Adjudicator's Determination

Pursuant to the

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

Adjudication Number	**39.14.03**
Prescribed Appointor	**The Institute of Arbitrators & Mediators**
Adjudicator	**David Richard Baldry**[1]
Applicant:	[redacted]
Applicant's contact details:	[redacted]
Applicant's solicitor:	[redacted]
Applicant's solicitor's contact details and applicant's service address:	[redacted]
Respondent:	[redacted]
Respondent's contact details:	[redacted]
Project:	[redacted]

[1] Registered Adjudicator Number 39

Amount to be paid by Respondent	**$10,694.94** including GST
Due date for payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	27 October 2014
Payment Claim	Claimed Amount : **$14,142.35** including GST Dated : 3 June 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : **$10,818.43**
Adjudication Application	Dated: 29 September 2014
Adjudicator Acceptance	Dated: 3 October 2014
Adjudication Response	Dated: 10 October 2014

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DETERMINATION

1) I, David Richard Baldry[2], the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) (**Act**), for the reasons set out below, determine that:

   a) the respondent must pay the applicant $10,694.94 (the "adjudicated amount") comprising $10,409.38 incl. GST in respect of the payment claim and interest thereon in accordance with clause 35(1)(b) of the Act from 2 July 2014 to 27 October 2014 in the sum of $285.56; and

   b) The respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

BACKGROUND

2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the Act for construction work carried out under a construction contract for [redacted] in the Northern Territory (**Project**).

3) The contract was partly oral and partly in writing, the written part consisting of a written order by the respondent dated 25 November 2013.

4) The works stated in the order were for the applicant to "supply labour only to complete, [redacted] at $90 P/Hr", without stating that that rate was inclusive or exclusive of GST. I have taken it to be the case that that rate was exclusive of GST, because all invoices by the applicant to the respondent making claims under the Contract were rendered on that basis and the respondent has not contended that that was not in accordance with the terms of the Contract.

5) There were no written specifications and the applicant performed the works as directed by the respondent.

6) The applicant submitted daily work sheets to the respondent.

7) The payment claim the subject of this adjudication application:

   a) was dated 3 June 2014;

   b) was said to be a final payment claim;

   c) claimed $41,600.47, comprising:

      i) $34,425 for labour at $90 per hour, before adding GST to such amount;

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ii) $598.14 for deliveries and [redacted] before adding GST to such amount,

iii) $2,795.47 for time spent by the applicant's personnel to attempt to enforce payment by the respondent and fees rendered by the applicant's lawyer to attempt to do so;

iv) plus GST of $3,781.86;

8) The applicant has also claimed for additional legal costs and interest, which I will deal with in more detail later in this determination.

9) On 8 August 2014 the Respondent part paid $27,458.12, leaving a balance of $14,142.35 owing on the payment claim.

10) The respondent:

a) contends the contract included express oral terms that the respondent could withhold a 5% retention until the end of the defects liability period, and that the defects liability period would be for the period of 12 months from the date of practical completion - the applicant denying that the contract included either of those terms;

b) denies the applicant's entitlement to the claim for $2,795.47, because the applicant has no contractual right to claim for time spent by the applicant's personnel to attempt to enforce payment by the respondent and fees rendered by the applicant's lawyer to attempt to do so;

c) claims a set-off for the cost of rectifying allegedly defective works totalling $9,067, including GST - the applicant denying that any of its works were defective and is not liable to pay any of such amount;

d) also claims that the respondent can retain a further $1,751.43 for retention monies because the defects liability period has not expired yet. It does not state in the response when the respondent considers it will expire but, presumably, it considers that that will occur 12 months after the date of practical completion (which according to the applicant was on 18 December 2013) i.e. on 13 December 2014; and

e) has also asserted that I lack jurisdiction to determine this claim on its merits on various bases (which I will detail later in this determination) and that I should dismiss this application for adjudication pursuant to s. 33(1)(a) of the Act.

APPOINTMENT OF ADJUDICATOR

11) Pursuant to section 28(1)(c)(iii) of the ACT, the applicant served its adjudication application dated 29 September 2014 on the Institute of Arbitrators & Mediators, which is a prescribed appointor under the Act.

12) On 3 October 2014 the adjudication application was referred to me as adjudicator by the Institute of Arbitrators & Mediators pursuant to section 30(1)(a) of the Act.

13) On 3 October 2014 I sent a letter to the applicant, the applicant's solicitor and the respondent by post and by email, which amongst other things of a procedural nature:

a) notified them of my appointment as the adjudicator of this matter by the Institute of Arbitrators & Mediators;

b) advised that I did not consider that any circumstance existed which would require, pursuant to s. 31 of the Act, that I be disqualified as the adjudicator of this application;

c) notified the parties that I accepted my appointment as adjudicator, subject to considering any submissions by them concerning whether they considered that any circumstances existed under that section of the Act which would require that I be disqualifies as the adjudicator and allowed them until close of business on Tuesday 7 October 2014 to deliver any such submissions to me;

d) asked the parties to advise me by close of business on Tuesday 7 October 2014 when and how the application and supporting documents were served; and

e) asked the parties to indicate whether, they were willing, pursuant to s. 29 of the ACT, to consent to another adjudication application by a different applicant, but involving the same respondent company and works at the same construction site as in this matter, being adjudicated simultaneously with the payment dispute the subject of this application.

14) On 4 October 2014 I received an email from the applicant's solicitor which, amongst other things, stated that:

a) the applicant had no objection to me acting as the adjudicator of this adjudication;

b) the adjudication application and supporting documents were served on the respondent on 29 September 2014 by facsimile transmission; and

c) the applicant was willing to consent to me adjudicating this application simultaneously with the aforesaid other adjudication application.

15) On 7 October 2014 I received an email from a director of the respondent which, amongst other things, stated that:

a) the respondent was unaware of any circumstance which would require me to be disqualified as the adjudicator of this adjudication;

b) the adjudication application and supporting documents were served on the respondent on 29 September 2014 by facsimile transmission; and

c) the applicant was unwilling to consent to me adjudicating this application simultaneously with the aforesaid other adjudication application.

16) As s. 29 only permits 2 or more adjudication applications being adjudicated simultaneously if all parties consent to that happening, on 8 October 2014 I advised the parties that I would determine both adjudication applications separately.

DOCUMENTS

17) The following documents were provided to me:

a) Adjudication application submissions dated 29 September 2014 and supporting documents in 17 tabs in 1 ring binder;

b) Adjudication response submissions dated 10 October 2014 and supporting documents in 39 tabs in 1 ring binder;

c) The respondent further submissions dated 15 October 2014;

d) The applicant's further submissions dated 15 October 2014;

e) The applicant's further submissions dated 21 October 2014;

f) The respondent's further submissions dated 21 October 2014; and

g) The respondent's further submissions dated 23 October 2014.

IMPLIED AND PROHIBITED TERMS OF CONTRACT

18) The applicant has submitted that because the Contract did not have written or orally agreed terms about certain matters ss. 16 to 25 of the Act operate so as to impliedly include the terms set out in Divisions 1 to 9 of the Act as contractual terms.

19) I do not consider that s. 17 of the Act operates by implying a term about the amount, or any way of calculating an amount that the contractor is entitled to be paid, because there was an express written term of the contract providing that the applicant would be paid at the rate of $90 per hour.

20) S. 24 of the Act can imply terms in the Schedule, Division 9 of the Act to contracts, which do not have a written provision about the status of an amount retained by the principal for the performance of the contractor of its obligations under the contract. I consider that that section would only apply if there were an oral term in the contract, which allowed retention monies to be retained.

21) I have found on the balance of probabilities in paragraphs 50 to 52 below that

there was no oral agreement reached between the parties for a 5% retention to be retained by the respondent until the end of a 12 month defect liability period and that there was no oral agreement for there to be a 12 month defect liability period. I therefore find that, as there were no express terms relating to retention monies, no terms of the contract were implied pursuant to s. 24.

22) S. 25 does not provide for the implication of any terms. It is an interpretation provision.

23) The only other terms implied pursuant to the rest of those sections of the Act which are pertinent to this matter are the terms implied by ss. 19 (dealing with making payment claims), 20 (dealing with responding to payment claims and time for payment) and 21 (interest on overdue payments) and I find that all of those sections operated in this Contract so as to imply the relevant terms in the Schedule to the Act dealing with those topics.

24) The applicant also contended that the payment term "EOM +30 days" contravened s.13 of the Act because it required payment to be made more than 50 days after the payment is claimed.

25) In paragraphs 47 to 49 below I refer to a request for further submissions from the parties in relation to this term of the contract and my finding to the effect that the term was a prohibited provision under that section of the Act, and, therefore, that the Contract should be amended to require the payment of payment claims is to be amended to made within 28 days after service of payment claims on the respondent.

PAYMENT CLAIM, PRIOR INVOICES AND SOME COMMUNICATIONS BETWEEN THE PARTIES

26) The payment claim dated 3 June 2014 is found at tab 2 of the application.

27) It consists of:

a) a dated letter signed purportedly by a director of the applicant named Rex Edmondson on the applicant's letterhead with its ACN, address and other contact information provided which:

i) is addressed to the applicant at [redacted] and by email to [redacted], a director of the respondent;

ii) has a reference line under the salutation in which it refers to the project by reference to the construction site and states it is a final claim;

iii) states it encloses a final claim invoice no. 13196 for $41,600.47, inclusive of GST;

iv) states it is due to be paid on or before 24 July 2014;

v) states the claim is being made under the provisions of the Act;

vi) responds to a letter from the respondent dated 21 May 2014.

b) final claim invoice no. 13196 with terms stated to be "net 30 after EOM" which, insofar as the labour and materials components of same concerned are stated to be:

i) "[redacted] – labour only to complete r[redacted] works" - $34,425.00; and

ii) "Additional – 3 deliveries, window packers, turps, tape, sikaflex, rivets" - $598.14.

c) a table summarising the applicant's work sheets; and

d) the applicant's work sheets numbered 2267 to 2285, both numbers inclusive for work allegedly performed on 27/11/2013 to 30/11/2013, 02/12/2013 to 7/12/2013, 09/12/2013 to 16/12/2013 to 18/12/2013 (all dates inclusive) – i.e. a total of 19 working days. In paragraph 1.3 of the application submissions the applicant says this was a 22-day period, but I find that that was incorrect. However, nothing turns on that discrepancy.

28) The parties regularly communicated with each other by email and I therefore find that they agreed that payment claims could be served by email.

29) I also find on the balance of probabilities that the payment claim dated 3 June 2014 was served on the respondent by email on 3 June 2014 because it states on its face that one way it was being sent to the respondent was by email. I also note that the respondent has not contended that it was not served on 3 June 2014.

30) The applicant first invoiced the respondent for these works on 20 December 2013 by invoice number 12966 for $38,525.45. It claimed the same amounts for labour and materials as claimed in the payment claim and also attached copies of the same daily work sheets, which were included with the payment claim dated 3 June 2014. It:

a) was addressed to "[redacted]";

b) included the same verbiage for the labour and materials as in the payment claim; and

c) was unsigned.

31) On 16 January 2014 by email the Respondent challenged the invoice by contending that it should be reduced, because one of the applicant's workers was an apprentice and should not be charging at the full $90 per hour rate.

32) On 17 January 2014 by email the Applicant adjusted its invoice by reducing it to $35,028.55 inclusive of GST by reducing the apprentice's hourly rate to $68, excluding GST. The revised invoice had the same number and date as the first invoice and was provided with a spreadsheet detailing the hours of [redacted] works performed and also provided more particulars in relation to the claim for materials. It was addressed the same way as the earlier invoice and was also unsigned.

33) By email sent on 10 March 2014 the respondent sent a payment schedule in response to the revised invoice which totalled $29,063.12 after deducting:

a) $3,000 (before adjusting for GST) for alleged defects described as [redacted]"; and

b) retained a 5% retention of $1,761.83.

34) By email sent on 21 March 2014 the respondent issued an attached revised payment schedule for $29,053.12.

NOTICE DISPUTING PAYMENT CLAIM AND DATE OF PAYMENT DISPUTE

35) The respondent did not deliver a notice disputing the payment claim to the applicant.

36) The applicant has contended that the payment claim was due for payment within 28 days and, because none of the amount claimed was paid within such period a dispute arose under s. 8 of the Act on the last date for payment, i.e. on 1 July 2014.

37) Assuming the payment claim is a valid payment claim under the Act, I find that the amount claimed in the payment claim dated 3 June 2014 was due to be paid by 1 July 2014 and, because none of the amount claimed was paid by that date, a dispute arose under s. 8 of the Act on that date.

APPLICATION FOR ADJUDICATION

38) Section 28(1) of the Act entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.

39) I am satisfied that the payment dispute occurred on 1 July 2014.

40) The applicant applied for adjudication of the payment dispute on 29 September 2014, which is within the time permitted by and in accordance with section 28(1) of the Act. Specifically:

a) the application is in writing as required by section 28(1)(a) and 28(2) of the Act;

b) the application was served on the respondent on 29 September 2014 by facsimile transmission, pursuant to s. 25 of the *Interpretation Act*, NT and s. 28(1)(b) of the Act; and

c) the application was served on the Prescribed Appointor on 29 September 2014 pursuant to section 28(1)(c)(iii) of the Act.

41) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the Act.

ADJUDICATION RESPONSE

42) 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 to prepare and serve its written response on the adjudicator and the applicant.

43) The respondent served its adjudication response on 13 October 2014.

44) I am satisfied, therefore, that the respondent served its response within the timeframes prescribed in the Act.

REQUESTS FOR FURTHER SUBMISSIONS AND FINDINGS IN RELATION TO SAME

First request

45) On 13 October 2014 I sent an email to the solicitor for the applicant and the respondent's contact, [redacted], requesting the following further submissions pursuant to s. 34(2) of the Act:

> ***"B. Contract terms dealing with making of payment claims and time for payment of same***
>
> *In paragraph 5.4 of the applicant's submissions the applicant has submitted, relying on the terms of the respondent's purchase order, that the payment terms in the contract were "EOM + 30 days", i.e. end of month plus 30 days and that that provision should be amended in the manner required by s. 13 of the Act, which states that "a provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed must be read as being amended to require the payment to be made within 28 days after it is claimed".*
>
> *The applicant then asserted that s. 13 applied, because the Final Payment Claim made on 3 June 2014 would not be payable under that term of the contract for about 57 days after its delivery to the respondent.*
>
> *The respondent has not made any submissions in this regard.*
>
> *It occurs to me that an alternative interpretation could be given to the phrase*

in the purchase order, i.e. that progress claims be made at the end of each month and be payable within 30 days thereafter. If that interpretation is correct that may also mean that s. 13 does not apply.

Interpreting this aspect of the contract terms is of importance for a number of reasons under the Act.

I therefore request that both the applicant and the respondent make further submissions regarding this possible interpretation of that phrase, which, if thought appropriate can include any pre-contractual discussions on the topic.

I request that these submissions be provided to me by email (and copied to each other) ***by 5:00 pm on Wednesday 15 October 2014****.*

C. The respondent's defect rectification set-off, retention money and defects liability period claims.

In paragraph 57 of the response submissions the respondent has submitted that in pre-contractual discussions between [redacted], for the respondent, and [redacted], for the applicant, it was orally agreed that the respondent would be entitled to deduct up to 5% of the contract sum as retention monies, and that it would be held for the duration of a 12 month defect liability period.

The respondent's defect rectification set-off claim appears to total $9,067, inclusive of GST, the manner of calculating it for the first time appearing in the response.

The applicant would not have been able to make submissions about the set-off claims in the application submissions, because, even though there was correspondence between the parties regarding possible defect rectification set-offs, requests for allegedly defective works to be inspected by the applicant and rectified by it and for the retention of some of the monies claimed by the applicant, the applicant could not have known which of such defective works rectification costs claims would be maintained by the respondent in its adjudication response or how it would calculate them. I therefore request that the applicant also provide further submissions to me by email (copied to the respondent) ***by 5:00 pm on Wednesday 15 October 2014*** *dealing with -*

1. *any pre-contractual oral discussions between the parties' representatives concerning retention monies and a defects liability period; and*

2. *the applicant's answer generally to each set-off item, both regarding liability and amount claimed.*

In the same general area, whilst it should be understood that I have not as yet formed a view in this regard, on the assumption that I find there were no pre-contractual discussions between the parties' representatives concerning retention monies and a defects liability period, I seek submissions from both parties regarding whether the respondent has any contractual right to claim a set-off for defective workmanship rectification costs? I request that both parties provide these submissions to me by email (and copied to each other) by ***5:00 pm on Wednesday 15 October 2014****."*

46) Both parties provided their further submissions in the time requested by me.

47) In relation to the submissions requested concerning Contract terms dealing with making of payment claims and time for payment of same, the applicant submitted that the possible alternative interpretation of the payment clause would have the result of marking time and, alternatively, that the alternative interpretation creates an inconsistency and, pursuant to the *contra preferentem* rule of construction, where such an inconsistency operates when construing contract terms, an interpretation which favours the party who did not draft the contract should be chosen, especially for a contract of short duration where an hourly labour rate applies, such as in this case.

48) The respondent stated that it did not oppose the applicant's submission that s. 13 applied.

49) Whilst construction contracts often provide for contractors to render progress claims on or before a certain date in each month, and that they be paid within a certain time thereafter and such provisions would not contravene s. 13, I find that such an arrangement would be unlikely to be used in a short labour contract of this kind. In any event I also find that the meaning of the payment clause was unclear and that on one view, it could contravene s.13 and, in those circumstances, s. 13 applies and the clause should be amended to require payment be made within 28 days after it is claimed.

50) In relation to the request for submissions concerning the alleged retention money and defects liability period oral terms of the contract, the applicant submitted that the applicant's [redacted] and [redacted] (the respondent's pervious project manager) denied that any such discussions occurred and were prepared , if asked to do so, to provide statutory declarations to that effect.

51) I find on the balance of probabilities that no oral discussions occurred when it was agreed there would be retention monies and defect liability period terms in the contract. I make that finding because:

a) even though an adjudicator need not comply with the rules of evidence, the respondent has not provided a statutory declaration to support this contention and has not stated, when the discussions occurred, who was present and the detail of what was discussed, absent which I am unable to form a view, whether any such discussions occurred before the contract was entered into or that an agreement was reached in the manner contended by the respondent;

b) it seems to me to be most unlikely that a subcontractor, performing relatively small[redacted] completion works for a short period on a daily directed hourly labour rate basis would be expected to agree to a retention

for 12 months or that there would be a 12 month defect liability period; and

c) one would expect that, if the respondent wanted to include such provisions, it would have put them in writing rather than leaving them in an uncertain oral evidentiary state.

52) It therefore follows and, I also find that, the respondent had no contractual right to withhold any monies by way of retention.

53) I will deal with the applicant's further submissions concerning the respondent's set-off claims for defect rectification costs in the section below dealing with same.

Second request

54) On 15 October 2014 I received an email from the applicant's solicitor which stated the following:

> *"We are in receipt of the Respondent's further submissions which you requested.*
>
> *We note that the Respondent now seeks to raise further new issues in relation to the Payment Claim and the Application and suggests that the Payment Claim and Application are now out of time.*
>
> *These matters were not raised in the Response and the Applicant seeks to address these new issues under s. 34(2) the Act following the decisions of Hall Contracting and M & P Builders."*

55) On 19 October 2014 I sent the following email to the applicant's solicitor and the respondent's [redacted]:

> *"I agree with* [redacted] *that the Respondent's further submissions went beyond my previous request for further submissions.*
>
> *However, as those further submissions address the question of whether I have jurisdiction to determine the payment claim on its merits, in order to afford the parties procedural fairness to make submissions I have decided to ask both parties, pursuant to s. 34(2) of the Act, to provide me with further submissions regarding whether they consider the payment claim should be treated as a repeat claim and, if so, whether it cannot be treated as a valid payment claim under the Act. If the Respondent feels it has already provided complete submissions in this regard it need not provide me with further submissions.*
>
> *I request that both parties provide these further submissions to me by 5:00 pm on Tuesday 21 October 2010."*

56) Both parties provided their further submissions in the time requested by me.

57) The applicant made submissions on the following topics:

a) whether the payment claim does not strictly comply with the requirements

of the Act;

b) whether the payment claim contains amounts which are not amounts under the contract; and

c) whether the payment claim is a repeat claim and therefore invalid.

58) The applicant's further submissions concerning the topics in paragraphs 57(a) and (b) were not the submissions I requested in my email sent on 15 October 2014.

59) So on 23 October 2014 I sent the following email to the applicant's solicitor and the respondent's [redacted]:

> *'[redacted] further submissions attached to the email below dealt with some matters which were additional to my request for further submissions, which were limited to submissions regarding whether the payment clam should be treated as a repeat claim, and, if so, whether it cannot be treated as a valid payment claim under the Act. The additional matters related to:*
>
> *1. whether the payment claim did not strictly comply with the provisions of the Act; and*
>
> *2. whether the payment claim contained amounts which are not amounts under the contract.*
>
> *Whilst I would normally ignore submissions going to matters in addition to those requested by me, in this case I do not consider it appropriate for me to ignore these additional submissions, because, arguably, both of those additional matters may be relevant to whether I have jurisdiction to determine the claim on its merits. In those circumstances, I consider I should take the applicant's submissions into account, but, in order to afford the respondent procedural fairness, I request that the respondent provide any further submissions in reply it may want to make in relation to the matters listed a paragraphs 1 and 2 above and I request that such further submissions be delivered to me by email* ***by 5:00pm on Thursday 23 October 2014****. I note however, as the respondent has already made submissions about these matters in its response, it need not make any further submissions on these matters if it does not wish to do so.*
>
> *I also note that while the time I have allowed for the provision of these further submissions is short, as the submissions requested are exactly the same as those requested in the other adjudication I am currently acting in, I do not expect it would be difficult for these further submissions to be provided in this timeframe."*

60) I will therefore set out in the section below headed "Third request" both the applicant's and the respondent's submissions in relation to those two topics.

61) The applicant's submissions concerning whether the payment claim was a repeat payment claim and therefore invalid were as follows:

a) the invoices rendered by the applicant before the payment claim dated 3 June 2014 did not strictly comply with the implied payment claim

provisions in cl. 5 of the Schedule Division 4 of the Act, and in particular cl. 5(1)(h), because it was not signed, and therefore were not valid payment claims.

b) Reliance was made on the NT Supreme Court of appeal decisions in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 and *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1, which provided that, when an adjudicator is considering whether a payment claim is valid, he or she must firstly determine whether it complies with the terms of the contract and, where those terms are mandatory, whether it strictly complied with those terms.

c) As the earlier invoices were not valid payment claims the payment claim dated 3 June 2014, which did strictly comply with those terms, was not a repeat claim and was therefore a valid payment claim.

62) The respondent's submissions on that topic were as follows:

a) The respondent cited the first instance decisions of *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34 and *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14.

b) In those decisions earlier invoices were rendered and a later payment claim was rendered and held invalid as a repeat claim, because to allow a repeat claim amounts to an attempt by a claimant to re-set the 90 day deadline for applying for adjudication in s. 28 of the Act.

c) The same situation applies in this matter and, therefore, the payment claim dated 3 June 2014, was a repeat claim, was invalid and I should dismiss the application without deciding the claim on its merits.

63) I find that the payment claim dated 3 June 2014 was not a repeat claim, was not invalid and I do have jurisdiction to decide this payment claim dispute on its merits, because:

a) the cases cited by the respondent were overruled in the Court of Appeal decisions cited by the applicant;

b) as the requirements for the contents of a payment claim in cl. 5 of the Schedule Division 4 of the Act are expressed in mandatory terms, i.e. the preamble to same says "A payment claim under this contract must [emphasis added]" be done in the manner set out in the following sub-paragraphs;

c) that meant that all of the requirements of those sub-paragraphs had to be strictly complied with; and

d) even though the earlier invoices did comply with the requirements of most of those sub-paragraphs, they did not comply with cl. 5(1)(h), because they

were not signed and, therefore they were not valid payment claims under the contract.

Third request

64) The respondent provided further submissions concerning the two matters referred to above within the requested time.

65) In relation to the question concerning whether the payment claim did not strictly comply with the requirements of the Act the respondent made the following submissions in the response:

a) the parts of the claim which makes claims for time spent by the applicant's personnel and charges by the applicant's lawyer to try to obtain payment of previous invoices do not itemise the obligations the contractor, performed under the contract, as required by s. 5(1)(f) of Division 4, Schedule 5;

b) there is no contractual entitlement to make those claims and therefore the payment claim does not comply with s. 3 of the Act;

c) the rest of the claims in the payment claim fail to comply with s. 5(1)(f) in that they do not provide enough information about the labour performed and materials suppled in the invoice attached to the payment claim;

d) the invoice fails to comply with s. 5(2) because it does not say what proportion of the works it relates to; and

e) as the payment claim does not comply with the requirements of the Act, it fails in its entirety, or alternatively, each claim component should be rejected if it failed to strictly comply with the requirements of the Act.

66) The applicant made the following further submissions in relation to that question:

a) that, as the payment claim was a final payment claim, it should be read as being a composite claim comprising all its elements (letter, invoice, spreadsheet and day work sheets), which, as required by cl. 5(1)(f) of the Schedule, Division 4 of the Act, described the claim in sufficient detail for the respondent or a competent contract administrator to assess the claim; and

b) that it should be taken to have done so, because the respondent was able to assess it and make part payment.

67) The respondent's further submissions in relation to this question in reply were as follows:

a) it repeated its previous submissions;

b) that the assertion that the respondent assessed and then part paid the

claim, is not factual, because it only paid part of it on account in accordance with the requirements of s. 5(1)(f) of Division 4 of the Schedule to the Act by paying *"the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations"*; and

c) that the respondent did not make such payment at the reduced labour rate of $70 per hour as asserted in the application submissions.

68) I find that the payment claim did comply with the requirements of the Act in part and that, even though I find that it did not do so in paragraph 71 it did not do so, in relation to some of the claims made in it, that does not result in the whole of the payment claim being invalid.

69) I also find that one should consider all the component parts of the payment claim, in order to determine whether it contained sufficient details of the claim, and that it certainly did so for the labour and materials portions of the claim, because the spreadsheet and related daily job sheets had a lot of information in them about what works were performed each day, the hours spent doing so by each of the applicant's personnel, what materials were supplied, their quantities and unit prices.

70) I consider that the respondent's submissions to the effect that there was insufficient detail provided in the payment claim in relation to those payment claim components to be unfounded.

71) The components of the claim, which I consider do not contain adequate details, are the claims for the time spent by the applicant's personnel trying to obtain payment, presumably of the previous invoices which were not valid payment claims, and the legal costs rendered by its lawyers, because:

a) no details of what was supposed to have been done by the applicant's personnel were provided; and

b) no details of what work was performed by the applicant's lawyer was provided.

72) In relation to the question concerning whether the payment claim contained amounts under the contract the respondent made the following submissions in the response that the claims for the time spent by the applicant's personnel trying to obtain payment and the legal costs rendered by its lawyers did not relate to a claim for work performed under the contract by the applicant.

73) In relation to that question the applicant submitted that:

a) If it is found that there were any parts of the payment claim which did not form part of the applicant's obligations under the contract that does not invalidate the payment claim entirely; and

b) The claims for the time spent by the applicant's personnel trying to obtain payment and the legal costs rendered by its lawyers would not have been incurred if the respondent had paid the contract on time and therefore formed part of the contract.

74) I find that the claims for the time spent by the applicant's personnel trying to obtain payment and the legal costs rendered by its lawyers were not claims arising from the applicant's performance of its contractual obligations, because, in simple terms, the only obligations to be performed by the applicant under the contract was to perform incomplete [redacted] works on an hourly labour rate basis as directed by the respondent each day. Activities and costs incurred by the applicant to enforce the respondent's obligations to pay monies it owed to the applicant under the contract do not form part of a contract unless there are clear and express terms to that effect, which was not the case here.

75) In any event, as the claims for the time spent by the applicant's personnel trying to obtain payment and the legal costs rendered by its lawyers to assist it do so could only have related to attempting to enforce the previously rendered invoices which the applicant has submitted were not valid payment claims, I consider the applicant's submission in relation to them being properly incurred to enforce the respondent's payment obligations under the contract to be unfounded, because no failure to pay could have arisen until a valid payment claim was served on the respondent.

76) I also find, even though these parts of the payment claim were not properly claimed, that does not make the whole payment claim invalid.

JURISDICTION

77) The parties entered into a contract to carry out to complete [redacted] relating to the Project (**Contract**) on at [redacted] in the Northern Territory on or about 25 November 2013[3].

78) It was partly oral and partly in writing.

79) The Contract was entered into after the commencement of section 9 of the ACT.

80) The work carried out under the Contract is '*construction work*' as defined in section 6(1) of the Act because it involved constructing part of a building on land in the Northern Territory.

81) Accordingly, the Contract is a construction contract as defined in section 5(1) of the Act and the Act applies to payment disputes arising under the Contract.

82) S. 19 of the Act applied so as to imply terms into the contract dealing with making payment claims.

83) Pursuant to section 9 of the Act, the applicant claimed an amount in a '*payment*

[3] statutory declaration [redacted] para 3

claim' dated 3 June 2014 under the Contract.

84) S. 13 of the Act applied to require payment within 28 days after the date of service of the payment claim on the respondent and it was served on 3 June 2014.

85) The payment claim was due for payment on 1 July 2014. The amount claimed in the payment claim was not paid in full and, accordingly, a payment dispute arose on 1 July 2014 for the purposes of the Act.

86) Pursuant to section 27 of the Act, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.

87) The applicant submitted an application for adjudication on 29 September 2014 in accordance with the Act. The respondent submitted its response on 13 October 2014 in accordance with the Act.

88) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or other person or court or other body dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the Act.

89) Given that I have found against various additional jurisdictional challenges made by the respondent (see my findings in above section headed requests for further submissions and findings in relation to same), I am, therefore, satisfied that I have jurisdiction to determine the adjudication application pursuant to the Act.

MY FINDINGS IN RESPECT OF AMOUNTS PAYABLE IN PAYMENT CLAIM

90) I find that the only amount claimed in the payment claim which was properly claimable was the claim for labour in the sum of $34,425, excluding GST or $37,867.50, inclusive of GST, because that claim claimed for works at the contract rate and adequate details of the work performed was included in the daily job sheets and spreadsheet, provided with the payment claim.

91) I also find that, even though the applicant reduced the labour charge rate for work performed by its apprentice in a previous invoice, which I have held was an invalid payment claim under the Contract, the applicant had no contractual obligation to do so and was not therefore obliged to repeat that concession in the payment claim.

92) I find that the whole of that amount is payable, because the respondent has failed to establish any other reason for reducing the amount claimed for labour.

93) I find that the claim for $598.14 for materials was not properly claimable because the contract was a labour only contract and the only way that the applicant could have been entitled to claim for materials would have been if the contract was varied in some way. The application contains no information

concerning whether such a variation occurred.

94) Given that the respondent made a part payment of the payment claim on 8 August 2014 of $27,458.12, I find that the balance of the payment claim, which is properly payable by the respondent, is **$10,409.38, inclusive of GST.**

RESPONDENT'S SET-OFF CLAIMS FOR DEFECTS AND INCOMPLETE WORKS

95) The respondent has claimed a set-off for the cost (amounts claimed by respondent, inclusive of GST, also being stated below) of rectifying the following allegedly defective works by the applicant:

a)	[redacted]	$3,355.00
b)	[redacted]	$1,408.00
c)	[redacted]	
	[redacted]	$814.00
d)	[redacted]	$517.00
e)	[redacted]	$397.00
f)	[redacted]	
	[redacted]	$2,576.00
	TOTAL RECTIFICATION COST	
	CLAIMED BY RESPONDENT:	$9,067.00

96) I will now deal with the parties further submissions, regarding whether the respondent has any contractual right to claim a set-off for defective workmanship rectification costs, which formed part of my request for further submissions in my email to the parties sent on 13 October 2014 and my findings in that regard.

97) In its further submissions provided on 15 October 2014, the applicant does not appear to have made any submissions in this regard and, instead, limited its submissions to comments about each set-off claim item.

98) The respondent submitted that:

a) every construction contract includes an implied term that the works to be carried out under the construction contract be performed in a good and workmanlike manner;

b) to do so in any other way would mean that the contractor has not performed its obligations under the contract; and

c) there are a number of authorities, which provide that in valuing the works carried out by a contractor, one must have regard to defects, but did not cite any such authorities.

99) I agree that if there is no express term in a construction contract requiring works performed by a contractor to be carried out in a good and workmanlike manner such a term would normally be implied. That has long been the case under the common law and there is now a statutory guarantee as to due care and skill in s. 60 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act*, 2010, Cwth.

100) The question which would need to be considered would be whether that statutory guarantee replaces the common law implied term and, if so, whether the respondent could be considered to be a 'consumer' as that term is defined in that legislation.

101) Neither party made submissions in this regard and I am mindful of my duty not to make a finding which is absent any submissions by the parties.

102) However, I do not consider that I need to make a finding in that regard, because I find that because s. 2 of the Act states that a contractor is entitled to be paid a reasonable amount for performing its obligations and I find that a reasonable amount must require that its building services the subject of any payment claim be of satisfactory quality.

103) I therefore also find that the respondent is entitled to claim a set-off for the cost of rectifying any defective works by the applicant.

104) I also find that, as there was no express term entitling the respondent to withhold payment of part or all of a payment claim by the applicant as an estimate by the respondent of the cost of rectifying the applicant's defective works, the respondent had no contractual right to do so. So I find the respondent's withholding of monies from the applicant in its payment schedules, on that basis, was in breach of the respondent's payment obligations pursuant to the Contract.

105) Whilst there was no express clause entitling the applicant to be given the opportunity to attempt to rectify any defectively performed works, it is evident by the communications between the parties that that is how they proceeded, because the respondent sent a list of defects to the applicant, and expected the applicant to rectify the allegedly defective works and the applicant responded on the basis that it had the right to attempt to rectify any defective works by it and would rectify them if it considered they were performed by it and had been defectively performed.

106) The applicant's application includes a letter dated 23 June 2014 addressed 'to whom it may concern' by a former project manager[4] employed by the

[4] See letter by [redacted] at tab 1 of the application

respondent who states that:

a) two the projects, including the project the subject of this adjudication, had been poorly managed by the respondent on site and commercially;

b) it was his job to try and rescue them, the worst one being the project the subject of this adjudication;

c) his predecessor had failed to source pricing to reflect the contract documentation and local contractor rates;

d) by December 2013 the respondent's [redacted] office had decided to recover losses by back charging its engaged contractors; and

e) he resigned, because he did not want that improper behaviour by the respondent to adversely affect his good working relationships with those contractors.

107) The respondent did not directly respond to the assertions in that letter. So I have borne that in mind when assessing the respondent's set-off claims.

108) I therefore now turn to each individual set-off item claimed by the respondent.

Replace twisted/bent flashing

109) The respondent has:

a) highlighted entries in some of the job sheets to confirm that the applicant installed [redacted][5];

b) provided evidence that the project client first notified the respondent about this defect by email on 24 December 2013 in item 32 of a defects list [6] and the respondent forwarded that email to the applicant on 31 December 2014[7];

c) has submitted the applicant has never attended the work site to inspect the alleged defects;

d) provided a photograph of a [redacted][8];

e) cited Australian standard section [redacted]; and

f) provided a detailed calculation for the anticipated cost of rectifying that defect which included the hiring a scissor lift crane, attending at site to measure the section of [redacted] needed to be replaced, cost of new [redacted] (including delivery charge), the labour of a [redacted] to perform the

5 See tab 24 and 25 of response
6 See tab 26 of response
7 See tab 9 of response.
8 See tab 27 of response.

rectification works and skip bin hire fees.

110) The applicant:

a) has included correspondence between the applicant's lawyers and the respondent in May 2014[9] which, in part, refers to an attempt to arrange for the applicant to meet a director of the respondent at the construction site to inspect the alleged defects, but that meeting was cancelled by such director on short notice for personal reasons;

b) contends that the applicant did not perform all of the [redacted] and it is unclear where the [redacted] photographed was located and whether it was [redacted] installed by the applicant;

c) contended that the alleged defects sit in stark contradiction with the inspection of the works at the end of each day by an engineer engaged by the respondent and the sign off of same by such engineer on such job sheets to indicate the works were properly performed;

d) relied on its general assertion that all the respondent's set-off claims were bogus and were made to enable the respondent to try and recover its project losses; and

e) did not make any comments about the respondent's calculation of the cost of rectifying the defects.

111) Whilst I find that the application lacks an explanation of what the applicant did in response to the defects list delivered in December 2013, it is evident that in May 2014 the applicant attempted to inspect the works with the respondent's director (which was arranged by the applicant's solicitor) and that attempt was unsuccessful because the respondent's director could not attend due to personal difficulties.

112) So I find that the applicant did indicate a willingness to inspect the allegedly defective works.

113) Soon after that occurred the applicant issued its payment claim and after that happened it seems no further attempts were made to re-arrange that inspection. I find that the respondent should have tried to re-arrange that site inspection because its director's personal situation caused the cancellation of the May 2014 inspection.

114) The respondent has the burden of proving that there were defective works by the applicant.

115) I also find that the respondent has failed to prove that the applicant's works were defective, because:

9 See correspondence in tabs 11 to 13 of application

a) in the circumstances where the applicant's contract of retainer was to complete the [redacted] works for the project, to prove its set-off claims on the balance of probabilities, the respondent should have provided evidence in the response to establish, which part of the [redacted] works were performed by the applicant and, where the alleged defective [redacted] works were located, without which I can not be certain that the defective works complained of were works performed by the applicant or by another roofing contractor; and

b) the respondent did not provide any evidence by the engineer who inspected the applicant's works and certified such works by signing the applicant's daily job sheets concerning the extent of his daily inspections.

116) I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

Straighten [redacted]

117) The respondent has:

a) highlighted entries in some of the job sheets to confirm that the applicant installed [redacted][10];

b) provided evidence that the project client first notified the respondent about this defect by email on 24 December 2013 in item 31 of a defects list [11] and the respondent forwarded that email to the applicant on 31 December 2014[12];

c) has submitted the applicant has never attended the work site to inspect the alleged defects;

d) provided a photograph of [redacted][13];

e) cited Australian standard section [redacted]; and

f) provided a detailed calculation for the anticipated cost of rectifying that defect which included the hiring a scissor lift crane, attending at site to measure the section of [redacted] needed to be replaced, the cost of new [redacted] (including delivery charge) and the labour of a [redacted] to perform the rectification works.

118) The applicant made similar submissions in relation to this alleged defect as for the previous alleged defect.

119) I make similar observations and findings as I did for the alleged [redacted]

10 See tabs 24 and 25 of response
11 See tab 24 of response
12 See tab 9 of response.
13 See tab 31 of response.

defect claim.

120) I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

Cladding around exposed [redacted] needs to be resealed/ [redacted]

121) The respondent has:

a) highlighted entries in some of the job sheets to confirm that the applicant installed [redacted] [14];

b) provided evidence that the project client first notified the respondent about this defect by email on 24 December 2013 in item 32 of a defects list [15] and the respondent forwarded that email to the applicant on 31 December 2014[16];

c) has submitted the applicant has never attended the work site to inspect the alleged defects;

d) provided a photograph, which shows a large gap between the [redacted] and the exposed metal beam[17];

e) cited Australian standard section [redacted] and

f) provided a calculation for the anticipated cost of rectifying that defect which included the hiring a scissor lift crane, attending at site to seal the exposed section and the labour of a [redacted] to perform the rectification works.

122) The applicant submitted that it did not perform this work and otherwise made similar submissions as for the pervious two defect claims.

123) I make similar observations and findings as I did for the alleged first defect claim.

124) I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

[redacted] do not line up some out by 25-30mm

125) The respondent has:

a) highlighted entries in some of the job sheets to confirm that the applicant installed [redacted] [18];

b) provided evidence that the project client first notified the respondent

14 See tabs 24 and 25 of response
15 See tab 26 of response
16 See tab 9 of response.
17 See tab 31 of response.
18 See tabs 24 and 25 of response

about this defect by email on 24 December 2013 in item 47 of a defects list [19] and the respondent forwarded that email to the applicant on 31 December 2014[20];

c) submitted this defect is of major concern, because in a severe storm water could penetrate into the [redacted], causing severe damage to the [redacted];

d) has submitted the applicant has never attended the work site to inspect the alleged defects;

e) provided a photograph of [redacted], which twists between the fixings[21];

f) cited Australian standard section [redacted]; and

g) provided a detailed calculation for the anticipated cost of rectifying that defect which included the hiring a scissor lift crane, attending at site to measure the section of [redacted] needed to be replaced, cost of new [redacted] (including delivery charge) and the labour of a r[redacted] to perform the rectification works.

126) The applicant submitted that it did not perform this work and otherwise made similar submissions as for the first defect claim.

127) I make similar observations and findings as I did for the first defect claim.

I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

[redacted] ***does not match*** [redacted]

128) The respondent has:

a) highlighted entries in one of the job sheets to confirm that the applicant installed dry [redacted][22];

b) provided evidence that the project client first notified the respondent about this defect by email on 24 December 2013 in item 47 of a defects list [23] and the respondent forwarded that email to the applicant on 31 December 2014[24];

c) submitted this defect is of major concern because in severe storms water could penetrate into the [redacted] causing severe damage to the [redacted] structure

19 See tab 26 of response
20 See tab 9 of response.
21 See tab 34 of response.
22 See tab 24 of response
23 See tab 26 of response
24 See tab 9 of response.

or the building;

d) has submitted the applicant has never attended the work site to inspect the alleged defects;

e) provided a photograph of the [redacted] no correctly matching the [redacted][25];

f) cited Australian standard section [redacted]; and

g) provided a calculation for the anticipated cost of rectifying that defect which included the labour needed to install [redacted] and the cost of such [redacted].

129) The applicant submitted that it did perform this work, but did not do so defectively by misaligning them. However it has observed that the [redacted] used appears to be a different colour than the [redacted] and the applicant is willing to replace them if the respondent pays it to do so.

130) I am unable to ascertain with any certainty from the photograph that there has been any mis-alignment.

131) In any event, I find that the respondent has failed to prove its case on the balance of probabilities, because it has not provided any evidence by its daily job sheet certifying engineer.

132) I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

[redacted]

133) The respondent has:

a) Highlighted entries in one of the job sheets to confirm that the applicant installed [redacted][26];

b) provided evidence that the project client first notified the respondent about this defect by email on 24 December 2013 in item 16 of a defects list [27] and the respondent forwarded that email to the applicant on 31 December 2014[28];

c) has submitted the applicant has never attended the work site to inspect the alleged defects;

d) provided a photograph of [redacted] by way of

25 See tab 35 of response.
26 See tab 24 of response
27 See tab 26 of response
28 See tab 9 of response.

example[29];

e) cited Australian standard section [redacted]; and

f) provided a calculation for the anticipated cost of rectifying that defect which included the labour to [redacted] and the cost of such [redacted].

134) The applicant submitted that it did not perform this work and otherwise made similar submissions as for the first defect claim.

135) I make similar observations and findings as I did for the first defect claim.

136) I therefore determine the amount payable by the applicant in respect of this component of the respondent's set off clam to be $NIL.

137) In summary I determine that no amount is payable by the applicant to the respondent by way of set-off for the cost of rectifying alleged defective works by the applicant.

COSTS

138) The applicant has submitted that I should exercise my discretion under the Act to order that the respondent pay the whole of the costs of the adjudication, including my fees, and it seeks payment of $5,134.80 for the applicant's costs up to the date of filing of the application. I expect that it would have incurred further costs since then, due to the need to prepare of further submissions requested by me. Although, the applicant has not provided me with details of any such additional costs.

139) The applicant contends that I should, so order, because "the Respondent fabricated its counterclaims and they are inconsistent with and simply cannot be sustained by the factual matrix of events of this contract".

140) S. 36(1) provides that the normal position in relation to the payment of the costs of an adjudication is that each party bear their own costs of the application.

141) S. 36(2) gives adjudicators the discretion, if satisfied that a party to an adjudication has caused the other to incur costs due to frivolous or vexatious conduct or, because the other party has made unfounded submissions.

142) In paragraphs 70 and 75 I found that both parties made some unfounded submissions so, I find that, for costs consideration purposes under s. 36, they effectively cancel each other out . My findings that the respondent's set-off claims should not be upheld, were not based upon the respondent's claims being frivolous or vexatious, but due to them not being proven on the balance of probability.

[29] See tab 38 of response.

143) I do not consider, despite the contents of the letter included with the application by a former employee, of a belief by him that the respondent was making spurious back charges to reduce its project losses, to have been made out on the balance of probabilities, because a credible attempt was made by the respondent to prove that defective works had occurred by providing a defects list, notifications to the applicant of such defects and photographs of same.

144) I am therefore not willing to depart from the normal position in relation to the allocation of costs between the parties under s. 36(1).

INTEREST

145) The applicant has also claimed interest pursuant to s. 21 of the Act at 8.5 % per annum payable from 1 July 2014, which it has calculated to be **$510.33**.

146) I find that that was the correct rate of interest to apply under s. 21.

147) I determine that the respondent pay interest to the applicant on $10,409.38 at the rate of 8.5% per annum from 2 July 2014 to 27 October 2014 (being 118 days at $2.42 per day), which amounts to $285.56.

THE DETAILS OF THE DETERMINATION

1) Pursuant to s 34(1)(a) of the Act, I have made this determination on the basis of the application and its attachments, the response and its attachments and the further submissions by the parties requested by me.

2) Pursuant to s 33(1)(b), I have determined that:

   a) the respondent must pay the applicant $10,694.94 (the "adjudicated amount") comprising $10,409.38 incl. GST in respect of the payment claim and interest thereon in accordance with clause 35(1)(b) of the Act from 2 July 2014 to 27 October 2014 in the sum of $285.56; and

   b) the respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

3) Pursuant to section 36(1) of the Act, each party shall bear its own costs in relation to this adjudication.

4) Pursuant to section 46(5) of the Act, both parties shall share the costs of the adjudication equally.

CONFIDENTIAL INFORMATION

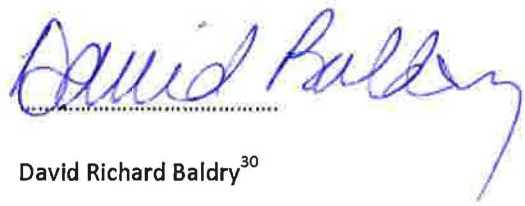
5) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.

6) In any event, pursuant to s. 38(1)(e) of the Act I consider that the following information, because of its confidential nature, is not suitable for publication by

the Registrar under s. 54 of the Act:

a) the identity of the parties; and

b) the identity and location of the project.

Signed: 

David Richard Baldry[30] Date: 27 October 2014

[30] Registered Adjudicator Number 39