

Adjudicator's Determination pursuant to the
Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant

and

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator, determine on 2 October 2009 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act* (NT) that the amount to be paid by the Respondent to the Applicant is \$60,049.63 inclusive of GST and interest and the date the sum of \$60,049.63 is payable is 2 October 2009 and that the Respondent is to pay interest to the Applicant on any part of the sum of \$53,037.11 exclusive of GST unpaid and interest accrues on the sum of \$53,037.11 exclusive of GST at the rate of 10.5% per annum after 2 October 2009.

Further, I determine that pursuant to section 46(9) of the Act, the Respondent must pay the Applicant the sum of \$3,168.00 being the Respondent's equal share of the costs of the adjudication, such sum being payable on 9 October 2009.

Finally, I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Contact Details

Applicant

Respondent

Appointment

Advance Construction Services Pty Ltd ("the Applicant") applied on about 7 September 2009 for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) ("the Act"), consequent upon which I was appointed adjudicator on 10 September 2009 by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointer Pursuant to regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s28(1)(c)(iii) of the Act.

Documents Received

I received and have considered the application supported by the Statutory Declarations of [AD] dated 19 August 2009 and 31 August 2009 and of [BD] dated 19 August 2009 and 2 September 2009 and the attachments thereto together with and the Declaration of [CD] dated 8 September 2009 and the other documents contained in single volume of the applicant's material the Law Society delivered to me.

[The Respondent] was served with the application on 8 September 2009 and had until 22 September 2009 to deliver written response to me. I have not received a response. The Applicant has advised me that it has not received a response.

Background

1. The Applicant alleges as follows:
2. The Applicant and Respondent entered into a construction contract ("the Contract") in or about November 2007 to supply and place formwork in accordance with architect and engineer drawings at [omitted], Bayview in the Northern Territory of Australia ("the site").
3. The Contract was both verbal and written. The contract was in part contained in the document being a quotation dated 5 November 2007 and signed by the Respondent,
4. The price quoted for the work was \$97,670.00 plus GST.

5. The Applicant commenced the work and made several progress claims.
6. An invoice No 77 dated 30/1/08 in the sum of \$53,718.50 inclusive of GST. The invoice is made up of a claim for 50% of the quoted price.
7. The Respondent part paid invoice 77. It paid \$30,000 inclusive of GST on about 3 March 2008.
8. On 1 /3/08 the Applicant issued a further invoice No 97 in the sum of \$26,859.25 inclusive. The Applicant claimed a further 25% of the quoted price.
9. On 18 March 2009 the Respondent paid a further \$40,000.
10. On 18 March 2008 the Applicant issued a further invoice No 103 claiming the sum of \$26,693.30 incl of GST. This was made up of a claim for \$96,693.30 incl, being for 90% of the quoted price less the payments received of \$70,000. The Applicant was in fact claiming arrears and a further 15% of the contract price or \$16,115.55 inclusive.
11. On 19 March 2008 the Respondent advised by Fax that it would not be paying any hire charges as the Applicant was in breach of contract.
12. On 2 April 2008 the Applicant issued a further invoice, No 126 claiming sum of \$31,942.90 incl GST. This sum was made up of a progress claim for the final 10% of the quoted price, namely \$10,743.70 and a claim for additional hire in the sum of \$21,199.20, both incl GST.
13. On about 26 May 2008 the Respondent sent the Applicant a list of defects.
14. The Applicant further alleges it served a payment claim, in the manner of an invoice dated 11 May 2009 bearing No 446, on a director of the Respondent on 17 May 2009 and by fax, on 15 May 2009. The invoice claimed \$58,636.20 inclusive of GST.
15. This invoice is made up by claiming \$107,437 as per amended quotation plus additional hire, less payments of \$70,000 giving the figure of \$58,636.20.
16. The Applicant alleges it has served a payment claim in accordance with the provisions of the Act.
17. The Applicant alleges that the payment claim was not responded to in the manner required by the implied terms of the contract, such terms being implied pursuant to Section 20 of the Act.

18. The Applicant made an adjudication application to which no reply has been received either by the Applicant or the adjudicator.

The Issues

19. An adjudicator has always to determine whether he has jurisdiction to determine the application. In this matter the determination is more difficult and there is no response and hence no agreement or admissions as to any of the facts or issues.
20. I note the particular issues thrown up by the background to this application are :
 - 20.1 Are the invoices issued in 2008 payment claims as described in the Act.
 - 20.2 Are the terms set out in Division 4 of the Schedule to the Act implied into the contract as required by Section 19 of the Act.
 - 20.3 Do I have to dismiss the application as the Applicant is attempting to have claims adjudicated more than 90 days after the payment disputes have arisen.
 - 20.4 When do the sums claimed fall due.

Jurisdiction

21. Section 33 of the Act requires the adjudicator to, within the prescribed time, dismiss the application without consideration of its merits if one of the following are true:
 - 21.1 The contract concerned is not a construction contract.
 - 21.2 The requirements of section 28 of the Act have not been complied with.
 - 21.3 There is some other order, judgment or finding concerning this dispute.
 - 21.4 It is not possible to make a fair determination.

Consideration of Jurisdiction Points

Is there a Construction Contract?

22. I find there is a construction contract to which the Applicant and Respondent are parties.
23. I find the contract is made up in part of the quotation accepted by the Respondent, being part of the annexure DD2 in the application but relating to Lot 6209 O'Ferrals Road Bayview Marina Estate. These quote refers to drawings which would be incorporated into the contract. The quote is for the supply and placing of formwork on Lot 6209 in accordance with drawings Architectural and Engineers provided for the soffit and internal staircase.

24. A construction contract is defined in the Act. The Act relevantly provides:

Section 5 Construction Contract

(1) A construction contract is a contract (whether or not in writing) under

which a person (the contractor) has one or more of the following obligations:

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work;

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.

Section 6 Construction work

(1) Construction work is any of the following work on a site in the Territory:

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it);

25. I determine that the Applicant was to supply goods and services related to construction work and to do construction work and hence there was construction contract and the Applicant and the Respondent were parties to the construction contract.

Section 28 Compliance

26. I find there is compliance by the Applicant with section 28 of the Act.

27. Section 28 requires the following:

The Applicant must”

be a party to the contract, and

serve the written application within 90 days of the dispute arising, and

provide any deposit of security for the cost of the adjudication that the adjudicator requires.

And,

The application must be prepared in accordance with the regulations and state the details of or have attached to it the construction contract or relevant extracts and any payment claim that has given rise to the payment disputes and all the information documents and submissions on which the party making it relies in the adjudication.

28. I have already determined the Applicant is a party to the Contract.

Service of the Application

29. I find the Adjudication Application was served on the Respondent on 8 September 2009 and on a prescribed appointer, and (there being no requirement for deposit or security) therefore made, before the expiration of 90 days after the payment dispute arose.
30. I consider the question of when the payment dispute arose later in these reasons but now deal with the 90 day period.
31. Service of the Adjudication Application has to be within 90 days of the payment dispute arising. Section 28(1).
32. The statutory declaration of [CD] dated 8 September 2009 as to service states that the application was served on the office manager of the Respondent on 8 September 2009.
33. A statutory declaration of [BD] dated 19 August 2009 states that the payment claim attached to the application was served on 15 May 2009 when it was faxed to the Respondent at fax number [omitted]. The fax number appears in the Respondent's letterhead on the Respondent's documents contained in the application. There is also a statutory declaration that states the payment claim was handed to a director on 17 May 2009.
34. The *Interpretation Act*, section 25, states that a person may serve a document on a body corporate by fax and service is taken to be when it is faxed to a current fax number of the recipient.
35. I find the payment claim was served on the Respondent on 15 May 2009.
36. I find for reasons that appear later in this determination that the payment dispute arose on 12 June 2009.
37. I find 8 September 2009, the date the application is made, is less than 90 days after 12 June 2009.

38. I now have to consider when the payment dispute arose.

The Payment Dispute

39. Section 8 of the Act provides that a payment dispute arises relevantly when the amount claimed in a payment claim is due to be paid under the contract or the claim has been rejected or wholly or partly disputed.

40. In this matter, on the information available, I determine there has been no correspondence or verbal contact between the Applicant and the Respondent about the payment claim since the payment claim was faxed or delivered to the Respondent. I determine therefore that there has been no rejection or dispute, either wholly or partly, as to the payment claim.

41. There being no rejection or dispute of the payment claim, assuming for the moment the payment claim is valid and properly served, a payment dispute must have come into existence when the amount claimed became due to be paid under the contract. When did that occur?

42. I turn to the documents that make up the contract. I have not been given any information as to conversations which allegedly incorporated terms as to claims and payment into the contract.

43. I note there is only one written term relating to payment of progress claims. The contract states, "Progress Payments 14 days of invoice".

44. I infer from this phrase that progress payments are to be made by the Applicant to the Respondent and they are to be made by delivery of an invoice. The phrase itself clearly requires the Respondent to pay the sum claimed within 14 days of invoice.

45. Unfortunately that is not the end of the matter.

46. Section 20 of the Act provides for terms to be implied into a construction contract that does not contain a written provision about the matters of:
(a) when and how a party must respond to a payment claim made by another party;
(b) by when a payment must be made.

47. The contract has a term about when a payment must be made. I.e. 14 days of invoice.

48. The Supreme Court in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [56] held that s 20 of the Act applies if either, or both, of paragraphs (a) and (b) set out in section 20 are not provided for by a written provision in the contract.

49. I disagree in that I think the section says that only the terms that should be implied are those that are missing from the contract but I am obliged to follow the decision. Thus if either of the matters (a) or (b) are missing from the contract, the implied terms set out in Division 5 of the Schedule to the Act are incorporated into the contract and, as in this case, may over ride a provision in the contract as to when the sum claimed is to be paid.
50. Accordingly in this matter, as there is no provision in the contract as to how the Respondent must respond to a payment claim made by another party, the terms provided for in the relevant schedule to the Act are implied into the contract.
51. The implied terms gave the Respondent 14 days within which to give the Applicant a notice of dispute and pay any balance that is not disputed or failing that, the Respondent must within 28 days after receiving the payment claim pay the whole of the amount of the claim.
52. I have determined that there was no response to the payment claim and so the implied terms required the Applicant to pay the whole of the amount of the claim 28 days after delivery.
53. The Applicant asserts and there is no information before me that says otherwise, and I find that the Respondent has failed to pay the whole of the amount of the claim within 28 days of service of the payment claim.
54. Therefore in this matter I determine that the amount claimed in the payment claim became due to be paid under the contract 28 days after the delivery of the payment claim, namely on 12 June 2009 and that sum had not by or on that date not been paid in full or at all.
55. Accordingly I find a payment dispute arose between the parties on 12 June 2009.
56. Even though I have determined that there is a payment dispute I am required to determine that the document the Applicant asserts is a payment claim, is in fact a payment claim. If the document is not a payment claim then there is no payment dispute and the Application has to be dismissed.
57. More particularly if any of the 4 invoices sent to the Respondent in 2008 are payment claims the sums claimed would have become due in 2008 and the relevant payment disputes would have arisen more than 90 days before the Application was made in this matter and the Application would have to be dismissed.

58. The application would have to be dismissed as a payment dispute could not be based on the payment claim of 11 May 2009.
59. The reason for that is the invoice of 11 May would not have been a payment claim.
60. The reason for that is the court in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor* [2009] NTSC 48 at [23] [24], held that when the amounts included in a later document that is asserted to be payment claim have already been claimed in prior payment claims that would have fallen due for payment more than 90 days before service of the Application, in relation to those amounts the adjudicator has to dismiss the application without considering the merits of the claims.
61. I note that Invoice 446 is an amalgam of the prior invoices. Invoices 77, 97, 103 and 126 claim the combined sum of \$107,437.00. Invoice 446 claims \$107,437.00 in total and then credits payments of \$70,000 paid up to 18 March 2008.
62. The table which follows shows the date of the invoice, the amount claimed that has not previously been claimed in any earlier invoice and finally the day 28 days after the invoice which is the date the sum claimed fell due pursuant to the contract as discussed above. The contract provided for claims to be made by invoice payable in 14 days but the implied terms for payment within 28 days were incorporated into the contract per force of the provisions of the Act.

TABLE

Invoice date 30/1/08
Amount \$53,718.50
Payment fell due 27/2/08

Invoice date 1/3/08
Amount \$26,859.25
Payment fell due 29/3/08

Invoice date 8/3/08
Amount \$16,115.55
Payment fell due 15/4/08

Invoice date 2/4/08
Amount \$31,942.90
Payment fell due 30/4/08

63. Each of the dates that the sums fell due for payment is before 10 June 2009 which is 90 days before 8 September 2009 when the adjudication application was served and which is in effect the date the application was made.
64. According to the *AJ Lucas Case* and without more, I have to dismiss the application.
65. The Applicant is saved however by the terms the Act implies into the contract as to how a payment claim has to be made.

Payment Claim

66. The Act relevantly provides that a payment claim means a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.
67. The definition seems to cover any claim made for the payment of money for work done or goods supplied. Fortunately for the Applicant this is not the case in all circumstances.
68. The Act in certain circumstances implies terms into the contract so that the contract requires the claim has to have specific attributes.
69. Section 19 of the Act states that the provisions in Part 5 Division 4 of the Schedule to the Act are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.
70. The terms implied which are relevant to the present question are as follows:

5 Content of claim for payment

- (1) A payment claim under this contract must -
 - (a) be in writing;
 - (b) be addressed to the party to which the claim is made;
 - (c) state the name of the claimant;
 - (d) state the date of the claim;
 - (e) state the amount claimed;
 - (f) for a claim by the contractor - itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

- (h) be signed by the claimant; and
- (i) be given to the party to which the claim is made.

- 71. In order for those requirements to be relevant to the Applicant's application I have to consider whether there is a written provision in the contract about how a party must make a claim to another party for payment. Section 19.
- 72. The only reference the contract makes to a claim for payment is the phrase, "Progress payments 14 days of invoice."
- 73. In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford* [2008] NTSC 42 the provisions as to the making of a claim for payment were these:

28.1 Payment Claims, Payment Certificates and Time for payment

At the time for payment claims stated in Annexure A, the Subcontractor shall deliver to the Contractor claims for payment supported by such evidence required by the Contractor or considered necessary by the Subcontractor to enable the Contractor to certify the amount due to the Subcontractor.

74. The Court held in *Nilsen*:

[45] There is nothing non-specific about the definition of "payment claim" in the Act. It is always possible to determine whether a particular claim is a "payment claim". If a construction contract contains a written provision about payment claims the Act defines "payment claim" by reference to the terms of the construction contract actually made by the parties: s 4 of the Act.

.....It is to that contract that the adjudicator must go to determine whether there is a "payment claim" and hence a "payment dispute" for him to adjudicate. If the construction contract does not contain such a written provision the Act implies into the contract the relevant contractual provisions in the Schedule of the Act.

[46] That does not mean that an adjudicator is free to get the question about whether a payment claim exists wrong. Whether there is a payment claim is a threshold question which an adjudicator has the jurisdiction to determine, but if he makes an erroneous decision in relation to that threshold question, then he steps outside his jurisdiction and any subsequent purported determination is a nullity and is void.

75. In *Nilsen* it was accepted there was a specific direction as to how payment claims were to be made. There was a process which was obligatory. There was a written provision about how a party must make a claim to another party for payment.
76. The Court also directed that the adjudicator has to go to the terms of the contract to determine whether there is a payment claim. I am directed therefore that if the implied terms set out in Division 4 are implied into the contract then I have to go to those terms to decide whether there is a payment claim.
77. The Court also held that the adjudicator has to ask the question of whether a payment claim exists. I indicate that should the parties consider I am wasting their time in considering this point.
78. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [24] the provision relied on to give the right to a payment claim was as follows:

"23.3 Adjustment to sub-contract sum

When any of the Subcontract Works execute (sic) by others as referred to in clause 23.2 have been completed, the Builder shall assess the cost, losses, expenses and damages it has thereby incurred and shall

notify the Subcontractor of those amounts, and the difference between the sum of those amounts and the amount which would otherwise have been paid to the Subcontractor had the Subcontractor completed those Subcontract Works, which difference is a debt due and payable upon such notice by the Subcontractor to the Builder."

79. The contractor had to notify the subcontractor of the amounts referred to in the clause and the amounts claimed. The contractor in that case submitted an invoice. At [52] it is stated that there is no dispute the invoice was a payment claim as defined by section 4. In that case the contract set out a process which was obligatory and there was a written provision about how a party must make a claim to another party for payment.
80. I refer also to *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 (30 June 2009); *Silent Vector Pty Ltd T/as Sizer Builders and Squarcini* [2008] WASAT 39 (22 February 2008) and *Merym Pty Ltd and Methodist Ladies College* [2008] WASAT 164 (21 July 2008)
81. In this matter there is no written term that is the equivalent of the terms referred to in the above cases.
82. In this matter the document contains the term "Progress payment 14 days of invoice."
83. It could be inferred from the phrase used in the relevant contract that the claim is to be made by invoice. I find that that is an inference and not a written provision about how a party must make a claim to another party for payment.
84. I find there is no written provision in the contract about how a party must make a claim to another party for payment. Section 19.
85. I determine therefore that section 19 of the Act applies to the contract and the terms set out in the Schedule, Division 4 are implied into the contract.
86. I have determined that the Applicant is a party to a Construction Contract. The contract is exhibited in part by the document that is exhibit DD2 in the application and which relates to Lot 6209. The contract requires the Applicant to supply and place formwork only at the above site in accordance with drawings architects & engineers provided for the soffit and internal staircase.
87. I refer to the document that the Applicant alleges is the payment claim.
88. The document is the invoice dated 11 May 2009 and bearing Invoice number 446.

89. The claim is described as relating to [the Site] For the supply and placement of conventional and modular formwork to achieve a class 3 finish to the above site as per our amended quotation 511071 of 28th Nov 2007 Signed and approved by [Respondent's directors]. Additional hire of formwork after 8 weeks from 4th March 2008 to 25th March 2008 - (22 days \$876.00 per day) due to conflicting drawings and incorrect location of block work, all circumstances outside our control.
90. The claim is clearly in writing and addressed to the other party to the contract. It has the name of the claimant on it and the date states the amount claimed.
91. The claim itemises and describes the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim. Division 4 item 5(1)(f).
92. In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [76], the Court held that the payment claim can be in an abbreviated form which would be meaningless to the uninformed reader but will be understood readily by the parties themselves because of their experience in the building industry and with the particular contract and their knowledge of the history of the project and the issues in dispute.
93. I determine that invoice 446 dated 11 May 2009 passes the test set out in Division 4, 5(1)(f) as the principal has been able to determine the amount payable in respect of the other 4 prior invoices which contain similarly abbreviated and unintelligible statements, to the layman, as to the work done.
94. Invoice 77 dated 30 January 2008 described the work as [the Site] To supply and place formwork in accordance with Architects and Engineers drawings provided for the Soffit and Internal Staircase PROGRESS CLAIM (1) 50% of Quoted Price and that was enough for the principal to determine that it would only pay \$30,000 of the sum claimed.
95. Similarly with Invoice 97 which claims an additional 25% after which a further \$40,000 was paid.
96. Finally the document is signed and has been given to the other party by fax as deposited to in the Statutory Declaration of [BD] dated 19 August 2009.
97. I find that the 2008 invoices, No 77, 97, 103 and 126 have nearly all the characteristics required by the contract, referring to the terms set out in Division 4 and implied into the contract per force of section 19, but they are not signed. I have to look to the terms of the contract to see if there is a payment claim. *Nilsen*. The implied terms of the contract require payment

claims to be signed. The 2008 invoices cannot be payment claims as they are not signed.

98. For this reason alone, i.e. they are not signed, I find that the 2008 invoices are not payment claims.
99. Not being payment claims they cannot be an element of a payment dispute.
100. The lack of signature on those invoices, Nos 77, 97 103 and 126, saves invoice 446 from being invalid by reason of it repeating sums claimed in prior payment claims, which the prior invoices are not.
101. I find Invoice 446 dated 11 May 2009 is out of the five invoices delivered by the Applicant to the Respondent regarding Lot 6209 the only payment claim under the Act for the purposes of sections 28 and 33(1)(a).

Further Compliance with Section 33(1)(a)

102. I find the contract concerned is a construction contract and that the application has been prepared and served in accordance with section 28 of the Act.
103. I find there is no order, judgment or other finding about the dispute that is the subject of the application.
104. I am not satisfied as to the matters contained in Section 33(1)(a)(iv).
105. For the reasons that appear above I am not required to dismiss the application without making a determination of its merits.
106. Given that the Application is not dismissed the adjudicator has to move to the second stage of the determination.

Determination - Section 33(1)(b)

107. The Act provides that if the application is not dismissed because of the matters provided for in section 33(1)(a) then the adjudicator has to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and determine the amount to be paid. Section 33(1)(b)
108. In order that I might determine liability I have to look at the contract.

The Contract

109. The Applicant alleges the contract was contained in the document being quotation reference 511071 dated 5 November 2007 relating to [the Site] and

signed by the Respondent. The price quoted for the work was \$97,670.00 plus GST. It was a written term that: Our price is based on a maximum 8 week formwork hire period from depot to depot. Form hire will be charged @ \$876.00 per day after 8 weeks for delays due to following trades or circumstances outside our control.

110. There was a variation on 19 December 2008 regarding goings and one on 2 or 3 January regarding some soffits.
111. I have found that Division 4 of the Schedule contains terms of the contract.
112. That being so, the contract states that the principal must pay the contractor the contract sum for the performance of all the obligations under the contract or a proportion of that sum that is equal to the proportion performed.
113. To determine the extent of the Applicant's claim I must look at the payment claim.

Assessment

114. The document is the invoice dated 11 May 2009 and bearing Invoice number 446.
115. It is clear the Applicant is claiming 100% of the work has been completed. There is no dispute about this, there being no payment dispute, nor dispute to the application.
116. The contract states that the principal must pay the contractor the contract sum for the performance of all the obligations under the contract or a proportion of that sum that is equal to the proportion performed.
117. With respect to the contract sum the Applicant is claiming that 100% of the obligations have been performed and the amount equal to the whole of the contract sum less sums already paid is due and payable.
118. I note the Applicant is claiming \$107,437.00 as the contract sum. This is the quoted sum inclusive of GST.
119. I find the contract sum was \$107,437 inclusive of GST.
120. I find the Respondent has paid \$70,000.
121. I find the balance of the contract sum payable is \$37,437.
122. The Applicant has made a claim for \$21,199.20 for Additional Hire.

123. I see no reason to disallow this claim there being no opposition to the claim by the Respondent and there being no indication in the papers that it is an improper claim

124. The Applicant admits defects to the value of \$295.38.

Reconciliation

125.	100% of the Contract Sum Claimed	\$107,437.00
	Claim for Additional Hire	\$21,199.20
	Payments credited	\$70,000.00
	Admitted defects	\$295.38

126. Sum Due \$58,340.82 inclusive of GST

127. I find on the balance of probabilities the Respondent is liable to make a payment to the Applicant and the sum payable by the Respondent to the Applicant is \$58,340.82 inclusive of GST.

128. I find on the balance of probabilities the sum is payable immediately.

Interest

129. The Applicant claims interest on the sum outstanding from the date of delivery of the Payment Claim. The rate claimed is 10.5%.

130. Section 21 provides for incorporating into the contract terms as to the payment of interest when a contract does not have a written provision about interest to be paid on unpaid sums.

131. I find the contract does not have a written term as to the payment of interest.

132. Division 6 of the Implied Provisions Schedule requires interest on payments for the period between the due date for payment and the actual date of payment. The interest rate is prescribed as that fixed for Rule 35.8 of the Federal Court Rules. This rate is presently 10.5% per annum.

133. The due date for payment was 12 June 2009.

134. The date of the determination is 2 October 2009. This is 112 days.

135. As at the date the payment dispute arose the sum claimable was 58,340.82 exclusive of GST.

136. 10.5% is the rate allowed to be claimed for interest pursuant to the Act.

137. Interest on the sum payable exclusive of GST is to the relevant date \$5,568.90 pa or \$15.26 per day.
138. I determine the interest payable to the date of the determination is \$1,708.81
139. I allow interest until payment on the sum payable of \$53,037.11 exclusive of GST at the rate of \$15.26 per day until payment.

Conclusion

140. Summarising my findings, I find
 - 140.1 The parties entered into a construction contract.
 - 140.2 The 2008 invoices are not payment claims.
 - 140.3 The Invoice of 11 May 2009 is a payment claim.
 - 140.4 The payment claim was served on 15 May 2009.
 - 140.5 The sums claimed became due on 12 June 2009.
 - 140.6 The payment dispute arose on 12 June 2009.
 - 140.7 The adjudication application was served and made on 8 September 2009.
 - 140.8 The adjudication application was made less than 90 days after the payment dispute arose.
 - 140.9 The Respondent has not served an adjudication response.
 - 140.10 The Respondent must pay the Applicant the sum of \$53,037.11 exclusive of GST, plus GST.
 - 140.11 The sum inclusive of GST is to be paid on 2 October 2009.
 - 140.12 The Respondent is to pay interest on the amount not paid exclusive of GST from the date the payment dispute arose to the date of determination in the sum of \$1,708.81.
 - 140.13 The Respondent is to pay interest at the rate of 10.5% pa on the unpaid portion of \$53,037.11 exclusive of GST until payment.

Costs

141. Section 36(1) of the Act requires the parties to bear their own costs.
142. 36(2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

143. The submissions from the Applicant had merit.
144. The Respondent did not serve any adjudication response and so I cannot make any finding as required by section 36(2) before I could make any award different to the status quo.
145. I find that the obligations as to costs as set out in Clause 36(1) should not be altered.

DETERMINATION

1. In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant as at 2 October 2009 is \$60,049.63 being the amount owing of \$58,340.82 inclusive of GST plus interest of \$1,879.69 to 2 October 2009 under s 35(1)(a). Interest accrues on daily rests on the sum of \$53,037.11 or such amount of that sum which is unpaid at the rate of 10.5% pa from and including 3 October 2009.
2. The sum of \$60,049.63 inclusive of GST is payable immediately.
3. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).
4. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctable error.
5. I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

David Alderman
Registered Adjudicator 23
2 October, 2009

Amendment to the Determination

The Applicant has paid 100% of the costs of the adjudication and pursuant to section 46(9) of the Act. I determine that the Respondent must pay to the Applicant the sum of \$3,168.00 so that the parties involved pay an equal amount of the costs of the adjudication.

The Respondent must pay the Applicant the sum of \$3,168.00 referred to in the paragraph above on 9 October 2009.

David Alderman
Registered Adjudicator 23
9 October, 2009