**DETERMINATION NO. 16.12.01**

**Adjudicator's Determination**

**pursuant to the**

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

I, Cameron Ford, determine on 12 October 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 $65,356.66 being the amount owing of $63,780.50 plus interest of $1,576.16 under s 35(1)(a). The sum of $65,356.66 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* (NT).

**Appointment as adjudicator**

1. On 14 September 2012 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act* (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 an affidavit of [the applicant's representative] affirmed 14 September 2012, together with the response dated 28 September 2012 and a statutory declaration of [the respondent's director] sworn that day. I also received material described in the following paragraphs.

3. Because the respondent raised the point discussed below, which I considered the applicant should have an opportunity of addressing, by email on 28 September 2012 I gave the applicant the opportunity of providing evidence and submissions on that issue alone by 5 pm CST on 3 October 2012.

4. On that day I received a signed but unaffirmed affidavit of [the applicant's representative] dated that day, and further submissions from the applicant. I said I was content to accept the unaffirmed affidavit in its current form as a statement but that it would carry more weight if an affirmed copy was submitted on [the applicant's representative's] return from overseas on 6 October 2012, which was done.

5. I then gave the respondent an opportunity of commenting on the further evidence and submissions of the applicant, which I sought by close of business on 5 October 2012. On 4 October 2012, by email the respondent objected to that shortness of time and requested an extension to 10 October 2012 on the bases that there was insufficient time to put the material together and that the two days allowed to the respondent was much shorter than the time allowed to the applicant.

6. By email on 4 October 2012 I invited submissions from the applicant on the respondent's application for an extension of time. The applicant replied on that day by email opposing the extension of time.

7. By email on 4 October 2012 I allowed the respondent until 10 October 2012 to comment on the applicant's further evidence and submissions, saying:

> This is essentially a matter of fairness in providing a reasonable opportunity to both parties to address the issue. While acknowledging the points Mr Silvester makes, I should in the circumstances accord parity of opportunity to the respondent. I therefore allow the respondent's application for an extension of time until close of business on 10 October 2012.

8. The respondent delivered its comment by email on 10 October 2012 consisting of a statutory declaration by each of [AB], [BB] and [the site supervisor], together with further submissions.

**JURISDICTION**

9. The sole point raised in the response in opposition to the application for adjudication was that the contract relied upon by the applicant was not with the respondent but was with another company, [EPL].

10. This, the respondent submitted, deprived me of jurisdiction to determine the application because:

    (a) the contract upon which it was based is not a "construction contract" within the definition of s 5 of the Act as between the applicant and the respondent;

    (b) the application was not an application under the Act as required by s 28 and does not comply with the requirement of the Act;

    (c) the payment claim upon which the application was based is not a "payment claim" within the definition of s 4 of the Act;

    (d) the payment claim is invalid as the respondent is not the principal within the definition of s 4 of the Act.

11. There is no doubt that if the contract was in fact between the applicant and [EPL] rather than with the respondent, the application for adjudication must fail. The applicant did not submit otherwise.

12. No suggestion was made that I do not have jurisdiction to determine my jurisdiction by determining who were the parties to the contract. It is clear that an adjudicator has such jurisdiction: *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1.

13. Leaving aside the question of the parties to the contract, I find on the materials and in the absence of contention the following other factors relevant to jurisdiction:

    (a) the contract (whoever it was between) 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 (assuming for present purposes that the payment claim was validly made) – s 28; and

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

**Who were the parties to the contract?**

14. I must determine whether the respondent or [EPL] was party to the contract. The respondent did not submit that no contract existed at all, merely that the contract was with [EPL], not with the respondent.

*Respondent's contentions*

15. The respondent's contentions are set out in the statutory declaration of [the respondent's director] who stated he was the sole director of the respondent. In summary, he said that:

    (a) the respondent was subcontracted to [EPL] to supply machinery and labour for works on [the project site];

    (b) the respondent's foreman and employee was the acting site supervisor of [EPL] in September 2011;

(c) that foreman was directed by [EPL] (without saying by whom on behalf of [EPL]) to engage the applicant to provide plumbing services for the works;

(d) the applicant rendered invoices to the respondent, for reasons unknown to [the respondent's director];

(e) to the best of his knowledge, [EPL] paid and was liable for payment of the applicant's invoices;

(f) the respondent had a commercial arrangement with [EPL] which included lending it monies to assist it meeting its liabilities. Some of the monies lent by the respondent to [EPL] were used to pay subcontractors, including the applicant;

(g) the outstanding invoice the subject of this application for adjudication should have been addressed to [EPL];

(h) as [the respondent's director] understands it, the invoice is in dispute because "[EPL] assert, amongst other things, that the works performed by [the applicant] did not meet the appropriate standard and required rectification works."

16. Attached to the statutory declaration was a company search of [EPL] dated 28 September 2012 which showed [EPL] having:

(a) the same registered office and principal place of business as the respondent;

(b) [BB] as sole director and secretary;

(c) [BB's] address being the same as [the respondent's director's] address (although this could be explained by his using the respondent's place of business as his address on the statutory declaration);

(d) [BB's] address being the same as the principal place of business of both [EPL] and the respondent;

(e) [AB] and [BB] being the only shareholders of [EPL];

(f) [AB] and [BB] having the same address as each other and as the principal place of business of both [EPL] and the respondent.

17. No explanation was given of the relationship between [the respondent's director], [BB] and [AB] or of their sharing the same address. I state that as a fact, not critically of the respondent. In the end, nothing turns on it.

18. When on 28 September 2012 I invited further material from the applicant followed by the respondent, I drew attention to the respondent and [EPL] appearing to have the same addresses, saying I did not know if it had any significance to the issue in this determination. I will deal with the parties' submissions on the addresses later.

19. Also attached to the statutory declaration of [the respondent's director] was an undated letter from [EPL] outlining its contractual relationship with the respondent. The letter was signed by [BB] as director of [EPL] and said, in summary:

(a) [EPL] entered a contract in October 2010 for work on [the project site];

(b) the respondent was contracted to [EPL] for the supply of equipment and labour for the duration of the contract;

(c) In about September 2011, [EPL's] site supervisor was instructed to engage the applicant on [EPL's] behalf;

(d) [The site supervisor] was "on contractual hire from [the respondent];

(e) despite invoices being rendered to the respondent, [EPL] has been liable for and paid most of the invoices;

(f) [EPL] has paid $228,113.50, including $53,376 "borrowed from" the respondent;

(g) the outstanding invoice is in dispute as [EPL] "assert amongst other things, that the works performed by [the applicant] did not meet the appropriate standard and required rectification work";

(h) "The rectification work, noncompliance issues and time sheet errors amount to far more than that claimed from [EPL]".

20. I note that no documents were provided evidencing the dispute between [EPL] and the applicant. This may be because none exist, or because [EPL] did not release the documents to the respondent in preparing the response, or for other unknown reasons. I deal with this in more detail later.

21. Neither were any documents provided evidencing the "commercial arrangement" between the respondent and [EPL] referred to by [the respondent's director], or of the loan of $53,376 by the respondent to [EPL] in pursuance of those arrangements, as stated by [BB] in her letter. Those documents, or an explanation of their absence, might have supported the reasons given by the respondent for payment being made by it rather than by [EPL].

22. Also attached to the statutory declaration of [the respondent's director] was an email from [AE] of [the head contractor] to [AB] dated 28 September 2012 stating that [EPL] was engaged by [the head contractor] in 2010 to complete the subdivision and associated works at [the project site]. No contractual documents between [the head contractor] and [EPL] were provided, a matter on which I comment later.

*Applicant's contentions*

23. In his affidavit of 14 September 2012 delivered with the application, [the applicant's representative] said that he was approached by [the site supervisor] in October 2011 to provide plumbing services to the respondent, including an initial review and a report, after which [the site supervisor] asked [the applicant's representative] to repair some of the defects identified in the report. This first report was addressed to the respondent.

24. The applicant performed that work and later provided a second report addressed to the respondent relating to the testing and commissioning of the sewer main.

25. In its further material submitted on 3 October 2012, the applicant said, in summary (taken from the further submissions and the statement of [the applicant's representative] signed 3 October 2012):

    (a) the applicant believed it had a contract with the respondent;

(b) [The site supervisor] indicated to [the applicant's representative] that [the site supervisor] was acting as a representative of the respondent and not any other entity;

(c) at no stage did [the site supervisor] or [the respondent's director] mention [EPL] whatsoever;

(d) the applicant was instructed to forward invoices to [AB's email address] and to [the site supervisor's email address] (I note that the email address on the letterhead of [EPL] is [AB and the respondent's director's email address] and that it is also the email address on the letterhead of [the business name] in Annexure G to [the respondent's director's] statement);

(e) at no time did the respondent take issue with the invoices being issued to it rather than to [EPL], or advise that they were misdirected;

(f) the respondent paid the first and other invoices;

(g) [The applicant's representative] did not notice that payments had been made by [EPL] until he checked his bank statements for the purpose of this application;

(h) it appears that the respondent paid $73,835 and [EPL] paid $90,498 on account of invoices rendered by the applicant;

(i) the applicant provided its initial report to the respondent, not to [EPL], and no-one took issue with that recipient;

(j) the time sheets submitted by the applicant have a box at the foot requiring signature by "[respondent] Civil supervisor";

(k) many of those time sheets have the name "[site supervisor]" next to that box;

(l) some time sheets were addressed to "company: [the business name]";

(m) On 14 December 2011, in response to a request from the applicant for payment of invoice number 34, an email was sent from [AB's email address that incorporates the business name] to the applicant and to

[AB and the respondent's director's bigpond email address], copied to [BB], over a "signature" of [the respondent's director's name, the business name, and address]. That email said (in block letters):

"Good morning
Your invoice issued on 17.11 was for work to 15.11
Our terms of payment as stated at the start with [the applicant's representative] were 30 days
We send our invoices in at the end of each month and receive payment by the end of the next month
We will pay your first invoice at the end of this week
The remaining invoices will be paid in line with the terms originally discussed."

(n) On 5 February 2012, in response to an email from the applicant seeking payment of invoices 40 and 41 which were then allegedly 3 and 5 weeks overdue respectively, another email was sent from [the respondent's director's work email address (containing the business name)] to the applicant over the "signature" of [the respondent's director] without further details. That email said:

"Good morning
As you should be well aware we are tied with large payouts to the receiving of monies in Before Christmas monies were received early and we paid you early
The client has been a bit slower this time however we have now received the payment advice
So funds usually come within 2 days so you will be payed as soon as they are cleared
Business does not always happen the way we want it to
I have made a person commitment to you regarding payment so it will be honoured
This is the second time I have received threats from you
So it is time we met and sorted these attitudes out we will not be doing further business"

(o) By letter dated 7 May 2012, [the applicants representative] wrote to [the business name (but with Pty Ltd added to the name) at the respondent's address and marked for the attention of the respondent's director] relating to outstanding invoices, and received a letter dated 15 May 2012 on letterhead of [the business name, with a Palmerston post office box No and with the bigpond email address of the respondent's director and AB over the signature of the Accounts Auditor for the business name].

(p) This letter is the only objective evidence of a potential dispute about amounts owing to the applicant. It refers to some discrepancies in the hours charged for the applicant's staff because the lunch hour has not been deducted, and says that a full audit of the hours charged on the project will be undertaken. Rather it lends support to the applicant's argument of a contract with the respondent. An Accounts Auditor could be expected to notice and mention invoices being addressed to the wrong company, particularly if there was a potential dispute about the amount of the invoices.

(q) [The applicant's representative] replied to the letter of 15 May on 17 May, to which [the respondent's director] replied [by email from his email address incorporating the business name] over the full name and address of [the business name] as set out above. That email said:

"I should have an answer soon on the funding I am in the process of arranging. This will attend to your outstandings.
[The site manager] told me he spoke to you last night.
Is you send a Plummer over I will guarantee to pay his costs weekly.
If this is acceptable please advise otherwise WE will need to make other arrangements.
Please Advise"

(r) [The respondent's director] is not a director or shareholder of [EPL], nor has he stated in his response that he is an officer, employee or representative of [EPL];

(s) All works performed by the applicant were inspected and approved by a quality assurance officer of [the head contractor] and an independent engineer, and the applicant has received no notification that it "did not meet the appropriate standard and required rectification work".

*Respondent's answering material*

26. As I related in paragraph 8, the respondent submitted further material on 10 October 2012.

27. In her statutory declaration, [BB] said she is the director of [EPL], and then repeated the matters stated by [the respondent's director] in his first declaration summarised at paragraph 19(a)-(g) above. So far as I could discern, no new factual matter was alleged, but of course this statement is

direct evidence from the director of [EPL] rather than from [the respondent's director] who, on the materials in this application, has no formal connection with [EPL] by way of directorship, shareholding, employment or agency. [BB] did not say that [the respondent's director] had any authority to act on behalf of [EPL].

28. I note that no document was produced evidencing either the contract between [the head contractor] and [EPL], or [EPL] and the respondent. While it might be unremarkable that the latter contract was oral only, one would expect a written contract to exist between [the head contractor] and [EPL]. [BB] is the director of [EPL] and has chosen to assist the respondent by making her declaration. One could reasonably expect her to append any document supporting her contention of a contract between [the head contractor] and [EPL].

29. This is not to say I do not accept that contention. In the end, as I explain, I do not think it is decisive that [EPL] maintain it has a contract with [the head contractor].

30. I note also that no documents are offered by [BB] supporting the "financial relationship" between [EPL] and the respondent, nor the dispute [EPL] has with the applicant over the standard of work. This absence of documents, taken with no explanation of their absence, does not assist the respondent in explaining the respondent's payment of the applicant's invoices, nor its contention that the contract was with [EPL] rather than the respondent. [BB's] declaration contains assertions unsupported by documents when one would expect documents to exist, and without explanation of their absence.

31. There is also no explanation of why [EPL] allowed the applicant to continue submitting invoices to the respondent. Having invoices addressed to [EPL] for payment for which it says it was liable would presumably be important for it, not only for its contractual liability to the applicant (and perhaps the respondent), but also for income tax, GST, insurance (perhaps) and liability under the head contract.

32. Neither does [BB] say that the applicant was informed, at any time, of the contract [EPL] had with [the head contractor], of the applicant's contract being with [EPL], or of the financial relationship between [EPL] and the respondent as an explanation of the respondent's paying some invoices.

33. Finally, no documents are provided by [BB] evidencing [the site supervisor's] contractual hire by [EPL] from the respondent – no contract, no letter of engagement, no pay slips, no time sheets, or any other document supporting the assertion. Neither was there any explanation for the lack of documents..

34. In his new statutory declaration, [the respondent's director] says that he specifically recalls stating to [the applicant's representative] on or about 30 October 2012 (sic, I presume he means 2011) that the respondent was contracted to [EPL] and that the applicant would be doing work for [EPL]. He denies that [the applicant's representative] was not informed that the applicant would be contracting with [EPL].

35. This is a factual dispute between [the applicant's representative] and [the respondent's director], which, if necessary, is to be resolved on the balance of probabilities. I will deal with it below under "Consideration of the material".

36. I note that [the respondent's director] proffers no explanation of:

    (a) why the applicant's two reports were addressed to the respondent rather than to [EPL];

    (b) why the respondent did not correct the addressees of the reports if they were wrong;

    (c) why the respondent did not correct the applicant's addressing of the invoices to the respondent;

    (d) why the addresses on emails in this adjudication bearing his name had the domain name of the respondent rather than of [EPL];

    (e) why the letters in this adjudication bear the name of the respondent rather than of [EPL];

(f) his authority to enter a contract on behalf of [EPL], despite this being directly raised by the applicant in its material delivered 3 October 2012.

37. In his new statutory declaration, [the site supervisor] gives an explanation of his employment slightly different from that of [the respondent's director] and [BB]. They both say that he was on "contractual hire" to [EPL] from the respondent. He says he was working for the respondent as [EPL] representative (par 2). Perhaps the difference is only in description, but it seems that at all times he remained in the employ of the respondent and that pursuant to some arrangement between [EPL] and the respondent, he was [EPL's] representative.

38. Again, no document was provided evidencing that appointment. Even if the appointment was not formal, one would expect there to be some document in existence passing from [the site supervisor] as [EPL]' representative to some other party ([the head contractor], for example). If there is, I have not seen it.

39. [The site supervisor] says that he told [the applicant's representative] that he worked for the respondent which was working for [EPL] and that [EPL] needed a plumber. He says he told [the applicant's representative] that [the respondent's director] would "discuss rates and the like on behalf of [EPL]." (par 4).

40. [The site supervisor] says that [the respondent's director] spoke to [the applicant's representative] in his presence in late October 2011 and told [the applicant's representative] that the respondent was contracted to [EPL] and that the applicant would be working for [EPL] under the respondent's direction.

41. Pausing there, this assertion that the applicant would be working for [EPL] under the respondent's direction does not fit well with the assertion that [the site supervisor] was [EPL's] representative. If the applicant's contract was with [EPL] and [the site supervisor] was directing the applicant, it would presumably be as representative of [EPL]. Thus on this version, the applicant would be working under the direction of [EPL], since [the site supervisor] was [EPL's] representative.

42. [The site supervisor] says that when the first invoice came from the applicant, he pointed out to [the respondent's director] that the applicant had not deducted the lunch hour and had directed the invoice to the respondent. He said [the respondent's director] said he "would sort it out".

43. Very curiously, [the respondent's director] himself does not depose to this conversation or explain what steps he took to "sort it out", or why he did not, or what he did in relation to either the wrongly claimed lunch hours or the incorrect addressee on the invoice. [The respondent's director], apparently the person to whom [the site supervisor] deferred on this job and who appeared to be in ultimate control of the contracting, does not mention this important issue.

44. There remains no explanation from the principals of either [EPL] or the respondent as to why neither of them attempted to correct the allegedly incorrectly addressed invoices.

45. [The site supervisor] also said in his most recent declaration that the applicant did not provide him with time sheets and that they were left with the office of the respondent or [EPL] (par 7). He said that at no time did he say to anyone on behalf of the applicant that the respondent was responsible for payment of the applicant's invoices or that the arrangement was with the respondent. He said that he specifically told [the applicant's representative] when they first spoke that he would be working for [EPL] and would need to invoice them (par 8).

*Consideration of the material*

46. The applicant did not address the test I should apply in determining the parties to the contract. The respondent said in its final submissions of 10 October that the enquiry is not to the parties' subjective intentions "but the objective intentions of the parties, based on what two reasonable businessman making a contract of that nature, in those terms and in those surrounding circumstances, must be taken to have intended", citing *Bridges & Salmon Ltd v The Swan (Owner)* [1968] 1 Lloyd's Rep 5 at 12. I agree and apply that test, as applied in recent years in a number of Australian cases including the Full Federal Court in *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers*

(2007) 243 ALR 472 at [23] and the Federal Court in *Lampson (Australia) Pty Ltd v Australian Crane & Machinery Pty Ltd* [2008] FCA 400 at [23].

47. The respondent submitted that I cannot have regard to post-contractual conduct in determining who were the parties to the contract. It is undoubtedly the law that, in accordance with the prevailing objective theory of contract, post-contractual conduct is irrelevant in construing the terms of a written contract other than in limited circumstances which do not apply here: *Current Images Pty Ltd v Dupack Pty Ltd* [2012] NSWCA 99 and the many cases it cites.

48. However, it is otherwise where the contract is oral and the issue is the existence of the contract involving a question as to the parties. In *Tomko v Palasty* [2007] NSWCA 258 at [68], after reviewing authorities, Einstein J said, with Mason P agreeing:

> Hence subsequent communications may legitimately be used against a party as an admission by conduct of the existence or non-existence, as the case may be, of a subsisting contract, where an issue concerns whether a particular person was a party to that contract.

49. Last year, in *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303, Campbell JA, with Basten JA and Sackar J agreeing, said:

> [141] There is a vast difference between the task that is involved in interpreting a wholly written contract, and the task involved in finding what has been agreed in a contract that is not wholly in writing. The difference between those tasks in itself makes a vast difference between the circumstances in which post-contractual conduct can be relevant for the respective tasks.
>
> [143] By contrast, the task in ascertaining what are the terms of a contract that is not wholly in writing is quite different — the task is finding as a fact what the parties have agreed. A range of post-contractual conduct could be relevant to ascertaining what the parties have agreed. For example, their conduct in carrying out the contract could itself be objective evidence of what they had agreed, an admission of one of the parties could assist in ascertaining what they have agreed, and business records created to record or report on the contract rather than carry it out could also assist in that task.
>
> [145] Spigelman CJ's analysis [in *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193] would permit subsequent conduct to be used to ascertain the terms of a contract that was wholly or partly oral even if the party to the litigation against whom the evidence was sought to be used was not party to the contract in question, or even if no party to the litigation had engaged in the subsequent conduct in question. The subsequent conduct is an objective matter that operates as retrospect ant evidence of what the parties to the contract had earlier agreed.

50. I take it that this was the way in which Brandon J in *The Swan* at 13 used the plaintiff's "subsequent conduct" of sending their bills to the company rather than to the defendant. In any case, his Lordship had regard to their post-contractual conduct where the contract was partly oral and the question was who were the parties to the contract?

51. In my view, those comments apply to this case where the applicant alleges a wholly oral contract and the respondent denies the existence of a contract between it and the applicant and says it is not a party to the contract. Any admissions by conduct by the respondent after the contract was formed may be taken into account in determining the contract's existence and its parties.

52. But to err on the side of caution, I will consider the question of the parties to the contract both having regard to and not having regard to post-contractual conduct. I will make such findings of fact as I can and then consider the issue in those ways by first putting aside any findings as to post-contractual conduct.

53. I make the following findings of fact on the balance of probabilities from the material submitted by the parties:

    (a) when the applicant submitted the first report to the respondent, no-one told the applicant that the respondent was the incorrect recipient and no mention was made of [EPL];

    (b) when the applicant was engaged to conduct the work, it was engaged by [the site supervisor] who indicated he was employed by the respondent;

    (c) when the applicant submitted the second report to the respondent, no-one told the applicant that the respondent was the incorrect recipient and no mention was made of [EPL];

    (d) all invoices were submitted to the respondent without any objection from the respondent, despite the respondent apparently having an Accounts Auditor;

    (e) the first invoice was paid by the respondent, with later invoices being paid by either the respondent or [EPL];

(f) although [EPL] paid some invoices, it never told the applicant that the respondent was the incorrect recipient of the invoices and they should be addressed to [EPL];

(g) the first time the respondent raised the argument that the contract was with [EPL] was in its response to this application;

(h) at no time during the course of the course of the contract did the applicant receive a letter or email apparently from [EPL] dealing with matters relating to the work under the contract (or any other matter so far as I can tell);

(i) "[the business name]" was a trading name of the respondent (see the letter from [EPL] signed by [BB], undated, referred to earlier);

(j) all written communications to the applicant about matters relating to the contract were on the letterhead of the respondent or by emails bearing the respondent's name, or were by emails from [the applicant's representative] showing an email address indicating the respondent;

(k) all communications I have seen to the applicant about performing the contract and payment under the contract were from [the site supervisor] or [the respondent's director] or the respondent's Accounts Auditor;

(l) [The respondent's director] is the sole director and secretary and a joint shareholder of the respondent. He is not a director, secretary or shareholder of [EPL], nor has he or [BB] claimed in the response that he is an officer, employee or representative of [EPL].

*Not considering post-contractual conduct*

54. I will first leave aside any post-contractual conduct as an indicator of who the parties considered were the parties to the contract. I will, however, consider that conduct legitimately in determining the truth of assertions made about pre-contractual conduct. The post-contractual conduct I refer to is set out in paragraphs (c) to (j) inclusive above.

55. An important issue is whether [the respondent's director] and [the site supervisor] told [the applicant's representative] that they represented [EPL], that the contract would be with [EPL] and that the applicant should invoice [EPL], as they assert. I have not addressed that issue above since it required some explanation, which I now provide.

56. Those assertions are disputed by [the applicant's representative]; consequently I need to determine their truth on the balance of probabilities on the material before me. In my view, I can have regard to post-contractual conduct in determining the likelihood of those assertions; I can compare the assertions with later conduct to determine their consistency with that conduct, and, if inconsistent, I can reject them on the balance of probabilities.

57. The credibility of witnesses is in issue and all I have are statutory affidavits and declarations, without having seen witnesses being examined and cross-examined. The remarks of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at 128-129 are apposite where their Honours said:

> Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical

58. Justice Brandon found himself in a similar situation in *The Swan* where he said:

> Taking the view of the witnesses that I do, I have not found ti possible to resolve the conflicts between them by always accepting the version of one side or the other. I have rather had to judge each conflict separately and resolve it in the main by considering the consistency or otherwise of either side's evidence with the contemporaneous documents and the commercial and human probabilities of the case.

59. I propose to use any post-contractual conduct in that sense – as contemporary materials, as objectively established facts and as to the apparent logic and inherent probability of events (the commercial and human probabilities of the case, to use Brandon J's phrase).

60. Turning to that conduct, although [the respondent's director] and [the site supervisor] say they told [the applicant's representative] the contract was with, and invoices should be submitted to, [EPL]:

(a) they did not object when the two reports were addressed to the respondent;

(b) they did not object when all of the invoices were addressed to the respondent;

(c) all but the last invoice was paid;

(d) no point as to the addressee of even the last invoice was raised until this application was made;

(e) [the respondent's director] does not depose to [the site supervisor's] pointing out to him the incorrect addressee on the invoices;

(f) [the respondent's director] did nothing, on the material before me, to "sort out" the issues with the invoices, if [the site supervisor] in fact pointed them out to him;

(g) [the respondent's director] apparently sent emails from an address showing the respondent's domain name;

(h) letters on the respondent's letterhead were sent to the applicant about the contract;

(i) on the material before me, the first time the respondent raised the argument that the contract was with [EPL] was in its response to this application;

(j) no letters apparently from [EPL] were sent to the applicant about the contract or anything else;

(k) [the respondent's director] has not stated how he derived authority from [EPL] to form a contract on its behalf with the applicant, even though that was placed in issue by the applicant in this application;

(l) [the site supervisor's] position as "representative" of [EPL] is ambiguous, and is unsupported by any documentation. In any case, it appears that he is not being held out as the one who formed the contract with the applicant on behalf of [EPL], with that being done by [the respondent's director].

61. In my opinion, that conduct and state of the evidence is inconsistent with their having said that [EPL] was the contracting party and the appropriate recipient of the invoices in the early meetings with [the applicant's representative]. Perhaps one or two of those events may have occurred as an oversight, but that concatenation of events strongly indicates that they did not say those things to [the applicant's representative].

62. Turning to the inherent probability of events, no explanation has been offered as to why the applicant would submit invoices to the respondent if it had been told its contract was with to [EPL] and to submit invoices to that company. There is no apparent benefit to the applicant in submitting invoices to the respondent rather than [EPL]. But there is an obvious benefit to the respondent in now denying any contract with the applicant and asserting the applicant was told its contract was with [EPL] in the beginning.

63. I find it inherently improbable that the applicant would send all its invoices to the respondent without any comment or complaint from the respondent or from [EPL] if Messrs [the site supervisor] or [the respondent's director] had said (or believed) the contract was with, and invoices should be submitted to, [EPL]. This is particularly the case when no-one on behalf of the respondent or [EPL] provides a reason for not correcting the invoices, and emails and letters to the applicant are from the respondent, not from [EPL].

64. In summary, the applicant's conduct after the contract was formed is consistent with its not having been told that the contract was with [EPL]; the respondent's conduct post-contract is entirely inconsistent with the applicant having been so told.

65. I therefore reject the respondent's assertions that [the respondent's director] or [the site supervisor] told [the applicant's representative] that the applicant's contract would be with [EPL] and that invoices should be submitted to that company.

66. I can accept for the purposes of the application, without deciding, that Messrs [the respondent's director] or [the site supervisor] may have told [the applicant's representative] that the respondent's contract was with [EPL]. That information is not at all inconsistent with the applicant's contract being with the respondent rather than with [EPL]. It is a common situation of a subcontract. But I find strange the manner in which the respondent has endeavoured to prove that its contract was with [EPL] and [EPL's] contract was with [the head contractor]. Rather than simply annexing a copy of the contracts or contemporaneous documents created in pursuance of the contract, the respondent has relied on secondary statements of witnesses. Neither has it said that the contracts were oral and that no documents were created under them. I would be surprised if the contract with [the head contractor] were oral given that it is a consortium of three large, relatively sophisticated Territory construction companies.

67. This absence of documents, with no explanation of their absence, raises a doubt in my mind as to the party to the [the head contractor] contract, even though there is an email from the Contract Administrator of [the head contractor] stating "To whom it may concern" that "[EPL] NT was engaged by [the head contractor] in 2012 to complete the subdivision and associated works at [the project site]." This is secondary evidence of a primary document and, while I am not bound by the rules of evidence, in the circumstances of this application, such a bland statement without explanation of the absence of the documents does not carry much weight.

68. If I had to decide (which I do not think I do), I would find that on the material before me on the balance of probabilities the respondent has not proven that the contract with [the head contractor] was with [EPL] and that [EPL] had a contract with the respondent. There are too many bald assertions unsupported by documents one would expect to exist.

69. I should also say that I consider the respondent had an evidential burden to show that the applicant's contract was with [EPL] since it was the one who raised the defence contrary to the objective documentary evidence offered by the applicant which prima facie proved its case to the requisite standard. He who asserts must prove, and the respondent is positively asserting these matters as a defence after the applicant prima facie discharged its burden.

70. Excluding the alleged assertions as not proven on the balance of probabilities, I have no doubt that a reasonable contractor in the position of the parties would have considered the contract was between the applicant and the respondent and I so find to a high degree of satisfaction.

*Considering post-contractual conduct*

71. I have come to that conclusion excluding post-contractual conduct in determining the objective intention of the parties. Since I have found that their objective intention would have been a contract between them, strictly speaking I do not need to consider it again taking the post-contractual conduct into account. But for completeness and in case I am wrong in the approach I have taken coming to that conclusion, I will briefly consider whether the conduct of the parties after the contract was formed amounted to an admission in the sense that word is used in the authorities referred to above.

72. In summary, the formation of the contract, the performance of the contract, and even disputes under the contract were conducted by persons representing themselves (orally or by email and letter) as from the respondent. In my view, the facts set out at par 60 (a) to (i) above, but excluding sub-par (e), amount to admissions by the respondent that the contract was with it rather than with [EPL], and I so find.

73. Essentially, the only objective fact relied upon by the respondent to indicate that the contract was with [EPL] was [EPL's] payment of some of the applicant's invoices. The respondent says that its – the respondent's – payment of the remaining invoices was because of a funding arrangement between it and [EPL] whereby the respondent provided funding to [EPL]. But [EPL's] payment of some invoices is equally consistent with the reverse funding

arrangement, whereby [EPL] would provide funding to the respondent. This is especially the case in light of [the respondent's director's] email of 17 May 2012 from [his email address incorporating the business name] in which he said "I should have an answer soon on the funding I am in the process of arranging. This will attend to your outstandings". To a reasonable contractor in the applicant's position, this would have supported a perception that the respondent was in need of funding, with quite possibly some of that funding coming from [EPL], either in the past or the future.

74. [The applicant's representative] says neither he nor anyone on the applicant's behalf noticed that some payments were from [EPL]. I do not have to decide whether this is the case, although I certainly find it possible. But even had the applicant noticed [EPL's] payments, in the light of all the other indications I have mentioned pointing to the contract being with the respondent, I do not think this would have made a reasonable contractor consider they had a contract with [EPL]. But I will go further and say that, even if every payment had been made by [EPL], in the absence of anything more and in light of the facts I have found above, I think a reasonable contractor would still consider it had a contract with the respondent.

75. Relying on the undated but apparently recent letter from [EPL] signed by [BB], the respondent says [EPL] has a dispute with the applicant over the quality of the work. No documentary evidence of [EPL's] dispute was produced, despite its director submitting a declaration in support of the respondent and repeating the same formula of words as in her letter and in [the respondent's director's] first declaration. The only documentary evidence before me of a dispute is the letter from the Accounts Auditor of the respondent.

76. On the material before me on the balance of probabilities I do not accept that [EPL] has dispute with the applicant as alleged. There is no objective evidence supporting that allegation when one would expect there to be if a genuine dispute existed between them.

77. It seems very strange that the Accounts Auditor, who was concerned to comb through all of the time sheets in search of improperly claimed lunch hours, would not notice the allegedly incorrect name of the payer on all of the

invoices submitted. One would expect this to be a critical matter, relevant not only to contractual liability, but to income tax, GST, insurance (perhaps) and liability under any head contract. The absence of any complaint from the respondent as to the name on the invoices, particularly when it had this Accounts Auditor looking for errors, would undoubtedly add to the perception of a reasonable contractor that the name on the invoices was correct.

78. In its latest submissions of 10 October, the respondent said at par 12(b) that the fact that the respondent did not take issue directly with the applicant over the incorrectly addressed invoices cannot be taken to be a form of acquiescence or estoppel by conduct. The applicant has not relied on acquiescence or estoppel by conduct but since they have been raised by the respondent who has had an opportunity of addressing them, I will deal briefly with estoppel. I consider there is a very good argument that the same matters I have held were admissions by the respondent and therefore able to be taken into account also create an estoppel preventing the respondent from denying that the applicant's contract was with it or that invoices addressed to it would be paid without demur as to the party to the contract.

79. If one takes the elements of estoppel by conduct to be representations, intended to be acted upon, and in fact acted upon to the detriment of the actor, then in my view:

(a) those admissions amounted, alone and cumulatively, to representations that the applicant's contract was with it or that invoices addressed to it would be paid without demur as to the party to the contract;

(b) those representations were intended by the respondent to be acted upon by the applicant by continuing to do the work; and

(c) the representations were acted upon by the applicant to its detriment in continuing to do the work and submitting invoices to the respondent rather than to [EPL].

80. In *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 443, Deane J said "Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs". Clearly this is an abbreviated description of the doctrine, however in my view an estoppel would be created to preclude the

respondent from departing from the assumed state of affairs *which it created*, namely that the applicant's contract was with it and not with [EPL]. I make it clear I do not base my determination on this view. I am simply dealing with a submission raised by the respondent.

81. The reason given by the respondent in par 12(b) of its final submissions for there not being acquiescence or estoppel by conduct is "the uncontradicted evidence of the respondent is that all invoices were passed on the principal, [EPL]."

82. To my mind, this on its own does not assist the respondent when the issue is representations made by the respondent to the applicant. Unless the respondent told the applicant that it was forwarding all invoices to [EPL], the respondent's acceptance of the invoices and arranging of payment would act as a representation that the respondent was liable or that it would not take the point of the addressee being incorrect. Uncommunicated conduct does not assist the respondent in dispelling or negating representations it had made.

*Evidence generally*

83. In paragraphs 14 to 20 of its submissions of 10 October, the respondent objected to certain paragraphs of [the applicant's representative's] affidavit of 3 October 2012. An adjudicator is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate: s 34(1)(b). I considered it appropriate to make my determination on the basis of the materials submitted by both parties, giving them such weight as I have indicated.

**Conclusion on parties to the contract**

84. On the material before me on the balance of probabilities I have no difficulty in finding that the contract was between the applicant and the respondent, and I so find.

85. Since that was the only objection to my jurisdiction, and since I have found that I otherwise have jurisdiction, I formally find that I have jurisdiction to determine the application.

**THE APPLICATION**

86. The applicant seeks $63,780.50 inclusive of GST plus interest, being the amount said to be outstanding in respect of a payment claim made on 18 June 2012 (the payment claim). The amount claimed is the total of the amount due for work of $57,982.27 plus GST of $5,798.23. It is for plumbing work on [the project site].

87. The respondent raised no substantive defence to the amounts claimed in the payment claim. On their face so far as I can determine on the materials before me on the balance of probabilities, I find that the work was done and that the amounts claimed are appropriate.

88. I find that:

(a) a valid payment claim was made on 18 June 2012;

(b) payment has not been made;

(c) a payment dispute arose 28 days later on 16 July 2012 by virtue of s 8 and cl 6(2) of Division 5 of the Schedule to the Act and;

(d) this application for adjudication was made within time – s 28;

(e) the applicant is entitled to the sum claimed of $63,780.50.

89. The applicant also seeks interest under s 21 and Division 6 of the Act. This is not opposed by the respondent. The applicant seeks interest at 10.25% under s 85 of the *Supreme Court Act 1979* (NT) pursuant to cl 9 of the Regulations to the Act.

90. I find that the applicant is entitled to interest at 10.25% from 16 July 2012 to the date of payment. Interest for 88 days from that date to the date of this determination (12 October 2012) is:

$63,780.50 x 10.25% x 88/365 = $1,576.16.

**DETERMINATION**

91. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $65,356.66 being the amount owing of $63,780.50 plus interest of $1,576.16 under s 35(1)(a). The sum of $65,356.66 is payable immediately.

**Costs**

92. On 7 October 2012 I informed the parties by email that I proposed to give them an opportunity of considering this determination and making submissions before I decide the question of costs. I said that it seemed to me that s 36 contemplates a decision on costs separate to the substantive determination, particularly where in subsection (3) where it requires written notice of the decision and reasons, and in subsection (4) where it apples Divisions 4 and 5 to a costs decision. These Divisions relate to the effect and enforcement of determinations. I invited the parties to inform me if they disagree with my approach and said that if they did, the issue would have to be determined. Neither party responded to my email, which I take to be an indication they have no objection to that course.

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

Dated: 12 October 2012

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CAMERON FORD

Registered Adjudicator