valuation of its Preliminary costs already includes for profit and therefore, profit should not be paid as an additional amount.

237. I also find that the time claimed for '*Commercial Planning [AM]* in the amount of $22,000 could be construed as legal costs as [AM is the legal representative for the Applicant in this matter. I therefore do not allow these costs as each party is to bear their own legal costs in this matter (refer section 6.2 below).

238. Exhibits K of the EOT Document sets out cost heads of claim as being preliminaries, fixed ongoing expenses and hired equipment which are all time related expenses and generally recoverable as prolongation costs in instances where the Date for Practical Completion has been extended (as is the case here).

239. In the table presented below, I have assessed the overhead costs component of VO-91 and have made the following adjustments in the 'Adjudicator Determined Amount' column:

Preliminaries	Days	Direct Cost Daily	Direct Cost Total	Direct cost + 10% Margin	Adjudicator Determined Amount
Supervisor	33	$800	$26,400	$29,040.00	$26,400
Project manager	33	$800	$26,400	$29,040.00	$26,400
Commercial/Planning	25	$800	$20,000	$22,000.00	-
Site Administration	33	$330	$10,890	$11,979.00	$10,890
Insurances	33	$329	$10,842	$11926.40	-
Insurance bond in lieu of bank guarantee or retention	33	329	$10,842	$11926.40	-

Fixed ongoing expenses					
Mobile phones x3 @ $65 per month	43	$15	$644	$708.40	$644
Site internet @ $65 per month	43	$2	$92	$101.20	$92
Microsoft Office @ $33 per month	43	$1	$46	$50.60	$46
MS Project @ $83.50 per month	43	$3	$117	$128.70	$117
Blue beam @ $550 per month	43	$19	$804	$884.40	$804
Total Station	43	$86	$3,715	$4,086.50	$3,715
Vehicle Hilux @ $69 per day	43	$138	$5,934	$6,527.40	$5,934
Vehicle bus @ $77 per day	43	$77	$3,311	$3,642.10	$3,311
Hired equipment					
Schwing concrete pump @ $1500 per week	43	$214	$9,214	$10,135.40	$9,214
Office demountable @ $627.30 per week	43	$21	$886	$974.60	$886
Printer @ 159 per month	43	$5	$225	$247.50	$225
Air compressor @ $772.73 per week	43	$110	$4,747	$5,221.70	$4,747
TOTALS			**$135,110**	**$148,621**	**$93,425**

- Omission of 10% Margin from the Preliminaries section;
- Omission of ‘Commercial/Planning [AM] costs; and
- Omission of insurances and insurance bond costs as they are included within the rates provided in Table B5(a) above.

240. On review of the information provided by the Applicant in the EOT Document, I am satisfied that, on the balance of probabilities, the overhead costs claim is justified and sufficiently evidenced.

241. Accordingly, I find that the Applicant is entitled to be paid for the overhead costs component of VO-90 in the amount of $93,425.00.

VO-91 Summary

242. Accordingly, in view of the above, I find that the Applicant is be paid the following amounts in respect of VO-90:

Disruption Costs - Nil

Direct Costs	-	$ 32,000.00
Overhead Costs	-	$ 93,425.00
Total	**-**	**$125,425.00**

6.0 SUMMARY

For the foregoing reasons, I make the following conclusion:

Item	Applicant to Pay	Respondent to Pay
Due in respect of VO-14	Nil	Nil
Due in respect of VO-15	Nil	$58,909.09
Due in respect of VO-35	Nil	$4,428.50
Due in respect of VO-41	Nil	$4,312.50
Due in respect of VO-79	Nil	Nil
Due in respect of VO-90	Nil	$125,425.00
Total Due in respect of Payment Claim	Nil	$193,075.09
Add GST @ 10%	Nil	$19,307.51
Sub-total	**Nil**	**$212,382.60**
Due in respect of Interest	Nil	Nil
Total to be paid [inclusive of GST]	**$Nil**	**$212,382.60**
Adjudicator's Fees (shared) (Already Paid)		Refer Schedule B

6.1 Interest

243. Section 35(1) provides that if an adjudicator determines that party to a payment dispute is liable to make a payment, the adjudicator may also determine that interest must be paid if the payment is overdue under the construction contract. The payment must be in accordance with the contract.

244. Clause 5 h of Schedule B to the Contract provides that where any payment under the Contract is overdue, the party responsible for making the payment shall also pay interest on the overdue amount at the rate specified in Item 37 of Schedule A from the due date for payment until and including the date on which the money is paid.

245. Item 37 of Schedule A to the Contract states that the amount of interest is "Not Applicable". I take this to mean that the parties have agreed that interest will not be paid on overdue payments.

246. I therefore find that there is no interest payable under the Contract insofar as it relates to overdue amounts.

6.2 Costs of Parties to Payment Disputes

247. Section 36(2) of the Act provides that an appointed adjudicator has the power to direct one party to bear the costs of an adjudication, including the other party's costs and the Adjudicator's fees, where that party has engaged in frivolous or vexatious behaviour.

248. The Applicant and Respondent has both made submissions regarding the other paying its professional and legal costs in this matter.

249. The words in the phrase 'frivolous or vexatious' are not defined in the Act and should be given their plain and ordinary meaning. The Macquarie Dictionary defines 'frivolous' as *'of little or no weight, worth or importance; not worthy of serious notice; a frivolous objection characterised by lack of seriousness or sense*'. Similarly, 'vexatious' can be defined as '*causing vexation, vexing and annoying*'.

250. Having reviewed each of the submissions in detail, I am not satisfied that the conduct of either party has been frivolous or vexatious to warrant any costs order being made against either party.

251. Pursuant to s. 36(2) of the Act, I find that the parties to this Payment Dispute shall bear their own costs in relation to the adjudication of the dispute.

SCHEDULE B

7.0 CONFIDENTIAL MATTERS

252. Pursuant to s.38(1)(e) of the Act, an appointed adjudicator's decision must identify any information in it that, because of its confidential nature, is not suitable for publication by the Building Commissioner under section 54 of the Act.

253. [Redacted]

254. [Redacted]

255. [Redacted]

256. [Redacted].

8.0 COSTS OF ADJUDICATION

257. In accordance with Section 46 of the Act, I am required to consider the costs of adjudication.

258. The cost of the adjudication is as follows:

Adjudicator's fees (68 hours @ $360.00 per hour)	$	24,480.00
GST @10%	$	2,448.00
Total	**$**	**26,928.00**

259. The Applicant and Respondent have paid a sum of $8,000.00 each in respect of security. Total security held on account is $16,000.00 (incl. GST).

260. I confirm that I have also received the balance of my fees from both parties following the issue of my final invoices on 11 February 2022.

261. Pursuant to s.46 of the Act, I determine that the costs of the adjudication shall be shared equally and that, as this amount has been paid by the parties, I find that there are no further amounts due in respect of my fees.

Barry C Green LLB BSc(Hons) FRICS MAIQS CQS MCIArb PRIAdj
Registered Adjudicator No. 46 *15 February 2022*