DETERMINATION NO. 16.08.05

Adjudicator's Determination

pursuant to the

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

Applicant

and

Respondent

I, Cameron Ford, determine on 28 November 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is $164,741.98 exclusive of GST being the amount owing of $151,484.46 plus interest of $13,257.52 to today. Interest accrues on the sum of $151,484.46 at the rate of 1.25% per month, namely $1,893.55, which using a 30 day month is $63.12 per day from today. The amount of $164,741.98 is payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Appointment as adjudicator

1. On 31 October 2008 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointed under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. I made the parties aware of certain contacts I had had with one of them but neither objected to my appointment.

Documents received by adjudicator

2. I received and have considered the application supported by the documents 1 to 10 listed in the index to the application, together with the response and the documents attached thereto. I have also considered the further submissions I invited and the authorities provided.

3. The response was delivered on 14 November 2008 making my determination initially due on 28 November 2008.

JURISDICTION

4. The parties do not contend that I do not have jurisdiction, and I find that I have jurisdiction because:

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

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

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

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

THE APPLICATION

5. The applicant seeks $677,511.26 inclusive of GST plus interest, being the amount said to be outstanding in respect of progress claim 9 made on 7 October 2008. That claim included the amount claimed in progress claim 8, all but $2,351.82 of which was paid after progress claim 9 was made.

6. Background to the application is that the applicant was the builder and the respondent the owner of a warehouse, office and ancillary works in a suburb of Darwin. Eight progress claims were delivered by the applicant to the respondent, all of which the applicant says were paid later than the contract required. Interest under the contract on the amounts owing after their date for payment is part of progress claim 9 and this application.

7. Items 1 to 72 and V3 to V33 (which I take to be variations) are for work performed, some of which were claimed in progress claim 8 as I have said. Item V35 is for interest on late payments of $18,057.11 and V36 is for prolongation costs of $440,229.88 (exclusive of GST). Supporting the application are letters, emails and invoices passing between the parties. There is no signed statement of any servant or agent of the applicant, although I note that the application itself, setting out the background to and substance of the application, is signed by a director of the applicant. Generally speaking, all things being equal, a sworn statement credible in the circumstances will be more persuasive than one which is unsworn.

8. Summarised, the application is for:

   (a) work performed;

   (b) interest on late payment of previous payment claims; and

   (c) prolongation costs.

9. In response, the respondent says the applicant is not entitled to any amount for:

   (a) work performed because:

      (i) the respondent is only obliged to pay claims which it has agreed or approved, with the implied obligation that it act in good faith; and

      (ii) the respondent is entitled to withhold payment until it ascertains its future costs to complete the contract;

   (b) interest on late payment of previous claims because:

      (i) of (a)(i) above;

      (ii) the applicant breached its obligation to make progress claims every 14 days; and

      (iii) the calculation is wrong since "days" as defined does not include weekends and public holidays;

(c) prolongation costs because:

(i) the claim is not made "under a construction contract" as required by s 4 of the Act;

(ii) there is no contractual provision permitting the claim;

(iii)there is no evidence of actual prolongation costs.

(d) generally, because the contract was terminated on 10 October 2008 and therefore there is no contract for any claim to be made under, as required by s 4.

I will consider each in turn.

Claim for work performed

10. Nowhere does the respondent suggest that the work claimed by the applicant in items 1 to 72 and V3 to V33 was not done. In its letter of 10 October, three days after the claim was made, the respondent does not suggest the work was not done, rather asserting that it was entitled to withhold payment against potential future costs to complete the contract.

11. Based on those items in the progress claim, their apparent compatibility with the work required under the contract and the respondent's failure to allege at any time that the work was not done, I find on the balance of probabilities that those items were performed by the applicant.

Did the claim need to be "agreed or approved" by the respondent?

12. The respondent says that it is not liable to pay this claim because it had agreed or approved the claim. In saying so, it relies on item (b) in Schedule 2 – Payment Details which says:

(b) Progress Claims & Payments *(refer clause 15(1))*

(i) **Payment claims** are to be made on the due date which is determined by the following:-

(A) every 14 days from commencement of work; **or**

[struck through]

(ii) Payment of the claim, as agreed or approved, will be made:-

(A) 14 days after the **payment claim** is received; **or**

[struck through]

13. It is as a result of the phrase in (b)(ii) that the respondent says it is only obliged to pay claims which it has agreed or approved. It concedes that, to make the clause workable, there must be an implied term that it consider payment claims in good faith.

14. On the face of it this interpretation, even with the implied term, seems unworkable and open to considerable abuse by an owner. There would be a relatively broad range of conduct before it could be proved that an owner was not acting in good faith, especially bearing in mind the difficulties of such proof.

15. I do not agree with the respondent's interpretation. I believe that the phrase "as agreed or approved" qualifies the claim, not the payment. In other words, payment will be made within 14 days after receipt of a claim which has been agreed or approved. It is the receipt of the claim by the owner which triggers the 14 days, not the agreement or approval. An owner therefore has 14 days to agree or approve and pay a claim. Whatever amount is not paid within 14 days gives rise to a payment dispute as defined by s 8 of the Act.

16. This is consisted with the interest provisions in cl 15(f) which I go on to find impose an obligation on the owner to pay interest no earlier than 14 days after it receives the claim.

17. I find therefore that the respondent may not delay payment until 14 days after it has agreed or approved a claim: it is obliged to pay a claim within 14 days after its receipt. Any other interpretation requires the implication of imprecise, unusual and unworkable terms.

Is the respondent entitled to withhold payment against its future costs?

18. Both in its letter of 10 October and its response, the respondent argues that it is entitled to withhold payment to cover its potential future costs of completing the contract. Is it entitled to do so?

19. I invited further submissions from the parties on this point, an invitation which both accepted. The respondent relied upon its argument that it has the right under the contract to suspend payment indefinitely until it agrees or approves a claim, subject only to the obligation to act in good faith. I have already rejected this argument.

20. That being the only basis on which the respondent supports its right to withhold payment pending ascertainment of its completion costs, I could decide against it without going further. However I will say that I agree with the applicant's submissions that the respondent does not have the right to withhold payment on that basis because:

    (a) there is no contractual right to do so: *Algons Engineering Pty Limited v Abigroup Contractors Pty Limited* (1998) 14 BCL 215, *L.U. Simon Builders Pty Ltd v H.D. Fowles and Others* [1992] 2 VR 189;

    (b) progress claims under the contract are on account: cl 16(e);

    (c) the builder has the right to suspend the works on non-payment which would be rendered practically worthless: cl 15;

    (d) the respondent's claim is unliquidated as opposed to the applicant's liquidated claim: *Stooke v Taylor* (1880) 5 QBD 569, *Aectra Refining and Marketing Inc v Exmar NV* [1995] 1 All ER 641; and

    (e) arguably, an adjudicator cannot consider a set-off of this nature without the party making a separate payment claim and application under the Act.

21. I agree with the applicant that the respondent is not entitled, under the contract or the general law, to withhold payment of progress claim 9 to cover its potential future costs of completing the contract. For the respondent's benefit I should say that I have ignored certain additional factual matters which the applicant included in its further submissions which I did not seek.

22. In the event I find that the applicant is entitled to be paid the amounts of items 1 to 72 and V3 to V33. The applicant says at par 28 of its application that the payment dispute is in the sum of $615,919.33, excluding GST, which is $677,511.26 including GST (par 30 of the application). This appears to be accepted by the respondent at par 25 of its response, although contrary to the respondent's understanding, I understand the figure of $2,351.82 to be included in that sum of $677,511.26 (see pars 20, 21, 27 and 28 of the application).

23. Approaching it in that manner, the amount owing for items 1 to 72 and V3 to V33 is:

Total amount claimed excluding GST			$615,919.33
Less:	Interest claimed	$ 24,204.99	
	Prolongation costs, ex. GST	$440,229.88	$464,434.87
Total			$151,484.46

Interest on late payment of previous claims

24. The applicant says that progress claims 1, 2, 3, 4, 5 and 8 were paid more than 10 days after their receipt by the respondent, and that under cl 15(f) it is entitled to interest at 1.25% per month. In par 3 of its response, the respondent admits the amounts and dates of payment alleged by the applicant.

25. Clause 15 says:

> **15. PROGRESS PAYMENTS**
>
> (a) The Contract price or sum is to be claimed and paid in accordance with the timetable described in Schedule 2(b).

[(b) – (d) - not presently relevant]

(e) the making of any progress payment to the **Builder** is to be taken as payment on account.

(f) Should any progress payment or the final payment not be made within **ten (10) days** after request the **Builder** is entitled to interest thereon at the rate of **1.25 per cent (1.25%) per month**. The **Builder** may also act to suspend work and, as appropriate, terminate the contract. Refer **Clauses 12** and **27**.

26. On its face, this would lead to an odd result in combination with item (b)(ii) of Schedule 2. That item requires payment of a claim 14 days after receipt by the owner whereas cl 15(f) entitles the builder to interest after only 10 days. It is odd to have an entitlement to interest arising before an entitlement to payment.

27. I think, however, that this inconsistency is dealt with by the definition of "days" in cl 36. I will set it out, but essentially for present purposes it defines "days" as working days. In the ordinary course, barring public holidays, 10 working days is 14 days. (It is interesting to note that the period of 10 days, defined effectively as working days, is the period routinely used by the Act.) The relevant part of cl 36 says:

36. DEFINITIONS

(a) whenever the words or phrases (hereinafter defined) occur in these Conditions or in the relevant Drawings, Specification or any other document having reference to the Works, unless the context otherwise indicates, will be treated to mean as follows:

-

"Days" means a day when work is authorised but does not include:-

(i) Saturdays, Sundays or any day that has been or proclaimed to be a public holiday in the locality where the Works are being executed.

(ii) Rostered days off that have been (or may in the future be) granted to employees in the building industry by a relevant industrial Court, Commission or Tribunal and which has general application throughout the State to the building industry.

28. That, however, leads to one further question, and that is whether the 14 days in item (b) should not be 14 working days in accordance with cl 36. I think not because Schedule 2 is not "these Conditions or in the relevant Drawings, Specification or any other document having reference to the Works" and therefore the definition does not apply to the schedule. If I am wrong, I would consider that the context of the schedule indicates an interpretation other than 14 working days because 14 days including weekends and holidays is a widely used and recognised period, and items (c) and (d) in the schedule refer to "work day(s)". That would not have been necessary had "days" in the schedule carried the definition in the contract. (The limited order of precedence in cl 1(c) does not assist).

29. The result is not entirely satisfactory, having to take into account weekends, public holidays and rostered days off. I think, however, that that is to be preferred to the strange situation of interest accruing before the owner is obliged to pay.

30. I therefore agree with the respondent that the period of calculation of the interest by the applicant is wrong – it should have used 10 days as defined by cl 36 which in most cases will be 14 consecutive days plus any public holidays, rostered days off or days on which work was not authorised. While on the face of it this seems a cumbersome exercise, it is only those days falling between the due date for payment and the actual date of payment which must be considered.

31. Does this invalidate the claim and thereby the application? I think not, because:

(a) the respondent admits the late payment;

(b) a payment dispute arose on non-payment of the interest when the principal of each claim was paid;

(c) quantification of the amount owing for interest is simply a matter of calculation;

(d) I may inform myself in any way I consider appropriate – s 34(1)(b); and

(e) I may request a party to provide information – s 34(2)(a).

32. Weighing against that conclusion is the fact that the amount in progress claim 9 for interest is higher than that to which the applicant is entitled. Again, I do not think that invalidates the claim or the application. The Act clearly contemplates, and adjudicators routinely make, determinations awarding a lower amount than that claimed in a payment claim and an application. Section 34(1)(b) says that an adjudicator must determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and the amount of the payment. It does not require the adjudicator to determine whether the applicant is entitled to the amount claimed in the payment claim or the application, and to dismiss the application if the amount to which a party is entitled is different from that claimed.

33. It might be a another matter if the amount claimed in the application or considered by the adjudicator was higher than that in the progress claim, but I do not have to decide that issue.

34. To my mind, these factors indicate that, where there is a simple matter of calculation flowing from admitted facts and the amount to be awarded is less than that claimed, the claim and application are not thereby invalid and the adjudicator may award that lower sum.

35. I chose to ask the parties to calculate the interest using the definition of "days" in cl 36 and both provided me with wildly different figures. The applicant calculated it was entitled to $37,536.87 (higher than the amount initially claimed of $24,204.99), while the respondent calculated $5,086.03. I will append their respective calculations to this determination.

36. It is evident from the calculations that the applicant has taken the 10 days in cl 15(f) still to mean 10 consecutive days rather than excluding weekends, gazetted public holidays, rostered days off and days when work is not authorised (which I may refer to as "non-work days"). At the very least that would be 14 consecutive days from the date the payment became due.

37. On the other hand, the respondent adhered to its contention that claims only became due 14 days after it had agreed or approved them, hence a much later due date than that used by the applicant, in addition to taking at least 14 days thereafter before interest becomes due.

38. The best I can do, I think, is to deduct four days from the amount of each period of interest originally claimed by the applicant in its application, being the usual difference between 10 consecutive days and 10 working days. This takes weekends into account as required by cl 36. The respondent has not alleged any non-work days, and I would have expected it do so had there been. In the end I have no evidence of those days and, since they would benefit the respondent, I think it carries the evidential burden. It is to be born in mind also that these days only affect the *commencement* of the interest period, they do not affect the period during which interest runs – interest is not suspended under cl 15(f) on non-work days. I am satisfied on the evidence on the balance of probabilities that there were no non-work days arising in the period between a payment becoming due and being paid. I have checked the public holidays for the Northern Territory for those periods and the only potentially relevant public holiday was Anzac Day, 25 April 2008 which as I shall explain, was ultimately not relevant.

39. In its response and a supporting statutory declaration the respondent said that progress claims 4 and 5 dated 1 February and 21 April 2008 respectively were superseded by agreement and replaced with progress claim 5 (amendment 3) on 2 June 2008 and (over)paid three days later. I accept this evidence on the balance of probabilities, there being nothing to the contrary from the applicant apart from the original progress claim and the unsworn application. I therefore do not award interest on progress claims 4 and 5.

40. Set out below are the progress claims for which I award interest. I have used the following calculation, choosing 30 days as the number of days per month as an average, bearing in mind the fluctuating number of days in each month in which moneys were owing: Amount owing x days late/30 x 1.25%.

No	**Date of claim**	**Amount $** **(GST inc)**	**Date Due** **(14 days + public holidays, RDOs)**	**Date Paid**	**Amount Paid $**	**Days late**	**Interest $** **1.25% per month** **(days late/30)**
1	24 Sep 2007	153,217.00	8 Oct 2007			9	574.36
2	15 Oct 2007	131,885.00	29 Oct 2007	17 Oct 2007	285,102.00	0	Nil claimed
3	3 Dec 2007	327,515.00	17 Dec 2007	6 Feb 2008	77,515.50	51	6,959.69
				7 Feb 2008	250,000.00	1	104.16
4	2 Jun 2008	170,437.00	16 Jun 2008			0	Nil awarded
5	2 Jun 2008	244,348.99	16 Jun 2008	5 June 2008	250,000	0	Nil awarded
6	25 Jun 2008	176,296.54		18 July 2008	176,296.54		Nil claimed
7	31 Jul 2008	148,340.26		2 Sep 2008	148,340.26		Nil claimed
8	5 Sep 2008	227,351.82	19 Sep 2008	22 Oct 2008	225,000	34	3,220.81
9	7 Oct 2008	677,511.26 but only 151,484.46 awarded on 28 Nov 2008	21 Oct 2008			38 as at 28 Nov 2008	2,398.50
						Total	**13,257.52**

41. A final ground on which the respondent resisted interest on overdue payments was that the applicant did not follow the contractual requirement of submitting claims every 14 days. While it is true that these timetables should be

followed, it is equally true that in the vast majority of cases they are not followed. I make clear that I am not deciding this issue by taking judicial notice of that notorious fact. Instead, I find that there is no evidence that the respondent ever complained to the applicant about not following the timetable for submitting progress claims, and that in the circumstances it has waived that requirement. This accords with common experience in the construction industry.

42. The total amount I award for interest on late payments is $13,257.52. That this is higher than the amount in the progress claim is due to the days interest has been accruing since then. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Prolongation costs

43. The applicant claims prolongation costs of $440,229.88 excluding GST for various delays allegedly caused by the respondent. That amount is claimed in progress claim 9 by reference to a "notice" from the applicant to the respondent of 7 October 2008 which sets out the calculation of "Delay Costs under Contract". Claimed in the notice was the sum of $484,252.87, being the above sum plus GST.

44. Those prolongation costs are grounded on a daily loss of $1,498.94 calculated by dividing the cost of Preliminaries plus GST by the number of days those Preliminaries should have taken, and then multiplying that daily rate by the number of days delay. That calculation is:

Preliminaries	$213,940
Plus GST	$ 21,394
Total Preliminaries	$235,334
Divided by 157 days	$ 1,498.94 per day
Multiplied by 255 days	$382,229.70

45. In addition, the applicant claims "direct additional costs of having to execute the Works during the prolongation period" of $102,023.17. Those costs are calculated according to the following formula:

$$\text{Cost of adjustment} = \text{Value of Work Not Executed} \times \text{Proportion} \times \left[\frac{\text{Current Index No.} - \text{Base Index No.}}{\text{Base Index No.}}\right]$$

46. It is said in the notice that the Proportion factors used for materials and labour are 0.55 and 0.45 respectively, that the date applicable to the Base Index Number is the date 14 days prior to the date on which tenders closed, and the Current Index Number shall be the appropriate Index number applicable to the quarter in consideration.

47. I assume that the "proportion factor" is an industry standard estimate of the proportion of materials and labour in a contract price. I also assume that the index referred to is the Consumer Price Index (CPI).

48. If those assumptions are correct, the cost of adjustment claimed by the applicant is the estimated increase in the price of materials and labour over the period of delay based on rises in the CPI.

49. Without going further, it is readily apparent that the calculations for both the "prolongation costs" and "direct additional costs" are not the actual costs caused by delays. They may be a very accurate estimate, but they are not the actual costs. They are not costs based, for example, on actual invoices or prices or interest rates.

50. Repeating my previous comments, the respondent resists this part of the claim on the bases that:

    (i) it is not made "under a construction contract" as required by s 4 of the Act;

    (ii) there is no contractual provision permitting the claim;

    (iii) there is no evidence of actual prolongation costs.

51. Because of the way of I have recited the claim, I will deal with the last ground first. It is evident that I agree with the respondent that there is no evidence of actual costs caused by alleged delays. The relevance of this finding is the

respondent's contention that there is no provision in the contract for liquidated prolongation costs and that, at best, the applicant has a claim for general damages for breach of contract which it must prove with evidence in the usual way.

52. That leads to the question of whether or not there is provision in the contract for damages to be calculated in the way done by the applicant. Both parties rely on Schedule 2, item (d), which together with item (c) says:

> **(c) Liquidated Damages (Builder to Owner)** (refer clause 20)
>
> $\_\_\_\_-\_\_\_\_$ per work day (unless otherwise stated) payable by the Builder to Owner.
>
> **(d) Delay Costs (Owner to Builder)** (refer clause 6(f) [sic]
>
> $\_\_\_-\_\_\_$ per work day (unless otherwise stated) payable by Owner to Builder.

53. For both items, the dash is handwritten on an otherwise printed form. For its part, the applicant says because the word "Nil" was not inserted in the space, item (d) was "not completed" and was "simply left uncompleted", leaving the applicant to "recover such of its delay costs and expenses that it can reasonably establish, under clause 6(f)(i) of the Contract".

54. Naturally the respondent says the insertion of the dash rather than leaving the space blank indicates that the parties intended that neither should recover liquidated damages under items (c) and (d).

55. My task is to determine the objective intention of the parties. Even based on the necessarily limited materials before me, I have no doubt that the insertion of a dash in both items was intended by the parties to indicate that neither would be able to claim liquidated damages from the other. I do not agree with the applicant that the insertion of the dash left that part of the form uncompleted. Objectively, it was a deliberate act with intentional consequences.

56. What effect does that have on this part of the applicant's claim? Clause 6(f) must be examined to answer that question. It says:

> **Compensation for Delay**
>
> (f) (i) If the delay results from any of the matters listed in paragraphs **(i), (ii), (iii), (iv) or (v) of clause 6(a),** then the Contract Price is to be adjusted to include an amount calculated to cover the cost or expense of the delay as incurred by the **Builder**.
>
> (ii) The amount payable will be determined with reference to Schedule 2(d). In addition, any actual costs incurred by or payable by the Builder because of the delay which in total exceeds the amount payable with reference to the period of delay and the amount stated at Schedule 2(d) will be payable by the **Owner**.

57. To my mind it is clear that the effect of this clause where no figure is deliberately inserted in Schedule 2(d) is that the builder is left to the actual costs incurred. This means that the applicant does not succeed on its claim for prolongation costs as there is no evidence of the actual costs caused by any delay.

58. While not strictly necessary, I will briefly consider the respondent's remaining point that the claim was not "under a construction contract" and therefore it could not be a "payment claim" within the meaning of s 4 of the Act. In my view there is no substance to this argument. A claim for damages for breach of contract is a claim under a contract. In my view the word "under" is not to be given such a restrictive meaning as to mean only a claim which exists because of a particular clause of a contract. It could be interpreted as widely as "arising out of the performance of" a contract, which I know is the view of some senior lawyer-adjudicators.

59. In any case, the applicant's claim is under the contract in that restricted sense. Clause 6(f)((ii) clearly gives an express right to recover actual costs; the applicant is not left to the general law of remedies for breach of contract. It only fails in this case because of a lack of proof of those actual costs, not a lack of entitlement to them under the contract.

60. In the event I find that the applicant is not entitled to its "prolongation costs" or "direct additional costs" because it has failed to prove those actual costs.

Termination of the contract removes applicant's entitlements

61. Finally and applying to the whole application, the respondent repeats its argument that there is no contract for the claim to be under because the contract was terminated on 10 October 2008. I reject this argument for the reasons given immediately above and also because of the well-established principle that certain rights continue after a contract is terminated. Entitlement to damages for breach of contract is obviously one of those rights. That entitlement is still under the contract even though the contract has been terminated and it is a right emanating from the general law. Without the contract there would be no such entitlement. The entitlement arises directly because of the contract and its breach.

CONCLUSION

62. Summarising my findings, the applicant is entitled to payment for:

(a)	the work performed set out in items 1 to 72 and V3 to V33 of progress claim 9 (par 23)	$151,484.46
(b)	interest on overdue payments to 28 Nov 2008 (pars 40 and 42)	$ 13,257.52
Total		$164,741.98

63. The applicant is not entitled to any amount for prolongation costs.

DETERMINATION

64. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $164,741.98 exclusive of GST being the amount owing of $151,484.46 plus interest of $13,257.52 to today under s 35(1)(a). Interest accrues on the sum of $151,484.46[1] at the rate of 1.25% per month, namely $1,893.55, which using a 30 day month is $63.12 per day from today.

65. The sum of $164,741.98 exclusive of GST is payable immediately.

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

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

Dated: 28 November 2008

[signed]

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CAMERON FORD
Registered Adjudicator

[1] Section 35(2) precludes the awarding of interest on interest.