

Note: this determination has been redacted to remove reference to the type of works involved.

Adjudicator's Determination
Pursuant to the *Construction Contracts (Security of Payments) Act*

| | |
|---|--|
| Adjudication Number | 34.14.04 |
| Prescribed Appointor | RICS Dispute Resolution Service. |
| Adjudicator | Colin Bond (Adjudicator 34) |
| Applicant: | [redacted] |
| Respondent: | [redacted] |
| Project: | [redacted] |
| Amount to be paid by Respondent | \$989,191.06 |
| Due Date For Payment | 14 th October 2014 |
| Adjudication Fees Apportionment | Applicant: 50% Respondent: 50% |
| Date of Determination or Dismissal | 22 nd December 2014 |
| | |
| Payment Claim | Claimed Amount : \$1,066,921.18 including GST Dated : 5 th September 2014 |
| Notice of Dispute / Response to Payment Claim | Dated: 19 th September 2014 |
| Adjudication Application | Dated: 7 th November 2014 served on respondent 10 th November 2014 |
| Adjudicator Acceptance | Dated: 13 th November 2014 |
| Adjudication Response | Dated: 24 th November 2014 |

Table of Contents:

The Determination or Dismissal 3
Background..... 3
Appointment..... 3
Material 3
Jurisdiction 4
Payment Claim..... 5
Notice of Dispute / Response to Payment Claim 6
Adjudication Application 6
Adjudication Response 6
Reason for the Determination 6
Contract 7
Issues in Dispute..... 7
Work Under the Subcontract..... 7
Variations 9
Extension of Time Entitlement and Deduction of Liquidated Damages..... 11
Valuation of issues in dispute..... 11
Adjudication costs 26
Interest Costs..... 27
Confidential information 27

The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (NT) (the Act), for the reasons set out in this determination, determine that:
 - a. The amount to be paid by the respondent to the applicant is **\$989,191.06** including GST.
 - b. Interest is due on the adjudicated amount at a rate of 8.5% per annum from 14th October 2014.
 - c. The respondent is to pay the \$254,497.86 of the adjudicated amount to the applicant within 7(seven) days of the date of the determination being released and the balance of \$734,693.20 amount after provision of the replacement bank guarantee in the sum of \$734,693.20 as further explained at paragraphs 18-24 below.

Background

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the provision of [*work details redacted*] construction services at the [*project site redacted*] (the Project).

Appointment

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 12th November 2014 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 13th November 2014.

Material

6. The following material was provided to me:
 - Adjudication Application dated 7th November 2014, served on respondent 10th November 2014
 - Adjudication Response dated 24th November 2014
7. On 19th November 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties. The following responses were received:
 - The applicant's further submission dated 19th November 2014
 - The respondent's further submission dated 19th November 2014

8. On 26th November 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties in respect of the service of the adjudication application on the respondent. The following responses were received:
- The applicant's further submission dated 27th November 2014
 - The respondent's further submission dated 28th November 2014

Jurisdiction

9. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
10. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
11. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
12. The respondent has stated in its response the its primary contention is that the adjudicator is required by section 33(1) (a) of the Act to dismiss the Adjudication Application without making a determination of the merits because the payment claim was not submitted in accordance with and does not comply with the contractual pre-conditions in clause 14 of the Subcontract. The respondent states that the applicant does not dispute that it did not comply with clause 14. As a result, "no payment dispute" under the Act to be adjudicated has arisen and therefore the respondent considers the Adjudication Application must be dismissed.
13. At paragraph 54 of the Adjudication Application the applicant confirms that throughout the course of the Project only 3 payment claims were dated on the 5th business day of the month (payment claims 8, 17 and 32).
14. On my own analysis of the Subcontract conditions clause 14.1(a) states that the Subcontractor may submit payment claims on the date in each month stated in Schedule 1. Schedule 1 states the Subcontractor to submit Payment Claims "the 5th Business Day of each calendar month".
15. Both the applicant and the respondent agree that it is a condition to the making of a valid adjudication application that a 'payment dispute' has arisen within the 90 days prior to the submission of the adjudication application¹.
16. Under section 8(a) of the Act a '*payment dispute*' arises '*when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed*'.
17. I agree that the applicant is obliged to comply with clause 14 every month in relation to the submission of every payment claim. Based on the evidence provided in the adjudication application I am satisfied that the payment claim 32 was submitted on Friday 5th September 2014 i.e. the 5th business day in September and therefore conclude that the payment claim has been submitted in accordance with the Contract and is therefore a valid payment claim for the purposes of the Act.

¹ Refer to applicants submission at paragraph 31(b) of the Adjudication Application

18. The respondent also states that the applicant has no entitlement to payment as it has not provided a replacement Bank Guarantee. Clause 6.1(a) of the Subcontract required the applicant to provide Bank Guarantees as security to the value of 5% of the Subcontract Sum, or to the value of \$1,334,936.00 when the Subcontract was executed.
19. The respondent further argues in its adjudication response that the applicant provided two bank guarantees each of \$667,468.00. In accordance with the terms of the Subcontract, the first bank guarantee was to be released 14 days after Substantial Completion and the receipt by respondent of a Deed of Release² and the second 14 days after the end of the Defects Liability Period if the applicant had then performed all its obligations under the Subcontract³. The respondent then asserts that none of the pre-conditions for release of the security have occurred.
20. As stated in paragraph 8 above I requested further submissions in relation to the expiration of the Bank Guarantees from the parties on 26th November 2014.
21. Having reviewed the submissions from both parties it is common ground that one of the bank guarantees had expired - one of those bank guarantees, no. 4900088-570 in the sum of \$667,468.00, had an expiry date of 30th August 2014, and expired and ceased to be enforceable on that date.
22. It is also common ground that pursuant to clause 6.1(b)(iii) of the Subcontract, if a bank guarantee ceases to be enforceable, the applicant must, within 7 days of that occurring, provide a further bank guarantee and at the time of my request for submissions no replacement bank guarantee had been procured by the applicant.
23. I do not consider that the Act provides that I have jurisdiction to “step into the shoes of the respondent” and exercise the absolute discretion to determine that the respondent is to make payment of adjudicated amounts in the absence of the relevant bank guarantee.
24. I conclude that the applicant is entitled to payment of the first \$734,693.20 of any adjudicated amount only after provision of the replacement bank guarantee in the sum of \$734,693.20. The balance of any adjudicated amount in excess of this \$734,693.20 is due within 7 days from release of my decision.

Payment Claim

25. The applicant served the respondent with its Payment Claim dated 5th September 2014 in respect of the supply and installation of [*work details redacted*] at [*project details redacted*] (the Project).
26. The respondent has not denied receiving the applicant’s payment claim.
27. It is common ground that a construction contract exists.
28. The respondent does however state in its adjudication response that the adjudicator does not have jurisdiction to determine the payment claim made by the applicant as the payment claim was not submitted in accordance with the Contract, however I have addressed this issue in the jurisdiction section above.

² Subcontract clause 6.4(a)

³ Subcontract clause 6.4(b)

29. I am satisfied that the payment claim is valid for the purposes of the Act and do not consider it to have been issued outside the provisions of the contract.

Notice of Dispute / Response to Payment Claim

30. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
31. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

Adjudication Application

32. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
33. I am satisfied that the payment dispute arose on 19th September 2014 and therefore the 90 day period in relation to when the adjudication application has been satisfied.
34. The applicant applied for adjudication of the payment dispute on 10th November 2014 and within the time allowed pursuant to section 28(1) of the Act.
35. The application is in writing pursuant to section 28(1) (a) of the Act.
36. The application was served on the respondent pursuant to section 28(1) (b) of the Act.
37. The application was served on RICS Dispute Resolution Service pursuant to section 28(1) (c) (iii) of the Act.
38. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

Adjudication Response

39. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.
40. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

Reason for the Determination

41. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:

- the application and its attachments; and
- the further written submissions validly made by the parties.

Contract

42. The applicant in its adjudication application has provided a copy of the Subcontract Contract Conditions.
43. It is common ground that a Construction Contract exists between the parties for supply and installation of [*work details redacted*] at [*project details redacted*] (the Project).

Issues in Dispute

44. As discussed above the respondent has disputed the validity of the adjudication application and payment claim for reasons as detailed in the Adjudication Response. I have addressed these issues above and I am satisfied that both the adjudication application and payment claims comply with the requirements of the Act.
45. In addition to the jurisdictional issues which I have dealt with above I have summarised the key issues in dispute as follows:
 - Work Under the Subcontract
 - Variations
 - Extension of Time Entitlement and Deduction of Liquidated Damages

Work Under the Subcontract

46. The applicant in its adjudication application at paragraphs 120 and 121 states that:
 - (a) its payment claim comprised Subcontract works in the sum of \$707,264.66 for works carried out up to 26th August 2014; and
 - (b) in its Payment Schedule, the respondent scheduled the sum of \$474,752.43, therefore leaving the sum of \$232,512.23 in dispute.
47. The respondent states in its adjudication response that difference between the claimed amount and the scheduled sum relates to the:
 - [*work details redacted*] was not complete or commissioned;
 - [*work details redacted*] commissioning was not complete;
 - [*work details redacted*] were not satisfactorily commissioned; and
 - defects in respect of the [*work details redacted*].
48. These matters are described by the respondent in the statutory declaration of [AB] dated 24th November 2014.
49. In summary the respondent states says that:

- a. [work details redacted] was not complete or commissioned by applicant and contained defects at the time of the making of Progress Claim No. 32 by the applicant.⁴
- b. in relation to the [work details redacted]⁵:
- the test results submitted by the applicant were from the initial commissioning that had been proven to not be replicable in subsequent testing;
 - as at the end of August 2014, the respondent had not received any further [redacted] results from the applicant; and
 - as at 28th October 2014, the applicant was still completing the installation of [work details redacted], which then required re-testing by both the applicant and the Northern Territory Authority to confirm compliance;
- c. In relation to the [work details redacted] the respondent states in its adjudication response that as at the end of August 2014 the [work details redacted] were not satisfactorily commissioned and these works continued on through September 2014, [redacted]; and
- d. in relation to the [work details redacted], the respondent states that all of the defects have not been rectified, and in particular as at the end of August 2014 there were still significant numbers of outstanding defects identified with respect to [redacted] quality.
50. Within the applicant's adjudication application at paragraph 123, reference is made to the applicant's Notice of Dispute dated 4th October 2014 in respect to the reasons referenced above by the respondent for withholding payment in relation to the remainder of the Work under the Contract⁶.
51. At paragraph 125 the applicant also refers the adjudicator to the statutory declaration of [CD]⁷ in relation to the reasons the respondent has provided for withholding payment for the remainder of the Work under the Contract.
52. The applicant, states in its adjudication application that the works undertaken to rectify faults on the [work details redacted] were not caused by the applicant. Such faults are likely the result of damage to the [work details redacted] caused by third parties and further adjustments to the [work details redacted] to improve its performance beyond the product specification as directed by the respondent.
53. In addition, the applicant further states that the work details redacted] has not been in [redacted] condition and has not been [malfunctioning]. [Malfunction details redacted].
54. In relation to the [work details redacted], the applicant states that the test results that have been submitted by the applicant to the respondent indicate the [work details redacted] are in full compliance with Output Specification. Specifically they are 95% correct with the correct compromise between the two requirements. The current works are required to further exceed the requirements in key areas identified by the Territory.

4 See [AB] Declaration paragraph 73.

5 See [AB] Declaration paragraph 75

6 Attached to stat dec form [DB] tab 13 of adjudication application

7 Stat declaration from [CD] tab 8 of adjudication application

55. Upon review of all the relevant statutory declarations and technical documents provided to support each statement I am not satisfied that the respondent has provided sufficient evidence to justify withholding payment in relation to the Work remaining under the Subcontract. **I therefore value the disputed Work under the Contract at \$232,512.23** as claimed by the applicant.

Variations

56. The variations claimed by the applicant in Payment Claim 32 are the same as those claimed in its earlier adjudication.
57. The applicant states that it has merely included the variations in its Payment Claim 32 as a matter of completeness and out of caution in the event that Payment Claim 31 was invalid. Payment Claim 31 which was the subject of a separate adjudication also adjudicated by me with the consent of the parties was indeed dismissed and therefore I am willing to consider these variations in the current adjudication relating to Payment Claim 32.

58. In summary the variations relate to:

| | Disputed amount |
|---|--------------------|
| d. VO 133 CC24 Damaged bollards | \$2,865.50 |
| e. VO 134 CC25 [<i>work details redacted</i>] | \$1,430.00 |
| f. VO 135 [<i>work details redacted</i>] damage | \$58,219.73 |
| g. VO 136 [<i>work details redacted</i>] | <u>\$ 8,148.53</u> |
| Total | \$70,663.76 |

59. The respondent's position is that these variation claims should be dealt with as part of the adjudication of Payment Claim 31. It is the respondent's position that both adjudications must be dismissed under section 33(1)(a) of the Act.
60. The respondent states that:
- (a) each of the variation claims are time barred by clause 10.2 of the Subcontract; and
 - (b) further and in the alternative, variation directions 135 and 136 were issued prior to the Deed of Settlement and accordingly the applicant has already agreed to release and settle those claims.
61. The respondent also states that in respect of Variation 133 the applicant is not entitled to any payment for this claim because:
- (a) contrary to the requirements of clause 10.2 of the Subcontract no 'Clause 10.2 Notice of Claimed Variation' was provided within 5 Business Days or at all; and
 - (b) alternatively, contrary to the requirements of clause 10.2 of the Subcontract, the 'Notice of Potential Variation' provided on 23rd May 2014, 9 Business Days after the receipt of the direction in MEC:HON#0095 on 12th May 2014.
62. The respondent also states in respect of Variation 134 the applicant is not entitled to any payment for this claim because:
- (a) contrary to the requirements of clause 10.2 of the Subcontract no 'Clause 10.2 Notice of Claimed Variation' was provided within 5 Business Days or at all;

- (b) alternatively, contrary to the requirements of clause 10.2 of the Subcontract, the 'Notice of Potential Variation' was provided on 23rd May 2014, 11 Business Days after the receipt of the direction in MEC:HON#0094 on 8th May 2014.
63. The respondent also states in respect of Variation 135 that the applicant is not entitled to any payment for this claim because:
- (a) contrary to the requirements of clause 10.2 of the Subcontract no 'Clause 10.2 Notice of Claimed Variation' was provided within 5 Business Days or at all;
- (b) alternatively, contrary to the requirements of clause 10.2 of the Subcontract, the 'Notice of Potential Variation' was provided on 23rd May 2014 Business Days after the receipt of the direction in MEC:HON#0097 on 14th May 2014;
- (c) further, the applicant concedes⁸ that \$3,029.40 of the amount claimed for this variation related to damage which occurred prior to the deed being executed. In accordance with the terms of the Deed of Settlement, the applicant is not entitled to the \$3,029.40 claimed for this period.
64. The respondent also states in respect of 136 that the applicant is not entitled to any payment for this claim because:
- (a) contrary to the requirements of clause 10.2 of the Subcontract no 'Clause 10.2 Notice of Claimed Variation' was submitted to the respondent; and
- (b) alternatively, contrary to the requirements of clause 10.2 of the Subcontract, the 'Notice of Potential Variation' was not provided within 5 Business Days and was instead provided on 23rd May 2014⁹, 32 Business Days after the receipt of the direction in MEC:HON#0092 on 3rd April 2014.
65. I have reviewed the evidence provided by both the applicant and the respondent and prefer the respondent's view in that the time bar provisos are a condition precedent to entitlement which the applicant has failed to comply with.
66. I agree with the respondent in that the condition precedents to entitlement are unconditional and the applicant has not provided any evidence to suggest that it was not '*possible*' to comply with clause 10.2. The applicant was required under the Subcontract to comply with the time-bar conditions precedent in clause 10.2 and failed to do so.
67. Accordingly I agree with the respondent's view that the applicant is not entitled to any compensation for Variations 133, 134, 135 and 136 and therefore **value the variations at Nil.**

Extension of Time Entitlement and Deduction of Liquidated Damages

Counter-claim by respondent to deduct liquidated damages

68. It is common ground that the Date for Substantial Completion was agreed by the parties in the Deed of Settlement on 23rd April 2014 to be 30th June 2014¹⁰. No Extensions of Time to that date have been granted since the date of that deed.

⁸ at paragraph 148(c) of the Adjudication Application

⁹ as confirmed by the statutory declaration of [EF] dated 21 November 2014 (included at Tab 17) at paragraph 8.4

¹⁰ Deed of Settlement and Release clause 6

69. The respondent in its adjudication response states that as at the date of the payment schedule, the applicant was liable to the respondent for Liquidated Damages of 63 days x \$150,000.00 per day = \$9,300,000.00 in Liquidated Damages as set out in the Payment Schedule.
70. On this basis the amount owing from the applicant to the respondent as at the date of the Payment Schedule was \$9,540,527.30.
71. The applicant argues in its adjudication application that there can be no counter-claim by the respondent resulting in a sum owed to the respondent.
72. The respondent and the applicant agree that the relevant provision in this context is section 33(1)(b) of the Act which provides that *'the Adjudicator must...determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment'*.
73. The respondent considers that the term 'any party' clearly contemplates that an adjudicator may determine that a claimant is in fact liable to make a payment to a respondent. The respondent considers that is the plain reading of the Act.
74. The applicant states that this is not the case and relies on the case of *Alliance Contracting Pty Ltd v James* [2014] in support of its position.
75. The respondent further argues that if I consider the applicant's reading of the decision in *Alliance* then I should not follow that case because it is not a case on the NT Act and such a reading does not accord with a plain reading of section 33(1)(b) of the NT Act.
76. On review of the Alliance decision Justice Beech rejected Alliance's submissions and upheld the adjudicator's decision. His Honour found that the adjudicator's power is confined to accepting or rejecting a payment claim, not awarding counter-claims. In these circumstances, the merits of the counter-claim will be considered in determining whether the respondent is liable to make a payment in respect of the payment claim but the counter-claim is not subsumed into the payment dispute arising from Alliance's rejection of the claim. The counter-claim itself gives rise to a separate payment claim. The counter-claim must be rejected, in order to give rise to a separate payment dispute, before the respondent can recover the amount of the counter-claim via the CCA process.
77. Whilst I acknowledge that the Alliance decision was a case in Western Australia, the WA and NT Acts are virtually identical and I therefore concur with the applicant's position and the Alliance decision in that my jurisdiction in this matter is confined to accepting or rejecting the payment claim and not awarding counter-claims. I have addressed the valuation of the payment claim in the paragraphs below.

The submission by the applicant that time is set at large.

78. The applicant states in its adjudication application that the delays it relies upon are acts of prevention or breaches of the Subcontract by the respondent which set 'time at large' and that the respondent therefore cannot recover liquidated damages.¹¹
79. At paragraph 249 of the adjudication application the applicant states that the Deed limits its entitlement to EOT's to the following clause 4(b) Claims commercially settled and released including:

¹¹ Adjudication application paragraphs 245 and 274

- an Extension of Time for delay caused by a failure of [*respondent*] to meet 'Contractor's milestones' in the [*applicant's*] Accelerated program Rev 17.1 (18022014) Status @ 19022014; and
- an Extension of Time for delay occurring after the date of execution of the deed caused by Relief Events or Compensation Events as defined in the Subcontract¹².

80. The respondent's position is that there are a number of responses, including:

- (a) the matters relied upon by the applicant did not delay it;
- (b) the Subcontract by clause 13.1(a) expressly provided [the applicant] with a right to claim an extension of time and that clause was not varied or deleted by the Deed of Settlement¹³;
- (c) it is not the case that the Deed of Settlement '*enlivens respondent's liability for applicant's loss caused by the respondent's own acts of prevention*' as the applicant submits¹⁴. Rather, by entering into the Deed of Settlement the applicant agreed to commercially resolve and settle the claims it then had and some of the claims for extensions of time it may have in the future, in return for the sum of \$5,000,000. It cannot rely upon alleged preventing conduct of the respondent where the applicant failed to exercise its contractual right to an Extension of Time which would have negated the effect of that preventing conduct, because it chose instead to receive payment of \$5,000,000 in consideration of releasing those rights or claims;
- (d) further and in the alternative, the parties by the Subcontract agreed that the 'prevention principle' would have no application to the Subcontract. The Subcontract expressly provided that '*Failure by the Builder's Representative to grant a reasonable Extension of Time shall not set time at large and the Subcontractor's sole remedy for any such failure is to refer the matter to dispute resolution in accordance with the Subcontract.*'¹⁵;

81. Having reviewed the submissions in detail submitted by both parties and indeed the extensive material provided in relation to the prevention principle I am satisfied that both the wording of the Deed and the Subcontract agreement provided appropriate relief in the event of delays caused by the Builder. In particular I am satisfied that the extract from the Deed "*Extension of Time for delay caused by a failure of [the respondent] to meet 'Contractor's milestones'*" provides appropriate relief for the applicant for delays caused by the respondent.

82. I therefore conclude that I do not consider that the prevention principle applies nor is time at large. I shall address the issues relating to entitlements or otherwise to extensions of time below.

¹² Deed of Settlement and Release clause 4(b)(iii)

¹³ Subcontract clause 13.1 provides a right to an extension of time for '... a breach of the Subcontract or an act of prevention of the Builder';

¹⁴ Adjudication application paragraphs 248

¹⁵ Subcontract clause 13.3

Causes of Delay including expert reports of TBH & Hinds Blunden

83. The applicant groups the alleged causes of delay into the following seven categories¹⁶:
- 1) prior and ongoing [redacted] instability and defects in [*the respondent's*] works;
 - 2) failure of the [*respondent*] to provide completed buildings on time in order to enable [*the applicant's*] commissioning and testing works as scheduled;
 - 3) inconsistent provision of power (both in terms of quality and permanency) by [*the respondent*];
 - 4) repeated [*redacted works*] damage by [*the respondent's*] suppliers and / or subcontractors;
 - 5) complete failure of the [*redacted*];
 - 6) failure of multiple [*redacted*]; and
 - 7) failure of [*the respondent*] to manage the contract and completion outcomes including compliance to agreed testing and limitation of design changes prior to practical completion.
84. The applicant states each and every one of these causes of delay are solely caused by the respondent.
85. Contrary to the allegations raised by the applicant, the respondent considers that fundamental reasons for applicant's delays can be broadly described as follows:
- (a) a lack of resources in [*work details redacted*];
 - (b) the "[*work details redacted*]" issues; and
 - (c) the Inspection Test Plan (ITP) records issues.
86. In respect of the lack of the applicant's resources applied to [*redacted*] commissioning and integration, the respondent relies on the statutory declaration of [*FG*] dated 24th November 2014¹⁷, which it states provides evidence of a number of examples of the applicant delaying its works as a result of inadequate resources being employed.
87. During the negotiations leading up to the execution of the Deed of Settlement, the applicant represented that it would increase its resources on site to accelerate the works and it committed to do so in the Deed of Settlement itself¹⁸.
88. However, as stated in the adjudication response by the respondent this never occurred and the applicant's delays on site continued to be a product of its own lack of resources.
89. The respondent further argues that there were numerous occasions where buildings were ready to be fitted off by [*the applicant*] however they had not started or were still in the process of fit off but behind their own schedule. On a number of occasions [*GH*] of [*the applicant*] stated that its installation contractor, [*redacted*], was under-resourced and

¹⁶ Adjudication Application at paragraph 164

¹⁷ A copy of the Statutory Declaration of [*FG*] dated 24 November is at Tab 21

¹⁸ Deed of Settlement and Release paragraph 3(a) and 3(b)

therefore had neither the resources to undertake the works or were focussing resources on other areas to complete prior to moving on to other areas¹⁹.

90. [The applicant] also had significant problems on site concerning delays in its systems being tested and commissioned, delays in the supply of ITP's to verify the status of testing commissioning and delays in integration and demonstrating to both [the respondent], [name redacted] and the [principal's] representative that its [work details redacted] was functioning correctly, properly integrated and ready for operation²⁰. ITPs concerning [work details redacted] were outstanding for many months²¹. Sheeting to the [work details redacted] was thus significantly behind due to [the applicant] not signing the ITP²².
91. The respondent states that the applicant was responsible for the delay in its works because:
- (a) it continually failed to provide ITP's accurately confirming the status of its works and when tested for verification and challenged by [the respondent] they were found to be in error;
 - (b) testing by [the respondent] repeatedly uncovered short falls in the ITP's necessitating [the applicant] to revisit areas and undertake [work details redacted] to recommission and verify the operation of their [work details redacted]. This absorbed resources that should otherwise have been utilised on commissioning and testing in other areas and equipment and resources required for the [project details redacted].
 - (c) it failed to properly allow resources for and undertake its own obligations within the Subcontract
 - (d) there were repeated and ongoing failure of significant systems including, for example, [work details redacted] all as described in the commissioning status reports provided by [JJ] throughout the period after execution of the Deed of Settlement²³.

The [work details redacted]

92. Within the adjudication application the applicant states that '*the [redacted] issues are a significant cause of delay to the Subcontract Works and controversy between the parties*'.²⁴ In summary, [the applicant's] key proposition is that it has been delayed in its works by the instability of [the respondent's redacted work details].
93. It is common ground that within the scope of works of the Subcontract, the applicant was responsible for the supply, installation and commissioning of the [work details redacted].
94. [Description of particular works and their significance to the overall project redacted]
95. It is also common ground that the respondent was responsible for the construction of a [description of particular works and their significance to the overall project redacted].

19 See statutory declaration of [HI] at paragraph 32 (included at Tab 40)

20 See statutory declaration of [HI] at paragraph 34 (included at Tab 40)

21 See statutory declaration of [JK] paragraph 16(j) (included at Tab 24)

22 See statutory declaration of [JK] paragraph 36(d) (included at Tab 24)

23 See statutory declaration of [HI] at paragraph 36 (included at Tab 40)

24 Adjudication Application paragraph 166

96. The respondent also states that in accordance with the terms of the Subcontract, and in particular the terms of the redundancy obligations of section 12.10.5 of the Output Specification, the applicant was required to ensure that its [*description of particular work and its significance to the overall project redacted*], is available 100%.
97. The respondent also argues as supported in the statutory declaration prepared by [KL] that [*the principal*] acknowledged that, consistent with industry practice and understanding, the 100% availability requirement would be satisfactorily met if [*details redacted*]²⁵.
98. In addition the respondent also states that the Output Specification provides that the [*work details redacted*] would be available at all times (section 12.11 of the Output Specification), the Output Specification imposes a similar requirement on the [*work details redacted*]. In particular, section 12.10.5 of the Output Specification provides:
- [redacted]
99. Therefore the respondent's position is that the obligations of 'Project Company' in the Output Specification are passed down to applicant in relation to its Subcontract scope of works.
100. In summary the respondent considers [*work detail and significance redacted*], it was the applicant's contractual responsibility to:
- (a) [*work details redacted*] and
 - (b) [*work details redacted*].
101. Section 2 of Schedule 2 – Scope of Works to the Subcontract provides:
- [*redacted*]
102. The respondent's position is that clause 12.10.5(f) of the Output Specification means that the applicant must ensure that there is no single point of failure anywhere within the [*work details redacted*]. It was therefore the applicant's responsibility to provide whatever [*work details redacted*] that was necessary to achieve this outcome.
103. The respondent also state in the statutory declaration of [AB]²⁶ that:
- (a) [*redacted*]
 - (b) [*Redacted*] has undertaken an independent review of the disruptions to the [*works details redacted*] that have delayed the applicant and found that:
 - [*redacted*]; and
 - there should have been greater testing by the applicant of the [*work details redacted*] prior to deployment; and
 - (c) there has been exhaustive testing of the [*respondents equipment*] conducted by the applicant and it has not been proven that the [*redacted equipment*] is operating outside of the relevant [*redacted*] standards for [*redacted equipment*] as designed.

²⁵ See statutory declaration of [KL] at paragraph 34 - 38

²⁶ At Tab 73 of the Adjudication Response

104. The respondent therefore considers that in accordance with the terms of the Subcontract outlined above, the [redacted equipment] issues are fully the responsibility of the applicant under the Subcontract and therefore do not give rise to any extension of time entitlement.
105. As stated above it is common ground that the Scope of Works clause 6.0 states that the respondent was responsible for providing the [particular work details redacted].
106. The applicant states in its adjudication application that there have been frequent [redacted] and issues with the [applicant's] [redacted equipment] [work details redacted]. The applicant states that its investigations have indicated that the [redacted equipment] is deficient and specifically that:
- (a) [redacted];²⁷ and
 - (b) [redacted].²⁸
107. The applicant further states that [name omitted] made the following observations in its [redacted] Analysis Report dated 25 March 2014:
- [redacted]
108. The applicant also states in its adjudication application that the conclusions on the cause of failure of the [redacted] is supported by the fact that:
- (a) The respondent after entering into the Subcontract unilaterally introduced a new criteria in the specification/brief [details redacted];
 - (b) This new specification was not appropriate for the [equipment redacted] that [the applicant] had subcontracted to supply and install, and the change in the specification came at a time when [the applicant] could not vary its equipment to make it work with the [respondent's redacted equipment] criteria.
109. [Redacted]
110. [Redacted]
111. The applicant further states in its application that [redacted]
112. The applicant states that it specially chose equipment on the basis that the expectation as set out in the [work details redacted] would be that [those works] would be available 100%.
113. The applicant on 12th June 2014 submitted its Notice of Possible Delay (NPD) to the respondent in relation to this issue, the impact of these delays was approximately 10 weeks.
114. The applicant further describes the mitigation efforts undertaken in an attempt to assist the respondent with the resolution of the [redacted] issues as follows:
- (a) [redacted]
 - (b) The applicant suggested to the respondent in July 2014 that it remove the trigger of the issues by removing the outdated [work details redacted]²⁹

27 Adjudication application – [redacted] Report by [redacted]u dated 25 March 14 page 20

28 Adjudication application – [redacted] Report by [redacted] dated 25 March 14 page 27

- (c) [redacted]³⁰
- (d) [redacted]
- (e) [redacted]³¹

115. Based on the evidence provided by both parties I consider that the problems experienced with [equipment redacted] availability were the responsibility of the respondent and I consider that these delays give rise to an EOT entitlement due to a failure by the [respondent] to meet its milestones under the program entitled “[Applicant] Accelerated Construction Program Re 17.1 referenced in the Deed. I shall address the extent of the delay and any relevant EOT in the paragraphs below.

Failure to deliver up buildings in the required 'green state'

116. The applicant in its adjudication application alleges that the respondent failed to deliver up the buildings in the required state to enable it to install, commission and test their works. The applicant relies on the statutory declarations of [MM], [NO], [CD] and [OP]³². The respondent in its adjudication response relies on the [HI]³³ and [JK]³⁴ statutory declarations in response to the green state issue.

117. The applicant states in the statutory declaration by [NO] that:

- (a) [The applicant] is normally one of the last to commence its principal works on site and also usually one of the last to finish. This is because of the normal sequence of trades in this type of construction and because the [redacted] equipment and devices which [the applicant] must supply and install are valuable and fragile and are easily damaged by other trades and third parties with access to the site. [The applicant's] principal works comprises the fit-off of the field devices and the pre-commissioning, commissioning, testing and [work details redacted] component of the scope of works. The rough-in component of [the applicant's] Subcontract, the installation of [work details redacted] takes place in conjunction with the other trades and is co-ordinated to suit all other relevant trades.
- (b) It is essential that before [the applicant] is able to commence its principal works, a building needs to be in what is known as a “green state”, that is almost complete including live power supply, fully installed fixtures and furniture.
- (c) Relevant milestones were inserted into the respondent’s programme (as it existed at the time of entering into the Subcontract) to represent the extent and stage of completion needed before the applicant would be able and required to proceed with final [work details redacted].

118. Contained within the applicant’s statutory declaration from [MM] numerous examples have been quoted in an attempt to demonstrate the necessity of the buildings reaching green-state prior to [the applicant] installing [work details redacted]. Some of the examples quoted and the respondent’s failure to do so and the knock on consequences are detailed below:

29 Refer to tab 8 statutory declaration of [CD]

30 Refer to tab 8 statutory declaration of [CD] – attachment CR-6 e-mail from Kip Hayes to Cristian Reilly dated 30 July 14

31 Refer to tab 8 statutory declaration of [CD]

32 Refer to the relevant statutory declarations at tabs 7,6, 8 and 11 respectively of the adjudication application

33 At Tab 40 of the Adjudication Response

34 At Tab 24 of the Adjudication Response

- (a) [redacted].
- (b) Some [redacted equipment] had been installed by [the applicant] but as the walling trades needed to re-sheet the walls, they cut all [redacted equipment] back in order to undertake their works without having to co-ordinate or avoid the [redacted equipment].
- (c) Alleged poor design prevented the buildings from achieving [work details redacted] in order for [the applicant] to carry out the commissioning work.
119. As a consequence the applicant states that given the site conditions it could not commence its works as scheduled.
120. The applicant maintains that even after it had installed the [work details redacted] the issues continued due to the fact that the respondent was running behind schedule due to the substantial amount of defects present in the buildings. The applicant maintained a register of the respondent's defects which were issued in report format to the respondent highlighting the potential delay on [work details redacted] and commissioning.³⁵
121. The respondent submits that the applicant's position is factually incorrect because:
- (a) the reference to the term 'green state' is a misnomer and the commencement of the applicant's 'principal works' did not rely on buildings needing to be secured or completed to the extent alleged by [the applicant]³⁶;
- (b) this is confirmed by Hinds Blunden;³⁷
- (c) a milestone schedule of the items required in order for the applicant's [work details redacted] to commence and the subsequent pre-commissioning activities to progress was prepared. Milestone dates were achieved by [the respondent]. However, [the applicant] did not proceed with the [work details redacted] to all areas in line with the agreed milestone schedule. This is shown by comparing the milestone schedule with the marked up programmes³⁸; and
- (d) in summary the applicant delayed its 'principal works' because of its own schedule of works, unavailability of resources and procurement delays³⁹.
122. Having reviewed that various documentation prepared by both applicant and the respondent including the various statutory declarations, I am satisfied that the respondent failed to deliver the buildings to the applicant in the required state to enable it to install, commission and test the works all as per the previously agreed milestones.
123. I therefore consider that the problems experienced with the failure deliver up the buildings to the required "green-state" was the responsibility of the respondent and I consider that these delays give rise to an EOT entitlement due to a failure by the [respondent] to meet its milestones under the program entitled "[Applicant] Accelerated Construction Program Re 17.1 referenced in the Deed. I shall address the extent of the delay and any relevant EOT in the paragraphs below.

³⁵ Refer to the relevant statutory declarations of [OP] at tab11 of the adjudication application

³⁶ See for example paragraph 22 of the [HI] Declaration and paragraph 14 of the [MN] Declaration

³⁷ Hinds Blunden report dated 24 November 2014 at Tab 10

³⁸ See for example paragraphs 8 – 18 of the [MN] Declaration and paragraphs 15 – 33 of the [HI] Declaration

³⁹ See for example paragraphs 8 – 18 of the [MN] Declaration and paragraphs 15 – 33 of the [HI] Declaration

Failure to provide uninterrupted or consistent power supply

124. The applicant alleges⁴⁰ that the respondent failed to provide uninterrupted or consistent power supply, causing disruption to the works, affecting the efficiency of the applicant's workforce and causing or contributing delay.
125. Contained in the respondent's statutory declarations of [JK]⁴¹ and [AB]⁴² the respondent considers that this allegation is without merit and wrong because:
- (a) power was made available to buildings in accordance with the Milestone schedule;
 - (b) to the extent that power shutdowns were required to areas of the Project for certain defect rectification or otherwise, these works were planned and communicated with subcontractors prior to proceeding, in particular to the applicant; and
 - (c) power issues were attributed to tripped RCDs which was the result of faulty equipment being plugged into the GP Outlet, and the power system engaging as it is designed to do in accordance with Australian Standards.
126. Based on the evidence produced I am not satisfied that the applicant has adequately demonstrated that the respondent was fully responsible for provision of consistent power supply and therefore I do not consider this as a valid reason for any EOT entitlement.

Repeated [redacted equipment] damage

127. The applicant claims that it was delayed in achieving Substantial Completion by *'the Contractor and/or its other suppliers or subcontractors [who] have repeatedly damaged the [redacted equipment].'*
128. The applicant also relies on the statutory declarations of [NO], [MM] and [DB] which describe the extent of the damage that occurred to the [redacted equipment].
129. The damage incurred to the [redacted equipment] fell within two categories. The first being damage to the [work details redacted] and the second being damage to the [work details redacted].
130. [Work details redacted] was a part of the [applicant's] works under the Subcontract.
131. The respondent refers to clause 10.20 of the Subcontract which provides:
- 'The Subcontractor shall at all times until Practical Completion and otherwise when carrying out its work (including defects rectification) be responsible for and protect from damage or loss:*
- (a) the Works (from any cause including work by others)...*
132. Having reviewed the documentation prepared by both applicant and the respondent including the various statutory declarations, I am satisfied with the applicant was prevented from achieving Substantial Completion due to the ongoing damage to the

⁴⁰ At paragraphs 231 to 232 of the Adjudication Application

⁴¹ See Tab 24 of this Adjudication Response

⁴² See Tab 73 of this Adjudication Response

[redacted equipment] caused by the respondent and parties outside the control of the applicant and therefore consider that these delays are the responsibility of the respondent.

Complete failure of the DRUP's system

133. The applicant claims that a site wide power loss on 12th July 2014 caused damage to [work details redacted] and resulted in a number of alleged secondary affects.
134. [Redacted]
135. The Project site was without power for approximately 6 hours. That was the extent of the delay only⁴³.
136. As it is common ground that the failure caused a power outage of 6 hours the impact on the critical path will be addressed below however the applicant has not provided sufficient evidence to demonstrate the extent of any damage caused as a consequence of the 6 hour shutdown.

Failure of the air-conditioning system

137. The applicant claims that the respondent's failure to supply 'adequate' air conditioning systems 'caused and/or contributed' to the applicants delay in achieving Substantial Completion.
138. The respondent states that in fact⁴⁴:
- (a) whenever the air-conditioning units were required, this was at all times co-ordinated with [the applicant] and did not affect the [the applicant's] works or [redacted equipment];
 - (b) the respondent has never received any evidence of any warranties for [redacted equipment] being voided as a result of any air-conditioning deficiencies and it disputes that this occurred – if it did (which is denied), this is applicant's responsibility given that it was advised in advance of the shutdown of the air conditioning; and
 - (c) the only equipment replacement which was a result of any air conditioning failures was a [redacted equipment] replacement which did not delay [the applicant's] works.
139. Based on the evidence produced I am not satisfied that the applicant has demonstrated that the respondent was fully responsible for the failure of the air-conditioning system.
140. I am also not convinced that the applicant has provided any evidence to demonstrate any damage to its equipment as a consequence of a failure on the part of the respondent to provide an adequate air-conditioning system.
141. I therefore do not consider this as a valid reason for any EOT entitlement.

Time bars

⁴³ See statutory declaration of [AB] paragraph 60

⁴⁴ See statutory declaration of [AB] paragraph 61

142. The contractual process for submitting claims for Extensions of Time and the conditions precedent for entitlement are contained in clauses 13.1 and 13.2 of the Subcontract.
143. In relation to the requirements of clause 13.1 (being the Notice of Possible Delay, Extension of Time Notice and Refresher Extension of Time Notices), the applicant contends at paragraph 327 of the adjudication application that:
- '...it must be implied into clause 13.1 as a matter of necessity, that time does not start to run until [the applicant] **knows** that the delay being incurred, or that it considers will be incurred, was **caused by one of the matters set out in clause 4(a) of the Deed** (although, prior to the Deed, clause 13.1).'*
144. As [the applicant] has identified, the circumstances in which a term will be implied were summarised in the majority judgment of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*⁴⁵. For a term to be implied, it must:
- (a) be reasonable and equitable;
 - (b) be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
 - (c) be so obvious that "it goes without saying";
 - (d) be capable of clear expression; and
 - (e) not contradict the express terms of the contract.
145. [The applicant] submits that *'an implied term in these circumstances, that time does not start to run until [the applicant] knows that the delay being incurred, or that it considers will be incurred, was caused by one of the matters set out in clause 4(b) of the Deed, satisfies these requirements.*
146. The respondent contrary to the applicant's submission states that there is simply no legal basis for the implication of such a term. Further, the implied term contended for by the applicant clearly contradicts the express terms of the Subcontract.
147. The respondent considers that the applicant's comments concerning alleged [redacted equipment] issues on this point at paragraph 329 to 330 of the adjudication application are irrelevant to the implication of a term which is a question of construction to be assessed at the time the contract was entered and alleged post contractual conduct is inadmissible. However, I have considered the [redacted equipment] issues above and conclude that these delays were the respondent's responsibility.
148. I concur with the applicant in this regard and consider that as it did not have any visibility over the [respondent's infrastructure], it submits it did not actually know that the delays it was incurring were in fact caused by the [respondent's infrastructure] or the change in the [redacted equipment] specification [for the respondent's infrastructure] until the time that it submitted the relevant notices.
149. In relation to the requirement to submit an Extension of Time Claim under clause 13.2 of the Subcontract in addition to the notices required by clause 13.1 of the Subcontract, [the applicant] admit that it did not submit such claims.

45 (1977) 180 CLR 266 at 283

150. The respondent considers its refusals of the applicant's Extensions of Time were and are in accordance with the terms of the Subcontract.
151. Based on the evidence provided by the parties and review of the Extension of Time provisions in the Subcontract I conclude that the time bar provisions do not apply and that I agree with the applicant's position that time does not start to run until the applicant knows the delay is being incurred. Therefore with regard to the [redacted equipment] delays the applicant was unaware of the extent of the delay until the time it actually submitted the relevant notices.

Jurisdiction of adjudicator to extend time

152. The applicant submits that the adjudicator can and is required to exercise the discretion contained in the Subcontract to grant the Extensions of Time claimed even if they do not strictly comply with the Subcontract.
153. The discretion that applicant refers to is contained in the third paragraph of clause 13.3 of the Subcontract which provides:
- 'The Builder in its absolute discretion may at any time (whether or not a claim for an Extension of Time has been made), grant an Extension of Time.'*
154. The Subcontract confers the discretion on the Builder. It is not conferred on the adjudicator. The respondent does not accept that the adjudicator may step into the shoes of the Builder and assess whether the applicant is entitled to Extensions of Time.
155. The respondent further argues that even if the adjudicator determines that he is entitled to assess whether the applicant is entitled to Extensions of Time (which is denied) the adjudicator must reject any purported entitlement on the basis that the Extensions of Time does not comply with the time bars in the Subcontract as discussed above.
156. As stated above I have concluded that the time bar provisions do not apply and I consider that I do have jurisdiction to assess the extent or otherwise of any extension of time claims included within the payment claim and adjudication application which I shall address below.

Right to EOT

157. In the statutory declarations and the report of TBH provided in support of the adjudication application, a total of 26 individual Extensions of Time are referred to (as listed in section 7 of the report of TBH).
158. In the alternative to its alleged prevention defence the applicant contends that it is entitled to Extensions of Time that would extend the Date for Substantial Completion to:
- (a) 17th October 2014 ([redacted] EOT), being EOT 208; or
 - (b) in the alternative to 3rd October 2014 ([redacted] EOT), being EOT 203.⁴⁶

⁴⁶ See paragraph 409 of the Adjudication Application

159. On this basis the applicant alleges that adjusted Date for Substantial Completion had not passed as at the date of the Payment Claim, and no set-off for Liquidated Damages is justified.⁴⁷

EOT 208 – [redacted]

160. The respondent considers that the applicant is not entitled to any Extension of Time concerning EOT208 because:
- (a) if it had an entitlement, that Claim was released by the Deed of Settlement;
 - (b) pursuant to the terms of the Subcontract, the respondent and not the applicant was contractually responsible for the issues;
 - (c) the claims for the Extension of Time are time barred under the Subcontract;
 - (d) the adjudicator has no power under the Subcontract to grant an Extension of Time;
 - (e) for the reasons explained in Hinds Blunden's report and summarised in the adjudication response, nothing in TBH's report establishes any delay; and
 - (f) the actual cause of applicant's delays are as set out in below in paragraphs 171-173 below.
161. In relation to items (a)-(d) I have previously considered each issue in my decision above and do not agree with the respondents position in relation to each item.
162. With regard to items (e) & (f) I have carefully considered all the documents provided by the parties in relation to EOT 208 and the [redacted equipment] issues, in particular the relevant statutory declarations and the more specific delay reports produced by TBH and Hinds Blunden respectively.
163. The specific issues associated with the [redacted equipment] were also addressed in my decision in paragraphs 92-115 above where I conclude that the delays associated with the [redacted equipment] were the responsibility of the respondent.
164. I have also analysed the expert delay reports and based on the information provided by both experts together with the fact that I consider the [redacted equipment] delays were the responsibility of the respondent; I prefer the conclusion reached in the TBH report in that the delay encountered as a consequence of the [redacted] was the critical delay for the period from 24th April 2014 to 17th October 2014 and therefore the applicant would be entitled to an Extension of Time.
165. Once this delay is applied to the Deed Programme, along with the October status information the revised Date for Substantial Completion is 29th October 2014 and therefore the deduction of liquidated damages does not apply.

EOT 203 – [redacted]

166. The respondent considers that the applicant is not entitled to any Extension of Time concerning EOT203 because:

⁴⁷ See paragraph 409 of the Adjudication Application

- (a) if it had an entitlement, that Claim was released by the Deed of Settlement.
- (b) the claims for the Extension of Time are time barred under the Subcontract for the reasons set out in section 15;
- (c) the adjudicator has no power under the Subcontract to grant an Extension of Time for the reasons set out in section 16;
- (d) the so-called 'green state' matters did not delay the applicant
- (e) for the reasons explained in Hinds Blunden's report and according to the Rev 17.1 Program, the [*the respondent's*] works remaining to be completed in order for the applicant to complete their works as of 19th February 2014, were completed by the date of the Deed of Settlement; and
- (f) the actual cause of the applicant's delays are as set out in below in paragraphs 171-173 below.

167. In relation to items (a)-(d) I have previously considered each issue in my decision above and do not agree with the respondents position in relation to each item.

168. With regard to items (e) & (f) as I have concluded that EOT208 was the critical delay for the period once this delay is applied to the Deed Programme, along with the October status information the revised Date for Substantial Completion is 29th October 2014. I have therefore not considered EOT203 any further.

The balance of [Applicant's] EOTs

169. The respondent further states in its adjudication response that the applicant is not entitled to any Extension of Time concerning the 24 further Extensions of Time because:

- (a) if it had an entitlement, that Claim was released by the Deed of Settlement;
- (b) the claims for the Extension of Time are time barred under the Subcontract;
- (c) the adjudicator has no power under the Subcontract to grant an Extension of Time
- (d) the respondent was not responsible for those delays for the reasons set out in Appendix 2 to the statutory declaration of [*KL*]; and
- (e) the actual cause of the applicant's delays are as set out in below in paragraphs 171-173 below

170. With regard to items (a)-(e) as I have concluded that EOT208 was the critical delay for the period once this delay is applied to the Deed Programme, along with the October status information the revised Date for Substantial Completion is 29th October 2014. I have therefore not considered these EOT claims any further.

Actual causes of the applicant's delay

171. The respondent states in its adjudication response that its delay expert, Hinds Blunden, has undertaken its own analysis of the delays to the applicant's works which is set out at section 5 of its report. It concluded the following in respect of delay to the works:

- (a) in the period from 23rd April 2014 to 3rd June 2014 the critical path of the works and the Date for Substantial Completion slipped by a period of 9 calendar days. The cause of this delay was the delayed progress of the applicant's installation works to the [redacted] and [redacted] Commissioning;
- (b) in the period from 3rd June 2014 to 9th August 2014 the critical path of the works and the Date for Substantial Completion slipped by a period of 21 calendar days. The cause of this delay was the delayed progress of the applicant's [redacted] Commissioning and its successors; and
- (c) in the period from 9th August 2014 to 29th October 2014 the critical path of the works and the Date for Substantial Completion slipped by a period of 73 calendar days. The cause of this delay was unsuccessful completion of the 28 Day Fault Free Period due to faults which were the applicant's responsibility.

172. The actual causes of the applicant's delays are summarised at paragraphs 14.4 – 14.11 of the adjudication response.
173. The respondent further provides that the delays due to faults occurring during the 28 Day Fault Free Period are explained in the statutory declaration of [KL]⁴⁸. The problems experienced during the 28 day fault free period were the same as those experienced before the execution of the Deed of Settlement. As Appendix 1 to [KL's] statutory declaration attempts to demonstrate the applicant was responsible for each re-start notice.
174. As I have concluded that EOT208 was the critical delay for the period and once this delay is applied to the Deed Programme, along with the October status information the revised Date for Substantial Completion is 29th October 2014.
175. As stated above having reviewed all the relevant evidence, statutory declarations and expert delay reports I do not agree with the actual causes of the applicant's delay as stated by the respondent.

Liquidated damages are not void as a penalty

176. As I have agreed with the conclusions reached by the applicant in relation to its EOT208 and therefore consider that the revised Date for Substantial Completion is now 29th October 2014 and therefore the deduction of Liquidated Damages is no longer relevant and hence the argument raised in the adjudication application and the adjudication response is no longer relevant.
177. In the spirit of the Act and in an attempt to reduce costs to the parties I have not considered the merits of either argument raised, as the deduction of Liquidated Damages is not applicable as the date for Substantial Completion is now 29th October 2014.

Valuation of issues in dispute

178. My determination in relation to this adjudication is as follows:

| VO No | Description | Payment Schedule | Payment Claim 32 | Issues in Dispute | Adjudicated Amount |
|--------------|--------------------|-------------------------|-------------------------|--------------------------|---------------------------|
|--------------|--------------------|-------------------------|-------------------------|--------------------------|---------------------------|

⁴⁸ At paragraphs 79 – 85 and Appendix 1

| | | | | | |
|------|--|------------------------|------------------------|-----------------------|------------------------|
| | Work Under the Subcontract | \$26,303,805.85 | \$26,536,318.07 | \$232,512.22 | \$26,536,318.07 |
| 1.00 | Design & Project Management - refer to sch 2 | \$4,311,730.61 | \$4,311,730.61 | \$0.00 | \$4,311,730.61 |
| 2.00 | Development Costs | \$2,250,000.00 | \$2,250,000.00 | \$0.00 | \$2,250,000.00 |
| 3.00 | Site Mobilisation - refer to sch 2 | \$135,000.00 | \$135,000.00 | \$0.00 | \$135,000.00 |
| 4.00 | [redacted] - refer to sch 2 | \$17,357,770.00 | \$17,574,198.46 | \$216,428.46 | \$17,574,198.46 |
| 5.00 | MHBM | \$2,084,592.33 | \$2,100,676.09 | \$16,083.76 | \$2,100,676.09 |
| | SAPC | \$164,712.91 | \$164,712.91 | \$0.00 | \$164,712.91 |
| | Variations & LD's | -\$6,651,000.00 | \$2,759,663.76 | \$9,410,663.76 | \$2,689,000.00 |
| | Variations 1-132 | \$189,000.00 | \$189,000.00 | \$0.00 | \$189,000.00 |
| | Deed of Settlement | \$2,500,000.00 | \$2,500,000.00 | \$0.00 | \$2,500,000.00 |
| | Variations Post Deed | \$0.00 | \$70,663.76 | \$70,663.76 | \$0.00 |
| | Back Charges - Post Deed (incl Liquidated Damages) | -\$9,340,000.00 | \$0.00 | \$9,340,000.00 | \$0.00 |
| | Sub total | \$19,652,805.85 | \$29,295,981.83 | \$9,643,175.98 | \$29,225,318.07 |
| | Less previously paid | \$28,326,053.47 | \$28,326,053.47 | | \$28,326,053.47 |
| | Total | -\$8,673,247.62 | \$969,928.36 | | \$899,264.60 |
| | GST 10% | -\$867,324.76 | \$96,992.84 | | \$89,926.46 |
| | Totals | -\$9,540,572.38 | \$1,066,921.20 | | \$989,191.06 |

179. I therefore find that the adjudicated amount is **\$989,191.06**

Adjudication costs

180. Pursuant to section 36(1) of the Act, I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.
181. The adjudication costs for this determination amount to 108.75 hours @ \$325.00 plus GST = \$38,878.13 including GST and as stated in paragraph 180 above, is to be paid equally by both parties. Tax invoices will be issued accordingly.

Interest Costs

182. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1) (b) of the Act at rate of 8.5% per annum from the 14th October 2014.

Confidential information

183. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
- a. The identity of the parties.
 - b. The identity and location of the project.



Signed:
Colin Bond – Registered Adjudicator No. 34

Dated: 22nd December 2014