DETERMINATION NO. 16.09.04

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act (NT)

Applicant

and

[AA BB] Limited

Respondent

I, Cameron Ford, determine on 17 August 2009 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is $25,881.48 being the amount of $25,807.24 plus interest of $74.24. Interest accrues on the sum of $25,807.24 from 17 August 2009 at the rate of $7.42 per day. The sum of $25,881.48 is payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

Applicant: Respondent:

Appointment as adjudicator

1. On 15 July 2009 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act) seeking some $1,232,064.44, consequent upon which I was appointed adjudicator by the Law Society of the Northern AA to determine this application. The Society is a prescribed appointer under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment.

Documents received by adjudicator

2. I received and have considered the application supported by a Document Book containing 32 indexed documents and a Claim Book containing 366 pages of claims, together with the response comprising a combined Claim Response Book and Respondent's Document Book which contains documents responding to each of the claims and 17 further supporting documents.

3. At my invitation the parties also provided and I have considered the following further written submissions:

   Applicant and respondent: 7 August, 12 August, 14 August

   Applicant: 11 August

   Respondent: 13 August

4. The response was delivered on 3 August 2009 making my determination due no later than 17 August 2009.

JURISDICTION

5. The respondent contests jurisdiction on the bases that there is no contract between the applicant and the respondent (as required by s 27 of the Act), and that the payment claim upon which the application is based is not valid as it is not a claim on or to the respondent or the party with whom the applicant holds a contract. These issues also raised incidentally the question of whether the application was made in time or prematurely.

6. Apart from those matters, I find that I would otherwise have jurisdiction because:

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

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

Was there a contract between the applicant and respondent?

7. The applicant has named [AA BB] Limited as the respondent to this application, giving the correct ABN for that company on the face of the application. I note that the cover page of each of the folders containing the documentation supporting the application refers to [AA BB] Pty Ltd as the respondent, but this is not a statutory or formal document in any sense and cannot affect the named respondent on the application.

8. Section 27 of the Act says:

> **27 Who can apply for adjudication**
>
> If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless [not presently relevant]

9. An application may therefore only be made by a party (and against a party) to a construction contract.

10. The contract alleged by the applicant and accepted by the respondent is formed partly by the [project] Construction Specification dated 9 September 2008 (**the specification**) which incorporates by reference general conditions of contract Australian Standard AS 4000 – General Conditions of Contract (DB12, cl 1.1.1, p 11(89)).

11. Under the definition of "Principal" in cl 1.1.3, the specification states that it "[s]hall mean [AA BB] Pty Ltd". In a text box at the beginning of cl 11 of the specification headed "Exclusions and Other Prequalifications" the "Client" is named as "[AA BB] Pty Ltd". In the following exclusions and prequalifications, the word "Client" appears to be used in place of the word "Principal".

12. The result of those definitions is that the "Principal" and the "Client" under the contract are both [AA BB] Pty Ltd, not [AA BB] Limited. The general conditions contain no reference to either company, with none of the usual information being provided in Part A of the Annexure, including the name of the contracting parties (DB13, p 215).

13. On the face of the documents which the parties to this application accept form the contract, the applicant has a contract with [AA BB] Pty Ltd and not with [AA BB] Limited.

14. Precontractual documentation refers to "[AA BB]", as do most post-contractual documents such as payment claims 2, 3, 4, 5 and 6 addressed to "[AA BB]".

15. One post-contractual document referring to [AA BB] Limited is the applicant's tax invoice 12 dated 5 September 2008 for the first payment claim (before the date of the specification). That invoice has been paid, but I do not know by which entity.

16. In its response, the respondent provided search results of various companies, but there were no results for [AA BB] Pty Ltd. This raised in my mind the possibility that the company may not have existed – had it done so I would have expected search results for that company to have been provided by the respondent along with the results for the other companies.

17. A further document clouds the issue, namely a letter of 1 May 2009 from [AA CC] Pty Ltd responding to the applicant's payment claim 7 of 8 April 2009 on which this application is based. While denying liability for the amount claimed, [AA CC] Pty Ltd responded substantively to the claim and denied it on its merits, not on the basis that either the contract was not with [AA BB] Pty Ltd or that the payment claim had been made on the wrong entity (this is dealt with in more detail below in relation to the respondent's second jurisdictional point). There thus appears to be a degree of informality (or confusion) between the parties as to the contracting entities, or at least as to arrangements for claims and payment.

18. Because of these issues, I invited the parties to make further submissions, including providing further information and documents, as to why the naming of [AA BB] Pty Ltd in the contract as the "Principal" and the "Client" was not fatal to the application, being against [AA BB] Ltd. Both parties provided further submissions on 7 August 2009.

19. The applicant said in its further submissions that it was clear that the contract was with [AA BB] Ltd from:

19.1 the use of "[AA BB]" in pre- and post-contractual documents;

19.2 the fact that the works were done for the benefit of the [related project name], registered in [AA BB] Ltd's name;

19.3 information on that company's website;

19.4 a letter of 18 December 2008 from [AA CC] Pty Ltd to the applicant instructing invoices to be sent to [AA BB] Ltd;

19.5 emails from [PK], described as "General Manager, Logistics and Procurement, [AA BB] Ltd", and from [OJ], described as "OHS Superintendent, [AA BB] Ltd, [project]"; and

related the fact that there is no company entitled "[AA BB] Pty Ltd".

20. The respondent simply "embraced" my comments in my invitation to provide further submissions, namely that the only company named in the contract was [AA BB] Pty Ltd, and the Act requires an application to be made between parties to the contract.

21. I find the applicant's submissions and documents persuasive. The letter of 18 December 2008 from [AA CC] Pty Ltd begins with the sentence "Help us to help you get paid" and instructs the applicant to direct invoices to [AA BB] Ltd at a Post Office box in [a city]. [AA CC] Pty Ltd's address on the letter is given as [project location]. It is true that there is nothing in the letter to link it directly with the applicant's contract, however I have no information of any other contract to which it could relate. In the context of the application and all of the other documents provided, the natural and ordinary inference is that the letter relates to the contract in question.

22. Avoiding for the moment the word "agent" or similar, it seems to me that [AA CC] Pty Ltd was at least the manager or operator of the [project] on behalf of [AA BB] Ltd ([AA CC] Pty Ltd is a wholly owned subsidiary of [AA BB] Ltd).

23. This is supported by the emails from [PK] and [OJ], both of [AA BB] Ltd. I have seen five emails from [PK], each going to substantive matters relating to performance of the contract. In the main, these emails appear to have been to

[name deleted], the superintendent, and were forwarded by the superintendent to the applicant.

24. In one email from the superintendent of 22 August 2008 forwarding [PK]'s email of 18 August 2008, the superintendent says "Please see the attached work order references for the [work]. These are to be referenced in your/your contractors [sic] invoicing." The email from [PK] says:

> Please use following numbers on invoices strictly in line with cost centres.
>
> -
> - Survey – 06.16.0001
> - Roadworks – 06.64.0001
>
> All invoices are to be firstly passed for payment (name) in [city] prior being sent to my attention in Perth for authorization. Please do not send to [city] first without [name] signature otherwise all I will do is send back to [city].

25. This is a clear acceptance that [AA BB] Ltd is the entity ultimately responsible for payment.

26. In an email of 18 July 2008 from the superintendent to the applicant, forwarding an email from [PK] of the same day, the superintendent says "*The client* has asked me to forward to you their new requirements for HSE" (emphasis added). [PK]'s email says "The attached needs to be conveyed to [the applicant] as we discussed in relation to SMP and TMP for [project location] roadworks. Have discussed with [BD] that during site visit next Tuesday [the applicant] will need to be introduced to *our* OHS Superintendent on site" (emphasis added).

27. [AA BB] Ltd's OHS Superintendent was [OJ]. (I note for reference on the second jurisdictional point that the address on his emails ends with the words "[AA CC]" in the same style and with the same logo as on the letters from [AA CC] Pty Ltd.)

28. The [AA BB] Ltd website deals with the [project] as one of its operations, making no reference I can see to either [AA BB] Pty Ltd or [AA CC] Pty Ltd. On its own this is not determinative as, for one reason, an asset holder may well use another entity to provide services to the asset or the asset holder. However, the comments on the website of [AA BB] Ltd's ownership and management of the [project] were generally supportive of the notion that that was the contracting entity, and I saw nothing to undermine that proposition.

Without more, however, that would not have been enough to prove that proposition on the balance of probabilities.

29. I take my task to be to discern from the materials before me the objective intention of the parties as to the identity of the parties to the contract. In *Black v Smallwood* (1966) 117 CLR 52, Barwick CJ, Kitto, Taylor and Owen JJ said at 56 in relation to the parties to a contract:

> But the fundamental question in every case must be what the parties intended or must be fairly understood to have intended. If they have expressed themselves in writing, the writing must be construed by the court. If they have expressed themselves orally, the effect of what they have said is a question of fact – a question for the jury, if there is a jury.

30. Where there is ambiguity in the written contract, it is permissible to have regard to the surrounding circumstances and documents: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. Neither party has suggested otherwise.

31. It seems clear that the parties did not intend to contract with or by a non-existent company. There is also a level of informality or incompleteness in the written contract (the only document which refers to [AA BB] Pty Ltd), with the usual details in Part A of the Annexure to the general conditions not being provided. Taken together, the other documents referred to above lead to the conclusion on the balance of probabilities for the purpose of this determination that the applicant contracted with [AA BB] Ltd and that the reference in the specifications to [AA BB] Pty Ltd was an error either not noticed or ignored by the parties.

32. The respondent referred to the decision of Bergin J in *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd* [2007] NSWSC 1340 under the NSW security of payment legislation. Her Honour there had to determine whether there was a contract between the parties to the adjudication and held that there was not. This was because a letter of invitation had referred to one company but the applicant had sent invoices to another company, and there was no evidence before the adjudicator to justify any change in the contracting entity.

33. I think the situation here is materially different where the entity appearing in the specification as the contracting party does not exist. There then perforce must be an enquiry as to what other entity the parties intended to be the

contracting party. There is material before me which leads to the conclusion that the parties intended the respondent to be the contracting party as I have outlined.

34. There is therefore a contract between the applicant and the respondent sufficient to ground jurisdiction for the application.

Second jurisdictional point – was there a valid payment claim?

35. The respondent's second jurisdictional point is that the payment claim on which the application is based was not made on or addressed to the respondent.

36. This application is based on payment claim 7 dated 8 April 2009 which, unlike every preceding claim, is addressed to [AA BB (CC)] Pty Ltd. That company name appears next to the heading "Principal:" of the claim.

37. Returning to s 27, an application may be made "[i]f a payment dispute arises under a construction contract". Leaving aside the existence of the contract for the moment, by s 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) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
>
> (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

38. The only part of s 8 relevant here is subsection (a), predicated on non-payment or a payment claim. "Payment claim" is defined in s 4 to mean

> 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
>
> (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

39. To be a valid payment claim giving rise to a payment dispute which in turn can found an application, the claim must be between the contractor and the

principal. In this case, the applicant is the contractor, but the addressee of the payment claim is not the principal.

40. Confusing the matter somewhat is a response to the payment claim written by [AA CC] Pty Ltd (not [AA BB (CC)] Pty Ltd) on 1 May 2009. In that letter, that company says that it "denies all claims set out in the" payment claim but then, without admission, deals with each head of claim in some detail factually. As its last sentence, the letter says "I hope this clarifies clearly our position on the matters you have raised".

41. Nowhere in that letter is it stated that the payment claim has been made on or addressed to the wrong entity, and the payment claim is responded to substantively as if it is the correct entity. The opening denial of the claims is not expressed to be on the basis that the contract is not with that company or that company is not liable under the contract – to the contrary, it immediately goes on to say that "the issues raised in the claim have been ongoing for sometime [sic] and that Opus, as *our works superintendent* for this particular project, have rejected certification of these items". [emphasis added]

42. This raises, as one of a number, the possibility that [AA CC] Pty Ltd has acted as, or has assumed the mantle of, or is estopped from denying that it is, the agent of [AA BB] Ltd, or otherwise represents, speaks for and is able to bind that company. I note that the address of [AA CC] Pty Ltd is in care of the respondent.

43. It may also lead to an acceptance of the payment claim on the part of [AA BB] Ltd, or a waiver of the point that it was incorrectly addressed, or some other form of estoppel.

44. Further confounding the issue is the respondent's urging in the response that this letter of 1 May 2009 is a valid Dispute Notice under Division 5 of the Schedule of implied provisions. At par 3.5 of its response, the respondent "submits that *its* Dispute Notice of 1 May 2009 …", clearly adopting the letter from [AA CC] Pty Ltd as its own. It does so again at par 3.8, with the last sentence stating "It is also equally evident from the Dispute Notice that such claims have been 'rejected' *by the Respondent*". [emphasis added]

45. Because of these issues, I invited further submissions, including information and documents, from the parties as to (1) any reasons as to why the payment claim was addressed to [AA BB (CC)] Pty Ltd rather than to the principal under the contract, and (2) the effect of the payment claim being addressed to [AA BB (CC)] Pty Ltd in light of (3) the response of [AA CC] Pty Ltd of 1 May 2009, and (4) the respondent's apparent adoption in the response of the letter as its Dispute Notice. Again, both parties responded.

46. The applicant says that the reason the payment claim was addressed to [AA BB (CC)] Pty Ltd was that it was intended to be addressed to [AA CC] Pty Ltd in compliance with that company's letter of 18 December 2008. It says that it was done so to cover all bases, that is to ensure that the two companies involved – one as principal and one as agent – were "captured" by the title.

47. I do not see how using the title [AA BB (CC)] Pty Ltd "captures" the title "[AA BB Ltd]". They are quite different and the fact that the words "[AA]", "[BB]" and "Ltd" can be found in the name [AA BB (CC)] Pty Ltd does not mean that the company [AA BB] Ltd is referred to thereby.

48. Further, the instruction from [AA CC] Pty Ltd in its letter of 18 December 2008 under the heading "Invoices" was:

> All invoices must be sent to the Perth office; not to any other site. The correspondence details are:
>
> [AA BB] Limited
>
> Mailing Address
> PO Box [XXX]
> [city]

49. If this direction is being relied upon by the applicant, it does not greatly assist as the instruction is to address the correspondence to [AA BB] Limited, not to [AA CC] Pty Ltd.

50. The applicant says that [AA CC] Pty Ltd was acting as agent in managing part but not all of the contract between the applicant and respondent, referring to *Bowstead and Reynolds on Agency*, 18 ed (2006) at [477]-[479]. I was not referred to any particular passage in those paragraphs which occupied some three pages. They deal with notification to an agent and, undirected by the applicant, I see them as being relevant only to notification of [AA CC] Pty Ltd

by the applicant of its payment claim. This presupposes the agency which is the very question and which is only asserted by the applicant.

51. The only correspondence or conduct to which I have been referred which could constitute [AA CC] Pty Ltd the agent of [AA BB] Ltd is the former's letter of 18 December 2008 and, only very possibly, the emails from OJ bearing the [AA CC] name and logo. [AA CC] Pty Ltd's letter of 1 May 2009 cannot create the agency as it occurred after the payment claim; it can, though, constitute evidence of the agency.

52. The letter of 18 December 2008 was written some three months after the contract was entered into and after the work had commenced. There were a number of payment claims by that date, addressed to [AA BB] as set out above.

53. This letter appears to be in response to either those claims, or other invoices which I have not seen. The letter is headed "[AA CC] Pty Ltd Purchase Order and Invoice Procedures" and appears in many respects to be a standard letter sent to its suppliers. It states, for example, that "To speed up our payment process, we would like to advise our supplier of the correct procedures for receiving purchase orders and issuing invoices. No goods are to be issued or services to be provided without a PO" and it then sets out the mandatory elements of a purchase order.

54. Those provisions would appear to be inapplicable to the applicant's contract because (1) it was with [AA BB] Ltd and (2) there was a contract, which would normally obviate the necessity of a purchase order.

55. It then goes on to state the requirements as to invoices I have set out above.

56. In one sense, and possibly the correct one, the letter is applicable to those who are providing services to [AA CC] Pty Ltd, with the instruction being all invoices for services provided to that company are to be sent to the parent company, [AA BB] Ltd. If this is the true construction, the letter does not constitute [AA CC] Pty Ltd as the agent for [AA BB] Ltd in the way contended for by the applicant. Without more, [AA BB] Ltd would be entitled to refuse payment of an invoice rendered by someone providing services to [AA CC] Pty Ltd.

57. I am mindful, however, not to apply a standard of perfection to construction contract administration, which, in my experience, is notoriously informal or ignorant of correct legal forms and even corporate structure. I bear in mind that [AA CC] Pty Ltd is a wholly owned subsidiary of [AA BB] Ltd and appears to be operating the [project] on its behalf.

58. Even bearing those real issues in mind, I cannot see the letter of 18 December 2008 as constituting [AA CC] Pty Ltd the agent of [AA BB] for the purpose of receiving payment claims, or even as evidencing such an agency. To my mind, the letter says in effect "If you provide services to [AA CC] Pty Ltd, you must have a proper purchase order and you must invoice [AA BB] Ltd".

59. I do not think a relevant agency is established or evidenced by the letter, and even if it was, the applicant has ignored the only relevant condition, namely that invoices be addressed to the parent company.

60. That, however, is not the end of the matter. As I have said, the applicant addressed its relevant payment claim to [AA BB (CC)] Pty Ltd at the address of both [AA CC] Pty Ltd and [AA BB] Ltd. The claim was faxed to [01 2345 6789] which I note is the fax number of [AA BB] Ltd in Perth. On 1 May 2009 [AA CC] Pty Ltd replied to the claim on the merits as I have stated above. More particularly, the letter was signed by [PK] who gave his position as [position].

61. I think the answer to the validity of the payment claim is to be found in the definition of payment claim in s 4 which is:

> 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
>
> (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

62. For present purposes, the critical words are in paragraph (a), "to the principal". The question here is, was the payment claim "to the principal". There is no doubt it was by the contractor.

63. I note the definition does not say "addressed to the principal" or similar. It is a fairly broad and general definition that it simply be "to" the principal. This is

to be contrasted with the wording of cl 5(1)(b) of Div 4 of the Schedule, implied by s 19 into a contract which is silent on how a payment claim is to be made, which uses the word "addressed".

64. Here, the payment claim was addressed to [AA BB (CC)] Pty Ltd at the principal's address and faxed to the principal's fax number. The payment claim did not go undelivered as it was responded to:

64.1 by a wholly owned subsidiary of the principal;

64.2 by someone who was an employee of the principal in the same position as he occupied in the subsidiary (if in fact they are two separate positions);

64.3 from the same address as the principal;

64.4 substantively as if on behalf of the principal; and

64.5 without taking any point as to the correctness of the name of the addressee on the payment claim.

65. Not only does [AA CC] Pty Ltd have the same address as [AA BB] Ltd, but on its letter of 1 May 2009 the former's address is given as "c/- [AA BB] Ltd" with the same fax number. To my mind this indicates a closeness greater than the mere sharing of addresses. It also indicates that letters addressed to a non-existent entity with a name similar to [AA CC] Pty Ltd would be received by [AA BB] Ltd. It is evident this is what occurred here with [PK] being the addressee of the facsimile cover sheet and of the letter covering the claim, and his replying to the applicant.

66. It would be flying in the face of common sense and commercial practice not to find that [PK], signing for [AA CC] Pty Ltd, did so with the authority of [AA B]B Ltd. In my view that inference is so strong as to be inescapable. I find on the material before me, on the balance of probabilities and for the purposes of this determination that the respondent authorised [AA CC] Pty Ltd to write the letter to the applicant of 1 May 2009.

67. Working backwards, this leads to a finding that the respondent received the applicant's payment claim sent to the respondent's address but addressed to a non-existent company with a name very similar to the respondent's wholly

owned subsidiary. I stress that it will not be every such case that it can be found that a payment claim has been "to the principal". Here it is the combination of factors, including the antecedent correspondence of the parties, that has meant it can properly be found that the payment claim was "to the principal" in the terms of s 4.

68. If that is not a legitimate approach, I would reach the same conclusion by finding that the payment claim addressed to a non-existent company at the address of the respondent with a name very similar to a wholly owned subsidiary of the respondent at the same address, and with a name similar to the respondent's, faxed to the number of the respondent, addressed to a person who was an employee of the respondent and of the wholly owned subsidiary and who occupied the same position in each, in circumstances where it was as likely as any other correspondence to the respondent at that address to be received by the respondent, was "to the principal" within the meaning of s 4.

69. The respondent again relies on *Berem* in submitting that "[t]he fact that a separate entity (albeit a related one) responds to the incorrectly made payment claim … does not cure the inherent defect of the Applicant's payment claim". There are a number of points to be made, principally that *Berem* was not a case where a response to a payment claim could have validated the payment claim, because there was no contract between the parties. The court did not consider or need to consider the effect of a response to a payment claim.

70. Other important points of difference are that when the respondent there filed its payment schedule in response to the payment claim, it raised that it was not the contracting party to the construction contract. As the respondent has submitted in its response, broadly speaking and for present purposes only, the NSW payment schedule is akin to the NT notice of dispute under Div 5 of the Schedule. Unlike the respondent in *Berem*, the respondent here did not raise the identity of the contracting party in its Dispute Notice. *Berem* was not a case where someone other than the contracting party replied substantively to the payment claim. Neither was it a case where the addressee of the payment claim did not exist. Further, the NSW legislation is materially different from the NT legislation regarding delivery of the payment claim. Section 13(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW)

allows a claimant to "serve a payment claim on the person who … is or may be liable to make the payment". In the present context this is significantly different from the NT requirement that the payment claim be simply "to the principal", not requiring the formality of service on the principal.

71. Neither party contended that the payment claim should have been addressed or given to the superintendent in the first instance rather than the principal, or that the failure to do so rendered it invalid in some way.

72. In those circumstances I find on the balance of probabilities and for the purpose of this adjudication that payment claim 7 dated 8 April 2009 founding this application was not invalid as a payment claim by reason of its bearing the name of [AA BB (CC)] Pty Ltd.

Did the payment claim need to comply with the Schedule, Div 4?

73. While examining the question of the time for the respondent's notice of dispute under cl 37 of the general conditions, it occurred to me that the parties' leaving Item 28 of Part A of the Annexure to those general conditions blank may have consequences for both the time for the notice of dispute and for the content of the payment claim.

74. As I have said earlier, the Annexure is that part of the general conditions where the parties are intended to record the particulars of the contract – the name of the parties, interest rates, amounts for liquidated damages and, in the case of Item 28, the timing of progress claims.

75. No part of the Annexure has been completed – it has all been left blank. In some cases the relevant Item states what value is to be used where the Item is left blank, but with others including Item 28 there is no default value.

76. Clause 37.1 states:

> The Contractor shall claim payment progressively in accordance with Item 28.
>
> An early progress claim shall be deemed to have been made on the date for making that claim.

77. When one turns to Item 28 it is blank. My concern was as to the effect of no details being provided as to how or when progress claims are to be made. I am

aware of authorities relating to liquidated damages which have held that inserting "nil" in a table disentitles a party not only to liquidated damages but also to damages at large: *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 34; *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1990) 6 BCL 137.

78. If leaving Item 28 blank had the effect that there was no provision as to the time and method of making progress claims, s 19 of the Act could apply, which says:

> **19. Making payment claims**
>
> 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.

79. Division 4 contains detailed requirements for payment claims, namely:

> **5 Content of claim for payment**
>
> (1) A payment claim under this contract must -
>
> (a) be in writing;
>
> (b) be addressed to the party to which the claim is made;
>
> (c) state the name of the claimant;
>
> (d) state the date of the claim;
>
> (e) state the amount claimed;
>
> (f) for a claim by the contractor - itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;
>
> (g) for a claim by the principal - describe the basis for the claim in sufficient detail for the contractor to assess the claim;
>
> (h) be signed by the claimant; and
>
> (i) be given to the party to which the claim is made.

80. These are quite more onerous than the simple requirement in s 4 that a payment claim be "to the principal", and if these provisions apply, there may be a real question as to whether the payment claim is a valid payment claim under the contract (remembering that the effect of s 19 is to imply the provisions of Division 4 into a contract rather than to impose them as part of legislation).

81. Because this was an important issue and went to jurisdiction, I invited further submissions from the parties as to the effect on the validity of the payment claim of leaving Item 28 blank, and also its effect on the timing for the notice of dispute. On this latter point, the respondent maintained that the time for the

notice was fixed by reference to the time for a payment claim in cl 37.1. If the effect of leaving Item 28 blank meant that there was no time for a payment claim in cl 37.1, then the time for the notice of dispute would be determined by cl 6(2) of the Schedule, Division 5, and the notice delivered by the respondent in this case could be out of time.

82. The respondent objected to my "request" (in truth an invitation) for further submissions, saying in an email of 11 August 2008:

> The Respondent respectfully submits that your latest request for further submissions, received on 10 August 2009 at 9.57 pm, is simply not warranted. Nor does it appear to have been made pursuant to s 34 of the Act.
>
> The matters you raise have already been dealt with at some length by the parties, including by the Respondent in its Adjudication Response: **see paragraph 2.1 to 2.19.** It is not in dispute that the contractual documents (which were attached to the Applicant's purported adjudication application) comprised the General Conditions and the Specifications: **see Adjudication Response at 2.4.**
>
> Clearly these documents - read together - form the basis of the agreement between the parties. The Respondent has already addressed the fact that Item 28 was blank: **see 2.5 Adjudication Response.** That "blank", however was remedied by the Specifications, which again the Respondent addressed specifically: **see 2.7 Adjudication Response.** Both parties addressed the question of whether 7 days (as stated in the Specifications) or 14 days (as stated in the General Condition) applied for a response to the purported payment claim: **see 2.13 Adjudication Response.** The Applicant applied the 7 day period. The Respondent submitted that either period would result in a valid response to the purported payment claim because of the deeming provision set out at paragraph 2.5 of the Adjudication Response. The Respondent also made submissions with the implied provision under Division 5 of the Act: **see 2.5 Adjudication Response.** The Applicant sought to apply the deeming provision under clause 37.1 of the General Conditions, which the Respondent has addressed: **see in particular 2.9 Adjudication Response.**
>
> As is evident from the parties' submissions, the Applicant sought to use a deeming provision under the General Conditions, without taking into account the deeming provision in the Specifications. These provisions are not inconsistent. They can operate together. The Respondent's Adjudication Response, under paragraph 2, deals with this point and addresses the Applicant's **"primary"** submission at considerable length. The only apparent inconsistency between the two contractual documents (ie the General Conditions and the Specifications) is whether the response should be provided within 7 days or 14 days. That apparent conflict in the contractual documents is irrelevant because on either application, the 1 May 2009 Dispute Notice is within time - applying the contractual deeming provisions and timeframes.
>
> The Respondent submits there is accordingly, no question of natural justice. It is not correct that "neither party has addressed" the point. Accordingly, none of the matters raised for further submissions set out in your email of 10 August arise and no further submissions should be provided by the parties on those matters. They are simply not relevant.

> The latest request, in essence, seeks to:
>
> - ignore the submissions of the parties with respect to the operation of the 2 contractual documents;
> - ignore the submissions of the parties as to how the relevant provisions, including the deeming provisions in the 2 contractual documents are to be dealt with; and
> - request further submissions on a **hypothetical** basis that the 2 contractual documents are in fact "blank" on the relevant issues addressed by both parties (which they are not).
>
> The request for further submissions is irregular and not in accordance with established authorities.
>
> The Respondent requests that you re-consider your request in light of the above. Should you confirm your request, the Respondent reserves its rights to address those matters, which it reiterates simply do not arise on the submissions of the parties, or otherwise.
>
> It should also be noted that according to the authorities an adjudicator cannot decide a matter on a basis that neither party has put forward in its submissions: see ***John Goss Projects v Leighton Contractors*** [2006] NSWSC 798 at [31]; see also ***Musico v Davenport*** [2003] NSWSC 977 at [107]; ***Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd*** [2006] NSWSC 205 at [10] as examples. There are other decisions.
>
> We await your urgent response.
>
> [original emphasis]

83. It was my view that because this was a matter going to jurisdiction it was properly a matter for an invitation to provide further submissions, and that the decisions referred to by the respondent in its email are an injunction against *deciding* a matter on a basis neither party has advanced. They do not preclude an adjudicator from seeking submissions on a matter the parties have not addressed to give them an opportunity of doing so. To my mind, speaking generally an adjudicator faced with an unaddressed issue has a choice between ignoring the issue or inviting submissions. Because this issue went to jurisdiction, I considered the proper approach was to invite submissions. I replied to the respondent that my invitation stood.

84. Both parties accepted the invitation, with the applicant providing submissions of four paragraphs in just over one page, and the respondent providing 55 paragraphs in over 15 pages.

85. The applicant says it is immaterial that Item 28 was left blank because the issue of making progress claims is dealt with in cl 4 of the specification which "take precedence over the general conditions in this respect" and which says:

> [The applicant] will be submitting monthly progress claims throughout the project in the last week of every month. Our understanding is that the claims will be certified by the superintendent within a week (7 days) of receipt of the claim. At this stage a tax invoice will be raised and sent to [AA BB]. [AA BB] will then have a week (7 days) for payment.

86. The applicant's submission says "The relevant element of cl 37.1 dealt with by Item 28 in Part A is the subject of express provision in section 1 clause 4 of the specification". I take this to mean that the provision in the specification is the relevant contractual term with which the parties had to comply, and not cl 37.1.

87. The respondent says that there is no inconsistency between cll 37.1 and 37.2 on the one hand and cl 4 of the specification on the other, and points to cl 1.1.4 of the specification which says:

> No ambiguity, conflict or discrepancy shall exist where a provision or requirement, which appears in one document is omitted from another …

88. This is not, however, a question of ambiguity, conflict or discrepancy between the two documents or provisions. It is a question, firstly, as to what meaning can be given to cl 37.1 where Item 28 is blank.

89. The form of Item 28 is as follows:

28	Progress Claims (subclause 37.1)	
	a) Times for progress claims	……..day of each month for WUC done to the …….day of that month
	OR	
	b) Stages of WUC for progress claims	……... ……... ……... ……...

90. It is clear that Item 28 is intended to be populated with the actual day of each month for making progress claims, or with the stages which would perforce eventually occur on certain dates. That this is so is evidenced by the form of Item 28 itself and the second sentence of cl 37.1 which says:

> An early progress claim shall be deemed to have been made on the date for making that claim.

91. If no dates or stages are provided in Item 28, there is nothing for progress claims to be "in accordance with". Neither is it possible to calculate "the date for making that claim" to enable the deeming provision in the second sentence of cl 37.1 to operate.

92. It does not solve this difficulty by inserting cl 4 of the specification, or times referred to in that clause, into Item 28. Clause 4 simply says that the applicant "will be submitting monthly progress claims throughout the project in the last week of every month". That can give meaning to the first sentence of cl 37.1, but not to the second sentence deeming provision. Making claims "in the last week of every month" does not provide a "date for making that claim". On what date would a claim be deemed to have been made? The best that could be done is for it to be deemed to have been made "in the last week of every month". This makes commercial and legal nonsense of the remainder of cl 4 and of cl 37.2.

93. This is the approach adopted by the respondent in par 2.10 of its response, taking the date for making the claim to be Monday 27 April 2009 because, it says, "[t]he last week of April 2009 commences on Monday 27 April 2009". Such an arbitrary selection of dates, when the contract says that progress claim will be made *in* the last week of each month, illustrates the artificiality of this approach. Why not select any other date *in* the last week of April 2009 as the date *for* making the claim? The simple fact is that, as a result of leaving Item 28 blank, there is no "date for making" a claim in the contract.

94. The respondent helpfully and extensively referred to authorities on the proper approach to be taken to interpreting commercial contracts – pars 13, 23 – 39. I accept the general thrust of those submissions, in particular that of an interpretation preferring business common sense, reflecting the conduct of the parties and their understanding of the contract over a narrow, literal, pedantic, semantic, syntactical analysis. I adopt this practical, common sense approach in light of the parties' conduct.

95. It seems to me abundantly clear from (1) the wording of the specification, (2) the fact that the whole of Part A of the general conditions is left blank and (3) the conduct of the parties in making, certifying and paying progress claims, that the intention of the parties was that cl 4 of the specification would replace

cl 37.1 of the general conditions, and that cl 37.2 would refer to and operate with cl 4 rather than cl 37.1. This seems to me on the material in the application to be how the parties have performed the contract. I accept the submissions of the applicant that the general conditions yield to the specification in this instance, supported by the submissions of the respondent at par 11, quoting Buckley LJ in an uncited case that:

> Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported.

96. I take the express agreement to be the specification and the imported terms to be the general conditions. Strictly speaking it is not necessary to speak of a conflict in this case because in my view leaving Item 28 blank has had the effect of depriving cl 37.1 of content on which to operate. However the quote exemplifies the approach to the specification and the general conditions which I adopt, namely that the express provision of the specification prevails.

97. The respondent says at par 17 of its submissions of 12 August 2009 that a possible consequence of cl 37.1 being rendered meaningless by Item 28 being blank is that the whole of the general conditions must fall away by virtue of the fact that the names of the contracting parties have also been left blank. This ignores the fact that each clause of the general condition has to be examined to determine the effect of its relevant Item in Part A being blank, and then the specification examined to determine whether it covers the issue. With the names of the contracting parties, they are provided (albeit slightly incorrectly) in the specification as I have explained above.

98. Following this argument, the respondent says at par 18 of those submissions that it "must follow" from cl 37.1 being rendered meaningless that cl 37.2 is likewise rendered meaningless because it is wholly dependent on the existence of the progress claim referred to in cl 37.1.

99. In my view, this approach falls into the very error eschewed by the respondent in pars 13 and 23 – 39 of its submissions, namely an overly pedantic, technical, legalistic approach. It is clear to me from the reference to the superintendent in cl 4, from the conduct of the parties in submitting claims to

for certification, from the superintendent certifying claims and the respondent waiting until he had done so, and from the respondent paying certified claims, that the parties intended cl 37.2 to apply and acted as if it did.

100. I have referred to the conduct of the parties. A number of claims were made by the applicant prior to the one in question, with the dates of their submissions and certification as follows:

CLAIM NO.	DATE MADE	DATE CERTIFIED	DAYS
1	5 September 2008	22 September 2008	17
2	8 October 2008	24 October 2008	16
3	30 October 2008	14 November 2008	15
4	23 November 2008	8 December 2008	15
5	6 January 2009	21 January 2009	15
6	26 January 2009	13 February 2009	18
7	8 April 2009	31 July 2009	114

101. Half of the claims before claim 7 were made other than in the last week of the month and certified without apparent complaint. In two months, two claims were made. And in most cases, certification occurred close to 14 days after the claim was made.

102. Very few and very minor amendments need to be made to cl 37.2 to give effect to the intention and reflect the actions of the parties. That clause says:

> The Superintendent shall, within 14 days after receiving **such** a progress claim, issue to the Principal and the Contractor:
>
> a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ("progress certificate"); and
>
> b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.
>
> If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).
>
> If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with **subclause 37.1**, that progress claim shall be deemed to be the relevant progress certificate.

> The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.
>
> Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

103. I have placed in **bold** the words in cl 37.2 which could be changed to give effect to this approach. The word "such" could simply be deleted; in fact, no confusion or conflict would arise if it remained even in the absence of cl 37.1. Replacing the phrase "subclause 37.1" could be the phrase "clause 4 of the specification". Alternatively, the whole phrase "in accordance with subclause 37.1" could be deleted with no replacement. To my mind, this is what the parties intended and this is what they performed. It is obvious from the drafting of the specification, the completion of the general conditions, and from the performance of the contract, that no strictly legalistic approach was taken.

104. The respondent says in par 32 of its further submissions that the deeming provision in cl 37.2 is dependent on the existence and validity of cl 37.1. For the reasons given above, I do not agree. It is dependent on an operative and workable clause as to progress claims and payments which exists in cl 4 in the way I have explained.

105. Finally the respondent says at par 33 that cll 37.1 and 37.2 contain reciprocal deeming provisions, cl 37.1 regarding the time of making a progress claim and cl 37.2 as to certification. It says that to leave one without the other would "do violence to" "the notion of fairness that is expressly adopted in a standard form of contract that is routinely used in the industry". I do not believe I can replace an interpretation which appears to be the intention of the parties, which reflects the conduct of the parties, which makes business commonsense, and which is workable practically and legally, with notions of fairness.

106. My starting point is that the deeming provision in the second sentence of cl 37.1 cannot operate because there is no date in Item 28 or anywhere in the specification on which it could operate. It cannot stand and is a matter on

which I have no choice. No workable interpretation has been suggested by the parties. On the other hand, the deeming provision in cl 37.2 can easily stand and be workable with cl 4 of the specification and without the deeming provision in cl 37.1. To strike down the deeming provision in cl 37.2 simply because it is unfair in not being coupled with a "reciprocal" deeming provision in cl 37.1 is contrary to law and practice. I should say that I do not accept that having one deeming provision without the other is in fact unfair, but I do not need to enter into that debate.

107. In my view, leaving Item 28 blank had the effect of depriving cl 37.1 of all meaningful content. It is replaced by cl 4 of the specification as the operative provision regarding progress claims.

108. Next the respondent submitted that the applicant had to comply with both the contract and the Act in making its payment claim (pars 38-42). Referring to NSW authorities on the requirements for payment claims and payment schedules, the respondent submitted that the Act established a "dual track" system and that the payment claim must be validly made both under the contract and the Act.

109. This is an area of significant and, on this point, decisive, difference between the NSW and the NT Acts. The NSW Act does not have a scheme of implying provisions into contracts on certain matters where there is no provision in the contract – for example, ss 16-24 of the NT Act. Instead, in relation to payment claims and payment schedules (akin to the NT notice of dispute under s 20 and Div 5 of the Schedule) the NSW Act simply legislates their minimum content in ss 13 and 14.

110. Thus it is correct to say of the NSW scheme that a claimant must comply with both the contract and the Act in making a claim for payment. It is not true to say of the NT scheme that a claimant must always comply with both the contract and Div 4 of the Schedule in making a claim for payment. To do so would be to ignore s 19 which says (repeating for convenience):

> **19. Making payment claims**
>
> 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.

111. The respondent says in par 42 that, "[a]s the contract between the parties is silent on the specific 'content' of a claim as required under the Act, this implied provision is applicable".

112. Section 19 does not use the word "content". That word only comes from the heading to cl 5 of Div 4, and as such cannot affect the requirements or operation of the section: *Interpretation Act 1978* (NT), s 55(2)(a). I note also that, even though the clause is part of the Schedule and by s 55(5) of the *Interpretation Act* a Schedule is part of an Act, cl 5 is effectively a term of the contract (if s 19 is satisfied). This to my mind reinforces the conclusion that the heading to cl 5 cannot change the requirements or operation of s 19.

113. Section 19 implies Div 4 into contracts which do not have written provision about "how" a party must make a claim. Does cl 4 (combined with cl 37.2 of the general conditions) make provision about how to make a claim?

114. While the language of cl 4 may be relatively informal, it nonetheless is adequate in setting out the basic rights and obligations of the parties on making and paying progress claims. Particularly is this so when combined with cl 37.2 of the general conditions as to certification and payment. In my view cl 4 states "how a party must make a claim to another party for payment", so that s 19 does not imply the provisions of Div 4 into the contract.

115. It is true that cl 4 provides none of the detail contained in Div 4 as to the form and content of the claim, but this simply means that the parties were unconcerned with its exact form and content. That such provisions are clearly workable is evidenced by the progress claims made, certified and paid under this contract until now. Section 19 does not contemplate a comparison between the contractual provision as to making claims and Div 4 to determine whether the contract makes *adequate* provision. Provided there is written provision in the contract as to "how a party must make a claim to another party for payment", s 19 does not take effect. I do not think the word "how" dictates a certain level of particularity as to the form, content, timing or any other facet of the claim. I think provided there is a workable provision as to how claims are to be made, that is sufficient.

116. In *Independent Fires Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [23] and [54], Mildren J agreed with the adjudicator that the following clause satisfied s 19:

> When any of the Subcontract Works execute [sic] by others as referred to in clause 23.2 have been completed, the Builder shall assess the costs, loss, expenses and damages it has thereby incurred and shall notify the Subcontractor of those amounts, and the difference between the sum of those amounts and the amount which would otherwise have been paid to the Subcontractor had the Subcontractor completed those Subcontract Works, which difference is a debt due and payable upon such notice by the Subcontractor to the Builder.

117. Clearly not a great deal of detail need be given in a contract to satisfy "how" claims are to be made.

118. I find therefore on the balance of probabilities that payment claim 7 of 8 April 2009 was a valid payment claim for the purposes of the Act.

The "notice of dispute"

119. That leads to consideration of the purported notice of dispute, its validity and effect. The respondent says that the letter of 1 May 2009 from [AA CC] Pty Ltd was a notice of dispute under Div 5 of the Schedule to the Act. Those provisions are implied into a contract which does not contain specific provision as to how a party must respond to a payment claim: s 20.

120. The respondent made clear that it was only putting this argument in the alternative if I found that the payment claim was validly made, which I have done. It was not to be taken, it said, to be maintaining the letter as a notice of dispute if the applicant's claim of 8 April 2009 was not a valid payment claim under the Act. The respondent did not wish to legitimise by its notice of dispute a document which would not otherwise be a payment claim.

121. If the provisions of Div 5 of the Schedule are implied into the contract and if [AA CC] Pty Ltd's letter of 1 May 2009 is not a notice of dispute, the respondent was obliged to pay the amount of the claim within 28 days of receiving the payment claim: cl 6(2)(b) of Div 5. Failure to do so would entitle the applicant to a determination in its favour for the amount of the claim, subject to the adjudicator conducting a bona fide assessment of the claim. Clause 6(1) and (2) says:

> (1) This clause applies if –
>
> (a) a party receives a payment claim under this contract; and
>
> (b) the party –
>
> (i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or
>
> (ii) disputes the whole or part of the claim.
>
> (2) The party must –
>
> (a) within 14 days after receiving the payment claim –
>
> (i) give the claimant a notice of dispute; and
>
> (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
>
> (b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

122. The first question I have to decide is whether Div 5 is implied into the contract by s 20. That section says:

> **20. Responding to payment claims and time for payment**
>
> The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:
>
> (a) when and how a party must respond to a payment claim made by another party;
>
> (b) by when a payment must be made.

123. Does the contract have a provision about when and how a party must respond to a payment claim and by when payment must be made?

124. The applicant says it does in cl 4 of the specification and cl 37.2 of the general conditions, stating that "[t]he Superintendent has 7 days to respond otherwise the deeming provision in clause 37.2 kicks in": par 4 applicant's submissions 12 August 2009.

125. In par 44 of its submissions of 12 August 2009, the respondent says that Div 5 does not form part of the contract because "[t]he contract, comprising the Specifications and the General Conditions, is not silent". In par 2.14 of its response, the respondent says:

> Alternatively [to the respondent or superintendent responding under cl 37.2], the respondent could issue its notice of dispute within 14 days under Division 5 of the Act (*if the contract was silent*). [emphasis added]

126. Then the respondent says in par 2.19:

> Accordingly, in the event that the respondent's primary submissions set out above [as to the payment claim being invalid] and the adjudication

> application is not dismissed, the adjudicator is required to fully and properly assess the various claims made by the applicant in accordance with the contract and the Act, *and in so doing is required to take into account the Dispute Notice*. [emphasis added]

127. The respondent has not qualified the words I have italicised in par 2.19 by the words I have italicised in par 2.14. If the respondent meant that I had to take the letter of 1 May 2009 into account whether or not Div 5 is implied into the contract, I disagree. The letter of 1 May 2009 has no special significance under the contract or the Act if it is not a notice of dispute under Div 5. It is simply a letter setting out the basis of the payment dispute, which I have found arose on 29 April 2009. The only special significance the letter of 1 May could have is if the payment dispute did not arise on 29 April, which would render the letter the evidence of the dispute and the crystallising of the arising of the payment dispute under s 8.

128. In the respondent's further submissions of 7 August, it said at pars 13-14:

> 13. As is made clear from the Adjudication Response, the classification of the letter of 1 May 2009 from [AA CC] Pty Ltd as a "Dispute Notice" within the meaning of the Act, is an argument pressed by the Respondent – **in the alternative to its primary submission**: see 2.1; 2.19; 3.5; 6.1. [original emphasis]
>
> 14. As a matter of common sense and logic, if the adjudicator determines that the Applicant's payment claim incorrectly addressed to [AA BB (CC)] Pty Ltd is, nevertheless, a valid payment claim, it must follow that the response to that purported payment claim by [AA CC] Pty Ltd, constitutes a valid Dispute Notice within the meaning of the Act, if it otherwise complies with the provisions of the Act (as it does on the Submissions of the Respondent at 3.1-3.8 of the Adjudication Response.)

129. Again the respondent does not condition that contention with the Act's silence on the relevant matters and the implication of Div 5 into the contract. It may be that that was not thought relevant in relation to the particular point being made by the respondent. In any case, it is clear as the respondent appears to accept early in its response, that Div 5 is only implied if the contract is relevantly silent, and only then can a document amount to a notice of dispute. The consequence is that if Div 5 is not implied into the contract, there is no obligation on the respondent in this case to give a notice of dispute, and failure to do so does not have the potentially drastic consequences of cl 6(2)(b) of Div 5, namely the amount of the claim becoming due.

130. Is Div 5 of the Schedule implied into the contract? This depends on whether the contracts contains written provision about (a) when and how a party must respond to a payment claim made by another party, and (b) by when a payment must be made: s 20.

131. For convenience, I repeat cl 4 of the specification and cl 37.2 of the general conditions, the two relevant clauses.

> **Clause 4**
>
> [The applicant] will be submitting monthly progress claims throughout the project in the last week of every month. Our understanding is that the claims will be certified by the superintendent within a week (7 days) of receipt of the claim. At this stage a tax invoice will be raised and sent to [AA BB]. [AA BB] will then have a week (7 days) for payment.
>
> **Clause 37.2**
>
> The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:
>
> a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ("progress certificate"); and
>
> b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.
>
> If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).
>
> If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.
>
> The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.
>
> Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

132. To my mind these clauses clearly contain provision about when a response and payment is to be made, and also state how a party is to respond. It is immaterial for these purposes that the response to a payment claim is to come

from the superintendent in the first instance. This constitutes provision as to how a party is to respond to a claim.

133. I bear in mind the comments of Mildren J as to the purpose of s 20 in *Independent Fires Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* at [55]-[56 where his Honour said:

> [55] Section 20 of the Act provides that if the contract does not have a written provision about when and how a party must respond to a payment claim and by when a payment must be made, the provisions in the Schedule, Division 5 apply. Counsel for the plaintiff submitted that paragraphs (a) and (b) of s 20 were conjunctive, so that, if the contract provided for when a payment was made, s 20 did not apply. I do not accept this analysis.
> [56] The purpose of s 20 is to ensure that building contracts contain a mechanism dealing with how and when a party must respond to a payment claim. It would not advance the purposes of the Act if the contract had no such provision and if payment could be demanded immediately without any mechanism for responding to a payment claim. In my opinion, the words "by when a payment must be made" in s 20 refer to the time when a payment must be made in **response** to a payment claim. Clause 6(2) of Division 5 of the Schedule specifically deals with the time within which a party must pay the amount of the payment claim and this time is calculated by reference to a date 14 days after receiving the payment claim. In my opinion, s 20 applies if either, or both, of paragraphs (a) and (b) are not provided for by a written provision in the contract. [original emphasis]

134. That being the case, Div 5 is not implied into the contract because there is written provision in the contract about the matters set out in s 20. The letter of 1 May 2009 was not required under the Act or the contract.

135. What was required under the contract after the progress claim was made? Clause 4 of the specification and cl 37.2 of the general conditions make apparently different provision. Clause 4 says that the superintendent will certify the claim within 7 days, that the applicant would then raise an invoice and the respondent would have 7 days thereafter to pay. Clause 37.2 says that the superintendent will certify within 14 days, failing which the progress claim will be deemed to be the progress certificate.

136. It is common ground that neither the superintendent nor the respondent responded to the payment claim within either 7 or 14 days of 8 April 2009 (the date the claim was faxed to the respondent).

137. I have previously decided that cl 37.2 remained and that the parties intended it to be complied with, modified slightly to reflect cl 4 of the specification. This means that the superintendent was to respond to the claim within 7 days failing

which the claim would be deemed to be the progress certificate. Clause 4 then contemplates that the applicant would give the respondent a tax invoice which the respondent would have 7 days to pay. Clause 37.2 on the other hand does not require a tax invoice, with the respondent to pay within 21 days after the superintendent receives the progress claim (where no progress certificate is issued).

138. Which clause governs the situation here, and is a tax invoice a precondition to the respondent's liability to pay? Section 8 of the Act says, relevantly that a payment dispute arises "when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed."

139. An evident precondition to an adjudicable dispute appears to be an amount "due to be paid under the contract". Is there an amount due here where there is no tax invoice?

140. Neither of the parties took this point and I should not determine the application on a point not taken by them: *John Goss Projects v Leighton Contractors* [2006] NSWSC 798 at [31]; *Musico v Davenport* [2003] NSWSC 977 at [107]; *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205 at [10].

141. I therefore find that, in accordance with the submissions of the parties, a tax invoice was not required to render the amount claimed due under the contract. This leads to the next question of the effect of the superintendent not providing a progress certificate within 7 or 14 days.

142. The applicant says that the deeming provision in cl 37.2 operates to make the payment claim of 8 April 2009 the progress certificate. In its response, the respondent relies on the progress claim being deemed to have been made on 27 April 2009 and the notice of dispute being given within 14 days thereafter. I cannot see that the respondent has mounted an argument that the deeming provision in cl 37.2 does not operate for some other reason (and I cannot see an argument myself).

143. Since I have found that the progress claim was made on the date it was made (8 April 2009) and not some later deemed date, and since I have found that the

letter of 1 May 2009 did not operate as a notice of dispute under Div 5 (because the contract contained a written provision about how a party was to respond to a payment claim: s 20), there remains no obstacle raised by the respondent to the payment claim of 8 April 2009 being deemed to be the progress certificate.

144. Clause 37.2 says that the claim will be deemed to be the certificate if the superintendent does not issue a certificate within 14 days. Clause 4 of the specification says that "[o]ur understanding is that the claims will be certified by the superintendent within a week (7 days) of receipt of the claim." Without evidence to the contrary, and taking the contract as an expression of the joint intention of the parties, I should take the "our" in cl 4 to be a reference to both parties, not just one of them.

145. Does cl 4 operate to reduce the time in cl 37.2 for the superintendent to certify from 14 to 7 days? I have said earlier that cl 4 would take precedence over cl 37.2 where there is a difference, but the relevant wording of cl 4 is not that of a mandatory contractual term. It is expressed as the parties' "understanding" rather than a requirement that it must occur.

146. In those circumstances I think I should take the period as 14 days from cl 37.2 being a much clearer statement of contractual responsibility than the 7 days of cl 4. I bear in mind the words of Buckley LJ cited by the respondent and quoted above, however I think the expressly agreed words do not unambiguously impose a contractual obligation whereas the imported words of cl 37.2 do.

147. Thus, the progress claim made on 8 April was deemed to be the progress certificate on 22 April 2009. By the terms of cl 37.2 the respondent had 21 days from 8 April 2009 to pay the claim where the superintendent did not issue a certificate. That date is also 7 days after the date of the progress certificate in compliance with cl 4 (both parties having ignored the reference to a tax invoice in cl 4. I do not know, but this may be because the parties accept that the invoice was merely mechanical and was not a precondition to the respondent's liability).

148. I find therefore that, the progress claim having been made on 8 April and deemed to be a progress certificate on 22 April, it was payable by the respondent on 29 April 2009. It is common ground that it was not paid.

149. The respondent said in its submissions of 12 August 2009 at par 47 et seq that if the letter of 1 May 2009 did not constitute a valid dispute notice under Div 5, there was an argument that there was no payment dispute within the meaning of s 8 of the Act and therefore the application for adjudication was prematurely made.

150. This submission is predicated on Div 5 being implied into the contract by s 20. I have found that it is not because the contract contains written provision about the relevant matters. One turns then to s 8, cited above, which provides that a payment dispute arises "when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed".

151. I have found that the amount of the claim was due to be paid on 29 April 2009 and it is agreed that it was not paid. A payment dispute arose on that date.

152. Even if this analysis is wrong, a two-member State Administrative Tribunal in Western Australia held in *Blackadder Scaffolding Services Pty Ltd v Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 at [59] that an invalid notice of dispute still operated as evidence of an actual dispute as to payment. Thus the letter of 1 May 2009 would be clear evidence that, in the words of s 8, "the claim has been rejected or wholly or partly disputed". A payment dispute arose at least on that day. The application is not premature, having been made on 15 July 2009.

MERITS

153. The respondent has taken, or rather made, a point on the merits which would make it unnecessary to make an assessment of the claim if upheld. The respondent has included a payment certificate of the superintendent dated 31 July 2009 entitled Final Certificate Number 7 for $25,807.24 inclusive of GST, and says that that certificate is conclusive of the amount owing to the applicant by reason of s 37 of the Act which says:

37 Evidentiary value of certificates of completion and amounts payable

(1) This section applies if –

(a) the construction contract to which a payment dispute relates provides for a person to certify –

(i) obligations under the contract have been performed; or

(ii) the amount of a payment that must be made by a party; and

(b) the certificate is provided by a party to an adjudication in the course of adjudication.

(2) For the adjudication –

(a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract – the certificate is taken to be conclusive evidence of its contents; or

(b) otherwise – the certificate has the evidentiary weight the appointed adjudicator considers appropriate.

154. There is no doubt that s 37(1)(a) is satisfied, at least in respect of par (ii), which is sufficient to attract the operation of the section. Clause 4 of the specification and cl 37.2 of the general conditions provide for the superintendent to certify the amount of a payment that must be made by the respondent to the applicant.

155. It would appear that s 37(1)(b) is also satisfied, as the respondent has provided the certificate in the course of the adjudication, namely in the response. There does not appear to be a requirement that the certificate be issued before the application for adjudication is made. "In the course of adjudication" would usually mean either in the application or in the response, as outside of those documents the parties do not have a right under the Act to provide further documents to the adjudicator unless the adjudicator seeks documents under s 34.

156. On 10 August 2009, the applicant wrote to me by email saying:

> We did not anticipate the Respondent raising a section 37(2) issue in sections 4 and 5 of their response and therefore seek your permission to make a further submission to you responding specifically to this issue only. The proposed submission would be no more than 2 pages and lodged by close of business on 11 August 2009 (i.e. tomorrow).
>
> Could you please advise if this is acceptable?

157. The respondent objected to my receiving further submissions, saying in an email of 10 August:

> (a) The Respondent is vigorously opposed to the Applicant making any submissions outside those requested by you, as adjudicator, in accordance with s 34 of the Act.
>
> (b) It is noted that s 34 of the Act **only** makes provision for a request for further submissions (or other information) **at the instigation of the adjudicator and not a party** to the proceedings under the Act. Accordingly, the submissions of the parties should be confined to the request as made.
>
> (c) The proposed approach of the Applicant is inconsistent with the philosophy of the Act for the quick determination of adjudication applications and opens the door to on-going submissions being put by the parties, contrary to the express provisions of the Act.
>
> (d) It is also noted that under the Act, as adjudicator, you are required to make your determination within 10 working days from receipt of the Respondent's Adjudication Response - ie **on or before Monday 17 August 2009.**
>
> (e) The Act does not permit extensions of that prescribed timeframe without the Registrar's consent being sought under s 34(3)(a) of the Act.
>
> (f) It would be a denial of natural justice and procedural fairness if you, as adjudicator, consented to the Applicant's request, without giving the Respondent an opportunity to put its submissions forward in response.
>
> [original emphasis]

158. Before receiving the request from the applicant to provide submissions, I had determined to invite those submissions and was formulating the invitation. This was a new matter raised in the response which could not have been anticipated by the applicant in making the application and I was mindful of the comments of Associate Justice Macready in *RTA v John Holland* [2006] NSWSC 567 at [44] that:

> If a new submission is legitimately made in an adjudication response then the measure of natural justice that the Act requires to be observed would most likely include notice of that submission to the applicant for adjudication with an opportunity to respond. Although the Act does not contain a mechanism to give the applicant an opportunity to provide responsive submissions by way of right, the Adjudicator has within his control a mechanism which would ensure that natural justice is given to the applicant in respect of such a submission. The mechanism is the power of the Adjudicator under s 21 to call for further written submissions from either party and give a party an opportunity to comment on those submissions.

159. After considering the respondent’s objection, I replied by email on 10 August saying:

> I had intended seeking further submissions from the applicant at least on this point. I seek the applicant's submissions on the effect of the payment certificate provided by the respondent purportedly under or with the effect stated in s 37.

> I note the respondent's vigorous objections to my seeking further submissions. I stress that I had intended doing so in any case. If those submissions do no more than respond to the respondent's submissions, at this stage I do not intend seeking further submissions from the respondent. In my view this satisfies the requirements of natural justice, and to seek a further response from the respondent would raise the spectre of further submissions from the applicant.
>
> However if the applicant's submissions on this point go beyond answering those of the respondent, my present intention is to provide the respondent with an opportunity to comment on that part which goes beyond.

160. That same day, the respondent's lawyer replied by email, saying:

> I note and accept your conditions regarding the further submissions by the applicant on the Section 37(2) issue. I will consider such further submissions and revert to you, only if thought necessary, after doing so.

161. In accepting the invitation and making submissions on 11 August 2009, the applicant said that (1) its payment claim of 8 April 2009 was not in fact a final claim, despite being headed as such, because the defects liability period has not expired (2) the certificate cannot be a final certificate because the defects liability period has not expired, (3) a final certificate under cl 37.4 does not have the effect of finalising the contract, and (4) the certificate did not in fact "have the effect of finalising the contract" because the applicant has invoked the dispute resolution procedure of cl 42.1.

162. This last reference was to a Notice of Dispute dated 11 August 2009 given by the applicant under cl 42.1 of the contract disputing that the respondent's certificate of 31 July 2009 was a final certificate. Thus continued the "tennis match" of documents in the adjudication. I felt I had to either ignore that Notice of Dispute or invite submissions on it from the respondent as I had foreshadowed in my email of 10 August. I chose the latter course to avoid any suggestion of denial of natural justice and in an endeavour to finalise the issues between the parties.

163. I turn to the applicant's arguments as to why the "final certificate" does not have the effect contended for by the respondent.

Was the payment claim a final claim under the contract?

164. This argument was made on the basis of cl 37.4 of the general conditions which says:

> **37.4 Final payment claim and certificate**

> Within 28 days after the expiry of the last *defects liability period*, the *Contractor* shall give the *Superintendent* a written *final payment claim* endorsed "Final Payment Claim" being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.
>
> Within 42 days after the expiry of the last *defects liability period*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*
>
> The moneys certified as due and payable shall be paid by the *Principal* or the *Contractor*, as the case may be, within 7 days after the debtor receives the *final certificate*.
>
> The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:
>
> a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
>
> b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
>
> c) any accidental or erroneous inclusion or exclusion of *any work* or figures in any computation or an arithmetical error in any computation; and
>
> d) unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*.

165. Words and phrases italicized in cl 37.4 are defined in the general conditions. Those presently relevant are:

defects liability period – "The defects liability period stated in Item 27 shall commence on the date of practical completion at 4:00 pm": cl 35. Item 27 provides for a 12 month period.

final certificate – "has the meaning in subclause 37.4": cl 1

final payment claim – "has the meaning in subclause 37.4": cl 1

166. The applicant says that the date of practical completion has not been fixed by a certificate of completion and that the work was finished in late November 2008. "Date of practical completion" referred to in the definition of "defects liability period" is defined in cl 1 to mean:

> a. the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or
>
> b. where another date is determined in any arbitration or litigation as the date upon which practical completion was reached, that other date.

167. Neither of those events has occurred and the applicant says (and the respondent accepts) that the formal requirement of a certificate of practical

completion has "probably been waived". What is the effect of such a waiver? The applicant says the time for commencement of the defects liability period runs from the date the work was completed, whereas the respondent says in par 3 of its submissions of 13 August 2009 that the "waiver goes beyond the formalities. The waiver has rendered the pre-conditions regarding the defects liability period nugatory".

168. In par 4 of those submissions, the respondent goes on to say:

> In the circumstances (and as is accepted by the Applicant) any pre-condition with respect to the defects liability period contained in clause 37.4 of the General Conditions has been waived.

169. In par 6, the respondent says:

> Having issued its final payment claim and endorsed the fact that it was "final" under the contract, the Applicant:
>
> (a) has not only waived any contractual pre-requisites regarding the defects liability period; but
>
> (b) is also estopped from now stating that its final payment claim "was not a valid final payment claim" under the contract.

170. Leaving the question of estoppel aside for the moment, the respondent is careful not to say that the defects liability period does not exist under the contract, or has not commenced. No doubt if some defect were discovered in the period following completion of the work, the applicant would seek rectification by the applicant under the defects liability provisions.

171. The respondent says in par 2 of its submissions of 13 August that under cl 34.6 the obligation is on the applicant to seek the certificate of practical completion. That is true only to an extent, since the last paragraph in that clause enables the superintendent to issue a certificate of practical completion even though no request has been made if it is of the opinion that practical completion has been reached.

172. No such certificate has been issued here, but I note that there is no obligation for the superintendent to do so – cl 34.6 is merely permissive.

173. The parties are agreed that the requirement of a certificate of completion has been waived. It is not suggested by either party that the defects liability period itself has been waived. This indicates to me that the defects liability period has commenced as suggested by the applicant, namely on completion of the work

in November 2008. Nowhere does the respondent even hint that there is no defects liability period, and I would not expect it do so.

174. Alternatively, since no certificate of practical completion has been issued, and no other date has been determined by any arbitration or litigation, the defects liability period has not begun. This runs counter to the submissions of both parties and I should not take that approach.

175. If that were all, I would be inclined to agree with the applicant that its payment claim was not final despite bearing that word. However, I take the respondent's submission quoted above that the applicant has "waived any contractual pre-requisites regarding the defects liability period" to mean that the applicant has waived the pre-requisites or pre-conditions to making a final claim, such as the expiry of the defects liability period.

176. The applicant has not sought a certificate of practical completion some nine months after the work was completed. It has submitted a claim headed "Claim 7" under cover of a facsimile cover sheet on which is handwritten:

> Please find attached claim No. 7 (Final Claim) for works completed on the [work] at [project site].

177. Under cover of that facsimile sheet and covering the claim was a letter dated 8 April 2009 from the applicant to [AA BB (CC)] Pty Ltd, Attention: Mr [PK] which said:

> **RE: Progress Claim No. 7 (Final Claim) [project]**
>
> Please find attached progress claim number 7, this is the Final Claim for works previously completed up to 31st December 2008, all items including those either in or not in dispute have been included and those which required adjustments have been adjusted.

178. Clause 37.4 says that the final payment claim is to be "endorsed Final Payment Claim" and is to be "a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract".

179. It seems clear that the applicant intended Claim 7 to be the final payment claim, from the use of similar words on the facsimile cover sheet and on the covering letter, and by complying with the content of a final payment claim that it contain all other claims. The covering letter expressly states that it contains "all items including those either in or not in dispute".

180. In essence, the only way in which Claim 7 does not comply with cl 37.4 is in not using the precise words "Final Payment Claim" on the document headed "Claim 7". It uses the words "Final Claim" on both the facsimile cover sheet and on the covering letter (twice on the latter). Those words are capitalised on both documents, indicating to me an intention of a degree of formality and contractual significance.

181. In my view, covering the actual claim with two documents using the phrase "Final Claim" three times is substantial compliance with cl 37.4 that the claim be "endorsed 'Final Payment Claim'". Firstly, I find that at least the letter of 8 April 2009 (and perhaps the facsimile cover sheet) is part of the claim itself such that words on the letter are "endorsed" on the claim. Secondly, the endorsement on the letter "Final Claim" is compliance with the requirement that it be endorsed "Final Payment Claim". Omission of the word "Payment" cannot have caused any confusion or detriment to the respondent and the parties would have clearly understood what was being claimed.

182. I bear in mind and apply the approach to contractual interpretation urged by the respondent to which I have previously referred, and also a common sense, practical, business-like standard of contract administration.

183. Testing the matter in another way, if the applicant was maintaining and the respondent resisting that the claim was the final payment claim, would the (1) absence of the requisite words on the claim itself, and (2) the absence of the word "Payment" on the covering documents, dictate that it was not the final payment claim? I think not. I think that would be applying a standard of contractual interpretation and contract administration warned against by the courts and not applied in practice, at least in the construction industry.

184. The final and important question to consider is that of timing of the claim. Clause 37.4 states that the final claim is to be given within 28 days after the expiry of the last defects liability period. I have found that the defects liability period has not expired. However the respondent submits that the applicant has waived its right to wait until that expiry to deliver its final claim.

185. On balance, waiting until the expiry of the defects liability period to deliver the final claim would be for the benefit of the applicant. Matters might occur

within that period which would entitle the applicant to make a claim. I think the right to wait is for the benefit of the applicant and therefore can be waived by the applicant.

186. It is no criticism of the applicant to say that the contract has not been administered to the letter. This is common in the construction industry and has in this case lead to these many pages considering what might be called preliminary issues. But not following the contract has consequences, one of which is waiver of provisions intended for that party's benefit. In this case, the applicant's failure to seek a certificate of practical completion (primarily but not exclusively for its benefit) and its submission of a claim clearly intended to be treated as the final payment claim before the expiry of he defects liability period, to my mind is waiver of the right to wait until the expiry of that period. I think the applicant, having acted in that way, cannot now say that the claim was not the final payment claim. It clearly intended it to be and the claim contained the substantive material required of a final payment claim under cl 37.4.

187. Without analysing the elements of estoppel, the respondent also says that the applicant is estopped from alleging that Claim 7 is not the final payment claim, essentially for the reasons advanced above. I do not need to decide this question, but one of the elements of estoppel is that the respondent act to its detriment in reliance on the representation such that it is unconscionable for the applicant to be allowed to resile from its representation. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J said at 428-429:

> … it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

188. That passage is one described, in Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 4th ed, par 17-050 at 550 as one in which "the

current state of authority in Australia as to equitable or promissory estoppel is encapsulated ...".

189. The respondent did not point to, nor can I discern, any detriment it suffered in relying on the applicant's representation that Claim 7 was the final payment claim. It wrote (I have found) the letter of 1 May 2009, it has not paid the claim, it has responded to the application and has obtained the final payment certificate. None of those matters constitutes a detriment in the sense described in *Waltons Stores*. However, as I said, I do not have to and I do not decide that issue.

190. In the result, I find on the balance of probabilities on the material before me and for the purposes of this adjudication, that Claim 7 of 8 April 2009 was the applicant's final payment claim under the contract as contemplated by cl 37.4.

191. Returning to s 37 of the Act, subsection 2 says:

> (2) For the adjudication –
>
> > (a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract – the certificate is taken to be conclusive evidence of its contents; or
> >
> > (b) otherwise – the certificate has the evidentiary weight the appointed adjudicator considers appropriate.

192. I have decided the first requirement of par (a), namely that the certificate relates to the final amount payable under the contract. Does it have the effect of finalising the contract?

193. The applicant says in its submissions of 11 August that it does not because cl 37.4 excludes from its operation the matters set out at in pars (c) and (d), and because it has no status in relation to unresolved issues the subject of the cl 42 dispute resolution process. It says that the contract is not finalised in any real sense "because the cl 42 door is left open for the contractor". In this case the applicant has given a Notice of Dispute under cl 42 disputing the validity of the final certificate.

194. Replying, the respondent says in its submissions of 13 August that cl 37.4 gives the final certificate the same status as does s 37, and that the Notice of Dispute under cl 42 is 5 days late (the applicant concedes the notice is "a few days late").

195. Clause 37.4 says:

> The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for …[setting out the 4 exceptions]

196. I read that paragraph as "The *final certificate* shall be conclusive evidence of accord and satisfaction and the *final certificate* shall be in discharge of each party's obligations in connection with the subject matter of the *Contract*". I do not read it so as to say that the final certificate shall be conclusive evidence in discharge of each party's obligations in connection with the subject matter of the contract, as suggested by the respondent at par 17 of its 13 August submissions. To read it that way to my mind is unnatural and not what was intended.

197. Nevertheless, if the final certificate is in discharge of each party's obligations in connection with the subject matter of the contract, it would appear to have the effect of finalising the contract. All that remains is for the amount of the certificate to be paid.

198. Both s 37 and cl 37.4 clearly contemplate that the defects liability period will have ended when the final payment certificate is given. To my mind, the contract is not finalised until the defects liability period has ended. However, neither party raised this point, and I should not decide the issue on a point not raised by the parties. I will ignore the effect of the unexpired defects liability period on the question of whether or not the certificate had the effect of finalising the contract.

199. Contrary to the submissions of the applicant, I do not think that the existence of the dispute resolution procedure, or the matters set out in pars (a)-(d) of cl 37.4, mean that the certificate does not have the effect of finalising the contract. I take that phrase to mean something akin to the wording of cl 37.4 as to the effect of the final certificate, namely that each party's obligations in connection with the subject matter of the contract are discharged. I do not think it means that every last issue arising out of the contract has been finalised. If this were the case, arguably the contract would not be finalised until the expiry of the limitation period for breach of contract, negligence and causes of action under the *Trade Practices Act* (to name those which

immediately come to mind), or the expiry of the time for an application under the Act.

200. The respondent says that the applicant's characterisation of the majority of its claims as for the "erroneous … exclusion of any work or figures in any computation" is a misconceived attempt to have the claims fall within cl 37.4(c) set out above, which the respondent describes as akin to the slip rule. I agree. Even if the majority of the applicant's claims could properly be described as for the "erroneous … exclusion of any work or figures in any computation", on the information and arguments before me they would not fall within cl 37.4(c).

201. The respondent says that the Notice of Dispute is invalid because it is out of time, while the applicant points to the extension of time provision in s 48 of the *Commercial Arbitration Act* (NT). On the face of it, one would have thought an extension of 5 days would not be difficult to obtain from the court where the parties were embroiled in this application and dealing with a number of requests for further submissions. However, I should not attempt to predict the outcome of any application (and there is no evidence before me that an application has been made), and at present the situation is that there is an admittedly invalid Notice of Dispute which may or may not be retrospectively validated by the court.

202. In all of those circumstances, I think that on the information and arguments before me and for the purposes of this application, on the balance of probabilities Final Certificate No 7 of the superintendent dated 31 July 2009 "relates to the final amount payable under the contract and has the effect of finalising the contract".

203. The effect of this conclusion is set out in s 37(2)(a), namely that the certificate is taken to be conclusive evidence of its contents. This is to be contrasted with the result of a certificate which does not relate to the final amount payable under the contract and does not have the effect of finalising the contract. In that case, by s 37(2)(b), the certificate has the evidentiary weight the appointed adjudicator considers appropriate

204. I think the clear intention behind and effect of s 37(2)(a) is that the adjudicator is to be bound by a final certificate falling within that definition. I consider myself so bound by Final Certificate 7 in this case.

205. At par 6.1(d) of its response, the respondent said if I found this to be the case, I should not embark on any further assessment of the application.

206. There are many NSW decisions which require an adjudicator to consider the merits of an application where the respondent has not served a payment schedule or delivered a response to an application. I do not think that the principles behind those decisions apply in this case where the Act states that a certificate is conclusive evidence of the amount owing. For an adjudicator to go behind the certificate and consider the merits would be to ignore the statutory injunction to be bound by the final certificate. For those reasons, I have not examined the merits of the application.

207. Neither party raised the possible argument that Final Certificate 7 could not be the final certificate under either cl 37.4 or s 37 because the payment claim was deemed by cl 37.2 to be the final certificate and that it was therefore too late to deliver a further "final certificate". I have therefore not considered this argument. Since it did not go to jurisdiction and since the parties had opportunity to raise the point in submissions, I did not invite further submissions.

DETERMINATION

208. The final certificate was for the sum of $25,907.24. That amount was due by the respondent to the applicant 7 days after 31 July 2009, namely 7 August 2009 (contrary to the statement on Final Certificate 7 that payment shall be made within 21 days – see cl 37.2 general conditions and cl 4 specification).

209. Interest is payable under s 35(1)(a) at the rate of 10.5 % per annum from 7 August 2009 until payment is made. Interest to the date of this determination (17 August) is:

$25,807.24 x 10.5% x 10/365 = $74.24

$25,807.24 + $74.24= $25,881.48

Interest per day from 17 August is $7.42

210. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $25,881.48 being the amount of $25,807.24 plus interest of $74.24. Interest accrues on the sum of $7.42 from 17 August 2009 at the rate of $ per day. The sum of $ is payable immediately.

211. Sensibly, neither party sought payment of its costs. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2). This adjudication raised an unusual number of novel, complex preliminary and technical points. I sought and obtained assistance from the parties navigating this minefield in the form of further written submissions.

212. I draw the parties' attention to the slip rule in s 43(2) in the event I have made a correctible error.

Dated: 17 August 2009

_____

CAMERON FORD

Registered Adjudicator