Adjudication Decision: 58.17.02

Construction Contracts (Security of Payments) Act

Adjudicator : Chris Lenz (58)

Applicant - Claimant

Name [***Redacted***]
ACN
Address

Respondent

Name [***Redacted***]
ACN
Address

Work

Nature of work [*Redacted*]
Applicant's trade [*Redacted*]
Location of construction site [*Redacted*]

Payment claim

Date : 22 August 2017
Due date for payment claim : 5 October 2017
Amount of payment dispute : $858,974.65 (excl GST)

Application detail

Application service date : 13 October 2017
Appointment date : 17 October 2017
Response date : 27 October 2017

Adjudicator's determination

Amount to be paid : Nil
Due date for payment :5 October 2017
Amount of interest : Nil
Claimant's adjudication costs :50%
Respondent's adjudication costs :50%

Determination date **:30 November 2017 (3 week's extension granted)**

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A. DECISION

I have decided under the *Construction Contracts (Security of Payments) Act* ("the Act"), and in respect of the claimant's adjudication application:

- the amount to be paid by the respondent,
- the date upon which the amount is to be paid,
- the amount of interest until this determination, and
- the parties are liable to pay the costs of the adjudication in the proportions,

as shown on the first page of this decision.

B. REASONS

I. Background

1. [*The applicant*] (referred to in this adjudication as the "claimant") was engaged by [*redacted*] (referred to in this adjudication as the "respondent"), for [*work and site details redacted*] (the "work").
2. The work involved the [*redacted*].
3. There was a written contract executed by the parties on 2 March 2017.
4. Payment claim no 6, dated 22 August 2017 for $858,973.65 (excl GST) comprising a claim under the contract, together with 18 claims for variations, was delivered to the respondent.
5. Payment schedule number C90375, dated 4 September 2017, identified a scheduled amount of $282,993.59 (excl GST) (the "scheduled amount") was payable.
6. The claimant alleged that the respondent has failed/refused to pay the scheduled amount on 5 October 2017.
7. The claimant lodged its adjudication application with RICS (numbered 58.17.02) on 13 October 2017.
8. The respondent lodged its adjudication response on 27 October 2017.
9. On 12 October 2017, the day before it lodged its application 58.17.02, the applicant filed another application with RICS (application 58.17.01) for payment claim 5 claiming $820,219.80.
10. In accordance with s34(3)(b) of the Act, the parties consented to me adjudicating the payment disputes together on 18 and 19 October 2017.
11. On 29 October 2017, and then later on 16 November I requested the Registrar's consent to extend the time to make a determination, and he granted permission for both determinations to be made by 30 November 2017.
12. The reason for a second request arose because of the need to seek submissions regarding a jurisdictional contest about whether a payment dispute had arisen for payment claim 5.
13. s34(4) of the Act allowed me to take into account information or documents received in the other adjudication in adjudicating each dispute, and I have done so.
14. Given that the disputes were considered together, I still considered the payment claim 5 dispute first, because it preceded payment claim 6.
15. Apart from the jurisdictional issue, which was resolved in payment claim 5, other issues that emerged, were as follows:
    (i) whether the claimant's design obligations precluded it from being entitled to some of the variation claims;
    (ii) whether the claimant was entitled to extensions of time ("EOT's");
    (iii) whether the respondent was entitled to set off liquidated damages;
    (iv) whether the respondent was entitled to set off the costs of having taken the works out of the hands of the claim.
16. These issues were resolved in my determination 58.17.01 for payment claim 5 by my close analysis of the issues, and the findings that I made, and these findings (which I identify below) were applied to this adjudication.
17. What was different in this adjudication were:
    (i) the additional variation claims that were made in payment claim 6, and

(ii) the need to consider whether the respondent was entitled to set off costs of taking the works out of the claimant's hands.

18. I refer further to those earlier findings under a heading "Previous determination 58-17-01" below.
19. I followed the format of the previous determination, as far as possible, because to my mind there was still a need to ensure that I had jurisdiction under the "Threshold matters" heading, and to identify the material which I had to consider.
20. The approach taken was to decide the claimant's entitlement under payment claim 6, and then to consider the respondent's set off claim, which was a live issue.

II. Material provided in the adjudication

Application

21. I received two lever arch folders documents from RICS from the claimant dated 13 October 2017.
22. In the application, the claimant outlined the basis of the payment dispute, and provided 19 annexures supporting its submissions that it had provided in the application.

Response

23. The response comprised two lever arch folders, together with a USB of case authorities.
24. I would like to express my gratitude to the respondent's solicitors for identifying its different submissions in this adjudication from its earliest submissions in determination 58.17.01.
25. This allowed this decision to be made far more quickly, which is of benefit to the parties.

III. Threshold matters

Construction contract and construction work

26. In determination 58.17.01 I found that there was a construction contract for construction, and this is the same contract, so there is no need to reconsider this issue.

Did the application comply with s28 of the Act?

27. I already found that the earlier application complied with the Act, and this application has followed an identical approach
28. Accordingly, I am satisfied that the application required it to be adjudicated in accordance with my obligations as an adjudicator under the Act.

IV. Is it a payment dispute?

29. s8 of the Act deals with the term **Payment dispute** provides that:
    (a) a payment dispute arises if a payment claim under the contract has been made and either:
        (ii) rejected or wholly or partly disputed; or
        (iii) an amount claimed which is due to be paid, that has not been paid in full; or
    (a) when an amount retained by a party under the contract is due to be paid under the contract, and the amount has not been paid; or
    (b) when any security of a party under the contract is due to be returned on contract, the security has not been returned.
30. At paragraph D of its submissions, and paragraphs 21 and 22 specifically, the claimant submitted:
    (i) the payment claim had been rejected or wholly or partly disputed in accordance with s8(a)(i) of the Act;
    (ii) the amount claimed in the payment claim and the amount certified the payment schedule had not been paid in full.
31. At paragraph 20 to the claimant said that the payment dispute arose on the following dates:

(i) upon delivery of the payment schedule on 4 September 2017;
(ii) upon the due date for payment of the schedule amount of 5 October 2017.

32. In my previous determination 58–17–01, I made some considerable analysis about the payment dispute ingredients, because it was needed to resolve the jurisdictional issue. There is no need to repeat that analysis here, nor is it material in this case, because I find that:
(i) A payment claim was made on 22 August 2017 for $858,973.65 (exc GST);
(ii) A payment schedule certifying $282,993.59 (exc GST) was delivered to the claimant.
33. Those ingredients are sufficient for a *payment dispute* to have arisen under s8(a)(i) of the Act, because in the payment schedule regarding several items, it stated, "*Costs are not accepted by CEA*."
34. Accordingly, I find that a *payment dispute* arose on 5 October 2017, when the certified amount should have been paid. This is in line with my reasoning in the earlier determination, based on *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd & Anor* [2012] NTSC 22.
35. This means that I have satisfied myself of the threshold issues needed to commence an adjudication.

V. Previous determination 58.17.01

36. This adjudication contains similar facts and submissions as that in my determination 58.17.01, which I completed on 29 November 2017. It dealt with payment claim number 5.
37. I note that the statutory declarations provided in this adjudication, are the same as those for my previous determination, as was the T report.
38. The parties' submissions in this adjudication, are for the most part similar, apart from those kindly identified by the respondent's solicitors using "track changes".
39. I have thanked the respondent's solicitors above for this considerate approach.
40. I am therefore content to only deal with new submissions raised by the parties, and the new facts surrounding the additional variations involved in this dispute.
41. In this adjudication, there is no need to again deal with the jurisdictional submission of the respondent about there being only one dispute because of an alleged waiver.
42. I refer to my earlier determination from time to time, and identify the various paragraphs of reasons, to ensure that the parties understand the findings that have already been made on certain issues, for which no further analysis is required.
43. I thought it prudent to now list some of those findings which, in my view, apply in this adjudication. This will allow this determination to be much shorter.
44. These findings included:
(i) the respondent was not entitled to raise the time bars [paragraph 211];
(ii) the respondent was not entitled to set off for liquidated damages [paragraph 276];
(iii) I could give no weight to the T report because there was no evidence of [*its author's*] qualifications upon which he could found an expert opinion even having searched the report in this adjudication to glean if any qualifications were provided, and found none [paragraph 227];
(iv) the claimant had no design obligations under the contract [paragraph 403];
(v) the [*redacted*] schedule did not form part of the contract [paragraph 423];
(vi) the tender letter did not form part of the contract [paragraph 452];
(vii) the respondent's RFQ did not form part of the contract [paragraph 453];
(viii) the contract did not fall within the *inclusive price principle* which, although not named by the respondent, was its argument against the variation claims [paragraph 457];
(ix) such that the claimant was entitled to variations, if it could demonstrate the claimed activity fell within clause 36.1 of the contract [paragraph 463].
45. The structure of the earlier determination is followed so that the parties can easily follow the reasoning although, there may be some deviations.

46. There is a need for an analysis of the set off claims for taking the work off the claimant, because, last time, the respondent was unable to set-off the claim, because it failed to follow the contractual mechanism.
47. It may be that the respondent has properly followed the contractual mechanism allowing set-off in this case, and I note that the claimant made no submissions about that issue in its application.

VI. Contact Works claim

48. The payment claim was provided by the claimant behind Annexure 4 and from the email attached behind Tab 7.1, I find it was sent under cover of an email sent on 22 August 2017.
49. The covering email indicated there was also an OSPS day works reconciliation dated 18 July 2017, but that was not provided to me in the application.
50. The claimant submitted, under heading F [*CLAIMANT'S*] ENTITLEMENT TO PAYMENT, that systems 19 – 21, 25, 26, 27, 28, 35, 38, 9, 51, 52, 59, 60 and 62 were claimable, and described this claim as "partially certified but not paid" in the amount of $403,345.14.
51. Under paragraph 30 of its submissions, in Item 1 of its table, it provided further details of its claim [page 10] to which it referred to Annexure 7.
52. As with payment claim 5, the claim for this aspect of work was based on its assessment of the completed percentages of works [based on a walk-around by [E]], and it substantiated that by reference to the Project NPC [paragraph 7 of the submissions relating to item 1].
53. There was nothing different in the claimant's submissions about its entitlement to this claim, and again, the claimant did not explain, nor cross reference documents within this annexure to its submissions with any meaningful detail.
54. As I found in the earlier determination at paragraph 332, the claimant has failed to substantiate its claim, but as I did in the previous decision, I looked to the payment schedule for the respondent's assessment of the contract works claim, which was provided behind tab 5 of the application.
55. The respondent's payment schedule assessed the contract works claim at **$210,378.84**, and as with my earlier determination, I am satisfied that this is the value of the contract claim.
56. This amount of **$210,378.84** was taken to the attached spreadsheet "LM2".
57. In my earlier determination, the spreadsheet was called "LM1", and sheet 2 of that document contained the Contract works claim details, which I compiled because I thought it would help me in assessing that claim. It certainly helped me to understand the subsystems comprising the *WUC* and the contents of the work.
58. Ultimately, however, it served no purpose, because I found that the claimant had not substantiated its Contract Works claim, so I have not put this sheet in "LM2".

VII. Variation claims

59. The variation claims up to and including VO 22 were already dealt with in the earlier adjudication, and there is no reason to disturb this finding.
60. I have taken the data from the attachment "LM1" to the earlier determination regarding all variations up to VO 22 to populate "LM2" because the values of all the variations up to and including VO 22 have already been decided.
61. The only additional variation claims in this adjudication are the following:
    (i) VO 23 $11,439
    (ii) VO 24 $2,940
    (iii) VO 25 $11,660
    (iv) VO 26 $3,300
    (v) VO 27 $1,260
    (vi) VO 28 $4,560
    (vii) VO 29 $9,361.90
62. In the payment schedule dated 1 September 2017, I note that each of those variations was approved by the respondent. Accordingly, given that there is no dispute about these

claims, I have put all those amounts into the spreadsheet "LM2" for calculation of the amount owing.

63. The total of the variation claims that I've found is **$231,858.30.**
64. However, as I said the variations up to and including VO22 were found to be payable under determination 58.17.01, and I accidentally allowed these variations to be counted again in this determination to decide the amount owing in payment claim 6.
65. Such a result would mean that the claimant could be paid twice for the same variations, because of my material arithmetic error.
66. I correct this error in this amended decision under s43(2) of the Act by deducting **$187,337.40** from the total variations of $231,858.30 previously found**.** This results in new variations of **$44,520.90**, which is confirmed in my calculation in LM2
67. The contract works claim was **$210,378.84.**
68. Accordingly, the amount payable to the claimant (subject to any set off) is **$254,899.74.**
69. I now consider the set off claims by the respondent.

VIII. Set off claims by the respondent

70. In this adjudication, the claimant again dealt with the respondent's setoffs as in the previous adjudication.
71. In the previous determination, as I have said, I found against the respondent regarding its claim for liquidated damages, because it was not able to overcome the prevention principle and demonstrate that it had exercised its *residual power* fairly and reasonably to grant the claimant EOT's.
72. There is nothing new in the respondent's submissions about its entitlement to liquidated damages, in this adjudication. Accordingly, I find again that the respondent is unable to set off its liquidated damages.
73. However, in this adjudication, the claimant did not make it submissions regarding the first and second certificates, which was crucial in preventing the respondent from setting off its takeout claim in my earlier determination.
74. The claimant's submissions against the takeout claim remained the same as previously identified, but in the earlier adjudication there was no need to consider them, because the respondent failed to overcome the threshold contractual requirement regarding the first and second certificates.
75. There was no need in my previous determination to consider the submissions regarding the claimant's conduct because it was unable to set off the claim. These must now be considered in this adjudication, and they are found at Heading D under paragraphs 11, 12 and 13.
76. As I have already mentioned, the claimant has not made those threshold contract submissions again. I note that the email of 4 September 2017 sent at 5.09pm referred to payment schedule 6 as a clause 37.2(a) certificate, and then later to the attached letter dated 4 September 2017, which it said was the certificate under clause 37.2(b).
77. I find these are the required first and second certificates, so the respondent is prima facie entitled to set off claims under the contract, subject to demonstrating its entitlement to do so.
78. I turn to the merits of the takeout claim.

Claimant's submissions

79. The claimant commenced its arguments against the respondent's set off claims at paragraph 31 of its application, and at paragraph 32 it provided details of the respondent's failure to abide by the contract for the following reasons:
    (i) the respondent did not raise it set off claims in the payment schedule or otherwise prior to the date by which it ought to have paid the amount certified in the payment schedule;
    (ii) the respondent committed a substantial breach of contract by failing or refusing to pay the full certified value of the payment claim;

(iii) it was not entitled to liquidated damages;
(iv) the respondent failed:
  (a) to acknowledge the qualifying causes of delay;
  (b) to substantiate its allegations of under resourcing and any associated effect on the performance of the WUC;
  (c) account for its own failure to properly program, sequence and manage the works,
(v) and these failures, about which the claimant had referred to in a number of communications with the respondent, meant that the respondent did not have proper grounds take the work out of the claimant's hands and was in breach of contract when it purported to do so.

80. At paragraph 66 of its submissions, and at paragraph 67 it dealt further with the takeout claim, the submissions for which were found on page 35, and it referred to annexure 19 for documents in support of its submissions.

Respondent's submissions

81. The respondent's submissions commenced at heading D and were contained in three paragraphs:
  (i) paragraph 11 dealt with resourcing;
  (ii) paragraph 12 dealt with delay;
  (iii) paragraph 13 dealt with the expert report summary.
82. I need to explain that the expert report summary was not considered by me in this adjudication for the reasons that [*its author*] had not demonstrated his expertise within his report.
83. At paragraph 18, the respondent continued with its submissions under the heading "Take out and Assessment of Take out".
84. At paragraph 19, the respondent made important submissions regarding an adjudicator's duty to take into consideration all of the contractual elements and determine legal liability as between the parties.

<u>Resourcing</u>

85. I turned firstly to the respondent's allegations regarding the claimant's resourcing in which the respondent alleges that there was a fundamental failure by the claimant to properly resource the project from commencement and that it was always impossible for the claimant to reach the nominated date for completion with its level of resourcing.
86. The claimant had provided a bare denial and stated that the respondent had no basis on which to say that the claimant had under resourced the project [paragraphs 1 to 3 on page 35 of the submissions]. It provided no support for this denial, apart from the documents behind annexure 19, to which I already had regard.
87. It had argued at paragraph 32.2 that the respondent had committed a substantial breach of contract by refusing to pay the full certified value of the payment claim.
88. The due date for payment is 5 October 2017, about which the parties do agree.
89. In its letter dated 4 September 2017, the respondent, outlined its rights to set off, so if I find that it was entitled to do so, in my view there would not be in breach of paying the scheduled amount, if there were legitimate setoffs.
90. This is the issue that I now need to decide.

My analysis and decision

91. It is important to explain that my findings in the previous determination about the inability of the respondent to claim liquidated damages because of the prevention principle, cannot cloud my analysis in considering the merits of the respondent's takeout claim.
92. In applying the prevention principle, I made no finding about the extent of EOT's to which the claimant was entitled, because there was insufficient material to do so.
93. The case authorities were clear that it was not a requirement for an adjudicator to determine an EOT, in order to apply the prevention principle.

94. I had found that the respondent had not discharged its onus in demonstrating that it had properly exercised its residual power to grant an EOT [paragraph 275].
95. I said that I had not considered whether there had been any failure by the respondent in respect of design, specification, management, programming and coordination of the WUC [paragraph 266].
96. I also did not find that the respondent was in breach of contract by failing to exercise its residual power. I found rather that the respondent did not demonstrate that it had reasonably considered the issues entitling the claimant to an EOT for a qualifying cause of delay.
97. One of the complications for any respondent regarding the prevention principle is that if a claimant can establish that it may have been entitled to an EOT, then the date for practical completion against which the liquidated damages are measured, is no longer fixed, meaning the calculation is inherently unsafe.
98. As I say these previous considerations were not based on the merits either way of the parties conduct, which must now be considered.
99. This analysis then focuses on the merits of the respondent's entitlement to take the work out of the claimant's hands in the circumstances. The claimant alleges that the respondent's breaches meant that the respondent was not entitled to do so.
100. In its application, the claimant provided no statutory declarations to support its submissions, but merely attached relevant correspondence at annexure 19, which it used to demonstrate the factual matrix surrounding this issue.
101. In the claimant's submissions it did not point to any particular piece of correspondence to illustrate its arguments, but merely made a general reference to annexure 19 at paragraph 7 on page 35, of the correspondence passing between the parties.
102. In contrast, the respondent provided three statutory declarations in support of the claimant's failure to resource the project, and at paragraph 11.5 of the response made reference to an analysis provided by [*the project manager (W)*], ostensibly at pages 175 – 183.
103. Unfortunately, the statutory declaration was not page numbered. However, on closer reading, it appeared as if the calculations were shown from paragraph 175 through to 183 of his statutory declaration, rather than the page numbers.
104. At paragraph 176 he explained that the respondent's staff kept an electronic record on a day-to-day basis of the progress of works and contractors on the site and attached a printout of these records at tab 9.
105. He explained that the respondent had retained data for over 20 years, such that there was an expectation of the expected man hours and staff requirements to compete a particular contract.
106. Although I was not prepared to accept [W's] statutory declaration regarding his attempt to swear to the issue about the claimant's alleged design obligations, insofar as this issue is concerned, his evidence is compelling.
107. He is an [*redacted*] with considerable experience in this type of work, since at least 1997, such that I am satisfied he can perform analysis on data about projects, because that would be something important for project managers.
108. [W], at paragraph 176, referred to the respondent's records of the electronic site diary for this project. I am satisfied these are company records, the production of which can fall within the exception to the hearsay rule.
109. In any event I am not bound by the rules of evidence, and in the circumstances, I am satisfied that these records accurately reflect the claimant's manning resources on the project.
110. What is less clear, is his reference in paragraph 178 to the respondent's retained data from which it has developed an expectation of the expected man hours/staff requirements that would be required in order to complete a particular contract work requirement.
111. It is not clear the basis upon any such calculations and the assumptions bound up with developing this model, but I am only obliged to make a finding on the balance of

probabilities. In my view, the orange line on the graph, which is the forecast manning required, and against which the claimant's actual manning is compared, based on 20 years of data, on balance is likely to reflect the resources needed, particularly for a contract with such a short time frame.

112. In addition, at paragraph 181, I note [W] used the expected manning hours data and tested it to see what level of resourcing it required, which was a sensible approach. The "S-curve generated from this data, is the typical resources curves for any project,
113. Accordingly, I am satisfied that [W] has satisfactorily carried out an independent check of the forecast manning required derived by the respondent and depicted as the orange line on the [*redacted*] Site Manning graph shown at paragraph 179.
114. This means that the concerns raised by the respondent about the inadequacy of the claimant's resources on the project, on balance, have been demonstrated.
115. At paragraph 3 of the claimant's submissions on page 35, the claimant submitted that the respondent had no basis upon which to say that the claimant had under resourced the WUC. To my mind, [W's] evidence suggests otherwise, and it is intriguing that on 9 April 2017 there was a sharp drop in the claimant's resources, which at that date had peaked at about 8 Mannings per week, when the orange graph suggested approximately 18 Mannings per week.
116. That is a significant deviation and there is no explanation from the claimant about its resourcing. In order to more closely analyse this issue, I had regard to the claimant's EOT one claim which was contained within the bundle at annexure 15.
117. In the notice of delay dated 2 June 2017, it makes reference to the claimant's RFI – 010 which had been issued on 29 March requesting a verbal go-ahead with the revised [*redacted*] layout under the [*redacted*].
118. I assume that this was the genesis of the VO 1 claim, and I note that on 4 April the respondent stated that it had received the variation claim and would review and make comment.
119. Then on 6 April 2017, the claimant issued RFI – 014 indicating that there had been a change in [*redacted*] from [*redacted industry standard*] 16 A to [*redacted industry standard*] 20 B, with the advice that the claimant had in store the majority of those [*redacted*].
120. On 7 April 2017 the respondent responded to RFI – 014 and said that the [*redacted*] under the [*redacted*] could stay as the installed 16 A, but later that week there was a purchase order placed for the additional [*redacted*] required.
121. Whilst it is evident that uncertainty associated with the [*redacted*]was a real issue, it is not clear why there was a drop of 4 men on the project in that week commencing 9 April 2017, because this was only dealing with a [*redacted*] under the [*redacted*].
122. In my view, at a period of 1 month into the project, to drop resources by 50% indicates an anomaly which has not been explained by the claimant.
123. Turning then to the documents attached at annexure 19 of the claimant's application the documents comprised, without any separations within the appendix as follows:
    (i) 4 September 2017 respondent letter which was essentially the set off claim for liquidated damages and for the costs of taking out of work up until that date;
    (ii) 4 September 2017 respondent letter headed "Notice of Exercise of Principal's Rights" to which was attached a site instruction C1 217 – 07 – ESI – 065_A;
    (iii) 18 August 2017 respondent letter headed "Response to Show Cause Notice";
    (iv) 11 August 2017 claimant letter responding to show cause notice. The claimant alleged that the respondent had failed to administer the contract fairly and in good faith and was in substantial breach of the contract, for which it listed a series of five breaches, and the claimant required the respondent to show cause;
    (v) 30 June 2017 claimant letter headed "Notice of Exercise of Principal's Rights" on the basis of the claimant substantially departing from a construction program without reasonable cause and it failed to provide adequate resources and forward planning;

(vi) 23 June 2017 respondent's letter headed "Notice of Exercise of Principal's Rights" that the claimant had failed to show reasonable cause in respect of the rectification of breaches;
(vii) 20 June 2017 claimant's letter headed "Notice of Exercise of Principal's Rights" in which the claimant argued that the respondent did not divide a basis for taking the work from it or white was entitled to do so;
(viii) 16 June 2017 respondent's letter headed "Notice of Exercise of Principal's Rights" in which the respondent said it was immediately taking out of part of the work from the contractor to which it attached site instruction C1 217 – 07 – ESI – 035_A;
(ix) 29 May 2017 respondent's letter headed "Breach of Contract – Notice to Show Cause" in which under heading to it argued that there was insufficient site management and reporting, and at heading three failure to provide adequate resources and forward planning, and at heading for failure to provide forward numbers, availability and qualifications of specialist trades;
(x) A 29 May 2017 email from the respondent to the claimant outlining a series of actions that had been agreed with a comment "There has been some good progress at [*redacted*]…;
(xi) A 29 April 2017 email from the claimant to the respondent in which it explained it had been requesting construction programs since the inception of the project and could not plan resources to meet a built program that had been not released;
(xii) 21 April 2017 respondent letter headed "Breach of Contract – Notice to Show Cause", which was similar in content to that dated 29 May 2017 to which was attached a program, but with no comments in the letter.
(xiii) Turning again to [W's] statutory declaration, paragraphs 130 through to 174 under the heading of "Resourcing/Delay Correspondence":
(xiv) at paragraph 130, [W] said that the claimant had failed at a fundamental level to properly organise and resource the project and never had enough people on site;
(xv) at paragraph 132 the claimant was meant to be on-site on 6 March 2017 did not attend until 22 March 2017;
(xvi) on 27 March 2017, there were no supervisors on site;
(xvii) at paragraph 136, the claimant advised in an email dated 28 March 2017 that there would be no work carried out over the Easter period, and [W] said he expressed his concern about staff not being on site effectively for a week;
(xviii) in an email dated 29 March 2017, [W] said that the claimant did not believe that the claimant's project manager was being adequately supported and required a site supervisor and leading hand;
(xix) at paragraph 139, he referred to an email dated 3 April 2017 in which he noted that only four men were on site on that day and were not properly resourced with materials and tools;
(xx) at paragraph 140 he identified that in early April 2017 the claimant obtained additional personnel from a labour hire company "Red Appointment";
(xxi) at paragraph 148, [W] referred to an email from the claimant's project manager dated 12 April 2017 in which he stated they were in process of recruiting additional personnel for an ongoing rain up during April 2017
(xxii) at paragraph 152, [W] referred to his email dated 21 April 2017 to the claimant's project manager noting a reduction in the numbers of the claimant staff on site.

124. If I pause at this stage, it is evident that the claimant conceded that it needed to obtain further personnel, and was not working over the Easter weekend, which I find from the program attached to the claimant's letter dated 21 April 2017 was outlined in yellow from 13 to 18 April 2017

125. I note from item 7(a) in Part A of the contract, that the date for practical completion was 2 June 2017, and I find this was an extremely tight timeframe.
126. To not adequately resource the project within such a short time frame, and concede that further personnel had to be engaged from an outside hire firm at a critical stage, suggests that something was awry.
127. On balance, I find that [W's] resourcing graph, referred to above, is supported by the evidence, and I find that the claimant did not adequately resource the project.
128. To my mind this entitled the respondent to issue the show cause notices, which it did, and that the claimant, based on the actual evidence of under resourcing, could not explain this deficiency away in a response to a show cause notice.
129. Accordingly, I'm satisfied that the respondent was entitled to take out part of the work from the claimant on the basis of the claimant's failure under clause 39.4 to show reasonable cause.
130. Clause 39.5 was then engaged, and the superintendent was to keep records of the costs of completing the work.
131. At paragraphs 184 through to 191, [W] explained that he'd made an assessment of the loss incurred by the respondent and attached a series of documents at tab 10 behind his statutory declaration which included:
    (i) PHE day worksheet;
    (ii) day works register;
    (iii) [*redacted*] installation check and construction verification sheet;
    (iv) invoices from PHE that had been issued to the respondent.
132. I am satisfied that these documents substantiated the quantum of the respondent's take out costs because from these costs.
133. At paragraph 189, [W] explains that he was able to estimate the value of the work that was to be completed by the claimant in accordance with the contract terms.
134. He said that he had computed the claim for the work taken out to August 2017 in the sum of $383,639.08 which had been identified in his letter dated 4 September 2017, and that he developed a schedule for the assessment of work taken out in September, which attached at tab 11. This schedule calculated an additional $41,690.74 of the costs of the work taken out.
135. There is no controverting evidence from the claimant in relation to this calculation, and I have found that the respondent was entitled to these amounts, and has adequately substantiated them. This means that I find for this claim that the respondent was entitled to set off the sum of $425,329.82 from progress claim 6
136. This means that I find for this claim that the respondent was entitled to set off the sum of $425,329.82 from progress claim 6, which is to be deducted from the corrected amount of $254,899.74, to which the claimant was entitled. This results in an amount of ($170,530.08).
137. I have included this amount in "LM2" which results in a corrected amount due to the claimant of $0.00.

IX. Due date for payment

138. The parties agree that the **due date for payment** is 5 October 2017, and I so find. This is the date, on or before which the amount must be paid for the purposes of s33(1)(b)(ii) of the Act. However, there is no amount to be paid to the claimant, because of my amended decision, resulting from a material arithmetic error.

X. Rate of interest

139. The claimant submitted that I could award the contractual rate of interest of 18% [Item 30of Annexure Part A of the sub contract agreement], as provided by s35 of the Act.
140. s35 (1)(a) allowed me to make a determination on the interest for any overdue payments.
141. The due date the payment for payment claim 10 is 5 October 2017.

142. The claimant was entitled to $0.00 on that date, according to my amended decision resulting from a material arithmetic error, so there is no interest due.
143. **I find the amount of interest is $0**.

XI. The costs of the adjudication

144. The default provision contained in s36(1) of the Act makes the parties liable to bear their own costs, including the costs that they are liable to pay the adjudicator.
145. s 46(4) of the Act provides that the parties are jointly and severally liable to pay the costs of the adjudicator in equal shares, but this can be altered if I am satisfied that a party has incurred costs of the adjudication because of unfounded submissions by a party, in which case I may decide that the other party pay some or all of those costs.
146. The claimant succeeded in its payment claim, but lost on the respondent's entitlement to take work out of the claimant's hands.
147. I adjudicated both matters together, so did not differentiate between the costs of each adjudication, but can say that the payment claim 5 adjudication was the most time-consuming.
148. Accordingly, I do not see a need to exercise my discretion to alter the default position, so I find that the respondent is liable to pay 50% of my fees and the claimant 50%, which are part of the costs of the adjudication under s36(3) of the Act.

Chris Lenz

Adjudicator 30 November 2017

ATTACHMENT LM2 FOLLOWING