IN THE MATTER OF
AN ADJUDICATION
BETWEEN

XXXXXXXXXXX (Applicant)
XXXXXXXXXXX
ABN XXXXXX
Tel XXXXXX Fax XXXXXX

XXXXXXXXXXX (Respondent)
C/- XXXXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXX
ABN XXXXXXXXX
Tel XXXXXXX Fax XXXXXXX

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004

Adjudication number 12-06-01

ADJUDICATORS DETERMINATION

By

Richard Machell (Adjudicator)
33 Chellaston Crescent
CARINE WA 6020- Tel/ Fax 9246 7405

26th SEPTEMBER 2006

THE DISPUTE

The Applicant, a Building Contractor entered into an AS 2124- 1992 standard form contract with the Respondent, a Developer, for the construction of a XXXX XXXXX (the works) at a site identified as the XXXXXXXXXXXXXXX

The Applicant has submitted 3 invoices for payment, No 5 in amount of $61,789, No 6 in the amount of $33,052.25 for Variations carried out and No 7 for interest on late or overdue payments in the amount of 21,364.48, dated the28th June and the 3rd and 4th August 2006, respectively.

The Respondent in an email dated 3 August confirmed payment would be made that day for invoice No 5, less 50% of the Variations that had been claimed. This appears to have prompted the issue of invoices no 6 and 7 that covered most of the unpaid variations except for the item 'amendment s to drawings' which remained unpaid from Invoice no 5.

The Respondent in correspondence dated 9 August 2006 declined to make payment for either Invoice 6 or 7.

The Applicant is disputing the non-payment of invoices 6 and 7 and the unpaid item 'amendments to drawings' identified in Claim 5, totaling $56,656.73 and has sought Adjudication in accordance with the Construction Contracts Act 2004 (CCA), to recover funds, unpaid from its invoices.

DETERMINATION

After consideration of the evidence adduced and in accordance with the requirements of the Construction Contracts Act 2004, on the balance of probabilities, it is my finding and determination that the Respondent shall pay to the Applicant, the sum of $9,856.74 before Close of Business on the 27th September 2006.

In addition Interest shall be payable on any unpaid portion of $9,856.74 at the rate of 22%, compounded every 2 months, for the period 28th September 2006, until such time as it is paid.

REASONS AND BASIS FOR DETERMINATION

1 Appointment

The Applicant submitted an application to Contractor Accreditation Limited (CAL) in the Northern Territory, dated 11 August 2005, a Prescribed Appointer under the Construction Contracts Act 2004 (CCA) to appoint an Adjudicator in accordance with the CCA.

Following failure by CAL to make an appointment within the time specified in Cl33 (1) of the CCA and upon request by the Applicant, the Construction Contracts Registrar exercised a right to appoint an Adjudicator, in accordance with CL 33 (2) of the CCA

The Registrar has by email dated 28 August 2006, appointed Richard Machell as Adjudicator in the dispute.

2 Acceptance

By email from myself on the 1st September 2006, I notified both parties that I had been appointed in accordance with the CCA as the Adjudicator in the payment dispute between the parties and set out administrative matters to progress the Adjudication in accordance with the CCA

3 Conflicts of Interest

I confirm that I have no material personal interest in the Adjudication that warrant disqualification in accordance with Cl 31 of the CCA

4 Jurisdiction

- The contract for the works was entered into by the parties and is assessed to be consistent with the definition of 'construction work' as identified in CL 5 of the CCA.

- The contract was entered into on the 14th September 2005.

- A dispute concerning payment has arisen in accordance with the CCA relating to 3 invoices dated 28th June, 3rd and 4th August 2005

- An application has been made for Adjudication in accordance with Cl 28 of the CCA and within 28 days of the dispute arising. The application for adjudication was initially contended to have been sent by certified mail to the Post Office Box of the Respondent on or around the 11th August 2006.

Following the failure of the Respondent to receive the Application and by email dated 1 September 2006, the Applicant advised that the Application had not been sent to the correct address and rectified the situation by hand delivering the Application to XXXXXXX on the same day. The Application was received by a person at that address, understood by the Applicant to be a 'Caretaker employee', of the Respondent. The Applicant agreed to the time for the delivery of the Response to be calculated from the 1 September 2006.

The Respondent contends that the Application was not served in accordance with the requirements of the Act. The CCA is silent on how service may be effected and reference is made to S25 of the *Interpretation Act 2006*.

The Respondent contends that CL 25 (1) (a, b, c,) have not been complied with in determining whether service has been effected or not. In this regard I agree that service may not be deemed by the mode of service effected by the Applicant, with any of the requirements of these sections of CL 25 (1) of the Interpretations Act

CL 25(1) d *identifies that a person may serve a document on an individual or body .. (d) by leaving it, addressed to the recipient, at the recipient's address with someone who appears to be at least 16 years old and appears to live or be employed there.* The Respondent contends that the address at which the Response was delivered was not the address of the Respondent but the site of the completed works under the contract and that the person to whom it was delivered was a twenty year old roustabout employed on a casual basis by the Respondent.

For the purposes of compliance with CL 25(1) d the person that received the Application is admitted by the Respondent to be an employee and over the age of 16 years. '*Address*' at CL 25(6) of the Interpretations Act is defined ' *address of a recipient, includes (emphasis added) the latest home and business addresses of the recipient that are recorded for a law in force in the Territory.*

This definition, in my view and with reference to the word, 'include' should not be interpreted to be exclusive of all other locations which might be an address at which the Recipient may be able to receive documents. A narrow construction of this definition, in my view should not be taken, particularly when it is admitted that the recipient has indeed received the documents in question.

For the purposes of determining whether service has been effected, it must of course be recognised that the Respondent did in fact receive the Application, but not until the 4th September and a Response has been made within 10 working days of both the 1st September 2006and the 4th September. It is my finding that the Application has been served on the Respondent in accordance with the CCA.

Since the delivery of the Application at the post office box of the Respondent was unsuccessful, it is not necessary for me to determine whether service through delivery to a post office box, rather than a physical address where the Respondent may be found, is deemed to be service in accordance with the *Interpretations Act*.

- A response to the Adjudication application was served by the Respondent by fax dated 14th September 2006 to both the Adjudicator and the Applicant and within the time specified and required in the CCA CL 29, if calculated from the earlier date of service being the 1st September 2006. This method of service is deemed effective in accordance with CL 25(1) (c) of the Interpretation Act.

- An Adjudicator has been appointed in accordance with Cl 30 of the CCA

5 Documents

The following documents have been supplied to me and form the factual basis upon which this Adjudication is made

Applicant

1. Applicants Application for Adjudication–dated 11 August 2006, including the following attached documents
2. Completed AS 2124 Contract, including Annexure
3. Applicant Summary of the dispute un-dated
4. Applicant invoice no 5 dated 28/6/06,
5. Applicant letter headed 'For the purposes of easy understanding this is a summary of notes introduced onto the original drawings and amended drawings'
6. 12 x A3 drawings variously marked up with reference to item 5 above.
7. Applicant invoice no 6 dated 3 August 2006 a
8. Applicant invoice no 7 dated 4 August 2006
9. Applicant undated 'Documentation provided to support proof of design change requested by the superintendent (XXXXXXXX)
10. Applicant invoice 0000359 dated 11 August 2006 summarising current variations claims unpaid
11. Building Certifier letter to XXXXXXXX dated 6th March 2006
12. Applicants letter to the Respondent dated 13th January 2005

13. Applicants letter to the Respondent undated describing variations 1-8

14. Applicant letter to the Respondent dated 4 August 2006

15. Applicants letter to the Respondent dated 9 August 2006

16. Letter from XXXXXX to the Applicant dated 9th August 2006

17. Email from XXXXXXX to the Applicant dated 15 May 2006

18. Email from XXXXXXX to the Applicant dated 3 August 2006

Respondent

- Covering letter from Respondent's solicitor
- Response to the Application with Annexures as noted therein

5 Reasons

The Respondent contends that CL 47 of the Contract sets out a procedure for the resolution of disputes and refers to attempts by XXXXXXX to sort out the outstanding variations with the Applicant. It is implied that the Applicant unreasonably rejected these representations and has acted precipitously in making an application for Adjudication. The point of this position is not clear to me, however it is noted that the CL 10 of Construction Contracts Act prevents contracting out of the operation of the Act. I am of the view that Clause 47 of the Contract does not seek to restrict rights arising under the CCA, however if it did, it would by virtue of CL 10 of the CCA, be of no effect.

Invoice No 6

Item 1 a This item is conceded by the Respondent as payable in the amount as claimed- $671

Item 1 b *Storage Cupboard* -Valued at $490 on the invoice.
The reasons or basis for this item has not been described or elaborated by the Applicant, other than an identification of 'storage cupboard' in Invoice No 6. The Respondent concedes that this cupboard is an additional item but installed by the Applicant as a result of its failure to install a floor safe at the correct height, thereby concealing the floor safe. In the absence of any reasonable alternate explanation for the installation of the cupboard, it not being a part of the works or required otherwise than to rectify an error of the Applicant, I find that this claim is not payable.

Item 2 *Supply and fix 2 low clearance frames and stainless steel capping to tiles*- Valued at $2,728 on the invoice

The reason and basis for the claim for 2 low clearance frames and stainless capping to tiles is not elaborated or adequately described by the Applicant sufficiently to enable the basis for it forming a variation claim. This item is however conceded by the Respondent, with the exception of the Stainless Steel capping which the Respondent contends was only installed as a result of a failure by the Respondent to fix the tiles within 2 centimeters from the wall edges. The Respondent, having conceded responsibility for the clearance frames and in the absence of any instruction by the Respondent as to how the tiles were to be fixed, in my view should accept responsibility for the stainless steel capping as an acceptable method of finishing the tiling. Accordingly I find that the amount of $2,728 is payable for this item.

Item 3 This item is conceded by the Respondent in the amount of $240

Item 4 *Additional Wall frames and lining to elevation 1 &2 auto bay, as per quotation dated 23/2/2006* -Valued at $9,528 on the invoice. The quotation referred to was not included as part of the Application, nor was a copy of any written instruction from the Respondent to install the frames.

The Applicant contends that the Respondent instructed the Applicant's subcontractors to install the framing, however this has not been substantiated, other than by claim.

The Respondent contends that this work resulted from a unilateral decision by the Applicant to construct a building otherwise than in accordance with the drawings. I am unable to find on the evidence submitted that this work was either authorised or required as a part of the structure of the building, or may be construed to the benefit of the Respondent.

I find that this item is not payable.

Item 5 This item is conceded by the Respondent in the amount of $1,578

Item 6 This item is conceded by the Respondent in the amount of $2,250

Item 8 *Construction of Disability Access on Certifiers requested and tiling item by owner's request*. Valued at $1,780 on the invoice

This item is identified in the correspondence from the Certifier to the Respondent dated 3 March 2006 as a remedial item resulting from inadequate circulation space at the ramp landing. The As constructed drawings show the ramp as being substantially larger than that shown on the original drawings and presumably reflects the advice that the Certifier provided to the Respondent, not included as part of the Application, and subsequently installed by the Applicant.

The Respondent contends that the Applicant failed to construct the ramp in compliance with the plans and should be responsible for rectification of its own error, however the plans do not comply with the requirements of AS 1428.1, either in respect to the provision of the landing and possibly in the width of the

ramp. In regard to the reference to 'tiling' the Respondent agrees that it supplied the tiles, without reference to any counterclaim or where the tiles were used.

The error in my view is that the original plans, do not comply with AS 1428.1 and consequently the Building Code of Australia, or contain notes that the ramps shall comply with this standard. Responsibility for this error, in my view rests with the Respondent as the supplier of the plans and the procurer of the Certifier. Accordingly I find that this item is payable in the amount of $1,780 as claimed

Item 10 *A trip to XXXXXXX for Head Contractor and Electrical contractor to modify and rectify defective documentation and engage dialogue with pro wash personnel, this including all costs incurred such as flights and man hours for two men*. Valued at $3,780 on the invoice

The Applicant contends that electrical works were not part of the contract as this work was to be carried out by a nominated subcontractor and the trip was necessary to resolve documentation issues. The Respondent contends that the electrical contractor is a subcontractor of the Applicant and the electrical works were always a part of the contract, that the trip to Alice Springs was unnecessary and instigated by the Applicant without approval from the Respondent and that the Respondent had previously flown a representative to consult with the Applicants subcontractors.

I can find no evidence, other than the contentions of the Applicant that the Electrical works were excluded from the Contract or were the responsibility of the Respondent. The item in question is described in Invoice No 6 as.. *'Please note: The electrical contract was not part of our works until a week previous to this event as XXXXXXX had a nominated sub-contractor for the electrical works. This Variation came about on close inspection of documentation and lack of detail and the need to gather proper directions'.*

It appears to me from this statement, there being no other information upon which to assess the status of the Electrical works, that the Applicant concedes that the Electrical works were a part of the contract. There is no reference to the date of the trip, whether it was before or after the signing of the contract, no evidence that the contract sum was adjusted to reflect the inclusion of electrical works and certainly nothing in the documents supplied to me that the Electrical Works were excluded from the contract or were to be carried out by a nominated sub contractor.

I find that the electrical works were a part of the contract and to be carried out by either a nominated sub contractor or another subcontractor provided by the Applicant. In either event responsibility for the electrical works rests with the Applicant. It has not been substantiated that the trip to Alice Springs was required or that the defective documentation was only able to be resolved in this way. Similarly it has not been substantiated that the Respondent was given the opportunity to resolve documentation deficiencies, or what those deficiencies might have been.

I find that this claim is not payable.

Item 11 *Engineering certification and on site inspection as requested by (sic) as part of inspection schedules.* Valued at $2,600 on the invoice

This claim does not describe the scope of the works undertaken, the basis for claimed costs or the reasons for the claim. Supporting documentation that underpins the basis of the claim has not been provided. I can only assume that this is a direct reference to item 1 of the Certifiers letter of 6 March 2006, '*As constructed drawings are required including engineers section 40 certification for design. I have attached copies of the existing drawings, which identify the differences'.* Copies of the existing drawings referred to were included with the Application, however they were not marked up to show the differences referred to.

The Respondent contends that the certification result from the Applicants conduct in constructing the building otherwise than as documented and is not the responsibility of the Respondent.

Evidence has not been provided that the roof design and other structural differences were made at the Respondents request, excepting the deletion of a firewall and the ramp landing noted above. Referring to the As constructed drawings; it is apparent to me that the construction of the roof is substantially simpler that the designed roof.

On the evidence received, it has not been established with any certainty the basis for the modifications to the roof and I accept the contention of the Respondent that the changes were made unilaterally by the Applicant. Having made these changes, the Applicant must in my view assume the responsibility for placing the Respondent in the place he would have been had the changes not occurred, i.e. there would have been no need to modify the drawings or obtain additional engineering certification if the building were constructed as designed.

The Applicant has not identified how 'site inspections' form part of this claim or how costs were calculated or upon which basis they were required.

I find that this claim is not substantiated and not payable by the Respondent

Item 13 '*Additional Driveway on adjustion (sic) property was quoted on plan concrete and no expansion joins, buy owners request the concrete was coloured black and by power and water request expansion joins were provided every 1.5m2 as the driveway is built over an easement, therefore there is an additional cost on colouring and expansion joins',* valued at $2,800 on the invoice

This claim has not been substantiated with any supporting documentation.

The Respondent contends that the Applicant is seeking to unjustly enrich itself by making a claim over and above the concretors invoices and that if there were any changes resulting in costs these were absorbed by the concretor. These invoices were not included as either a part of the Application or Response.

In the absence of any supporting documentation as to the scope of the works and the scope of the changes, I find that this claim has not been substantiated and is not payable.

Item 15? *Builders Margin- profit and overheads 15%* valued at $4,607.25 on the invoice

It is assumed, given the lack of supporting documentation for this claim that this claim contends that all variation claims contained within invoice no 6 are exclusive of Builders Profit and Overhead, as defined and allowed in the General Conditions of Contract CL 40 and corresponding Annexure references.

Calculations to support this claim have not been included in any of the Variations and the separate variation claims have been intemised inclusive of GST but apparently and according to this item exclusive of the Profit and Overheads.

An earlier version of variation advice emailed to the Respondent by the Applicant dated 25 July 2006 and containing item 4 above did not separately identify profit and overheads as a separate item, nor was item 4 above, as detailed in the email, less, as a result of not having the profit and overheads included.

The Respondent has not made any response to this item.

It appears to me that this claim is without foundation and accordingly is not payable.

Invoice No 5- This invoice in the Application is dated the 28th June 2006. An unpaid amount for the amendments to the drawings of $2,240. The Applicant contends that the responsibility for the Certifier and for inspections was the responsibility of the Respondent. The Respondent contends that As constructed drawings were required as a result of changes made to the works without the approval of the Respondent. It is unclear from the Application how the amount of $2,240 was calculated, other than as a lump sum.

I have reviewed the changes in the drawings between As Designed and As Constructed. With regard to my findings above, the only item that required to have revised drawings and which was the responsibility of the Respondent was the disabled access ramp. The modification of the ramp was a requirement of the Building Certifier to comply with AS 1428.1 and the Building Code of Australia, without which a certificate of occupancy could not be issued. It is apparent to me from the Application and Response that certifications were the

responsibility of the Respondent and the costs of As constructed drawings for the revised ramp component must in my view rest with the Respondent.

The cost of this component is valued as$120 payable by the Respondent to the Applicant.

Invoice No 7

Item 1- *Claim on interest due for Claim 5, Date of Claim 28/6/2006 Part Payment of Claim No 5 received 3/8/2006- $45,844 overdue interest on total claim no 5 for $61,789'*

This claim is valued at $13,593.58 on the invoice. The basis of calculation has not been provided.

The Applicant contends that by virtue of a quotation dated 13 January 2005, the time for payment is defined at 7 days from the date of invoice. The words used in that correspondence are '*Progress Claims will be made monthly and payment will be requested within 7 days of invoice'*. The contract document was subsequently signed on the 14th September 2005 and for an increased amount from that contained in the quotation, $XXXXX from $XXXXX. It is apparent that in the intervening time negotiation s continued regarding the works, culminating in a revised contract price at least if not a change in the scope of works and an executed written contract AS 2124-1992, as referred to above.

I find that the written contract executed on the 14th September 2006 and the terms therein supercedes the quotation of the13th January 2005 and that the terms of payment are as detailed in the executed contract. No contention has been made that the term of the quotation dated 13 January 2005 was intended to prevail over the otherwise express agreement of the parties contained in the contract, or that the quotation was accepted and varied or in any other way has any status as a contract document.

The Respondent contends that if calculated in accordance with the contract, the claim should be less than $1,000. The Respondent also contends that any delays in payment are due to the failure of the Applicant to construct the buildings according to the plans It is further contended by the Respondent that the nominated interest rate on overdue payments of 22% compounding every 2 months represents a penalty and as such should be unenforceable as a matter of law as it is not a genuine pre estimate of loss likely to be suffered by the Applicant as a result of late payment. A reference to either Statute or Case law has not been made in respect to this.

It is clear that the Annexure to the contract does nominate the interest rate noted above for late payments and on the face of it would seem to be high, however in terms of the default provisions of contract CL 42.9 which nominates 18% compounded six monthly, is perhaps not as excessive.

It stands however that both parties agreed to and signed the contract with the interest rate provision, and in the absence of the basis for how the interest rate is estimated to act as a penalty rather than as compensation, is unable to be considered a penalty and unenforceable.

The Respondents position that the interest should be 'less than $1,000 if calculated pursuant to the provisions of the Contract' is not supported by any provision of contract than enables this resultant calculation. Annexure D of the Response provides information about when the invoices were submitted and 2 possible basis for the calculation of interest, with the unstated assumption that the invoices were payable within 7 days.

The invoice submitted as part of the Application is dated 28 June 2006, however the Respondent contends that the invoice was first emailed on the 14th July and was undated, this is supported in the Response by copies of the email and corresponding invoices from the Applicant to the Respondent. I find this evidence more reliable and find that the Claim 5 was not submitted for payment until the 14th July 2006.

With reference to the Contract, it is noted in the Annexure item 42.1 that Claims shall be made by the 28th day of each month. CL 42.1 of the Contract requires that a progress certificate shall be issued by the Superintendent within 14 days or that payment shall be made within 28 days if a progress payment certificate is not issued.

In the current circumstance payment of Claim 5 was due to be made by the 11th August 2006, 28 days after the issue of the invoice on the 14th July. Accordingly I find that invoice no 7 for interest on late payment of Claim 5 is without foundation up until the 11th August 2006.

It is common ground that the invoice No 5 was partly paid on the 3rd August and a claim can only be valid after the 11th August date if the unpaid items in the invoice were payable. With reference to the only item in this invoice not reissued in Invoice No 6 and as noted above, the claim for interest is without foundation.

Item 2 *Claim No 6 $35,322.25 due to late payment of No 5 &6*, valued at $7,770.90 on the invoice.
For the same reasons as identified in the item 1 above the claim for interest on late payment of invoice no 6 in the amount of $7,770.90 is without foundation and appears not to be calculated in accordance with the Contract. Invoice no 6 was issued on the 3rd August 2006 and in the normal course would not be payable until 28 days later, if substantiated. A claim for interest on late payment the following day (4th August, the date of invoice no 7) is entirely without merit or contractual basis.

Accordingly I find that this claim is not payable.

7 Interest

In accordance with CL 35 (1) (a) of the CCA, Interest is payable on the amount of $8,917 from the 1st September 2006 (28 days past the date of the invoice, 3 August 2006, in accordance with CL 42.1 of the Contract) at the rate of 22% compounding every 2 months (CL 42.9 and corresponding Annexure item) until such time as the amount is paid and calculated as at the date of this Award as follows-

Outstanding amount (see Flow of Money below)	$8,917
22% p.a for the period 1 Sep 2006- 27 Sep 2006	
I.e. 22% x$ 8,917 x 26 days /365 days	$139.74

8 Costs

Neither party has made a submission that the other party has acted frivolously or vexatiously as identified in the CL 36 (2) of the CCA, or that costs of the Adjudication should be determined on any other basis than contained within CL 36(1). Having regard to both the Application and the Response I am satisfied that neither party has acted frivolously or vexatiously and that costs shall be determined on the basis contained in CL 36(1) of the CCA and that each party shall bear their own costs in the matter.

Similarly and in accordance with CL 46 (5) of the CCA, I find and determine that each party shall bear the Adjudicators costs in this matter in equal shares. The total Adjudicator costs are identified as $1,600.

An amount of $800 was ordered to be paid by each party as security against the Adjudicators costs. The Respondent did not make the security deposit as required, whilst the Applicant made 2 security deposits of $800, totaling $1,600. On the basis for the sharing of the Adjudicators costs, as detailed above, the sum of $800 is payable by the Respondent to the Applicant.

- **Flow of Money**

Accordingly I find and determine that the amount payable by the Respondent to the Applicant is as follows-

Invoice No 6	
Item 1 a	$671
Item 2	$2,278
Item 3	$240
Item 5	$1,578
Item 6	$2,250
Item 8	$1,780
Invoice No 5	
Item amendments to drawings	$120
Subtotal	$8,917
Interest	$139.74

Cost of Adjudication	$800
Total payable to Applicant	$9,856.74

590

Signed ……Richard Machell, Adjudicator,
Dated this 26h day of September 2005

595