**DETERMINATION NO. 16.07.03**

**Adjudicator's Determination**

**pursuant to the**

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

**Applicant**

**and**

**Respondent**

I, Cameron Ford, determine on 26 October 2007 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 $1,409,558.99, inclusive of GST being the amount owing of $1,333,598.67 plus interest of $75,960.32 to today. Interest accrues on the sum of $1,333,598.67 at the rate of $383.64 per day from today. The sum of $1,409,558.99 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).

**Appointment as adjudicator**

1. On 27 September 2007 I was appointed adjudicator by the Institute of Arbitrators and Mediators to determine this application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act). That Institute 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.

2. On 1 October 2007 I held a teleconference with the lawyers for the parties. At that conference the parties stated that there was no objection to my acting as adjudicator, and I accordingly accepted the appointment.

**Documents received by adjudicator**

3. I received and have considered four volumes of material, two from each of the parties, the contents of which are too numerous to set out here.

4. In the teleconference, the parties agreed that the application had been served on 26 September 2007 and that the respondent's response was due on 10 October 2007, on which day it was received.

5. My determination would therefore have been due on 24 October 2007 had I not obtained an extension from the Registrar to 26 October 2007.

**JURISDICTION**

6. In the teleconference I referred to, the parties agreed that:

   (a) there was a construction contract – 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) a payment dispute had arisen – s 8;

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

7. However, in its response, the respondent contends that the application was not served within the 28 days required by s 28(1) and that the payment claim which founds the application for adjudication was not a valid payment claim under the contract.

**Application out of time**

8. The respondent's argument that the application is out of time is on two bases, namely that the payment claim includes amounts the subject of previous payment claims, and that in any case there was a dispute about the subject matter of the payment claim on at least 20 April 2007 (well outside the 28 day period for application).

*Inclusion of amounts previously claimed*

9. The respondent points out, and the applicant does not contend otherwise, that the amount claimed in the application was included in payment claims under the contract in January, February and March 2007. Certain items in each of those claims were unpaid by the respondent because of a disagreement between the parties as to the applicant's entitlement to those items.

10. The present payment claim, the letter of 16 August, claims the unpaid balance of those invoices, together with interest and the costs of preparation of the claim.

11. In its submission the respondent argues that there is no entitlement under the Act to deliver more than one claim in respect of the same work, and that the time for an application begins to run once a claim is disputed. Further, once the time for application has expired, it cannot be revived by delivery of another payment claim for the amount in dispute. This, the respondent, says would be to undermine the purpose of the Act and enable an applicant to harass a respondent with repeated claims and applications for amounts outside the time limit.

12. On the other hand, the applicant says that to limit a party to one claim in respect of any item of work would be to impose an artificial restraint on a potential applicant and to import limitations not in the Act.

13. In my view the answer is not to be found in the Act but in the terms of the contract. Payment claims referred to in the Act are payment claims under the contract. Even where a contract is silent on the ability to make payment claims and their form, the Act responds by implying terms into the contract rather than imposing statutory entitlements and forms.

14. My view is that, if the contract permits more than one claim for the same work, a subsequent claim including previously claimed work may be a valid payment claim under the Act.

15. Neither party referred in their submissions to *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (Supreme Court of NSW, 1 April 1998, unreported – BC9800988) where it was held that invoices including amounts claimed in previous invoices could be delivered if the contract provided that right.

16. Giles CJ said at 10:

> "A progress claim [under the contract] was to 'include the value of work carried out by the Subcontractor in the performance of the Subcontract to that time together with all amounts then due to the Subcontractor arising out of or in connection with the Subcontract or any alleged breach thereof'. It was not limited to work done since the previous progress claim, and was to include all amounts then due - that is, even if in an earlier progress claim."

17. I invited further submissions from the parties on that point and both parties accepted that invitation by providing helpful written submissions on 25 October 2007.

18. In essence, the applicant said that claims including previously claimed amounts were permitted because of the wording of cl 23.8 and because such claims were not expressly excluded, citing *Commonwealth of Australia v Jennings* [1985] VR 586 at 595 per Fullager J. The applicant also pointed out

that the payment claim included amounts not previously claimed, namely preparation costs and interest.

19. In its submissions, the respondent repeated its position that the dispute arose on 20 April 2007 and could not be revived by a further payment claim (as to which see below), citing *Doolan v Rubickon (Qld) Pty Ltd* [2007] QSC 168. I do not think this case is of any application in the Territory, being based on a specific provision of the Queensland Act which is not replicated in the Territory Act.

20. *Jennings* fortifies my view that in this case the contract permits the making of payment claims which include amounts previously claimed, with the result that time for those amounts begins to run again. I do not think this runs counter to the scheme of the Act; rather, I think it compliments the scheme being in line with commercial practice of repeating in a subsequent invoice or claim what remains unpaid from a previous invoice or claim.

21. As the applicant points out, the Act is conspicuously silent on the inclusion in payment claims of previously claimed amounts, unlike other State Acts, leading at least to the inference that the matter is left to the contract.

*Dispute arose on 20 April 2007*

22. The respondent says that a dispute arose as to the subject matter of the payment claim no later than 20 April 2007. Correspondence had passed between the parties in which they stated their respective positions on the applicant's entitlement to charge the respondent certain amounts under the contract.

23. In its response, the respondent referred to a number of authorities dealing with the meaning of the noun "dispute". As useful as those authorities are, they have little application outside the artificial construct of the Act.

24. It is important to note that a payment dispute is defined under the Act by reference to a payment claim only. A payment dispute arises on non-payment of a payment claim when it is due under the contract, or when the claim has been rejected or wholly or partly disputed – s 8. I am of the view that "the claim" in s 8(a) refers to the payment claim.

25. A dispute does not arise if the parties are merely in general disputation about their rights under the contract. A dispute arises when there is a payment claim which is either not paid or is rejected or disputed.

*Conclusion on time for application*

26. Since I have held that there is an entitlement under the contract to make payment claims which include amounts claimed in previous payment claims, it follows that the applicant's claim of 16 August 2007 was a valid payment claim under the Act.

27. Since I have held that a dispute must be in relation to a payment claim to qualify as a payment dispute and to start time running for the application, it follows that the respondent's letter of 29 August 2007 created a payment dispute under the Act. The application on 26 September 2007 was within the 28 days required by s 28.

**Claim not a claim under the contract or the Act**

28. The respondent next says that the claim of 16 August 2007 was not a valid payment claim because it was not in the correct form and it was not made at the time required by the contract.

*Form of the claim*

29. Clause 23-8 of the contract states:

> **Invoicing & Payment**
>
> - Invoice in approved form may be submitted weekly
> - Payment to be made within 30 days of receipt of invoice in agreed form

30. The applicant says there was no approved or agreed form for invoices while the respondent says there was an approved form by at least 30 March 2007. It points to a number of emails and a letter between the parties referring to the necessity of including timesheets with the invoices. The clearest of these is a letter of 13 March 2007 from the respondent to the applicant which says in part:

> …invoices received from [the applicant] are not considered to be in "agreed form" without the provision of the original signed timesheets.

31. I note that the respondent has used the word "agreed" rather than "approved", contrary to its submission at par 2.4.12(a) – the clause refers to both "approved" and "agreed".

32. Little turns on the distinction here because I am of the view that, even if there was an approved or agreed form requiring timesheets, the letter of 16 August complied with that requirement. This is despite, so far as I can tell, no timesheets being included with the letter.

33. It is to be remembered that the claim of 16 August was a repetition of the unpaid portion of previous claims. Part of those claims had been paid by the respondent. Whether or not timesheets had been provided with them, or supplied later, or never provided, the respondent accepted the form of those invoices eventually. In fact the respondent says at 2.4.16 that it paid the undisputed amounts in those invoices "despite having no record of ever receiving these original timesheets".

34. It follows that either those invoices were in the approved or agreed form, or that the respondent accepted they were. The non-payment of the contested portions was not on the basis of the form of the claim; it was on the basis of the applicant's contractual entitlement to those amounts.

35. The payment claim of 16 August effectively incorporates those previous invoices and their supporting documentation. Nothing is claimed in the subject payment claim that was not in those invoices, except interest and the costs of preparation of the claim.

36. In my view two things may be said – the letter is in the approved or agreed form because the timesheets have been provided, or the respondent cannot now be heard to say it is not in the approved or agreed form when it has paid the major portion of the previous invoices.

37. Reference was made by both parties to Div 4 of the Schedule, incorporated by s 19 which says:

> **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.

38. The provisions of Div 4 therefore apply if the contract is silent about "how" a party must make a claim. Here the applicant says there was no approved or agreed form and the respondent says there was. This works against each party on the importing of Div 4 into the contract, but that is the position to which they were forced by previous submissions and in the end makes no difference.

39. I do not find it necessary to determine whether the alleged lack of an approved or agreed form for a claim under cl 23-8 means there is no provision about how a party must make a claim. My tentative view is that the absence of the form does not mean there is no written provision about how a party makes a claim. To put it in the positive, the terms of cl 23-8 are written provision about how a party makes a claim – they make it in the approved or agreed form.

40. But in any case, the claim of 16 August complies with Div 4 of the Schedule. That division states:

> (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.

41. The only requirement about which there could be doubt is (f), however I am of the view that the reference in the letter of 16 August to the invoices already rendered at paragraphs 1, 2.11, 3.5, 4.3 and 4.6 sufficiently incorporates those documents to "itemise and describe the obligations the contractor has performed". There could have been no doubt in the respondent's mind as to the precise nature of the applicant's claim.

*Conclusion on form of claim*

42. The letter of 16 August 2007 complies with Div 4 of the Schedule and is in a proper form to be a valid payment claim. Even if it did not comply, my view would be that it did not need to comply as there was written provision in the contract as to how a party was to make a claim for payment and therefore Div 4 was not implied into the contract.

*Time for claim*

43. At paragraphs 2.1.3(b)(i) and 2.4.4(b) of its submissions, the respondent says that the letter of 16 August 2007 was not a payment claim because it was not made at a time permitted under the contract. This is developed at 2.4.28-2.4.32 by the respondent saying, in essence, that the applicant had invoiced for all of its work under the contract in January, February and March 2007, and that it had done no work since then.

44. This argument is met with the same argument relating to the ability to make subsequent claims for work in previous claims. Clause 23-8 relied upon by the respondent does not say that claims are limited to work done since the last invoice, or not included in previous invoices. It simply says that claims may be made weekly. It does not say for what the claims may be made.

45. In my view this argument fails for those reasons.

**Conclusion on jurisdiction**

46. I find, then, that there was a valid payment claim made on 16 August 2007 which was disputed by the respondent on 29 August 2007, creating a payment dispute under the Act. This application was made on 26 September 2007, within the 28 day period.

47. I find that I have jurisdiction to adjudicate the application.

**MERITS**

48. At the centre of the dispute is the applicant's alleged entitlement to charge the respondent casual loading overtime, special class allowance, supervisor allowances and meal allowances for labour supplied by the applicant to the respondent.

49. The problem is caused because the schedule of rates annexed to the contract includes those allowances, while cl 23 warrants and says that the wage rates and allowances will be "consistent with" the relevant enterprise bargaining agreement ("EBA").

50. It is therefore a situation of potential internal inconsistency in the contract. The EBA applies different rates and allowances from those in the schedule. A first question must be: what is the meaning of "consistent with" in cl 23-2 of the contract. To my mind, undirected by authority or submissions, there is a range of meaning of that phrase from "the same as" to, say, "broadly in line with". If it means "the same as", clearly the rates in the schedule were not the same as those in the EBA. However if it means "broadly in line with", it could well be argued that the schedule is broadly in line with the EBA. This means there is no inconsistency between contractual documents and, prima facie at least, the applicant is entitled to charge in accordance with the schedule.

51. Since neither party addressed this issue in their submissions, and I thought it an important and potentially decisive one, it seemed fair to invite further submissions from the parties before concluding my view.

52. Both parties agree that the meaning of the phrase is to be taken from its contractual context, and that a definition in another context cannot determine its meaning here. The respondent cited many cases supporting this principle and the concomitant one that words in a commercial document should not be interpreted too legalistically.

53. Each party contended for a meaning consistent with its case, the applicant for a broader meaning and the respondent for a narrower meaning. The applicant pointed out that it was a commercial contract where there was an understandable difference between what the applicant would charge the respondent and what the applicant would pay those it employed. The respondent emphasised the precontractual negotiations and post contract conduct as supporting its contention.

54. In its further submissions, the applicant pointed to cases in the NSW Land and Environment Court dealing with that phrase in town planning legislation. While I initially referred the parties to some of those cases, I apply interpretations in other contexts very warily, and take no more than guidance from them. I think the most accurate that can be said of the phrase is as Sackville J said in *Flannagan v Australian Prudential Regulation Authority* [2004] FCA 1321 (cited by the applicant), that "there is a certain elasticity about the expression".

55. Context colours meaning so it is important to consider the contextual setting of the clause. It is in a simple 5 page (excluding execution clauses and attachments) Letter of Intent which became the agreement. As can be seen from the invoicing and payment clause, the provisions of the agreement are neither detailed nor complex.

56. Clause 23 contains the special conditions, including somewhat surprisingly, the invoicing and payment clause. Subclauses 1 and 2 say:

**1 Project Execution Plan & Roster**

- As per Attachment 1

**2 Wages Rates**

- Wages paid to [applicant's] personnel and other working conditions are to be consistent with the Enterprise Bargaining Agreement applying at the Site;
- [The applicant] warrants that the wages rates included in Attachment 2-Rates payable to [the applicant] are consistent with the Enterprise Bargaining Agreement applying at the Site;
- [The applicant] warrants that the inclusion of allowances in rates is consistent with the Enterprise Bargaining Agreement in respect of each person to whom the rate applies.
- As per Attachment 2

57. If there is any significance to it, clause 23-2 places the attachment containing the schedule of rates last, after reference to the EBA. There is a general arbitrary rule that where a term in a contract is contradicted by another, the term first appearing prevails (*Forbes v Git* [1922] 1 AC 256 at 259), however that rule is not directly applicable here and in any case, has no application where the second term merely qualifies the earlier one: *Maile v Jennings* [1956] VLR 45 at 46.

58. However the order of the subclause may give colour to the meaning of "consistent with". It may indicate that the EBA was intended by the parties to be the primary document and that the schedule would be the same as the EBA, or at least that the EBA would prevail where there was inconsistency.

59. Since there is ambiguity in the meaning of the phrase "consistent with" and therefore in the meaning of clause 23-2, it is permissible to have regard to the surrounding circumstances including precontractual negotiations: *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 per Mason J at 352.

60. The agreement was executed on 13 December 2006 following a proposal submitted by the applicant to the respondent and correspondence between them. In the proposal of 24 November 2006 at p 16 the applicant said it had "priced this proposal in accordance with the [EBA]" and at p 17 said "We have priced this proposal with a view to a long term partnering agreement with [the respondent] and in accordance with the [EBA]."

61. In an email from an employee of the applicant to an employee of the respondent on 30 November 2006, the applicant said:

> There is (sic) 4 main components to a charge rate in regards to labour.
>
> **Pay Rate - Pay rates in accordance with site EBA**

with the latter sentence heading being in bold print as I have indicated.

62. At par 3.2.6 the respondent states its "concern" at having the rates in accordance with the EBA. I do not think I can have regard to that concern in determining the meaning of the clause as it is subjective to the respondent and there is no indication it was communicated to the applicant: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [36].

63. Bearing in mind the order of the references to the EBA and the attachment in cl 23-2 and the pre-contractual correspondence, it seems to me that it was intended by the parties that the schedule of rates would be the substantially the same as the EBA, or at least that the EBA would prevail where there was any inconsistency.

64. One matter that has caused me concern is why the words "consistent with" were used if it was intended that the rates be the same as those in the EBA. It would have been much easier and simpler to use those words rather than the ones used. In its further submissions the applicant highlights this point. Also of relevance is that cl 23-2 was drafted by the respondent (see submissions par 3.2.6) and should be construed contra proferentum.

65. What have overcome that concern are the precontractual statements by the applicant, particularly in the submission on which the contract was based. The use of the words there "in accordance with the [EBA]" to my mind is a clear representation that there will be nothing in the rates which will be inconsistent with the EBA.

66. I therefore find that the applicant is entitled only to charge the respondent at rates in the schedule (Attachment 2) where there is no inconsistency between those and the EBA. I bear in mind that the applicant was entitled to make a profit on the arrangement by paying different rates from those it received, however I think the ambiguity in the phrase must be resolved in light of that representation.

67. It follows that I accept the respondent's contention at par 3.3.11 that the applicant is entitled to whatever the persons it supplied would be entitled to under the EBA.

**The disputed allowances**

68. There are four disputed allowances, namely:

    (a) casual loading allowance on overtime;

    (b) special class allowance;

    (c) supervisor allowance; and

    (d) meals allowance.

*Casual loading allowance on overtime*

69. The applicant says it is entitled to $1,290,009.90 ($1,172,736.35 plus GST) for casual loading on overtime. It says that the EBA requires it to calculate the overtime penalty on a casual employee's ordinary hours wage rate plus the prescribed casual loading of 25%. (The respondent says only $996,845 of this amount is for overtime, with the remainder of $174,841 being for a special class allowance for all tradespeople).

70. On the other hand the respondent says that the 25% casual loading does not form part of the ordinary hours wage rate, and that there is no loading on overtime rates.

71. Overtime is dealt with in cl 2.3 of the EBA. Confusingly, it is stated at the outset of the relevant section that "Overtime *in addition to the Project's rostered hours* may be worked …" (emphasis added). Under the heading "Rostered hours of work" is the following: "The roster for actual working hours will be 10 hours Monday to Friday, 8 hours on Saturday and 8 hours on every second Sunday."

72. On the face of it, overtime is therefore only that time worked outside those 68 hours. This is clearly absurd and must yield to a commonsense interpretation.

73. In the Overtime section of the EBA it states:

> *Day workers*
>
> For day workers, the time worked outside of ordinary hours of work will be paid at the rate of time and a half for the first two hours and double time thereafter.
>
> Overtime worked Monday to Friday will be for a minimum of two hours.
>
> Over time worked on a Saturday will be for a minimum of four hours and be paid at time and a half for the first two hours and double time thereafter.
>
> Overtime worked on a Sunday will be for a minimum of four hours and be paid at double time for all hours worked.
>
> *Shift workers*
>
> For shift workers, all time worked outside of ordinary hours of work will be paid at the rate of double time.

74. Despite the wording at the beginning of the Overtime section, it is clear that overtime will be paid for work outside ordinary hours of work.

75. "Ordinary hours of work" is defined in cl 2.3 thus:

> The ordinary hours of work for an employee will be 36 per week (ie 8 hours per day with 48 minutes pay accruing each day worked to two paid rostered day off every 4 weeks), and be worked between the hours of 6.00am and 6.00pm Monday to Friday.

76. It is clear that for day workers, overtime is calculated by reference to the ordinary hours of work which is 36 hours per week worked between 6 am and 6 pm Monday to Friday. For ordinary day workers, the rates for overtime would be calculated by reference to the ordinary hours wage rate. This is not expressly stated but it must be the case.

77. Casual employees are dealt with later in cl 2.3 in this way:

> *Casual Employees*
>
> Casual employees will be paid a 25% loading on their Group ordinary hours rate as compensation for non-receipt of weekly employee benefits such as annual leave, sick leave, payment for public holidays not worked, bereavement leave, family leave, and jury service.

78. "Group ordinary hours rate" is a reference to the immediately preceding section in cl 2.3 which sets out the ordinary hours wage rates for different groups.

79. The question is then, on what rate for casual employees is the overtime rate calculated? Is it the ordinary hours wage rate, or that rate plus the 25% loading?

80. There is nothing express to assist in answering the question. As the respondent points out, the 25% loading is to compensate for the benefits referred to above. Those benefits are not included in a day worker's ordinary hours wage rate, so when he or she receives overtime, they are not receiving overtime based on those benefits. If the overtime rate for casual employees were determined inclusive of the loading, casual employees would be receiving overtime higher than their day worker colleagues.

81. The applicant points out that the interpretation requiring overtime on loading is of long-standing, that it usually requires express words to negate it, that the respondent appears to have earlier adopted that interpretation, and that the schedule of rates states overtime will be paid on the loaded rate.

82. I think the last is the decisive point in terms of this contract, where the answer is to be found. I have found that the contract in cl 23-2 says, effectively, that the rates payable shall be in accordance with the schedule of rates, except where that is inconsistent with the EBA. The schedule of rates is not to be ignored all together. It is relevant and applicable up to the point of inconsistency with the EBA.

83. On the question of the rate on which over time is calculated for casual employees, the EBA is silent. It is not at all clear which should be the base rate for calculation of overtime. That being the case, it is not inconsistent with the EBA for the schedule to state the loaded rate as the base rate for calculation of overtime, which it does in lines 20, 40, 42, 43 and 44.

84. In my view, under the wording of cl 23-2 of the contract, the applicant is entitled to charge the overtime rates based on the loaded rate for casual employees. The schedule of rates in Attachment 2 is consistent with the EBA because the EBA is silent as to the rate on which that overtime is calculated. Attachment 2 therefore provides a mechanism for calculation of that overtime which is lacking in the EBA. To rule otherwise would be to deprive the words "As per Attachment 2" in cl 2.3 of any meaning. It would be to say that only the rates under the EBA were payable. If that is what the respondent intended to do, it has failed to do so by cl 2.3, a clause of its making.

85. That is not to say that every payment in the schedule which is not in the EBA is payable by the respondent. Some payments may be in the schedule which could not be said to be consistent with the EBA. But this is not that case. Here there is an entitlement to overtime under both the EBA and the schedule, with the EBA being silent on the method of calculation of that entitlement. The schedule provides that lack and may be regarded for that purpose. On that point there is no inconsistency between the two documents.

86. The applicant is therefore entitled to the $996,845 it claims for overtime.

*Special class allowance*

87. As I said at the beginning of this section, the respondent says that $174,841 of the figure claimed for overtime is in fact for a special class allowance. It says in section 3.5 of the response that the applicant is not entitled to this amount because it has not proved that the workers for whom the allowance was claimed were in entitled to the allowance.

88. There is nothing in the contract which suggests that such proof is necessary. If this was legal proceedings and the plaintiff was put on notice by a defence that the defendant alleged workers were not entitled to the allowance, a plaintiff may well be advised to go into evidence. However, that is not the case here. In the absence of a clear contractual requirement I do not think it is incumbent upon a claimant to prove in or with its payment claim that workers are entitled to the allowance.

89. This being the only ground of objection to the payment of the $174,841, I reject the opposition and allow that amount.

90. The applicant is entitled to the full amount of its claim for overtime allowance and special class allowance in the sum of $1,290,009.90 ($1,172,736.35 plus GST).

*Supervisor allowance/project payment*

91. The applicant claims a supervisor allowance, saying that it appears in the schedule (line 47) and is consistent with the EBA.

92. In response the respondent says there is no statement in the schedule that it applied to all employees and that those for whom the allowance was claimed would not be entitled to the commensurate allowance under the EBA.

93. To my mind the schedule makes it clear that the supervisor allowance applies across the board and is not limited in its application. It appears at the end of the schedule under the heading "Allowances" and is followed by first aid, meal allowances and redundancy. Those items would also be of general application and I see nothing in the schedule to limit the allowance in the way the respondent suggests.

94. Nor does the respondent give any reason or evidence for saying that the "persons [the applicant] employed … were not within the scope of application of the [EBA] and would not have been entitled to receive such a payment": par 3.6.3. There is no way I can assess such an assertion in the absence of material or reasons.

95. Those being the only objections of the respondent to the supervisor allowance, I find that the respondent is entitled to it in the sum claimed of $43,588.77 ($39,626.16 plus GST).

*Meal allowance*

96. The applicant claims a meal allowance for all employees in accordance with the schedule. As I have set out above, a meal allowance is one of the allowances provided for in the schedule.

97. Resisting payment, the respondent says the meal allowance does, or should, not apply to all employees because it is specifically dealt with in the EBA. In cl 2.3 of the EBA it states:

> *Crib break and meal allowance*
>
> Where an employee works two hours or more overtime Monday to Friday the employee will be entitled to a crib break of thirty minutes or be paid thirty minutes at the applicable rate.
>
> An employee will be paid a $9.90 meal allowance after working more than two hours overtime. This allowance will be paid to employees supplied with accommodation [by the respondent] or who is (sic) otherwise provided with a meal.

98. Thus the EBA deals specifically with the entitlement to a meal allowance and its method of calculation. In line with my reasoning regarding the overtime allowance, my view is that this is not consistent with the schedule of rates, or perhaps to put it in the terms of the contract, the schedule is not consistent with the EBA.

99. For that reason I find that the applicant is not entitled to the meal allowance in the amount it has claimed of $17,621.41 ($16,019.47 plus GST).

**Interest**

100. Interest is claimed by the applicant on the amounts owing. Neither party directed me to any provision of the contract allowing for payment of interest, and I can find none myself. Entitlement to interest is therefore under s 21 which implies into a contract silent on interest the provisions of Div 6 of he Schedule to the Act. Combined with s 35, those provisions entitle the applicant to interest at 10.5% (the prescribed rate) from the day after the amounts became due under the contract until they are paid.

101. Clause 23.2 of the contract required payment to be made within 30 days of invoice. There were (it appears) approximately 18 invoices, two of which were reversed by credit note and most of which contained claims for all allowances discussed here. Since those invoices were at different dates and included claims for the meal allowance which I have found is not recoverable, and since the amount of the meal allowance is not set out in each invoice, it is not possible for me to calculate precisely the interest on the amount outstanding.

102. The best I can do, I think, is to calculate interest from 30 days after the last invoice was delivered, being the date on which there can be no doubt that all moneys owing under the contract were due.

103. The last invoice which would have included the disputed allowances was invoice 962277 dated 8 March 2007 and received by the respondent on 12 March 2007. Clause 23-8 of the contract requires payment within 30 days of receipt of the invoice, hence that invoice was due to be paid on 11 April 2007.

104. The total amount owing by the respondent to the applicant is $1,333,598.67 being:

| | |
|---|---|
| Overtime and special class allowance | $1,290,009.90 |
| Supervisor allowance/project payment | $43,588.77 |

105. Interest on that amount at 10.5% from and including 12 April 2007 to date is:

$1,333,598.67 x 10.5% x 198/365 = $75,960.32

106. Interest accrues from today at the rate of $383.64 per day.

**Costs of claim preparation**

107. I agree with the respondent that the applicant is not entitled under the contract or the Act to the costs of the preparation of its payment claim of August 2007. Those costs are not a recognised head of damage flowing from the respondent's non-payment of the invoices and are not otherwise recoverable. If they are claimed as part of the costs of the adjudication, I reject the claim as such costs are only recoverable where there has been "frivolous or vexatious conduct on the part of, or unfounded submissions by, another party": s 36(2). That is not the case here. The applicant's conduct and submissions were quite proper in the circumstances.

**SUMMARY OF APPLICANT'S ENTITLEMENT**

108. The applicant is entitled to an award of $1,333,598.67 plus interest of $75,960.32, making a total of $1,409,558.99, inclusive of GST. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

**RESPONDENT'S SET OFF**

109. The respondent claims a set-off against any amount found to be due to the applicant on two bases, namely:

(a) damages for breach of the warranties in cl 23-2 in that the wages paid, and the wage rates and allowances in the schedule were not consistent with the EBA; and

(b) damages for misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act* (Cth) ("TPA") and s 42(1) of the *Consumer Affairs and Fair Trading Act* (NT) ("CAFTA").

**Breach of warranties**

110. The basis of my determination in favour of the applicant is that the amounts awarded were consistent with the EBA. There is therefore no breach of warranty.

**Breach of TPA and CAFTA**

111. Misleading or deceptive conduct under the TPA and CAFTA is quite a different matter. The respondent points to the representations in the initial proposal by the applicant upon which the contract was formed. I have found earlier that the words in that document, which I have set out, operated on the meaning of the words "consistent with" in the contract. That submission, and other conduct the respondent may be able to point to, may make out a case under those Acts, but I expressly state no view.

112. The difficulties I face are at least twofold. Such a claim is complex, requiring the assessment of evidence from a number of participants who have not provided statements. There is simply insufficient material upon which to form a view on such a claim. More importantly however, the applicant has not had an opportunity to respond to the claim, and to proceed now would be to deny the level of natural justice required by the Act: *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSLWR 421.

113. I think the fairest and most correct course to take is to dismiss the claim to a set-off for breach of the TPA and CAFTA on the basis that it is too complex to consider on the present materials, that the time available is insufficient and that to do so would be to deny the applicant natural justice (see generally s 33). Alternatively, if that course is not open to me, I would dismiss the set-off for breach of the TPA and CAFTA on the basis that I am unable to determine it on the materials on the balance of probabilities.

114. No unfairness should be caused to the respondent by adopting that course as it would be entitled to bring an application for adjudication for those damages (if that is open under s 8), or commencing proceedings for them. It could seek a stay of the judgment based on this award pending determination of the adjudication or litigation.

**DETERMINATION**

115. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $1,409,558.99, inclusive of GST being the amount owing of $1,333,598.67 plus interest of $75,960.32 to today. Interest accrues on the sum of $1,333,598.67 at the rate of $383.64 per day from today.

116. The sum of $1,409,558.99 is payable immediately.

Dated: 26 October 2007

_____

CAMERON FORD
Registered Adjudicator