DETERMINATION NO. 16.09.03

Adjudicator's Determination

pursuant to the

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

Applicant

and

Respondent

I, Cameron Ford, determine on 30 March 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is $3,604,503.37 being the amount claimed of $3,553,680.87 plus interest to the date of determination of $50,822.50. Interest accrues on the sum of $3,553,680.87 at the rate of 10.5% per annum, being $1,022.29 per day. The sum of $3,604,503.37 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 24 February 2009 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed

appointed under 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 the documents listed in the index to the application, together with the response being submissions and documents 1 to 39.

3. The response was delivered on 10 March 2009 making my determination initially due on 24 March 2009 on which day I obtained an extension of time from the Registrar to 30 March 2009.

JURISDICTION

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

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

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

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

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

THE APPLICATION

5. The applicant seeks the sum of $3,553,680.87 exclusive of GST for:

Payment claimed dated 17 December 2008		$4,694,991.92
Less:	Payment of November payment claim	$1,109,441,40
	Payment of December payment claim	$31,899.65
Total		$3,553,680.87

6. The applicant says that the respondent is obliged to pay the full amount claimed because the respondent did not issue a valid payment certificate for the payment claim of 17 December 2008 (the payment claim).

7. Opposing, the respondent says that the payment claim was not valid under the contract and that its payment certificate dated 21 January 2009 was valid and properly assessed the amount due to the applicant.

8. Two initial questions therefore present themselves – was the payment claim valid and, if so, was the payment certificate valid. Because the validity of the payment claim is fundamental to the application, I will consider that issue before examining the validity of the respondent's payment certificate.

Was the payment claim valid?

9. The respondent contests the validity of the payment claim on two bases, namely:

    9.1 it did not include details of the value of WUC done as required by cl 39.1 of the contract; and

    9.2 an amount is not due under the contract until it has been added to the order by the superintendent. The respondent says none of the contested amounts in the payment claim have been added to the order, are therefore not due under the contract and cannot be the subject of an application for adjudication, since s 8 of the Act defines "payment dispute" by reference to amounts due under a contract.

Details of the value of WUC done

10. Clause 39.1 says:

> Each claim shall be:
>
> (a) in the form provided by the Superintendent; and
>
> (b) given in writing and in an approved electronic form to the Superintendent,
>
> and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor in respect of the Order and any further information which the Superintendent reasonably requires.

11. Relying on this clause, the respondent says that the applicant "failed to include details of the value of WUC that was completed" and "failed to itemise and describe the obligations" it had performed and to which the payment claim related in sufficient detail. It relies on the decision of Austin J in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42 in which his Honour held at [41] that a payment claim under the NSW *Building and Construction Industry Securities of Payment Act 1999* "must on its face contain all the ingredients required by the Act."

12. Under consideration in *Jemzone* was s 13(2) of the NSW Act which required the payment claim to identify the construction work to which the progress payment related, the amount claimed to be due for that work, and that the claim was made under that Act. The payment claim in that case simply said "motel construction for Jemzone Pty Ltd" with an overall balance owing, which was held to be insufficient identification of both the work and the amount.

13. The respondent here says that the lack of details provided by the applicant "is clearly analogous to facts in *Jemzone*". Even if that were so, it does not mean that the overall legal situation is analogous. I do not accept that the approach of his Honour in *Jemzone* dictates a similar approach here. Firstly, the statutory schemes in NSW and the NT are significantly different, especially in relation to payment claims. In the NT, payment claims are made under the contract where there are relevant contractual provisions, with the Act in those cases only prescribing the content of the application. By contrast, payment claims in NSW are made under the Act, with as Austin J said at [46] the serious consequences of a proper payment claim requiring of a recipient full payment regardless of any genuine dispute or offsetting claim, unless a payment schedule is lodged in time.

14. A payment claim in NSW is therefore a statutory mechanism with prescribed content and serious statutory consequences. In the NT it is a contractual mechanism (where there are relevant provisions), with such content as is agreed, and without the same serious statutory consequences.

15. Secondly, the principles of statutory construction are not the same as the principles of contractual construction. An Act and a contract may have identical terms, but one may require strict compliance while the other only substantial compliance depending on all of the factors taken into account in construing each instrument.

16. I invited submissions from the parties on whether the payment claim complied with the contractual requirement of cl 39.1 to include details of the value of WUC done.

17. Both parties in their supplementary submissions relied on the decision of Southwood J in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42 where his Honour set out the requirements of a valid payment claim. His Honour said that an adjudicator must first have regard to the requirements of the contract and that then to be valid, a payment claim must:

    1. be made pursuant to a construction contract and not some other contract;
    2. be in writing;
    3. be a bona fide claim and not a fraudulent claim;
    4. state the amount claimed;
    5. identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.

18. Looking first to the contractual requirement of include details of the value of WUC done, in my view the payment claim complied by describing the value as it did and in appending 75 pages of detail. Sheer volume of appendices, of course, does not guarantee sufficient detail; they could be more obfuscatory than illuminating. However in this case I believe the supporting documents properly described the work done and its value. It is important to bear in mind the contract's use of the word "include". It is not a necessity that all of the details be set out on one piece of paper. In my view it is sufficient to satisfy the injunction to "include details" by appending explanatory documents.

19. To my mind, the purpose of the contractual requirement of details being included in the payment claim is substantially the same as the legislature's intention expressed in the Act as stated by Southwood J in *Trans Australian Constructions* at [66]:

> It was the intention of the legislature that a valid payment claim must be of adequate particularity to enable a principal or head contractor to know the ambit of any potential application for a determination by an adjudicator under the Act if the claim is unpaid or disputed. To do so, a payment claim, must contain sufficient detail to put the principal or head contractor on notice of the precise amount claimed and it must sufficiently identify the obligations said to have been performed under the contract to which the amount claimed relates. If a payment claim does not contain such detail the principal or head contractor cannot determine if the progress claim should be paid, part paid or disputed. It was the intention of the legislature that a principal or head contractor must be given a fair opportunity to determine whether to pay, part pay or dispute a payment claim.

20. In my view, the payment claim did sufficiently comply with the requirement of cl 39.1 to include details. There can have been no real doubt in the respondent's or superintendent's mind as to the work and value for which the payment claim was being made. They would have been able to regulate their positions with the information clearly provided.

21. In my view this is sufficient compliance with a *contractual* requirement to include details in a payment claim. As *Jemzone* illustrates, it may well be different where the requirement has its origin in a statute which places considerable significance on the form and content of a payment claim and ascribes serious consequences to a failure to reply.

22. As the applicant submits and I accept, it is also relevant that:

    1. practical completion had been achieved before the payment claim was delivered, with a final claim only awaiting the expiry of the defects liability period. This would assist in making it clear to the respondent all that had been claimed;

2. the respondent had accepted all previous payment claims in this form without complaint or apparent difficulty;

3. the respondent issued a payment certificate without stating that it was impossible to do so because of lack of detail in the payment claim.

23. I do not put a great deal of weight on the fact that the respondent has been able to respond to the claims in the application, as submitted by the applicant at [17] of its supplementary submissions. Obviously the respondent has also had the benefit of the application itself to enable it to prepare a response.

24. In its supplementary submissions, the respondent said that the payment claim here fell short of what Southwood J found to be a valid payment claim in *Trans Australian Constructions*. I respectfully disagree for the reasons set out above.

25. Also relied upon by the respondent was a decision of Finkelstein J *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA1248 dealing with the validity of a payment claim under the Victorian *Building and Construction Industry Securities of Payment Act 2002*. For the reasons given above in relation to *Jemzone* and the NSW Act, I do not consider that decision to be relevant. As the applicant submitted, in *Independent Fire Sprinklers (NT) Pty Ltd* v *Sunbuild Pty Ltd* [2008] NTSC 460 at [46]:

> There are very significant differences between the *Building and Construction Industry Security Payment Act 1999* (NSW) and the *Construction Contract (Security of Payments) Act* (NT). There is no equivalent s 33(1)(a) of the NT Act and there are a number of other important differences. The NT Act is modelled on the *Construction Contracts Act 2004* (WA). Structurally, the WA Act and the NT Act bear little resemblance to the NSW, Victorian or Queensland Acts. Great care must be exercised in relying on decisions from those jurisdictions as to the interpretation to be given to the NT Act.

Not added to order by superintendent

26. Included in the payment claim were:

(a) a provisional sum for materials claim of $74,735.92;

(b) a delay damages claim (submitted to the respondent on 10 November 2008) of $1,535,636; and

(c) a project variation claim (submitted to the respondent on 16 December 2008) of $1,718,799.

27. Clause 39.1 says a payment claim "may include details of other moneys then due to the Contractor in respect of the Order". Fastening on the word "due", the respondent says none of those moneys were due under the contract as they had not been added to the superintendent as required by relevant clauses.

28. In relation to the provisional sum for materials, cl 3.4(a) states:

> where pursuant to a Direction the work or item to which the Provisional Sum relates is carried out of supplied by the Contractor, the work or item shall be priced by the Superintendent. … The difference shall be added to or deducted from the Order Contract Sum.

29. The respondent says the effect of this clause is that until the provisional sum item is priced by the superintendent (and I interpolate, added to the Order Contract Sum), no sum is due to the applicant.

30. In relation to the delay damages claim, cl 36.10(a) says:

> where the Contractor has been granted and EOT for the delay … the Contractor shall give the Superintendent notice of its claim for delay damages within 7 days after the determination of the delay by the Superintendent under clause 36.6, including all necessary particulars and supporting documentation.

and cl 36.10(d) says:

> the Superintendent shall assess and decide as soon as reasonably practicable the extra costs necessarily and reasonably incurred by the Contractor under this clause 36.10.

31. Again, the respondent says the effect of this clause is that until the extra costs are assessed by the superintendent, no sum is due to the applicant.

32. In relation to the project variation claim, cl 38.4 says:

> the Superintendent shall as soon as possible, price each Variation. … That price shall be added to or deducted from the Order Contract Sum.

33. Repeating its argument, the respondent says that until each variation is priced by the superintendent (again I interpolate, added to the Order Contract Sum), no sum is due to the applicant.

34. Because this appeared to be a new submission and one which the applicant had not anticipated, I exercised the powers under s 34 of the Act to seek further submissions from the applicant on this point. The applicant referred to a line of authority to the effect that an adjudicator may assess a claim where a condition precedent to an applicant's entitlement under the contract has not arisen (*Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027), such as a superintendent's certificate (*Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58, *John Holland Pty Ltd v. Traffic Authority of New South Wales*), or an extension of time (*O'Donnell Griffin Pty Ltd v Davis* [2007] WASC 215).

35. In *John Holland*, Hodgson JA (with whom Beazley and Basten JJA agreed) said:

> . . . contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s 34. I do not think the legislature intended to make such usual provisions void.

36. While these comments are by NSW court in relation to the NSW Act, they are applicable here since the same broad principles apply to when (as opposed to how) a party may make a payment claim – in s 4 of the Act it is a claim for payment of an amount in relation to the performance by the contractor of its obligations under the contract. In other words, when a contractor has performed its obligations under the contract it is entitled to make a payment claim.

37. A provision in a contract that an amount is not due until certified by a superintendent would be void if it was interpreted as prohibiting a payment claim without certification. As Hodgson JA said, the legislature cannot have intended that such common provisions be void. If the provisions were not

void, many legitimate claims would not be able to be the subject of a payment claim and the Act would have a much restricted application, again an effect which one would not expect the legislature to have intended.

38. In my view, where the work has been done or other factual circumstances have given rise to a claim (eg, delays, variations) under a contract of the type under consideration here, that claim may be the subject of a payment claim even though a superintendent has not issued a relevant certificate. That is supported by the wording of cl 39.1 cited above which entitles the contractor to include in a payment claim "details of other moneys then due to the Contractor". While the respondent may argue this is circuitous reasoning, leading back to the question of whether moneys are due, to hold otherwise would be to enable a principal through its superintendent to remove from the Act's purview all such claims by having the superintendent not issue certificates. This would make the scheme unworkable or greatly diminished.

39. As the cases cited by the applicant illustrate, where a superintendent does not certify (using a generic term, intended to include such words as "assess", "price", etc) an adjudicator may make his own assessment in the superintendent's place.

40. For those reasons, I consider that the payment claim including the amounts not yet assessed or priced by the superintendent is a valid payment claim.

Was the payment certificate valid?

41. The applicant contended in the application that the respondent's payment certificate of 21 January 2009 was not valid because it (a) did not provide reasons for the difference between the amount claimed and the amount certified as required by cl 39.2(a)(i), and (b) did not identify the amount due by the applicant to the respondent for a "negative variation".

42. The respondent issued two payment certificates on 21 January 2009, 204 and 204A for $31,899.65 (GST exclusive) and $0.00 respectively. The respondent agreed at [36] of the response that certificate 204A was issued in error, and I therefore disregard it.

43. Clause 39(2)(a) states:

> The Superintendent shall, within 21 days after receiving a valid claim, issue to [the respondent] and the Contractor:
>
> (i) a payment certificate evidencing the Superintendent's opinion of the monies due from [the respondent] to the Contractor and reasons for any difference;

44. Clause 39(2)(d) says:

> If the certificates specified in clauses 39.2(a)(i) and (ii) have not been issued, Telstra shall, within 30 days after the Superintendent receives the valid claim, pay to the Contractor the amount specified in the valid claim, after setting off such other sum as Telstra may elect to set off under clause 39.6.

45. The effect of the word "shall" in cl 39(2)(a), says the applicant, is that a failure to include reasons for the difference invalidates the certificate. Reliance was placed on *Daysea Pty Ltd v Watpac Australia Pty Ltd* (2001) 17 BCL 434, [2001] QCA 49 where the court was considering the validity of a payment certificate issued under a similar clause. At [17] it was said:

> In a sense the question largely boils down to whether or not the word "shall" …is mandatory, and in consequence failure to comply with the requirements thereof renders a certificate ineffectual. If that clause is construed in that way then a certificate not complying with those requirements is not a Payment Certificate for the purposes of paragraph. If that was so then the position would be the same as if *no certificate at all had issued*. [my emphasis]

and at [22]:

> Because of the consequences which flow from the issuing of a certificate, strict compliance with the provisions … is required. That, in any event, is the natural consequence of the use of the word "shall"… in my view it would be odd if the provisions relating to the issuing of the certificate, though mandatory in terms, were held not to be so.

46. As the payment certificate did not comply with the contract, it was held not to be a valid payment certificate.

47. Emphasising the word "and" in the phrase "and reasons for any difference" in cl 39(2)(a)(i), the respondent says that the requirement for reasons is a separate requirement to the issuing of a payment certificate and that any failure to provide reasons does not invalidate the certificate itself.

48. I cannot agree. In my view the clause is clear. A payment certificate must issue within 21 days evidencing two things - the Superintendent's opinion and the reasons for any difference. The word "evidencing" qualifies both the opinion and the reasons. That is the natural and ordinary interpretation flowing from the way the clause appears. If the reasons were to be separate from the certificate, the clause would separate them similarly, such as:

> The Superintendent shall, within 21 days after receiving a valid claim, issue to [the respondent] and the Contractor:
>
> (i) a payment certificate evidencing the Superintendent's opinion of the monies due from [the respondent] to the Contractor;
>
> (ii) reasons for any difference.

49. The objective intention of the parties seems clear – the payment certificate was to state the amount certified and the reasons for any difference between it and the amount claimed. This is understandable, to enable the parties to regulate their positions, as a check against the superintendent acting capriciously or as the respondent's cipher, and in particular to enable the applicant to determine its response to the certificate both legally and practically as to what it needs to do to obtain full certification or full payment.

50. In *Daysea*, Williams JA, with whom Davies JA and MacKenzie agreed, conducted a detailed analysis of the authorities, some from the Qld Court of Appeal and all of which agreed that there must be strict compliance with such a clause. (While not stated, it is obvious that if the contract or the regime were materially different, a different result might follow).

51. There, the clause stated that within 14 days of receipt of a claim for payment the principal's representative "shall assess the claim and shall issue" a payment certificate. The principal did not issue a certificate within that period but did so within 28 days. Even though an otherwise valid certificate existed, the Court of Appeal held that it was not valid because it did not strictly comply. It was as if no certificate had issued and the contractor was entitled to summary judgment for the amount of the payment claim.

52. Returning to the purpose and importance of reasons, it is instructive that the clause in that case also required (using the word "shall") reasons to be given for any difference between the amount claimed and that certified.

53. In dealing with this submission, the respondent simply said at [39]:

> None of the authorities relied upon by [the applicant] in its adjudication application is an authority dealing with the interpretation of this contract. It is of minimal assistance, if it is of any assistance at all, to an adjudicator, judge or arbitrator to be referred by a party to authorities speaking to the different language of different contracts. The only question for the adjudicator here must be that of the proper interpretation of the words of this contract.

54. The respondent did not state how the contract under consideration in *Daysea* was materially different from the contract here, why the reasoning in *Daysea* might not apply to this contract, or any other reason why there should not be strict compliance with the clause. Had there been a persuasive argument, I am confident that it would have been put by the very experienced representatives of the respondent.

55. I agree with them that the question here is the interpretation of this contract. I respectfully disagree that cases such as *Daysea* are only of marginal, if any, assistance. Where there is no material difference between the two contracts and the two clauses under consideration, where the decision is of such authority, and where there appears no other reason to ignore it, I am persuaded I should apply it to this case.

56. I find therefore that strict compliance is required with the obligation on the superintendent in cl 39(2)(a)(i) to provide in his payment certificate reasons for any difference between the amount claimed and the amount certified. In the absence of any reasons, the payment certificate is invalid and it is as if no certificate has issued. Clause 39(2)(d) then takes effect, requiring the respondent to pay the applicant the full amount of the payment claim.

57. The parties agree that the respondent has paid $31,899.65 of the claim, leaving $3,553,680.87 exclusive of GST owing as set out in [5] above.

Interest

58. The applicant seeks interest at the rate of 9% per annum pursuant to clause 39.5 of the contract and item 20 of schedule 1 of the project contract from the date payment should have been made (31 January 2009), to the date of determination, and thereafter pursuant to the *Act*. The respondent did not contest this part of the application.

59. Interest from 31 January to 30 March 2009 is:

$3,553,680.87 x 9% x 58/365 = $50,822.50

60. Interest from 30 March 2009 at the rate under the Act is:

$3,553,680.87 x 10.5% x 1/365 = $1,022.29 per day

DETERMINATION

61. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $3,604,503.37 being the amount claimed of $3,553,680.87 plus interest to the date of determination of $50,822.50. Interest accrues on the sum of $3,553,680.87 at the rate of 10.5% per annum, being $1,022.29 per day. The sum of $3,604,503.37 is payable immediately.

62. The respondent formally sought costs at the outset of its response, but did not address the point in any further detail. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).

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

Dated: 30 March 2009

_____

CAMERON FORD

Registered Adjudicator