

Registrar's note: This version of the determination has been edited and details of the parties, involved, the project site and the materials supplied have been redacted, for the purposes of section 54 of the *Construction Contracts (Security of Payments) Act*.

DETAILS

Applicant

[Applicant's details redacted]

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[Respondent's details redacted]

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Appointment

The Applicant applied on about 12 July 2018 for the Law Society of the Northern Territory under the *Construction Contracts (Security of Payments) Act* (the Act), for the appointment of an adjudicator. Consequent upon that application I was appointed adjudicator on 17 July 2018 by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointor under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

THE CIRCUMSTANCES

In this matter the Applicant contracted with the Respondent for the supply of [*the materials and equipment*] as part of the construction of the [*project details redacted*]. (“The Works”).

On 25 August 2016 the Respondent invited the Applicant to tender for the works. [A. annexure1]. The Respondent’s terms and conditions were provided to the Applicant prior to the acceptance of the tender. [A. Annexure 2].

The Applicant submitted a compliant tender on 31 August 2016. [A. Annexure 3].

The tender document provided for amendments to the Respondent’s terms and conditions namely, progress payments were to be made upon the milestones set out in the Applicant’s document, being reached and payments were to be due 30 days from the date of invoice. [A. Annexure 3].

On 12 October 2016 the Respondent provided the Applicant with a purchase order for supply and installation of [*the materials and equipment*]. [A. Annexure 5].

The Applicant alleges it carried out the works and during the course of the contract and it supplied and installed *the materials and equipment*].

The Respondent denies the [*the materials and equipment*] were installed as per the contract.

During the execution of the contract the Applicant delivered 4 invoices to the Respondent. [A. Annexure 7]. The invoices were delivered in accordance with the terms as to the progress payments which are set out in the Applicant’s tender of 31 August 2016. The Respondent paid the first 2 invoices. [A1.17].

The Applicant delivered its 3rd invoice on 25 January 2018. It claimed \$474,659.37. [A1.17]. This invoice went unpaid until 26 April 2018 when it was part paid. The Respondent on 26 April 2018 paid \$392, 989.04. The balance owing on the 3rd invoice was as at 20 July 2018, \$81,670.33.

The Applicant delivered its 4th invoice on 27 March 2018. The Applicant claimed \$237,329.68 in that invoice. [A1.17]. This invoice has not been paid.

In addition to the invoices the Applicant delivered to the Respondent on 12 April 2018 a document entitled "Payment Claim". (“the April claim”) [A. Annexure 9]. The Applicant claimed in the April claim to be owed \$711, 989.05. The sum claimed was the aggregate of the amounts claimed in invoice 3 and in invoice 4.

On 25 April 2018 the Respondent delivered to the Applicant a letter with reference “notice of dispute ... Payment claim, 12 April 2018...” [A. Annexure 10]. That document set out some complaints that the Respondent had as to the [*the materials and equipment*] supplied and installed by the Applicant.

The Respondent on 26 April 2018 paid the Applicant the sum of \$392,989.04 referred to previously. [A. Annexure 10].

The sum the Applicant claims was outstanding to it from 26 April 2018 is \$319,000.00. [A1.17].

The Applicant's claim for the unpaid sum and the non-payment of that sum by the Respondent is the dispute the subject of the Applicant's application for adjudication dated 12 July 2018.

The Respondent alleges the Applicant is in breach of the contract and claims from the Applicant by way of counterclaim the sum of \$561,058.16 (including GST) being the alleged cost to the Respondent of remedying the alleged breaches. [R1.12].

DOCUMENTS

Adjudication Application 12 July 2018. ("A1")

Further Submissions of the Applicant 24 July 2018. ("A2")

Further Submission of the Applicant 7 August 2018. ("A3")

Response of the Respondent 26 July 2018 ("R1")

Further Submissions of the Respondent 31 July 2018 ("R2")

Further Submission of the Respondent 7 August 2018. ("R3")

JURISDICTION

Section 27

The Applicant is entitled to make an application to a registered adjudicator for adjudication of its dispute with the Respondent pursuant to the provisions of the *Construction Contracts (Security of Payments) Act*. ("the Act"). Section 27.

The Applicant has delivered to the Respondent an application for adjudication of payment dispute dated 12 July 2018. It has done so pursuant to section 27 of the Act. [R1].

Section 27 of the act provides that a party to the contract may apply to have a payment dispute adjudicated pursuant to the Act unless:

1. An application for adjudication has already been made, or
2. The dispute is the subject of an order, judgement or other finding about the matter arising under the contract.

The parties agree that an application for adjudication of the dispute between the Applicant and the Respondent has not previously been made and the dispute is not subject to the conditions set out in section 27.

Section 28

Section 28 of the Act sets out further requirements that have to be met with respect to an application.

Section 28 requires the Applicant to comply with the following for there to be a valid application:

The Applicant must:

- prepare a written application for adjudication and
- serve it on each other party to the contract and
- serve it on an appointor and
- provide any deposit or security for costs.

The application must:

- be prepared in accordance with the regulations and
- state the details of or have attached to it the construction contract involved or relevant extracts of that contract and any payment claim that has given rise to the payment dispute and also to
- have attached to it all the information, documents and submissions on which the party making it relies for the adjudication.

The Applicant has delivered to the Respondent a written application dated 12 July 2018, for adjudication of the dispute described in the application. [R1].

There is no dispute that the requirements set out above have been met save there is a dispute between the parties as to what documents make up the contract.

Payment Dispute

Section 28 has the further requirement that the requirements set out above must be met within 90 days after the payment dispute referred to in section 27 arises.

Important questions that arise from those requirements are:

- Does a payment dispute as defined by the Act exist in the present circumstances; and
- Did the payment dispute arise no more than 90 days before the application was made?

What is a payment dispute?

A payment dispute is defined in section 8 of the Act.

Section 8

A payment dispute arises if -

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;

(b)

or

(c)

The relevant elements of a payment dispute are:

1. There is a payment claim.
2. The amount claimed in the payment claim is due to be paid under the contract but has not been paid in full, or
3. The claim has been rejected or wholly or partly disputed;

Section 4 of the Act provides as follows:

“payment claim” means a claim made under a construction contract:

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or ...

In order that a payment dispute might be determined the adjudicator has to determine the following:

1. what documents does the Applicant say make up the payment claim;
2. what documents or actions make up the relevant part of the contract relating to payment claims (if any); and
3. the terms of the contract by which a payment becomes due:
 - (a) as per the express terms of the contract, or
 - (b) as per the implied terms set out in Schedule 1 Division 4 implied pursuant to section 19 of the Act;
4. whether the documents which the Applicant says make up the payment claim comply with the requirements of the terms of the contract; and if so
5. whether:
 - (a) the amount claimed in the payment claim is due to be paid under the contract and has not been paid in full, or
 - (b) the payment claim has been rejected, or wholly or partly disputed:
 - (i) as per the express terms of the contract, or

- (ii) as per the implied terms set out in Schedule 1 Division 5 implied pursuant to s20 of the Act.

The Contract

For present purposes the construction contract is made up of “Purchase Order Terms and Conditions” of the Respondent (“the Respondent’s terms and conditions”) as amended by the Applicant’s quotation of 31 August 2016 (“the August amendments”), and the Purchase Order of 12 October 2016 which accepted the terms of the quotation. I do not agree the letter of 16 November 2016 is a relevant part of the contract for this discussion.

The Claim

The Applicant

The Applicant says the relevant payment claim is the document that is annexure 9 to its application for adjudication. That is the document dated 12 April 2018. [A. Annexure 9]. (“the April claim”).

The Applicant says that the terms of the contract which relate to what is required of a payment claim in the present circumstances are those implied pursuant to Section 19 of the Act. [A21].

Section 19 of the Act states:

“The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.”

Does the Contract Have a Written Provision?

The Applicant says the contract does not have a written provision about how a party must make a claim to another party for payment and therefore the provisions of the Schedule Division 4 of the Act were implied into the contract.

The Applicant refers to clause 3.1 of the Respondent’s TERMS AND CONDITIONS which is as follows:

- 3.1 The Supplier shall submit its tax invoice or credit note in respect of the delivered Goods or Services, which correctly identifies the Purchase Order, shows the quantity of Goods or Services supplied the Price applying to those Goods or Services and the Order Number.

The Applicant says that the amendment to the contract by the Respondent's acceptance of the Applicant's quotation of 31 August 2016 had the effect of rendering clause 3.1 of the Respondent's TERMS AND CONDITIONS nugatory.

The Applicant says the August amendments do not expressly replace clause 3.1 and so the contract does not contain a written provision about how a party must make a claim as the amendments and clause 3.1 are mutually exclusive. [A2.6].

The August amendments are:

“Progress payments to be as follows:

15% deposit upon placement of order

40% upon completion of build and FAT signed off

30% upon arrival of goods

15% upon delivery to site.” [A2.5].

“All due 30 days from date of invoice. “ (“the August amendments”) [A2.5].

Otherwise the Applicant accepted the Respondent's terms and conditions. [A2.5].

The Applicant says that the clause 3.1 contemplated a single invoice for a single supply of goods. Hence, the provision was not meant to operate where there was to be one supply but 4 separate invoices.

The Applicant says it carried out 1 supply but rendered 4 invoices. [A17]. Clause 3.1 could therefore not apply in the circumstances and it was not replaced with any provision about how a payment claim was to be made. [A2.8].

The Applicant says therefore that, as clause 3.1 could not be referred to, the contract did not make any provision about how payment claim was to be made and so section 19 applied and the implied terms had to be relied upon.

Alternatively, the Applicant says that if clause 3.1 was a term of the contract then the tax invoices sent on 25 January 2018 and 27 March 2018 did not satisfy the requirements of clause 3.1 and therefore are not valid the payment claims. [A2.9].

I assume the Applicant refers to the invoices not showing “the quantity of Goods or Services supplied the Price applying to those Goods or Services” as required by clause 3.1.

The Applicant says that to be a valid payment claim every single requirement for such a claim set out in the contract must be strictly satisfied. [A2.9]. The Applicant refers to the case of *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 per Kelly J at [147]-[153] and Olsson J at [203]-[253].

The Applicant says the invoices in fact state the milestone reached as set out in the August amendment and do not set out the information as required by clause 3.1 of the contract and therefore invoices 3 & 4 are not payment claims as required by the Act.

The Respondent

The Respondent says that the contract clearly sets out the provisions for the making of and responding to a claim for payment. [R2.9]. The Respondent says that clause 3 of the contract, as amended, has entirely adequate stipulations in regard to making claims for payment. [R2.9].

The Respondent says that while the content of clause 3 of the contract may not meet with what the Applicant considers necessary, the terms are nonetheless valid and there is a clear pathway for the Applicant's compliance with those terms when making a payment claim under the contract. [R2.9].

The Respondent says clause 3 of the contract was amended by agreement between the parties. [R2.11], [R2.14].

The Respondent says the Applicant could not say that it did not know how and when it was to make a claim for payment under the contract. [R2. 13, 14].

The Respondent says

"The Contract required the Applicant to make a payment claim as follows:

- A tax invoice for the goods or services setting out specific items of compliance;
- The information for each payment milestone;
- The Order Number; and then
- Sending the tax invoice to the address set out on the purchase. [R2.13].

The Respondent in its latter submissions then says the amendment was to add the August Amendments relating to the milestones to clause 3.1. [R3.09].

The Respondent says that the invoices were payment claims because:

The parties knew what was required for the making of and responding to a claim for payment under the Contract and they followed those requirements. [R1.47], [R2.14]

Neither party was confused in any way whatsoever as to the terms for the making of and responding to a claim for payment based on the amendment to clause 3 and the agreed four milestones. [R3.10]

The terms have been amended to reflect the bargain made between the parties. The Applicant has fully understood those amended terms and has fully invoiced the Contract over the four milestones in accordance with the amendments and well in advance of the April Claim. [R3.15]

I am of the view that the test of whether a claim for payment is a payment claim is not whether by intuition or some feeling the parties knew what was required or the parties were not confused or that the parties fully understood what to do. The test is did the claim follow the method of making a claim as set out in the terms of the contract (if there were any). *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 per Kelly J at [147]-[153] and Olsson J at [203]-[253].

The Issue

The Applicant says the amendments to the contract made no change to the terms of clause 3.1 and since they have to be strictly followed for there to be a payment claim, invoices 3 and 4 were not payment claims as they did not contain the information required by clause 3.1. The Applicant says, in the alternative, that because clause 3.1 was not amended per force of the August amendments it was impossible to follow and was therefore nugatory or did not exist. The Applicant says therefore there was no term in the contract that made provision about how a payment claim was to be made and so Section 19 applied and the implied terms had to be relied upon.

The Respondent says that clause 3.1 was only amended so as to add the August amendment to follow on from the terms set out in clause 3.1. It says that there was no other amendment to clause 3.1. It says in addition that the terms of clause 3 sets out entirely adequate stipulations in regard to making claims for payment and the Applicant followed those stipulation when making its claims.

Consideration of the Issue

It is clear, as the Applicant asserts that, compliance with the contractual conditions are a prerequisite to the raising of a valid payment claim and is essential to the proper characterisation of a valid payment claim for the purposes of the statute. *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at 241.

The Respondent however raises the issue of the August amendments having the effect of also amending clause 3 so that it was in sync with the August amendments.

The question therefore is what were the relevant terms of the contract that had to be followed.

I requested and received submissions from the parties as to whether the August amendment amended the words used in clause 3.1 in the Respondent's TERMS AND CONDITIONS so as to replace any reference to goods supplied with references to the milestones referred to in the Applicant's amendment to the Respondent's T&C.

I suggested that the aids used in the construction of contracts meant there had been a mistake in that the wording of clause 3.1 had not been changed to accommodate the August amendment. This mistake I thought was alluded to by the Respondent. See [R2.13]

The Respondent rejected this suggestion as did the Applicant. See [A3.14] and [R3.18]

The Respondent made it clear that it is the Respondent's position that there was no amendment as suggested. [R3.18].

The parties agree therefore that there was no change to the wording in the original clause 3.1 except that the Respondent says the August amendment was added on to clause 3.1 so as to follow the original wording of clause 3.1.

It is clear therefore that the Applicant cannot follow the terms of clause 3.1. It can comply in part with that clause and provide some of the information required by that clause, but cannot state the quantity of Goods or Services supplied the Price applying to those Goods or Services.

The Applicant says that clause 3.1 cannot be strictly followed. [A2.6, 7, 8].

It is apparent that without amendment that is the case.

The Respondent however submits the parties must consider all of clause 3 to determine whether there is a term which sets out how a party must make a claim to another party for payment. [R1.39, 41, 47, 53.b & c], R2.09, 10, 11, 13, 14, R3.10, 15].

The Respondent peripherally refers to the terms in clause 3.2 as being applicable. [R2.13].

I note that the Applicant also refers in its submissions to the balance of clause 3 as it refers to clause 3.6. [A2.22.d].

Clause 3.2 provides that "All invoices are to be forwarded to the address set out in the purchase order or such other address may be notified to the Supplier by the Purchaser."

Clause 3.2 is the only clause in the contract that refers to how a payment claim is to be made since I determine that clause 3.1 cannot apply.

It is my decision that the invoices have been sent in accordance with clause 3.2. The claims sent were invoices and the claims sent were sent to the address notified by the Purchaser. [A1. Annexures 6&7].

I conclude that the contract contained a written provision about how a party must make a claim to another party for payment. The provision is contained in clause 3.2. I decide that the terms referred to in section 19 of the Act are not implied into the contract.

I conclude that invoices 3 & 4 are payment claims as required by section 4 of the Act.

Repeat Claim

Repeat claims are not contemplated by the Act. Section 8 of the Act does not contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims. The section (section 8) makes no provision for repeat payment claims. *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [11] CA.

The service to the Respondent of a repeat payment claim comprised of claims for the identical amounts for the identical work cannot operate to revive a right which the Act Parliament has terminated or destroyed. *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [56], [124], [260].

A repeat claim is one which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28 to be available for adjudication. *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [39] CA.

Annexure 9 to the application for adjudication makes a claim for \$711,989.05 for progress payments for the supply and installation of [*the materials and equipment*]... This claim represents the payment instalments set out in your letter of 16 November 2018, namely:

“upon arrival in the Port of Darwin - 30% paid within 30 business days
upon arrival at [*the project site*] - 15% paid within 30 business days”

Annexure 7 to the adjudication application contains an invoice (invoice 3) dated 27/1/18 claiming 30% arrival of goods - \$474, 659.37 and contains an invoice (invoice 4) dated 27/3/18 claiming 15% upon arrival at [*the project site*] - \$2 37, 329.68. The total of those 2 invoices inclusive of GST is \$711,989.05.

It was a term of the August amendment that the invoices would be due 30 days from date of invoice.

Invoice number 3 was due 24th February 2018. A payment dispute arises when the amount claimed is due to be paid, the amount has not been paid in full. A payment dispute with respect invoice number 3 arose on 24 February 2018. Clause 28 requires the adjudication application to be made within 90 days of the payment dispute arising.

In this matter the Applicant had until 25 May 2018 by which to bring an adjudication application with respect to the payment dispute arising from the non-payment of invoice number 3.

A repeat claim seems to have 3 attributes. It makes a claim for the same amount, that was included in a previous payment claim and provides the same description as to the claim made as was provided in a prior payment claim and the time within which the prior claim could be the subject of an adjudication application has expired.;

Invoice 3 has these attributes. Invoice 3 as referred to in Annexure 9 is a repeat of a prior payment claim. The Act has terminated the right of the Applicant to have an adjudication of the payment dispute arising out of the sum claimed in invoice 3 not being paid in full. So even though the payment dispute arising out of the sums claimed in Invoice 3 not being paid in full, can be the subject of an adjudication application I do not have jurisdiction to determine that payment dispute as the requirements of section 28 have not been complied with.

Invoice number 4 was due 26 April 2018. A payment dispute arises when the amount claimed is due to be paid, the amount has not been paid in full. A payment dispute with respect invoice number 4 arose on 26 April 2018. Clause 28 requires the adjudication application to be made within 90 days of the payment dispute arising.

In this matter the Applicant had until 25 July 2018 by which to bring an adjudication application with respect invoice number 4.

The Applicant made an adjudication application dated 12 July 2018. The application was in respect of annexure 9. [A21]. Annexure 9 repeats the claims made in invoice number 3 and invoice number 4 which are Annexure A.7 in the Application

However, the claim in respect of invoice 4 made in annexure 9 was made within the 90 days provided for in section 28. Does this mean it is not a repeat claim?

Annexure 9 does not re-trigger a payment dispute with respect invoice 4 but it claims the same amount for the same milestone as appears in invoice 4. Annexure 9 does not revive a right which has been terminated or destroyed. *K & J Burns Electrical Pty Ltd*. In the case of invoice 4 it is apparent that the right given to the Applicant to have the payment dispute relating to invoice 4 has not been terminated or destroyed even though annexure 9 contains a claim which is already been made the claim is not out of time. *A J Lucas Operations Pty Ltd*. The Respondent agrees that this is the case. [R1.53.c]

The payment dispute relating to Invoice 4 is within the time limit set by section 28 of the Act. It is not a repeat claim.

Section 33 as to Jurisdiction

Section 33 of the *Construction Contracts (Security for Payments) Act* ("the Act") sets out further requirements that have to be complied with before the Act allows the adjudicator to, within the prescribed time, consider the merits of the claim.

Section 33 of the Act requires the adjudicator to dismiss the application if any of the following are true:

- The contract concerned is not a construction contract.

- The application has not been prepared and served in accordance with section 28.
- Another body has dealt with the subject matter of the dispute that is the subject of the application.
- The adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or it cannot be completed in time.

I am thus required by section 33 of the Act to dismiss the application as the application does not comply with the requirements of section 28 of the Act.

Invoice 3 was a payment claim as described by the Act. More than 90 days have passed since the payment dispute arose with respect invoice 3. The time within which an application had to have been made expired on 25 May 2018. Annexure 9 so far as it relates to the payment claim that is invoice 3 is a “repeat claim”. The reference to invoice 3 in annexure 9 cannot re-trigger nor revive the time limit.

Any adjudication application brought with respect to the payments dispute arising from Invoice 3 has not been brought within 90 days of the payment dispute arising.

Any application for adjudication of the payment dispute arising out of invoice 3 has not been brought within the 90 days required by section 28 and I am thus required by section 33 to dismiss the application.

I am of the view that annexure 9 has required me as an adjudicator to determine whether I had jurisdiction to adjudicate as to the payment dispute created by the incomplete payment of invoice 3. The importance of this decision is explained below.

Decision as to Invoice 3

For the reasons described above I am satisfied that the application for adjudication so far as it relates to the payment dispute relating to invoice 3 does not comply with the requirement of section 28 of the *Construction Contracts (Security of Payments) Act*.

I dismiss the Applicant’s application with respect of the payment dispute relating to invoice 3 and do so pursuant to section 33(1)(a) of the Act on the grounds that the Applicant’s application has not been prepared and served in accordance with section 28 of the Act.

No Consent

The Respondent submits at [R2.29, 30], an adjudicator cannot determine multiple payment disputes under one application unless he/she has the consent of Respondent. Section 34(3) of the Act. The Respondent does not consent. [R2.29].

Following the decision of *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44 at [48] I would be precluded as adjudicator from adjudication of either of the disputes.

The Respondent is correct in its submission but does not take into account the context of section 34(3).

An adjudicator is only adjudicating a dispute if he/she has jurisdiction to do so.

In this matter I have determined that I do not have jurisdiction to determine the payment dispute in relation to invoice 3. Section 33(1) states that an adjudicator can only make a determination on the merits if the application is not dismissed for the reasons set out in that section. The adjudicator must otherwise determine if one party is liable to make a payment to another party. Section 33(1). Section 33(2) makes a distinction between dismissing an application and determining an application.

Section 34 is only concerned with the making of a determination. Section 34(1).

I am not making a determination with respect to invoice 3 as I have decided that that payment dispute has to be dismissed.

I have determined that I have jurisdiction to determine the payment dispute with respect to invoice 4, and the Respondent agrees with that decision.

I am determining only one payment dispute so section 34(3) does not apply.

An Estoppel

I have determined that Invoices 3 and 4 were payment claims pursuant to the terms of the contract. I have determined that because of part payment of Invoice 3 and non – payment of invoice 4 payment disputes arose in relation to those invoices.

A payment dispute arises if a payment claim is made under the contract and either:

- the claim has been rejected or wholly or partly disputed; or
- the amount has not been paid in full by the time the amount claimed has become due to be paid.

The Applicant says at [A1.16] the Respondent is not entitled to argue that annexure 9 is not a valid payment claim because it was not made in accordance with the contract.

The submission is based on the assertion that the contract contains no provision about when and how a party must respond to a payment claim made by another party and so the implied terms in Schedule Division 5 are implied. Section 20 of the Act.

The Applicant submits the effect of those parts of Division 5, which became contractual terms between the parties, was that [*the Respondent*] had to make an election at the time of its notice of dispute, whether it believed the claim had not been made in accordance with the contract. It made that election and cannot resile from it.

I have determined that Invoice number 3 is a valid payment claim. Payment of invoice 3 was due 24th February 2018. A payment dispute arises when the amount claimed is due to be paid and the amount has not been paid in full. Invoice 3 was not paid in full by 24 February 2018. A payment dispute with respect invoice number 3 arose on 24 February 2018. An adjudication application with respect to that payment claim had to be made by 25 May 2018. It was not. The Act has destroyed the right of the Applicant to have that payment dispute adjudicated upon.

A failure by the Respondent to reject a repeat claim for payment as not being a payment claim under the Act cannot have an effect on the loss of the right to an adjudication of the payment dispute in relation to invoice 3.

Given that I can determine the merits with respect to invoice 4 the argument as to whether annexure 9 is a valid payment claim may have had to be considered but in the circumstances it does not arise as an issue.

The Boundaries of the Dispute

In paragraph 18 of the application the Applicant says that the adjudicator cannot go outside the boundaries of the dispute set by the payment claim of April 2018 and the response of April 2018.

I do not agree.

The adjudicator is required to look at the documents relevant to the adjudication and determine whether the adjudicator has jurisdiction to entertain the application for adjudication in accordance with the provisions of the Act. Should the adjudicator not interpret the Act properly when considering his/her jurisdiction the determination would be found to be void.

It cannot be that the parties can set the boundaries of a dispute and exclude examination of the acts of the parties as they relate to the provisions of the Act.

If, as the Applicant contends, the parties can set the boundaries of the dispute, a repeat claim followed by an incompetent notice of dispute would set out the jurisdictional requirements of a valid payment claim rather than the provisions of the Act. Such a result cannot be the intention of the Act.

The Counterclaim

In its response the Respondent counterclaims the sum of \$561,058.16. [R1.12]. It counterclaims for the Applicant's breaches for nonconforming works under the contract.

The Respondent pursuant to clause 3.5 Respondent's terms and conditions is entitled to deduct from any monies due to the supplier, all debts owed by the supplier to the purchaser and which remain unpaid on any account whatsoever.

The phrase "on any account whatsoever ", has the meaning of "on any ground" or "by reason of any circumstance".

Clause 3.5 refers to a "debt" owed by the supplier to the purchaser.

The Respondent by making the counterclaim seems to be referring to a claim by a principal as appears in the definition of payment claim.

Clause 3.5 is not a written provision by which party must make a claim to another party for payment. Clause 3.2 would appear to only apply to the supplier as a means by which a claim can be made pursuant to the contract.

Schedule 1, Division 4 of the Act would appear to apply as to how the Respondent would make a claim to the Applicant. Section 19.

I am of the view that the counterclaim contained in the response to the application does not comply with the provisions as to how a payment claim is to be made as set out in Schedule 1, Division 4 of the Act.

If the counterclaim is a payment claim then the claim was made on the date of the response to application document was served, namely 26 July 2018.

The contract is not set out how the Applicant is to respond to a payment claim by the Respondent and hence the term set out in schedule one Division 5 apply to the contract.

The 28 days within which the Applicant must pay the amount of the claim provided for in division 5 has yet to expire and so the amount is not yet due.

For those reasons the sum claimed in the counterclaim is not a debt owed by the Applicant to the Respondent and cannot be deducted from the monies that are due to the Applicant.

For these reasons I dismiss the Respondent's claim that it is counterclaim be upheld in the sum of \$561,058.16 (including GST).

Determination of the Claim

I have decided that a determination can be made with respect to invoice 4.

Invoice 4 dated 27 March 2018 claims a sum of \$237,329.68 inclusive of GST.

I have decided the Respondent is unable to deduct any sum from the amount claimed by the Applicant as there is no debt owed by the Applicant to the Respondent as provided for in clause 3.5 of the Respondent's terms and conditions.

I determine that the Respondent is to pay to the Applicant the sum of \$237,329.68 inclusive of GST.

Interest on the claims

I award interest pursuant to section 35 of the Act. I award interest at the rate of 7.5% on the non GST amount of invoice 4 from the date the sum payable became due namely 26 April 2018 until the date of the determination, namely 9 August 2018, at the rate of \$44.33 per day for 105 days or \$4,654.97.

Costs

I have not found either the application or the Respondent's position without merit, and I do not consider the Applicant's conduct in bringing the application to have been frivolous or vexatious. Nor do I consider the Applicant's submissions so unfounded as to merit an adverse costs order.

I make no decision under either section 36(2) or 46(6) of the Act. The parties must bear their own costs as required by the Act.

The Details of the Determination

Pursuant to section 34(1)(a) of the *Construction Contracts (Security of Payments) Act*, I have made this determination on the basis of the application and its attachments and the response and its attachments the further submissions of the Applicant dated 24 July 2018 and 7 August 2018 and the further submissions of the Respondent dated 26 July 2018 and 7 August 2018.

Pursuant to section 33(1)(a), I dismiss the Applicant's application in relation to the payment dispute relating to invoice 3 without making a determination of its merits as the application in relation to that dispute has not been prepared and served in accordance with section 28 of the Act.

I dismiss the Respondent's claim that it's counterclaim be upheld in the sum of \$561,058.16 (including GST).

I determine that the Respondent is to pay to the Applicant the sum of \$237,329.68 inclusive of GST within 14 days of the date of this determination.

I determine that the Respondent is to pay to the Applicant the sum of \$4,654.97 by way of interest within 14 days of the date of this determination.

I determine that each party is to bear their own costs.

I determine there are no confidential matters as described in section 54 of the Act.

David Alderman
Adjudicator No. 23
Dated: 9 August 2018