IN THE MATTER OF
An Application for Adjudication pursuant
to the *Construction Contracts (Security of Payments) Act* (the "Act")

BETWEEN

AND

Adjudication Identification No: 40.15.01

ADJUDICATOR'S DETERMINATION

For the reasons that follow, I make the following determination:

1. I have jurisdiction to evaluate the adjudication application.

2. The adjudicated amount is $64,357.15; this is inclusive of GST. This shall be paid by the Respondent to the Applicant on or before 1 February 2016.

3. Additionally, interest shall be paid by the Respondent to the Applicant on the adjudicated amount. Interest accrued until the date of determination is $399.90 and this shall be paid by 1 February 2016. Interest continues to accrue at the rate of $7.14 per day.

4. Additionally, the Applicant and the Respondent shall pay for the cost of this adjudication in equal shares of $3,291.75. Total cost of adjudication is $6,583.50.

Dated: 25 January 2016

Chidambara Raj C.B.
Adjudicator

Perth, WA

REASONS

BACKGROUND

1. The application for adjudication ("Application") refers to the supply of concrete for the works associated with Alice Springs [redacted] Project. The Applicant supplied ready-mix concrete to the Respondent. The Respondent acknowledged that the 'Terms of Sale', which was provided along with the Application, was part of their contract. The Respondent started to purchase goods and services from the Applicant in 2014.

APPOINTMENT OF ADJUDICATOR

2.1 The adjudication application was received by the Institute of Arbitrators & Mediators Australia (IAMA), the Prescribed Appointer designated by the Applicant, on 17 Dec 2015. I was appointed by IAMA as the Adjudicator to determine this application on 22 Dec 2015; I accepted the appointment. I am a Registered Adjudicator under section 52 of the *Construction Contracts (Security of Payments) Act, Northern Territory,* and my registration number is 40.

Conflict of Interest

2.2 From my review of the Application, I have no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen; I was not associated with the parties to the contract. The details of my appointment and the absence of conflict of interest were declared to the parties in a letter.

Order, Judgment or Other Finding

2.3 I asked the Parties to advise me in writing as to whether there had been any order, judgment or other finding by an arbitrator or other person or Court about the dispute that is the subject of this adjudication application. The Applicant and the Respondent confirmed that the dispute was not submitted to another adjudicator in the past, or to an arbitrator or a Court for resolution. Hence, this application does not warrant dismissal under section 33(1)(a)(iii) of the Act.

ADJUDICATION APPLICATION AND RESPONSE

3.1 Following the appointment, I received the adjudication application from IAMA. It is a plastic ring binder, which included the Application with 9 attachments. A copy of the 'Terms of Sale', a set of invoices, and letters of correspondence were enclosed with the adjudication application. In response to my query, [the Applicant] circulated an email that the Application was mailed to two addresses of the Respondent in Darwin by Registered Post on 16 Dec 2015, with tracking numbers 515729498019 and 515729497012. Upon tracking, one of the items showed delivery date as 21 Dec 2015. Hence, the date of service of the adjudication application on the Respondent was 21 Dec 2015. Independent of this, the Respondent confirmed the date of receipt of the application as 21 Dec 2015.

3.2 A hardcopy of the Response to the Adjudication Application ("Response") was hand-delivered to me on 7 Jan 2016; the person who brought it identified himself as Mr. [B] with telephone [No redacted]. Consequently, the date of service of the Response is 7 Jan 2016. A soft copy of the Response was also received by email on the same day. I received another hardcopy on the following day delivered by Toll. Generally, I used the copy delivered by Toll from Darwin.

3.3 Identification and contact details are as follows:

(a) Applicant: [redacted]

(b) Respondent: [redacted]

By an email dated 30 Dec 2015, De Silva Hebron, Barristers & Solicitors, informed me that they would act for the Respondent. Their details are:

De Silva Hebron
47 Knuckey Street
Darwin NT 0800
ACN: 065 226 922, ABN: 65 065 226 922
Contact: Melissa Yates
Phone: (08) 8924 4944, Fax: (08) 8924 4933

Prescribed Appointer: Institute of Arbitrators and Mediators Australia
Corporate Edge, Suite 3
11 Preston Street
Como WA 6152
ABN: 80 008 520 045
Tel: (08) 6278 2022, Fax: (08) 6278 2033

3.4 During the adjudication process, for email correspondence, the following addresses were used by the parties:

For the Applicant: [redacted]

For the Respondent: [redacted]

Additional Documentation

3.5 Section 34(2)(a) of the Act provides that I can seek additional documentation from the parties that would help to make the determination. I asked the parties to provide clarification and documents of evidentiary importance. Both parties responded to my queries promptly. In general, each party was given two days to respond to the questions. After one party responded to my question, the other party was given two days to comment on the response from the first party. The following were my questions:

Question 1 [To the Respondent]:

(a) In the Response, para 11, it is stated that a quotation was first obtained from Mr [AC] on 15 Oct 2013; then, supply of concrete started around Oct 2014 (almost a year later). Please provide a copy of the first invoice received from [the Applicant].

(b) At para 72, it is stated that Beam 1/03 and 1/04 were poured on 24 Feb 2015, which were ultimately rejected based on strength testing. Please provide a copy of the invoices received from [the Applicant] for the concrete for these rejected beams.

(c) At para 81, it is stated that for rejected deck beams, additional concrete was purchased from [the Applicant] and it was re-poured. Please provide a copy of the invoices received from [the Applicant] for the concrete that was re-poured, thereby, concrete was of acceptable quality.

Question 2 [To the Applicant]:

Response, para 93-94, refers to [the Applicant's] Terms and Conditions and Australian Consumer Law. Please provide your comments (if any) about para 93-94.

Question 3 [To the Respondent]:

At para 77-79 of the Response, it is stated that Panel 3, 4 and 6 were rejected by [the head contractor]. Please provide a copy of the invoices from [the Applicant] for that concrete.

Question 4 [To Both]:

(1) Refer to the Response, Attachment 15, email written by Mr [WH] dated 18 Feb 2016, this sentence "...To achieve specified slump (140) higher dosage of Super Plasticiser onsite". With reference to this sentence, please describe the way superplasticiser was added at site. Your description shall include the following information.

(a) Who was in-charge of the activities at the site?

(b) Generally, who were all present at the site when superplasticizer was added and concrete was poured?

(c) Who purchased the superplasticiser and where was it stored normally?

(d) Who received the concrete on behalf of [the Respondent]?

(e) Who is responsible for curing of concrete?

Note that different set of people might have been present at the site on different days; you need not describe "every day". Consider a "typical day" when concrete was poured and describe it.

(2) Para 65-80 of the Response describe the events in Feb-Mar 2015 during which the quality of concrete is being disputed; also, Application refers to the disputed concrete from Feb-Mar 2015. Now, consider the months of April-May 2015 and answer the following:

(a) Was concrete supplied during April-May 2015?

(b) If so, please provide 3 typical invoices of [the Applicant] from April-May for the supply of concrete or other materials, the quality of which is not in dispute.

(c) Was superplasticiser added during April-May? If so, was there a difference in dosage between the disputed concrete in Feb and the undisputed concrete in April?

(d) Are there significant differences between the concrete supplied during Feb-March and later months?

You may include supporting documents/pictures, where appropriate.

3.6 While responding to my Question 1, Mr. [IA] provided additional comments about some paragraphs in the Response. Ms. [MY] objected to such extra comments. Consequently, I did not take those extra comments into consideration. In making this determination, I have had regard to all the other information and documents.

3.7 I did not consider it necessary to inspect the site of the project nor the parties asked for an inspection.

CONTRACT BETWEEN THE PARTIES

4.1 It is a common fact that a contractual relationship existed between them for the supply of construction materials, including concrete; [the Applicant] was the supplier; [the Respondent] was the purchaser. The Respondent showed an invoice (No. 9401539472) dated 17.9.2014 and noted that that was the first invoice issued by [the Applicant]; the invoice was for the supply of Fill Scalps. The Applicant showed another invoice (No. 9401662269) dated 26.11.2014 and noted that that was first invoice for the supply of concrete. The dispute that is the subject of this adjudication application relates to the concrete supplied during February – March 2015. Material supplied in 2014 is not in dispute; those invoices issued in 2014 are also not in dispute. Based on the date on the invoices, it is obvious that their contractual relationship started in 2014. In all the invoices, Account Number is uniformly shown as 554657; this confirmed that [the Respondent] holds account number 554657 with [the Applicant].

4.2 The Applicant provided a copy of the 'Terms of Sale' (Application, Attachment 3); The Respondent acknowledged those terms as a part of their contract (Response, para 19). So, the 'Terms of Sale' represent common areas of agreement between the parties.

4.3 Further, exchange of email is observed; verbal discussion is acknowledged in some of the emails. I conclude that these communications form part of their contract.

4.4 I find that the work under the contract is construction work as that term is defined in s.6 and 7 of the Act. Supply of concrete to a construction site comes under section 7(1)(a) of the Act; this is acknowledged in the Response, para 26-27.

4.5 For the purpose of section 6(1) of the Act, the construction site is located in Alice Springs, Northern Territory.

THE DISPUTE

5.1 The Applicant noted that payment did not materialize for a set of invoices with aggregate value at $85,217.15.

5.2 The Response (para 58) disputed the adjudication application on several grounds, which include the following.

(a) Application for adjudication contains invoices, which are not valid payment claims.

(b) Application is made out of time with respect to section 28 of the Act.

(c) Application contains multiple payment claims; it purports to 18 disputes.

(d) The Respondent likes to set-off losses (Response, para 5) incurred by him.

WHETHER SIGNATURE IS REQUIRED

6.1 In the Response (para 33), it is noted that the invoices, which were included in the adjudication application, were not signed; based on this, it was argued that the invoices were not valid payment claims. I disagree with this argument for the following rationale.

6.2 It is true that there is no signature in the invoices.

6.3 Parties noted that their contractual relationship started in 2014; within their working arrangement, there were a number of undisputed invoices that were paid for by the Respondent. I examined the format, structure and content of such undisputed invoices, including the earliest invoices exchanged in 2014:

(a) Invoice No: 9401539472, dated 17.9.2014; and

(b) Invoice No: 9401662269, dated 26.11.2014.

6.4 Further, the Applicant and the Respondent showed three invoices, each from April-May 2015, which remain undisputed relating to format, structure, content and payment practices.

(a) Invoice No. 9401868364, dated 28.4.2015

(b) Invoice No. 9401872681, dated 30.4.2015

(c) Invoice No. 9401900484, dated 19.5.2015

(d) Invoice No. 9401868363, dated 24.4.2015

(e) Invoice No. 9401856068, dated 20.4.2015

(f) Invoice No. 9401851138, dated 1.4.2015

I observe that, the standard format of the invoice issued by [the Applicant] did not contain any signature. From the conduct of the parties, it is obvious that, in their contractual arrangement, unsigned invoices were paid for.

6.5 By continually accepting unsigned invoices, the Respondent had created an expectation that signature was not required; since the Respondent had honored several unsigned invoices in the past, it is noticeable that the Respondent is acting inconsistently now by expecting signature on the invoices that are included in the adjudication application. On the grounds of conduct and estoppel, I dismiss the arguments of the Respondent relating to the format, structure and content of the invoices. I conclude that unsigned invoices remain as valid documents for payment.

INVOICES

7.1 It is noticeable that the words "Invoices" and "Payment Claims" are interchangeably used by the parties in their communications. Actually, the documents issued by [the Applicant] are titled as 'Tax Invoice'. When the phrases are used interchangeably by the parties, it tends to distort the intended purpose; the following paragraphs clarify these terms.

7.2 In its plain meaning (Longman Dictionary, Pearson Education Ltd, 4th edition, 2005), 'Invoice' refers to *'a list of goods that have been supplied or work that has been done, showing how much you owe for them'*. Other sources provide a similar meaning as in Table 1:

Reference	**Meaning, Significance or Definition of 'Invoice'**
Oxford Dictionary, http://www.oxforddictionaries.com/	A list of goods sent or services provided, with a statement of the sum due for these; a bill
Australian Tax Office, (Definition for Tax Invoice) http://www.ato.gov.au/	A document generally issued by the supplier. It shows the price of a supply, states if it includes GST, and may show the amount of GST. It must show other information, including the ABN of the supplier

Table 1.

7.3 My emphasis is underlined. Invoice always refers to a list of goods/services supplied, for which a value is shown. In the current case, each invoice is a document that indicates that [the Applicant] has supplied some goods & services, thereby, completed certain obligations under their contract.

Account Number

7.4 Additional facts are available from the invoices and letters of correspondence. In all the invoices, an account number is indicated in the upper right portion; it is 554657

7.5 Further, the parties used 554657 in their correspondence: for example, letter from Ms. [AC] to Mr. [IE], dated 22 Sep 2015; also, there was a reply letter from Mr. [IE] to Ms. [AC] dated 16 Nov 2015.

The evidence confirms that the parties operated an account and identified it by 554657; the account was standing with credit at $85,217.15 in favour of [the Applicant] on 22 Sep 2015; hence, it was a credit account.

7.6 The Response (para 18) noted that,

"[the Respondent] never queried or disputed the rates charged for various types of concrete and associated materials or services supplied and implicitly accepted those rates by paying the invoices when due."

The Application (page 2, Background) noted that,

"Claimant supplied ready mix concrete from October 2014 to August 2015 and all invoices to 31st May 2015 were paid with no monies outstanding."

From these statements, I gather that, there was little or no conversation between the parties about prices and payment practices starting from 2014 and leading to Sep 2015. Whenever goods were supplied, an invoice was generated, and the invoice qualified for placement as a part of the credit account; whenever [the Respondent] paid an amount, it qualified for adjustment against the outstanding amount in the credit account.

7.7 Since the parties operated a credit account, it is common knowledge that each invoice was merely a part of the credit account. Consequently, the terms associated with the credit account would override the terms associated with the invoices. The terms of the credit account are available in the 'Terms of Sale'; The Response (para 19) acknowledged the 'Terms of Sale' as part of their contract. In the 'Terms of Sale', clauses 13-21 describe payment practices:

(a) Clause 15 suggests the existence of credit limits for certain accounts, and it gives an indication that credit limits may be exceeded at times;

(b) Clause 15 acknowledges the possibility of late payments, and that late payments may be acceptable;

(c) Clause 21 indicates that overdue accounts may be charged interest; and,

(d) Clause 20 indicates that [the Applicant] can vary or withdraw the credit limit at any time.

Based on the above, it is obvious that, a broad framework for operating the credit account was in place.

OPTIONS FOR PAYMENT

8.1 In a typical invoice issued by [the Applicant], more than one option for payment is evident. These are,

(A) Account No: 554657 (This was discussed in para 7.5-7.7)

(B) *'Payment Terms strictly 30 days'* (This is seen on most invoices, but not all invoices)

(C) *Due Date*, say, 31.7.2015 7

Since three options are printed on the invoice, it appears that [the Respondent] can choose to settle the invoice by either of the three mechanisms, **(A), (B)** or **(C).**

8.2 Option **(A)** was discussed already (para 7.5-7.9). Further, the parties exchanged letters (para 7.6), which was evident of the credit account ($85,217.15).

8.3 Option **(B)** is plain to understand; payment would be due in 30 days. Invoice date was 3.6.2015; so payment would be due by 3.7.2015.

8.4 Option **(C)** indicates the due date as 31.7.2015.

8.5 Since the parties have a working relationship starting from 2014, it is likely that, different payment options might have been exercised on different invoices in the past. However, for the 18 invoices issued during June-August 2015, Option **(A)** was the preferred payment mechanism because the credit account shows an aggregate value ($85,217.15) that matches with that of the invoices. Hence, adaption of Option **(A)** by the Respondent is undeniable.

8.6 Since Option (A) was in use for the set of 18 invoices, it is reasonable to conclude that Option **(B)** and **(C)** were abandoned by the Respondent for the same set of invoices.

8.7 At para 47 of the Response, it was argued that section 13 of the Act could be applicable for Option (C), thereby the due date of payment would be modified. By section 13 of the Act, a provision in the construction contract requiring payment to be made after 50 days after the payment is claimed would be modified to require payment within 28 days. My emphasis is underlined; in the plain meaning of the word, 'contract' is a formal agreement enforceable by law.

8.8 In the matter in hand, Option **(C)** was presented in the invoice by the Applicant as a possible mechanism for the settlement of invoices; however, Option **(C)** was abandoned by the Respondent. Clearly, an abandoned provision cannot become an agreed provision in a contract. It is incorrect to pick up an abandoned item and call it as an "agreement" or "contract". So, it is not proper to apply section 13 of the Act to modify Option **(C)**.

DATE OF INVOICE and DATE OF CLAIM

9.1 As observed from the common usage of the word (para 7.2), 'Invoice' refers to a record of supply of goods/services. 'Date of Invoice' means that goods/services were provided on or around that date. "Date of Invoice" does not necessarily mean that it is a "Date of Claim." Simply, an invoice indicates the completion of obligation by a party to supply goods/services.

9.2 In this context, [the Respondent] owes money to [the Applicant]. Admittedly, only [the Applicant] can make the claim; hence, the 'date of claim' is to be understood from the conduct of [the Applicant] in relation to the payment framework (para 7.9) stated in the 'Terms of Sale'.

9.3 'Terms of Sale' does not specify a single 'date of claim' or 'date of payment'. However, it outlines the steps associated with payment and it outlines the framework that binds the parties.

Step 1: *Clause 13. Unless prior arrangements for credit have been made, payment for goods and/or services in due in full before delivery.*

Credit arrangement was evident (para 7.6); hence, it is understood that this clause does not operate.

9.4 Step 2: *Clause 14. Payment terms for all credit accounts are as advised to the Customer at the time the credit account is opened, …*

This shows the possibility that the terms of credit were advised by [the Applicant] in 2014; if nothing was advised in 2014, then, nothing could be inferred. Secondly, from this clause 14, it is understood that *'Net 30 days'* is one possible advice; also, *'Net 30 days'* is seen on invoices (para 8.1, Option (B) and (C)). Hence, *'Net 30* days' remains as an option or advice. Advice is not a 'claim' or 'demand'. *'Advice'* refers to *guidance or recommendation offered with regard to prudent action (Oxford Dictionary, http://www.oxforddictionaries.com/definition/english/advice).*

9.5 Step 3: *Clause 15: Acceptance by the company of any late payment by the Customer or the Customer exceeding the credit limit set by the Company …*

This suggests the possibility of late payments; also, this suggests that credit limits may be exceeded at times. As of 22 Sep 2015, the existence of credit at around $85,000 was acknowledged by the parties (para 7.6-7.7). As long as the credit is utilized, payment need not be made. Thus, this clause does not set a firm date for payment. Further, 'late payment' and 'exceeding the credit limit' are acknowledged to be normal or accepted business practices. Therefore, 'late payment' cannot be considered as a 'dispute'. 'Exceeding the credit limit' is not treated as a dispute either.

9.6 Step 4: *Clause 17. The Customer is not entitled to withhold any payment by way of retention …*

[the Respondent] is not entitled to withhold money. If [the Respondent] makes an attempt to withhold money, it becomes a dispute between the parties. This can be a trigger for a dispute; it is considered further in para 10.3.

9.7 Step 5: *Clause 20. The Company can vary or withdraw any credit arrangements at any time …*

When the quantum of credit is increased, it is common knowledge that, 'claim' has not been made for payment. Obviously, increase in credit will push the date of claim or date of payment into the future.

9.8 Step 6: *Clause 21. The Company may charge the Customer interest on overdue accounts at the Reserve Bank of Australia's large business variable indicator rate.*

This indicates that 'overdue' account does not mean that it is a disputed account. By paying interest on the overdue amount, the parties may continue with normal business practices.

9.9 The parties can vary the credit arrangement (Terms of Sale, Clause 20) at any time. These clauses suggest that parties did not establish any specific 'payment date' for the credit account. Further, or in the alternative, even if a 'date of payment' or 'date of claim' existed, it can be pushed into the future, by way of increasing the credit limit, or by paying interest on overdue amount. Overall, I conclude that, a specific payment date did not exist for the credit account.

9.10 Table 2 gives the meaning of 'Credit Account' from common dictionaries.

Reference	**'Credit Account'**
Cambridge Dictionary, www.dictionary.cambridge.org	a formal agreement between a shop or other business and a customer, in which the customer can take goods and pay the shop or business for them at a later time
Merriam-Webster Dictionary http://www.merriam-webster.com/	an arrangement in which a bank, store, etc., allows a customer to buy things with a credit card and pay for them later

Table 2.

From the ordinary meaning of 'credit account', it is understood that a specific payment date does not exist for a credit account. But, the bank or store, which gives credit may set a date in the future.

9.11 Attachment 7 of the Application contains a letter (dated 16 Nov 2015) from Mr [IE] (the Applicant) to [the respondent]; this letter refers to the same account (554657) and demands payment by 30 Nov 2015. From the wording of the letter, it is clear that [the Applicant] has reduced and withdrawn the credit arrangement; under clause 20 (para 9.7) [the Applicant] can do so. I conclude that, for the credit account,

(a) the Applicant made a claim for payment on 16 Nov 2015, and,

(b) the due date of payment was set as 30 Nov 2015.

9.12 At para 45 (followed through para 53 & Attachment 8), an attempt was made in the Response to calculate the 'Date of Claim' and 'Date of Payment'; the Response considered Options **(B)** and **(C)** only. Option **(A)** and the 'Terms of Sale' associated with the credit account were ignored in the Response. Thus, it is obvious that the assessment presented in para 45–53 of the Response, and the arguments propounded in the same section, ***'When did the Payment Dispute Arise?,'*** are erroneous.

PAYMENT DISPUTE

10.1 For the purpose of section 8 of the Act, I find that the payment dispute arose on 30 Nov 2015.

10.2 Among the three options for payment, the Respondent preferred to make use of the credit facility; option **(A)** was their choice. A definitive date for payment was not known for the credit account prior to 16 November 2015. On 16 Nov 2015, the Applicant (para 9.11) reduced or withdrew the credit arrangement; thereby, the Applicant claimed payment. It was a claim under the contract; it was consistent with clause 20 of the 'Terms of Sale', which says that [the Applicant] can withdraw the credit arrangement at any time. Due date for payment was set by the Applicant as 30 Nov 2015. Payment did not materialize. Consequently, 30 Nov 2015 becomes the date of payment dispute.

10.3 The adjudication application was served on the Respondent on 21 Dec 2015 (para 3.1), which is within 90 days of the payment dispute.

10.4 Regarding the date of payment dispute, an alternative analysis is possible. On 22 Sep 2015, Ms. [AC] (Respondent) wrote a letter to the Applicant that payment ($85,217.15) would not be made. Under clause 17 of the 'Terms of Sale', [the Respondent] should not withhold money. Based on such a rationale, this date (22 Sep 2015) can possibly be considered as a date for the dispute.

10.5 Adjudication application was served (para 3.1) on the Respondent on 21 Dec 2015. This is exactly the 90th day from 22 Sep 2015. So, even if 22 Sep 2015 were considered to be the date of the dispute, service of the Application comes within the 90 days allowed under section 28(1) of the Act.

10.6 Among the two dates (22 Sep 2015 and 30 Nov 2015), I consider 30 Nov 2015 to be the most appropriate date for 'payment dispute', because the Applicant made a claim for payment on 16 Nov 2015; the same claim was not paid by 30 Nov 2015. In the days prior to 22 Sep 2015, the Applicant had not made an explicit claim for payment of money into the credit account; also, the Respondent had not made any objection prior to 22 Sep 2015. Overall, nothing much could be inferred from the parties' actions prior to 22 Sep 2015. Among the two dates, 30 Nov 2015 stands as the appropriate date for the payment dispute.

K&J BURNS

11.1 As a part of the arguments about the lack of signature on invoices, the Respondent cited the following decision (Response, para 33-34, "K&J Burns") from the Northern Territory Court of Appeal:
K & J Burns Electrical v GRD Group (NT) Pty Ltd (2011) 29 NTLR 1.

I read this decision at www.austlii.edu.au, where it is cited as,

K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor [2011] NTCA 1.

I notice important differences between K&J Burns and the case in hand in regard to the contractual arrangement between the parties and the type of evidence.

11.2 The Response, para 33-34, merely attempted to quote para [151] in K&J Burns regarding signatures on payment claims. However, in my view, [151] cannot be interpreted in isolation; there is a lot more to be read for full understanding of the decision in K&J Burns. While deciding that case, the Court sent a series of questions to the parties regarding the 13 invoices and the subcontract; this is stated at [62]. Thereafter, Honourable Judges interpreted the invoices, together with the subcontract, and evidentiary documents, along with the Act; this is described in [62-79], [108-124] and [168-181]. Therefore, in my view, in the present case, the invoices and the contractual arrangement are to be understood first.

11.3 I took up this task of analyzing the invoices early (para 6.1-6.5, 7.1-7.2) and I concluded that,

(a) the parties exchanged unsigned invoices and honored them; invoices are valid documents for payment (para 6.5);

(b) *[the Respondent] never queried or disputed the rates shown in the invoices .... and implicitly accepted those rates by paying the invoices…* (Response, para 18); consequently, the Respondent has a continuous and an on-going obligation to pay for the invoices; and,

(c) the arguments of the Respondent regarding the format, structure and content of the invoices fail on the grounds of conduct and estoppel (para 6.5).

Therefore, it is not appropriate to take just one paragraph [151] from K&J Burns. The whole decision must be read and utilized; I have adapted an analogous procedure in this adjudication, by which the contract, invoices and evidentiary documents were interpreted first.

ELECTRONIC TRANSACTIONS (NORTHERN TERRITORY) ACT

12.1 The Response (para 36-40) argued about signatures on invoices from the perspective of the *Electronic Transactions (Northern Territory) Act* ("ETA").

12.2 In the Outline of the Act (section 4), it is stated that,

> *(2) This Act also contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following:*
>
> *…*
>
> *(b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention;*

The contract between [the Applicant] and [the Respondent] formed automatically based on their conduct in 2014 using unsigned invoices. Section 4(2)(b) of the ETA, endorses that such a contract is not invalid or void. To say it in positive phrases, such a contract is valid and enforceable. Accordingly, I conclude that the terms and options observed on the invoices are enforceable; unsigned invoices are valid; the contract thus formed is enforceable.

12.3 Obviously, the arguments in para 38-41 of the Response are erroneous; such arguments do not align with section 4(2)(b) of the ETA.

JURISDICTION

13.1 In K&J Burns, based on a number of earlier decisions from the High Court and the Supreme Courts, Hon. Justice Southwood explained at [29] how adjudicator's jurisdiction is to be understood for construction contracts under the Act:

"The structure of s 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met. The prescribed criteria being those set out in s 33(1)(a)(i)-(iv) of the Act".

13.2 The Response, para 58, highlighted the topic of jurisdiction and there are three points in it:

(a) the invoices are not valid payment claims;

(b) the Application was made out of time with respect to section 28 of the Act; hence, the Application ought to be dismissed under section 33(1)(a)(ii) of the Act; and,

(c) [the respondent] did not consent to the determination of multiple payment disputes.

13.3 In para 6.1-6.5, I found that the invoices remain as valid documents for the purpose of payment. The invoices merged with the credit account (para 7.5-7.9); the claim for payment originated from the credit account on 16 Nov 2015 (para 9.11). Hence, the Respondent's argument that 'invoices are not valid payment claims' is incorrect.

13.4 Compliance with sections 28 and 33(1) of the Act are discussed under next section (para 14.1-14.9). The topic of 'multiple payment disputes/claims' is addressed in a subsequent section (para 15.1-15.9).

COMPLIANCE WITH SECTIONS 28 and 33(1)

Section 28(1)

14.1 The adjudication application is in writing; this satisfies section 28(1)(a). The application was served on the Respondent; this satisfies section 28(1)(b). The application was served on a prescribed appointer (IAMA); this satisfies section 28(1)(c). The Applicant provided a deposit of $3600 towards the cost of adjudication; this satisfies section 28(1)(d). Under section 28(1), application is to be served within 90 days of the dispute; this is confirmed in para 10.1-10.6. Overall, section 28(1) is complied with.

Section 28(2)

14.2 Section 28(2) states as follows:

(2) The application must –

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

14.3 It is noticeable that the Application contains the information prescribed by the *Construction Contracts (Security of Payments) Regulations*. The Application contains the 'Terms of Sale', which is relevantly an extract of the contract between the parties.

Under section 28(2), an option is available for the Applicant to state the details, or provide attachments. The invoices that gave rise to the payment dispute were summarized and included in a single sheet; also, several invoices were enclosed. Overall, I am satisfied that the Application contained information that adequately described the payment dispute, thereby section 28(2) was complied with.

Section 33(1)

14.4 Section 33(1)(a) of the Act states that,

An appointed adjudicator must …

(a) dismiss the application without making a determination of its merits if:

(i) the contract concerned is not a construction contract; or

(ii) the application has not been prepared and served in accordance with s 28; or

(iii) an arbitrator or other person or a Court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination:

(A) because of the complexity of the matter; or

(B) because the prescribed time or any extension of it is not sufficient for another reason; …

14.5 At para 4.4, it was decided that the contract between the parties is a construction contract; this satisfies section 33(1)(a)(i). The application was prepared and served in accordance with section 28; this was discussed in para 14.1-14.3; thus section 33(1)(a)(ii) is complied with. Compliance with section 33(1)(a)(iii) was outlined in para 2.4. I am satisfied that the matter in dispute is not complex; so, section 33(1)(a)(iv) is complied with.

14.6 Accordingly, for the purpose of jurisdiction under the Act, all the criteria under 33(1)(a)(i)-(iv) are satisfied.

TWO OR MORE PAYMENT CLAIMS/DISPUTES

15.1 In para 56-57 of the Response, section 34(3)(b) of the Act is referred to. Then, the Respondent argued that there were 18 invoices, which were purported to be payment claims; without the consent of the Respondent, which was neither sought nor given, multiple payment claims cannot be adjudicated by a single adjudicator. It is noticeable in the Response that the phrases 'payment claims' and 'payment disputes' are used interchangeably. Section 34(3)(b) of the Act states that,

An appointed adjudicator may:

…

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties; …

Precisely, the Act mentions payment disputes in section 34(3)(b); payment claims are not referred to in that section.

Evidence

15.2 In my observation, the parties are referring to a single payment dispute and it is evident in their communications. For example, Ms. [AC] (Respondent) wrote to the Applicant on 22 Sep 2015, which indicates singularly that 'failure of concrete' is the substance of the dispute.

15.3 Mr. [IE] (Applicant) replied to the above letter of the Respondent on 16 Nov 2015 and gave his opinion on concrete quality. Again, concrete quality & surrounding evidence was the sole focus of his communication.

Given that, the parties themselves engaged in it as a single dispute, I am unable to divide it into "18 disputes" as propounded in the Response at para 56. Based on the conduct of the parties, it is a single dispute.

15.4 It is true that there are 18 invoices associated with the adjudication application. The Application put the aggregate value of the 18 invoices at $85,217.15. The Response is in agreement with the aggregate value; in the Essence of the Dispute (para 5) and in Substantive Submissions (para 59-94), the Respondent argued about keeping the whole amount ($85,217.15).

15.5 Internally, what is stated in those 18 invoices (June-Aug 2015) is not in dispute; the supply of concrete, dates, rates, and quality are not in dispute. The aggregate value ($85,217.15) is not in dispute. Hence, I find it illogical to divide the aggregate value into "18 different disputes". Based on context and purpose, I decide that it is a single dispute valued at $85,217.15.

15.6 Independent of the above, the claim for payment originated from the credit account identified by 554657; all the invoices merged with the credit account (para 7.9) earlier; a single claim for payment was made on 16 Nov 2015 from the credit account (para 9.11). On that basis, a single claim gave rise to a single dispute.

Section 8(a) of the Act

15.7 The Act sets out how payment dispute may occur and it is stated in section 8(a).

A payment dispute arises if:

(a) a payment claim has been made under a contract and either:

(i) the claim has been rejected or wholly or partly disputed; or

(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or

The Act has a general objective as outlined in ***Section 3: Object and its achievement,*** and it caters to the vast sectors of building and construction industry ranging from road, railway and tramway (Section 4, Definition under ***Civil Works***), including ***construction work*** referred to under section 6. The Act makes no mention about invoices, or the number of invoices for civil/construction works, which typically form the basis of claims. Therefore, the words in the Act cannot have a restricted interpretation, but, the words must have a general interpretation applicable to the whole of the industrial sector it caters to.

15.8 Given the general nature of the Act, and its vast applicability, nothing can be deduced about the number of invoices or claims that may come within a particular dispute.

15.9 The *Interpretation Act* (NT) helps in the interpretation of acts, and for the shortening of their language. Specifically, section 24(2) of the *Interpretation Act* states that,

(2) In an Act:

(a) words in the singular include the plural; and

(b) words in the plural include the singular.

When interpreted with the help of *Interpretation Act* (NT), payment dispute may occur when payment claim or payment claims are rejected in a construction contract. Alternatively, invoice or invoices may be rejected in a construction contract giving rise to a single dispute. My emphasis is underlined; given the general purpose and objective of the Act, words in the singular include the plural. Depending upon the nature of the individual case, one payment dispute may spread over one or more claims (or one or more invoices). The Act does not propose a mathematical equivalence in numbers, such as, "one payment claim would be equivalent to one payment dispute", or, "18 invoices would be equivalent to 18 payment disputes." The Act is amenable to the interpretation that one dispute may spread over multiple invoices or claims based on context and purpose.

15.10 Accordingly, I dismiss the arguments of the Respondent that there are 18 payment claims or 18 disputes within the adjudication application for four reasons.

(a) The words and conduct of the parties indicate a single dispute on concrete quality (para 15.2-15.4).

(b) Substantive submissions (Response, para 59-91) goes back to the single and the same dispute, which is the quality of concrete (para 15.5).

(c) The Applicant made a single claim for payment, rejection of which gave rise to one payment dispute (para 15.6).

(d) Based on the *Interpretation Act* (NT), the *Construction Contracts (Security of Payments) Ac*t is amenable to the interpretation that a payment dispute may spread over multiple claims or invoices (para 15.7-15.9).

15.11 I find that there is only one dispute within the adjudication application. For deciding a single dispute, there are no implications from section 34(3)(b) of the Act.

CONCRETE QUALITY

16.1 Common Facts: The Respondent refused to pay $85,217.15 to the Claimant. $85,217.15 is the algebraic sum of all the invoices for the goods supplied by the Claimant to the Respondent during the months of June, July and August 2015. The quality of concrete supplied in June, July and August 2015 was not disputed. Right from 2014, the rates for concrete were never disputed. To say this in different words, the parties are in agreement over the price and quality of concrete that was supplied in June – August 2015.

16.2 According to the Respondent (Response, para 65-83), some of the concrete supplied during the months of Feb-Mar 2015 did not meet quality specifications. The Applicant noted that (Application, page 2, para 6) he was "aware of low-strength results". 'Low-strength' implies that the concrete was of lower strength than it was originally intended. So, there was common ground between the Application and the Response that something had gone wrong in relation to quality in Feb-Mar 2015.

16.3 The Respondent wanted to keep $85,217.15 and linked it to the quality of concrete. The Applicant asked for $85,217.15 from the Respondent and linked it to the quality of concrete. So, I find that the quality of concrete is irrevocably and inseparably linked to the $85,217.15.

16.4 'Terms of Sale' is an 11-page document. The Response (para 19) acknowledged it as a part of their contract. So, it is a common document. Page 7 of the 'Terms of Sale' contains clauses relating to the quality of concrete, quality tests and acceptance; these are clauses 40 – 44. For ease of reference, I have enclosed that page in the form of a picture on the page 24.

16.5 Clause 42 states that *'Unless agreed in writing by the Company and the Customer, pre-mixed concrete will comply with AS1379'.* This requires reference to AS1379, ***Australian Standard: Specification and Supply of Concrete;*** a copy was enclosed with the Response.

16.6 Clause 43 states that *'The Company ([the Applicant]) accepts no responsibility for the performance of pre-mixed concrete other than with respect to the criteria specified in AS1379, (when tested in strict accordance with the relevant Australian Standard by a NATA-accredited construction materials testing facility)…*

In short, the parties agreed that, only those test results from a NATA-accredited laboratory can be used in their contractual discussions and for fixing responsibility relating to concrete quality.

16.7 This point is reinforced again in clause 44, which states that, *'... if the Customer (the [Respondent]) wishes to perform independent tests at its own expense, the Company will only consider the results of samples and tests performed in accordance with the current issue of AS1012 (Methods of Testing Concrete) and tested in a NATA (National Association of Testing Authorities) approved laboratory.*'

Again, this emphasizes that only those tests done at an NATA-accredited laboratory can be used. Accordingly, I decide that, in this adjudication, only those results from NATA-accredited laboratories are acceptable as evidence.

Special Terms applying to the sale and delivery of Pre-mixed Concrete

40. Unless otherwise stated in the quotation, prices are based on "Normal Class Concrete" as specified in the current issue of Australian Standard AS1379 (Specification & Supply of Concrete) and having a nominal slump not exceeding 100mm and using a nominal 20mm maximum size aggregate. If the Customer requires a slump in excess of 100mm or aggregate with a maximum size other than 20mm, a surcharge may apply.
41. The Company reserves the right to charge for return cartage, handling and disposal costs for:
    a) any pre-mixed concrete ordered of which the Customer does not accept delivery,
    b) pre-mixed concrete which is returned from the job site due to the Customer being unable to use the full quantity ordered,
    c) pre-mixed concrete rejected because the time between batching and discharge is greater than the time permitted by AS1379 or the specification that covers the project being supplied, provided that the delay was not caused by the Company.
42. Unless otherwise agreed in writing by the Company and the Customer, pre-mixed concrete will comply with AS1379. If compliance with AS1379 requires the addition of a cooling agent, a surcharge to the quoted price may apply.
43. Pre-mixed concrete is sold in the plastic state and the subsequent in-situ performance when set is greatly affected by the Customer's work practices in handling, placing and curing of the concrete. The Company accepts no responsibility for the performance of pre-mixed concrete other than with respect to the criteria specified in AS1379, (when tested in strict accordance with the relevant Australian Standard by a NATA-accredited construction materials testing facility), and in particular the Company accepts no responsibility:
    a) if water or any other material is added to the plastic concrete before or after discharge from the delivery vehicle, unless there is prior approval by an authorised representative of the Company; or
    b) if the Customer has specified or prescribed a pre-mixed concrete mix design other than a mix design devised by the Company; or
    c) for the surface texture and colour of hardened pre-mixed concrete, including where the aggregate in the concrete has been exposed by the Customer, and for any future colour change or oxidation of aggregates that have been exposed to the atmosphere.
44. "Production Assessment" (as described in AS1379) will be carried out by the Company in accordance with AS1379. Where "Project Assessment" (as described in AS1379) is requested by the Customer, the Company will provide that service at the ruling price at the date of supply. If the Customer wishes to perform independent tests at its own expense, the Company will only consider the results of samples and tests performed in accordance with the current issue of AS1012 (Methods of Testing Concrete) and tested in a NATA(National Association of Testing Authorities) approved laboratory.

Figure 6. Terms of Sale, Clauses 40-44

16.8 Concrete test reports were enclosed with the Application and the Response. Laboratories that provided such reports are identified as follows.

(1) Alice Materials Testing (in short, AML, with NATA accreditation number 18054);

(2) HiQA (with NATA accreditation number 17079).

CONCRETE QUALITY: 3 FEB 2015

17.1 When Beam 1/01 was poured (Date: 3 Feb 2015, Concrete Delivery Docket No: 21360691) some technical issues were identified (Response, para 65-66); for those issues, the Respondent noted that the Applicant was not at fault. So, the issues pertaining to 3 Feb 2015 are not relevant financially; such issues do not influence the amount payable by one party to another.

CONCRETE QUALITY: 9 FEB 2015

18.1 According to the Response (para 67):

(a) Beam 1/02 was poured on 9 Feb 2015;

(b) Docket Numbers are 21360734 and 21360736;

(c) concrete was rejected by [the head contractor];

(d) Test Report is part of the adjudication application (Attachment 9); and,

(e) Test Report contains wrong sample dates and identification.

I notice a number of inconsistencies between the details of the Respondent and the Test Report of HiQA. These are underlined:

(a) The Respondent indicated the date of pour as 9 Feb 2015, whereas the Report shows a different date.

(b) The Respondent recorded the Docket numbers as 21360734 and 21360736, whereas docket numbers are different in the Test Report.

18.2 In my view, so many identification details are less likely to go wrong on the Test Report. There is substantial mismatch between the identification details of the Respondent and HiQA. HiQA is a testing laboratory accredited by NATA. Accreditation by NATA is a benchmark of performance; they are known for performing their work correctly and according to appropriate standards (https://www.nata.com.au).

18.3 In my view, the Respondent has not provided proper test results for the concrete supplied on 9 Feb 2015. Without test report (clause 43-44; para 16.6-16.7), I am unable to decide in favour of the Respondent for this sample.

CONCRETE QUALITY: 24 FEB 2015

19.1 According to the Response (para 72), identification details are as follows:

(a) Date of Supply: 24 Feb 2015

(b) Location: Beam 1/03 and 1/04

(c) Docket Numbers: 21360842, 21360841, 21360840 and 21360839

(d) [The Applicant's] Invoice No: 9401777279

19.2 Testing was done at Alice Material Testing and Test Reports were provided (Response, Attachment 25); 28-day Compressive Strength is reported:

Docket No.	Compressive Strength (MPa)
21360839	42.5, 42.5
21360840	34.0, 35.0
21360841	48.0, 50.0

[The Applicant] is identified as the supplier in the test reports. Docket numbers in the test reports match with that of Respondent's description.

19.3 Compressive strength of one docket is much lower (35.0 MPa) than the specification of 50 MPa; for another docket, the strength is lower too. The Respondent noted that the volume of concrete per beam was approximately $10m^3$. On the balance of probabilities, I have decided in favour of the Respondent; that is, the Respondent need not make payment to the Applicant for Invoice 9401777279 dated 24.2.2015; the amount is $9,405.00 (incl. GST). This invoice is for $20m^3$ of concrete.

CONCRETE QUALITY: 6 MAR 2015

20.1 According to the Response (para 77), identification details are as follows:

(a) Date of Supply: 6 Mar 2015

(b) Location: Panel 3 (PP01-3)

(c) Concrete Docket Number: 21360931

(d) [The Applicant's] Invoice No: 9401792204, for Concrete Grade N50-10-G,

20.2 Test Report (HiQA) was provided (Response, Attachment 29); 28-day Compressive Strength was reported at 45.5.MPa and it did not meet the specified strength of 50MPa.

20.3 Based on the test result, I decide in favour of the Respondent: that is, the Respondent need not make payment to the Applicant for Invoice 9401792204 dated 6.3.2015; this is $1,025.20 (incl. GST).

CONCRETE QUALITY: 9 MAR 2015

21.1 According to the Response (para 78), identification details are as follows:

(a) Date of Supply: 9 Mar 2015

(b) Location: Panel 4 (PP01-4)

(c) Concrete Docket Number: 21360947

(d) [The Applicant's] Invoice No: 9401796688, for Concrete Grade N50-10-G.

21.2 According to the Response (para 78), testing was done at HiQA; but, test report was not provided.

21.3 According to clause 43-44 of the 'Terms of Sale', it was agreed by the parties that only those tests performed in a NATA-approved laboratory are acceptable for any decision (para 16.6-16.7). In the absence of such a report, I am unable to decide in favour of the Respondent; that is, the Respondent shall pay to the Applicant for the relevant invoice.

CONCRETE QUALITY: 20 MAR 2015

22.1 According to the Response (para 79), identification details are as follows:

(a) Date of Supply: 20 Mar 2015

(b) Location: Panel 6 (PP01-6)

(c) Concrete Docket Number was not identified in the Site Diary.

22.2 Test Report was provided (Response, Attachment 33, Test Report No: J221 1602 A, dated 21.04.2015), 28-day Compressive Strength was reported as 41.5 and 45.5MPa, and Specified Strength was 40MPa. [The Applicant] is identified as the supplier. Date of concrete supply (20.3.2015) matches that of Respondent's description. This confirms that the concrete supplied conforms to the specified strength of 40MPa; it was of acceptable quality. Therefore, the Respondent should pay the Applicant for this concrete.

ADJUDICATED AMOUNT

23.1 The Respondent is currently holding $85,217.15. The Applicant is asking for $85,217.15 or such other sum as may be assessed in adjudication (Application, page 6, under ***Conclusion).*** The Respondent noted that it did not want to pay any money to the Applicant (Response, para 96) due to non-compliant concrete.

23.2 My conclusion is, the Respondent can continue to hold money for that part of concrete that is proven to be non-compliant. For the rest of the concrete, for which the Respondent is unable to establish proof, the Respondent shall not hold the money; such a sum is payable to the Applicant.

23.3 Summary of the Findings:

(a) For the supply on 3 Feb 2015 (para 17.1), the Applicant was not at fault.

(b) For the supply on 9 Feb 2015 (para 18.1-18.3), the Respondent failed to provide proper proof; the Respondent should not withhold money.

(c) For the supply on 24 Feb 2015 (para 19.1-19.3), the Respondent provided proof; he can withhold $9,405.00.

(d) For the supply on 6 Mar 2015 (para 20.1-20.3), the Respondent provided proof; he can withhold $1,025.00.

(e) For the supply on 9 Mar 2015 (para 21.1-21.3), there is no proof that the concrete failed the tests; the Respondent shall not withhold money.

(f) For the supply on 20 Mar 2015 (para 22.1-22.3), there is proof from HiQA that the concrete was of acceptable quality; money should not be withheld.

Total amount that can be withheld by the Respondent:

For 24 Feb 2015	$ 9,405.00
For 6 Mar 2015	$ 1,025.00
Total	$10,430.00

The amounts are inclusive of GST.

23.4 According to clause 32 of the 'Terms of Sale', when the goods (concrete) do not meet the specifications, the Company ([the Applicant]) is expected to reimburse the Customer ([the Respondent]) for the cost of goods. This is calculated in accordance with clause 32 and it is the lowest amount of either of the following:

(a) replacement of goods or the supply of equivalent goods; or

(b) repair of goods; or

(c) payment of the cost of replacing the goods or acquiring equivalent goods; or

(d) payment of the cost of having the goods repaired for.

23.5 In the current scenario, [the Applicant] supplied replacement concrete; the replacement concrete thus supplied shall be free of cost. Hence, I decide that [the Respondent] need not pay for another $10,430.00 worth of concrete. Total amount that can be withheld by [the Respondent] is $10,430.00 x 2 = $20,860.00.

23.6

Amount that is held by the Respondent	$85,217.15
Amount that relates to non-compliant concrete & replacement	$20,860.00
Balance payable to the Applicant	$64,357.15

Adjudicated amount payable by the Respondent to the Applicant is $64,357.15.

OTHER PARTIES and OTHER CONTRACTS

24.1 In the Response (para 8), it is noted that [the Respondent] submitted a tender in Oct 2013 to [the head contractor] for the [redacted] project in Alice Springs. The head contractor is reported to be the principal contractor to [the principal] for this project. The name of [the head contractor] appears in a number of paragraphs in the Response (para 67-90). Also, [the head contractor] ([Mr. HC], Project Engineer, [of the head contractor]) appears in the bundle of emails (Response, Attachment 15-16). From this, I take it that [the head contractor] is one level above the Respondent in the contracting chain for the [redacted] project. Based on this, I gather that a contract existed between [the head contractor] and [the Respondent]. I call this as OC-1 ("Other Contract-1").

24.2 Similarly, a contract must have been in place between [the head contractor] and [the principal]; I call this as OC-2 ("Other Contract-2"). Then, the [principal] is one level above [the head contractor] in the contacting chain for the [redacted] project. In some of the test reports, [the principal] is identified as the Client; that means, the [principal] has sent those concrete samples to the laboratory.

24.3 The Applicant and the Respondent noted that the following representatives witnessed the pouring of concrete:

(a) the Applicant's Representatives (Truck Driver and Material Tester)

(b) the Respondent's Representatives

(c) representatives from the Testing Laboratory (HiQA or AMT)

(d) [the head contractor's] Representatives

(e) [the principal's], Representatives

24.5 I do not make any positive or negative finding about the addition of superplasticizer by any person. Chemical admixtures are recognized as part of the concrete (AS1379, Clause 2.5 and 3.2.4). My understanding is that, with several witnesses around (para 24.3), each person had acted with the intention to deliver concrete of desirable workability and strength.

24.5 I read through the bundle of emails enclosed with the Response (Attachment 15 & 16). It appears that the "new mix" of concrete was developed on or around 17 Feb 2015 (Response, para 70). Therefore, it would take at least 28 days to know the 28-day Compressive Strength; 28 days would end by 17 Mar 2015. In any event, the 28-day compressive strength would not be known prior to 17 Mar 2015.

24.6 The concrete, which failed in compressive strength tests, was actually poured on 24 Feb 2015 and 6 Mar 2015 (para 19.1-19.3; 20.1-20.3). This means, even before knowing the laboratory results, [the Respondent] and [the head contractor] went ahead and made arrangements to pour concrete. Only NATA-accredited laboratory test results are acceptable. In any event, such results would not be available prior to 17 Mar 2015.

24.7 There is clear evidence, in the form of email (Response, Attachment 15 & 16), that [the Respondent] and [the head contractor] overlooked the significance of NATA-accredited test results:

Email from [VH], 20 Feb 2015, 11:11AM to [RG]: *"... I am wanting to just tell them we don't need NATA certified results..."*

Email from [RG], 20 Feb 2015, 11:46AM to [VH]: *"... There is additional costing in supplying a NATA certificate, ... I don't see the need for a NATA certificate"*

24.8 There appears to be a warning from [NB], [email address redacted], who appears to be a third-party in this context. He stated the importance of NATA testing in the email dated 20 Feb 2015, 9:18 ACST with the words:

"... NATA certification will only be accepted as satisfying the requirement...

We record that we were not informed on the trial mix test done on site (stress bed) on the 13th Feb 2015 and have not witnessed the same"

Still, [the head contractor] and [the Respondent] went ahead and poured concrete on 24 Feb 2015 and 6 Mar 2015, which failed in compressive strength. Overall, it is obvious that [the head contractor] and [the Respondent] ignored the importance of NATA accredited results. So, they had to recast some of the beams and panels and encountered additional expenses; this appears to be the expenses in Attachment 26 of the Response. In my view, [the head contractor] and [the Respondent] overlooked the importance of NATA-testing the "new mix" and so they shall bear the extra expenses of concrete failure listed in Attachment 26.

AUSTRALIAN CONSUMER LAW

25.1 The Respondent argued that (Response, para 5) they are entitled to a set-off for the costs incurred in rectifying non-compliant concrete to the extent of withholding $85,217.15. I dismiss such arguments for set-off based on the following rationale.

Reason 1

25.2 My role, under section 33(1)(b) of the Act, is to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment. I can consider only the payment dispute (for which I am appointed) and the construction contract that forms part of that payment dispute. Obviously, the construction contract between the Applicant and the Respondent is the only contract that comes within the payment dispute. As per the 'Terms of Sale' in the contract (clause 32), the cost of replacement concrete is the only item payable by [the Applicant].

Reason 2

25.3 In the Response (Attachment 26), about 32 items are included for set-off. The Respondent wanted to set-off all these items against the amount payable to [the Applicant]. It looks like most of these 30 items may come under the contract between [the Respondent] and [the head contractor] (This is OC-1, para 24.1) for building the [works]. That contract (OC-1) or any amount relating to that contract does not come under my jurisdiction. My jurisdiction is restricted to the payment dispute between the Applicant and the Respondent; my jurisdiction is restricted to the contract between the Applicant and the Respondent. I cannot make use of any provision from OC-1 and set-off an amount against [the Applicant]. Therefore, I dismiss the 32 line items (claims) put forward by the Respondent in Attachment 26.

COSTS

26.1 My entitlement in this adjudication is 21 hours of work at the rate of $285 per hour, plus GST. Therefore, the cost of adjudication is $6,583.50 (inclusive of GST). Under section 46(5) of the Act, I decide that this shall be paid by the parties in equal shares of $3,291.75.

26.2 It took 3 hours to read through the submissions of the parties, one hour of administrative work, and 18 hours to draft this report of 30-pages; so, the total is 21 hours.

26.3 The Applicant and the Respondent deposited $3,600.00 each towards the cost of adjudication. I will refund the balance [$3,600.00 – 3,291.75] to each, $308.25, in the form of a cheque.

INTEREST

27.1 I determine that interest shall be paid on the adjudicated amount (Terms of Sale, Clause 21). Indicator rates are published by the Reserve Bank of Australia and are available at http://www.rba.gov.au/statistics/tables/#interest-rates. The Large Business Variable Indicator Rate is 4.05%.

27.2 It is 56 days from the date of dispute (30.11.2015) to the date of determination (25.1.2016). Under section 35(1)(a) of the Act, interest is:

$64,357.15 x 4.05% x 56/365 = $399.90.

27.3 Interest accrues at the rate of $7.14 per day.

[$64,357.15 x 0.0405 x 1/365 = $7.14]

CONCLUSION

28.1 I have jurisdiction to determine the adjudication application.

28.2 I direct that the adjudicated amount, $64,357.15, be paid by the Respondent to the Applicant on or before 1 Feb 2016.

28.3 The Respondent shall also pay interest on the adjudicated amount on or before 1 Feb 2016. Interest accrued until the date of determination is $399.90. Interest continues to accrue at the rate of $7.14 per day.

28.4 I direct that cost of adjudication be paid by the parties in equal shares.