

DETERMINATION NO. 23.09.04

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

Applicant

and

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator, determine on 16 November 2009 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act* that the amount to be paid by the Respondent to the Applicant is \$209,165.64 inclusive of GST and interest, and that, the date the sum of \$209,165.64 is payable is 16 November 2009 and that, the Respondent is to pay interest to the Applicant and interest accrues at the rate of 10.5% per annum after 16 November 2009 on any part of the sum of \$185,257.30 exclusive of GST unpaid.

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

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Appointment

[The Applicant] applied on about 16 October 2009 for an adjudication under the *Construction Contracts (Security of Payments) Act* (the Act), consequent upon which I was appointed adjudicator on 22 October 2009 by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by section 28(1)(c)(iii) of the Act.

On 13 November 2009 I obtained an extension of time within which to make my decision. The Registrar extended the time to close of business 16 November 2009.

Documents Received

I received and considered the Application dated 16 October 2009 supported by the Statutory Declaration of [AB] and the attachments thereto, the payment claim, the cases and the other documents contained in volume 1 of 1 of the Applicant's material the Law Society delivered to me together with the further submissions of 13 November 2009.

I received and considered from [the Respondent] the Adjudication Response dated 30 November 2009 which contained the Adjudication Response, the Statutory Declarations of [BC] dated 30 October 2009 and [BD] dated 30 October 2009 and the annexures thereto and the cases contained in the volume 1 of 1 delivered to me by the Respondent together with the further submissions of 13 November 2009.

Circumstances

In early 2008 the Applicant invited tenders for the construction of the residential unit development known as [project name] in Darwin.

The Respondent put in the successful tender.

In August 2008 the applicant delivered to the respondent a document containing its price. Because the Respondent wanted to proceed with the building, post haste, the project manager delivered to the applicant a Letter of Intent dated 09/09/2008.

The letter of intent set out the contract price, a description of the works, being an eight level building with 12 apartments and car parking on three levels. It set out the date for taking possession and the date for completion and prescribed insurances that the applicant had to obtain. It contained a term that the applicant was to commence the works immediately but the parties would negotiate and eventually sign a detailed contract.

The letter of intent also contained a term that if the parties did not successfully conclude negotiations and sign a contract by a particular date, which date the Respondent could extend, the Respondent could terminate the agreement and the applicant could make a claim for work done which claim would be made on a quantum merit basis.

On about 21/10/2008 the works were reduced to the 3 carpark levels.

On about 16/12/2008 the Applicant was told that the scope of works was reverting to the original scope of works with variations for the original price plus an allowance for variations.

Up until 17/04/2009 the Applicant carried out the works and the parties attempted to negotiate a formal contract. The Applicant presented progress claims for the months of October, November, and December 2008, and for January, February and March 2009. The Applicant made claims for variations in February and March 2009.

The Respondent had the claims checked by a quantity surveyor and the Respondent paid the claims in accordance with the quantity surveyor's assessment. The quantity surveyor measured the claims as a percentage completed of the whole of the scope of the works.

On about 04/04/2009 the Respondent put a formal contract in front of the Applicant and gave the Applicant a time limit by which the contract had to be signed. The contract was not signed by the set date and the Respondent terminated the agreement on 17 April 2009. From the Applicant's point of view, the applicant submits the Respondent repudiated the agreement, which repudiation the applicant accepted.

In June 2009 the Applicant submitted a further claim for payment. Claim 7. The Respondent rejected that claim and the Applicant made an application for adjudication of the payment dispute.

Jurisdiction

Section 33 of the *Construction Contracts (Security for Payments) Act* ("the Act") requires the adjudicator, within the prescribed time, to dismiss the application without consideration of its merits if one of the following is true:

- The contract concerned is not a construction contract.
- The application has not been prepared and served in accordance with section 28.
- Another body has dealt with the subject matter of the dispute that is the subject of the application.
- The adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or it cannot be completed in time.

Construction Contract

I have to determine whether the contract with which the adjudication is concerned is a construction contract.

In this matter the applicant contends that three contracts were entered into, whereas the respondent asserts there is only one.

I determine that no matter which contention is correct, the applicable contract was a construction contract.

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);

As to the existence of a construction contract the Applicant makes the following submissions:

On 9 September 2008 the Respondent accepted the applicants quote to build the [project]. The project comprised 3 levels of car parks above ground level and six levels of units above them with two units on each level. ("the 9 September Contract")

The project clearly related to construction work being the construction of a building. The Applicant and Respondent had clearly contracted with respect to construction work.

On about 21 October 2008 the 9 September Contract was terminated mutually and the project became the building of only the carpark 3 levels. The Respondent contends that the cost of this reduced scope of works was about one third of the cost of the original scope of works.

On 16 December the project was changed again. On that day the Respondent informed the Applicant that the scope of the works was reverting to the original plan. ("the December Contract")

As to the existence of a construction contract the Respondent makes the following submissions:

The Respondent submits that the Applicant refers to there being three distinct contracts and the Applicant asserts that it relies on the terms of the third contract, the December Contract, for the right to deliver the payment claim.

The Respondent asserts that if the particular contract on which a claimant relies for making a payment claim does not exist then there is no construction contract on which the claimant can base its claim. The Respondent asserts that the December Contract does not exist and there was only ever one contract being the September Contract. The submission, as I understand it is, that because the Applicant relies on the December Contract for its rights,

and because there is no December Contract there cannot be a construction contract as there is no contract.

I reject this submission.

The Respondent refers in support of its submission to *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTSC 48 at [32] when the judge held, "I do not agree that actual compliance with the requirements of section 28(2)(b)(ii) was intended by the legislature to be a pre-requisite to the existence of a determination. Unlike the existence of a construction contract to which the act applies...".

The Respondent uses that quote in support of a submission that it is the existence of **the** construction contract on which the Applicant relies in its submissions which is critical to the determination and so the application must be dismissed if **that** contract does not exist for there is then no construction contract with which the adjudication is concerned [the emphasis is mine and deliberate]. The Court in my view referred to the existence of **a construction contract** not to the existence of the contract propounded by the applicant.

Section 33.1.a of the Act states the adjudicator must dismiss the application ... if "the contract concerned" is not a construction contract.

This section must be referring to the contract mentioned in section 28 of the Act which provides for the procedure for the making an application for adjudication. Section 28 requires a party to "the" contract to prepare and serve the application within 90 days after the dispute arises.

The section also provides, as the Respondent points out, that the application has to have attached to it "the construction contract" involved.

I am of the view that Section 28 is referring to the reference to a contract in section 27 of the act when section 28 refers to "the contract".

Section 27 provides that, "if a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated..."

Section 27 refers to a dispute arising under "a construction contract", not "the contract" on which the Applicant relies in his submissions. The Act requires there to be a construction contract, which is the subject of the adjudication.

In further support of its submission, the Respondent points to section 3.2 of the Act. The section does not refer to "the" construction contract the applicant is relying on, as asserted by the Respondent.

The Respondent also refers to section 8 of the Act and submits that the section requires consideration of the specific construction contract relied upon by the claimant in the adjudication. The act refers to the sum claimed or an amount retained being due to be paid under "the" contract. In that section the phrase can only be referring to the contract referred to in section 27 of the Act.

It is clear the parties agree that there was a contract between them. They dispute however which contract applies and the terms applicable between them.

I am of the view that these are matters often disputed between the parties to a contract. *Goldsbrough Mort and Co Ltd v Quinn* (1910) 10 CLR 674 at 695; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 77;

I determine that it is for the adjudicator to decide what the contract was. It is for the adjudicator to decide the existence of the contract and what its terms are. The Applicant can be mistaken as to such things as to whether there was one or three contracts as can the Respondent but an erroneous construction does not negative the existence of an agreement. The adjudicator has to act as the reasonable observer and decide what the true bargain was.

It is the true bargain entered into to by the parties that is the subject of the adjudication not the bargain the subject of the submissions of the parties unless the parties are in accord in which case there is no issue to resolve. If as the Respondent contends the first contract applies to the circumstances being adjudicated it is clear to me there is a construction contract. If the December Contract applies to the circumstances being adjudicated as contended by the Applicant it is clear to me that contract would be a construction contract. The allegation that the Applicant is bound to the contract that the Applicant submits in its application is the contract that applies to the circumstances giving rise to the application, is wrong. If the contract which I find is the subject of the adjudication is a hybrid of the contracts championed by the parties, then it is that contract that has to be a construction contract. Similarly if I find the September Contract binds the parties then that contract has to be a construction contract.

No matter what the contract was in this matter it was a construction contract as the scope of the works related to three story carparks or three story carparks and units, which are buildings or structures.

I determine that the Applicant was to supply goods and services related to construction work and to do construction work and hence the contract with which the adjudication is concerned is a construction contract. I determine that the Applicant and the Respondent were parties to the construction contract the subject of this adjudication.

Section 28 Compliance

Section 33.1 of the Act requires the adjudicator to be satisfied that the application has been prepared and served in accordance with section 28 of the Act.

Section 28 requires the following:

- The Applicant must be a party to the contract
- The Applicant must serve the written application within 90 days of the dispute arising.
- The Applicant must provide any deposit of security for the cost of the adjudication that the adjudicator requires.
- The application must be prepared in accordance with the regulations.
- The Application must 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 dispute and all the information documents and submissions on which the party making it relies in the adjudication.

Party to the Contract

I have determined that the Applicant is a party to the contract.

Other Section 28 Matters

Section 28 requires there to be a conforming application and service of the application within 90 days of a payment dispute arising, which in turn requires the determination of the existence of a payment dispute, which in turn requires the determination of the existence of a payment claim together with a challenge to the payment claim or a failure to pay the amount claimed which all require a determination of what is the construction contract and what are its terms, express or implied.

The Contract and It's Terms

I find what is reported in *Monarch Building Systems Pty Ltd v Quinn Villages Pty Ltd*, [2005] QSC 321 at [11] to be of assistance in this matter:

"In a case like this where there is no contractual document executed by both parties, the question is whether they nevertheless intended to be bound to the extent that they had reached agreement: "whether, viewed as a whole and objectively from the point of view of reasonable persons on both sides, the dealings show a concluded bargain" (*Meates v Attorney-General* [1983] NZLR 308, 377 per Cooke J). It is not essential that one be able to identify a discrete offer and a discrete acceptance, or the precise moment when a contract came into existence (*Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11, 110, 11, 117-8 per McHugh JA). The parties may agree to be bound now, "while deferring [even] important matters to be agreed later" (*Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, 619). In determining the intention of the parties in a case like this, that is, whether or not to contract, relevant circumstances may include prior negotiations and subsequent conduct (*African Minerals Ltd*, [30])."

The Respondent submits there was only one contract. The contract it says is the contract made on 9 September 2008 ("the September Contract"). The respondent submits the contract included the content of the Letter of Intent dated 9 September 2008, the price given by the Applicant on 28 August 2008 and the drawings and documentation given to the Applicant in order that he might price the job. The Letter of Intent set out an agreement for the parties to enter into a formal contract. It also stated that if the contract was terminated the Applicant would be paid for work done to the termination of the contract, on a quantum meruit basis.

The Applicant agrees that a contract was entered into on 9 September 2008 but says that as the scope of works was reduced on 21/10/2008 to the 3 carpark levels with variations. The Applicant asserts that the reduction of the scope of works was so significant that the first contract was repudiated and the Applicant accepted the repudiation, and a new contract was entered into. The Applicant says the price agreed for the second contract was \$5,600,000. The Respondent says the work done on the reduced scope of works was done pursuant to the terms of the September Contract and in any event as no price was agreed after the change in scope of works there could not have been a second contract.

The parties agree that on 16/12/2008 the scope of the works reverted to those described for the original project with variations.

The Applicant says this change again varied the scope of the works so significantly that the change necessarily meant a third contract was entered into ("the December Contract"). The Respondent says that as there was no second contract, as the first contract was never terminated, there was necessarily no third contract, and the September Contract always applied to the relationship between the parties.

I note that when the scope of the works was reduced to the 3 carpark levels, the Applicant says the value of the work changed from \$14 million to a much reduced a sum which the Applicant put at \$5.6 Million.

I am of the view that the revised scope of works is totally different from that which the September Contract contemplates. I find the change is not a variation and the difference in the scope of works is as per chalk and cheese (*Chademax Plastics Pty Ltd v Hansen & Yuncken (SA Pty Ltd (1984) 13 BCL 52*). Obviously the contract period would be different as would the price. Further the new scope of the works changed the economies of scale and the period available for recovery of profit.

I find that there has been a repudiation of the September Contract, which repudiation was accepted by the Applicant. The agreement made 9 September 2008 was terminated on about 21 October 2008.

The Applicant asserts that after the termination of the September Contract there was another contract entered into. The Respondent says, given that it disputes a termination of the September Contract, that there was no second contract, as a price was never agreed.

It is clear that the price the Applicant wanted was known to the Respondent for on 5 November the Respondent organised a meeting to discuss a price of \$5.6M for the reduced project. On 12 November 2008 the Respondent confirmed with the Applicant that the Applicant had been told to commence work immediately on the reduced scope of work even though there was a problem with the price being agreed as exhibited in the email of 29 November 2008.

I find that the Applicant did work pursuant to the reduced scope of works. The Applicant delivered a progress claim to the Respondent with respect to the work done after 21 October 2008 and was paid. The Applicant says that the claim was based on the reduced price of \$5.34 million and refers to payment claim number 2, dated 25 November 2008, which document shows a contract value of \$5,340,000. The Respondent denies receiving that document and produces another document which is evidently claim 2

dated 25 November 2008 with a signature on it. That document however has the contract value stated on it of \$14,060,000.

It may be in this matter that there was no second contract and the Applicant's entitlements to payment would have been determined on the basis of restitution measured as a claim in quantum meruit. The Applicant had rendered a claim for payment for the work done during the period after the scope of works had been reduced and was paid. I note with respect to that claim that the Applicant was paid \$107,000 less than the amount claimed.

In the circumstances I do not have to decide whether there was a second contract or not as clearly the parties entered into another contract on about 16/12/2008.

I reiterate that I have determined that the first contract came to an end at latest when the Applicant commenced work after the reduction in the scope of work.

On 16/12/2008 the contract superintendent emailed the Applicant and told the Applicant that the Respondent had decided that it would revert to the scope of works of the original project. The Respondent was also advised that it was to proceed with the construction as per the original quote. The quote is a one-page document, dated 2002 August 2008 quoting a price inclusive of GST of \$15,466,000. This equates to \$14,060,000 exclusive of GST.

On 18/12/2008 the contract superintendent instructed the Applicant that the original scope of works was varied such that the store area was to be changed into offices as per the attached plans. I assume that the contract price changed by variation so as to accommodate this variation.

On 19/12/2008 the Applicant proceeded to execute the original scope of Works as varied by the contract superintendent.

The terms of this contract, the December Contract, according to the Applicant include a promise that the Applicant would execute the original scope of works for the price of \$14,060,000 exclusive of GST plus the cost of additions and variations as the scope of works were developed by the respondent. The Applicant submits that the content of the Letter of Intent date 9 September 2008 are not terms of the December Contract.

The Applicant submits as does the Respondent that there are terms implied into the December Contract pursuant to the operation of the Act.

The Respondent says there was no second or third contract. The Respondent says the terms of the agreement were concluded on 9 September 2008. The Respondent would submit that if there was a second or December Contract then the terms of the December contract were exactly the same as the terms of the September Contract. This would include the content of the Letter of Intent.

The Respondent submits that an indication of the content of the Letter of Intent being terms binding the parties, points out that the Applicant continued after 19 December to negotiate towards the execution of a formal contract which was one of the terms set out in the letter of intent. The history shows the Applicant had its solicitor draft a contract and forward it the Respondent in January 2009. I note however this was done at the insistence of the Respondent who approached the Applicant to take steps to get the formal contract finalized. See e-mails 24/12/2008; 24 January 2009. I do not accept the Respondent's submission as the Applicant's action was not an independent act but rather as a result of the exhortations of the Respondent.

The Respondent submits the letter of 21/04/2009 from the Applicant to the Respondent also indicates that the Applicant was of the view that the parties were still attempting to negotiate a formal contract as per the Letter of Intent. The Respondent submits that the content of this letter contains an admission by the Applicant that is bound by the terms set out in the Letter of Intent.

I am of the view that the Applicant's letter of 21 April 2009 refers to the history of those negotiations according to the applicant and it does not contain an admission by the Applicant that it is still bound by the September Contract or the content of the Letter of Intent.

The Applicant denies that the termination provision as provided for in the letter of intent of 9 September applied to the December Contract. [A54]. The Applicant says the express terms of the December Contract did not include the terms as to termination as contained in the Letter of Intent and those terms cannot be implied. The Applicant submitted that it entered into negotiations towards a formal contract as its management could see the benefit of having one.

I am of the view that, as the contract of 16 December 2008 was a new contract, the terms agreed on 9 September 2008 would not apply unless there was some agreement that they did. There is no document dated 16/12/2008 or thereafter which refers to the content of the Letter of Intent being an express term of the December Contract and neither of the parties

recounts a conversation referring to the content of the Letter of Intent becoming an expressed term.

The express terms are set out in the correspondence of 16 and 18 December 2008 as set out above and do not include a reference to the Letter of Intent. The conduct by the Applicant of partaking in a negotiation toward a formal contract at the insistence of the Respondent is not sufficient to incorporate the content of the Letter of Intent as terms of the December Contract as it existed in April 2009 when the Respondent terminated the contract.

I find that the contents of the Letter of Intent dated 9 September 2008 are not terms of the 16 December contract.

I now turn to the manner in which the amount claimed by the Applicant in its progress claims was calculated.

After 16 December 2008 the Applicant submitted progress claims. Each progress claim referred to a category of work to be done within the scope of works. The Applicant has then divided the contract sum amongst the categories so as to give a budget for each of the categories. The Applicant sets out in the progress claim the amount claimed for each of the categories of work done during the invoice period. The progress claim then sets out the total claimed for each of the categories up to the end of the period to which the progress claim relates including the amount claimed for that period. The progress claim also sets out the previous payments received before the invoice period.

The Respondent had each progress claim submitted by the Applicant, assessed by a quantity surveyor and the Respondent has paid the Applicant the amount approved by the quantity surveyor.

The quantity surveyor assessed the claim made by the Applicant by determining for each category of works, a percentage of the budgeted amount of each category set out in the progress claim that had been completed by the Applicant up to the date of the claim. The quantity surveyor then determined the whole of the works done to the date of the claim as a percentage of the contract price and used that percentage to determine the sum to be paid by the Respondent to the applicant with respect to the progress claim. The quantity surveyor stated that if, for example, 20% of the works has been done, the Applicant has been paid for 15%, and therefore 5% of the contract price is to be paid to the Applicant. The Applicant did not raise any objection to the manner in which the Respondent's quantity surveyor assessed the Applicant's progress claims and

by which the Respondent determined the amount that the Respondent would pay to and paid the Applicant.

I find it was a term of the contract that the amount payable to the Applicant was to be calculated by determining the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations.

This is the calculation the Respondent's quantity surveyor did when he assessed each of the Respondent's progress claims and it is on that basis the Respondent paid the Applicant.

I find there being no written provision about how a payment claim is to be made, or as to how a response to a payment claim is to be made, that terms are implied into the contract pursuant to sections 19 and 20 of the Act.

The Payment Dispute

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.

The Applicant asserts that it has a valid payment claim which was served on the Respondent and the Respondent did not respond to it in time so that the Respondent had to pay the whole of the sum claimed within 28 days service of the payment claim and as it did not do so, there is a payment dispute.

The Respondent claims the payment claim was disputed within the time allowed by the terms of the contract which terms are in the circumstances implied pursuant to section 20 of the Act. There is no dispute that the terms as to the giving of a response to a payment claim are implied pursuant to section 20 of the Act.

The implied terms require the notice of dispute to be served within 14 days after receiving the payment claim (Schedule 1 Division 5 clause 6(2)(a)).

The payment claim was served on 10 July 2009. The parties agree to this date.

The parties agree that on 27 July 2009 the Respondent delivered a response to the payment claim.

The Respondent says that the 14th day after service of the payment claim, 24 July 2009, was a public holiday and thus that day did not count (section 28 of the *Interpretation Act*). The 14th day then would have been a Saturday. However, the *Interpretation Act* says Saturdays and Sundays do not count and so the 14th day for service was Monday 27 July 2009. I agree.

Service by fax is sufficient service (section 25 *Interpretation Act*). The applicant admits service.

I determine the notice of dispute was served within the time allowed for in the contract.

The payment dispute therefore arose on 27 July 2009.

The Payment Claim

The Applicant submits that the payment claim is annexure 14 to the statutory declaration of [AB]. The payment claim is referred to in paragraphs 32 to 34 of that declaration.

The payment claim has to comply with Schedule 1 Division 4 of the Act there being no written provision in the contract about how a party must make a claim to another party for payment.

Checking the payment claim against the requirements of the terms implied, it is clear the payment claim is in writing and addressed to the party to which the claim is made. It states the name of the claimant, the date of the claim, the amount claimed, and is signed by the claimant and has been given to the party to which the claim is made

It is not an issue in this matter that the claim itemises and describes the obligations the contractor has performed, nor whether it has done so in sufficient detail for the principal to assess the claim.

The Respondent objects to the method by which the claim is calculated. The Respondent says that the content of the Letter of Intent are terms of the contract. The term the Respondent relies on is this:

“If we do not successfully conclude negotiations and sign the Contract documentation by Tuesday 30 September 2008, (or such later date as we may notify you in writing), we may terminate this arrangement. If this arrangement is terminated you will:

- a. immediately cease all work and vacate the site,
- b. subject to complying with paragraph a you will be paid for work done, up to the date of termination, on a quantum meruit basis."

I have determined that the contents of the Letter of Intent dated 9 September 2008 are not terms of the December Contract as it applied in April 2009 when the contract was terminated. There was no obligation, therefore, for the seventh payment claim dated 26 June 2009 (the payment claim) to be presented as a claim for restitution based on quantum merit.

I have determined that it was a term of the December Contract that the amount payable to the Applicant was to be calculated by determining "the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations", for this is what the Respondent's quantity surveyor did when he assessed each of the Respondent's progress claims.

I find that Progress claim seven, dated 26 June 2009, is presented in accordance with the terms of the December Contract and thus the Respondent's assertion that the Applicant has failed to submit payment claim in accordance with the contract, fails.

I determine that the Applicant delivered to the Respondent a valid payment claim.

Repeated Payment Claims

Mildren J held in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 at 11 that, "the Act does not envisage that, a payment claim, which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28, to be [is] available for adjudication."

Southwood J, with whom Riley J agreed in the same case, held as follows:

1. A document which reformulates the applicant's payment claim for the total amount outstanding under all previously rendered invoices [which are payment claims] such that it makes repeat claims for payment for the performance of obligations under the construction contract which had already been invoiced [and which invoices were payment claims] does not comply with section 28.2.b.ii of the Act. Non compliance means the adjudicator does not have jurisdiction to assess the claim (at [45]).

2. A document which is an amalgamation of several previously made claims is not a payment claim and does not give rise to a payment dispute (at [46]).
3. Each of the unpaid or partly paid invoices [which are payment claims] and which were included in the document, gave rise to a payment dispute of their own. A document which is a claim for the total amount outstanding under previously rendered invoices or payment claims in respect of which there was already a payment dispute is not a payment claim (at [46]).
4. The payment claims included in the amalgamation document were disputed when each of the relevant original invoices rendered during the course of the contract were rejected, disputed or partly unpaid when they fell due pursuant to the contract and not when the amalgamated document was responded to by the respondent (at [47]).
5. Time ran in relation to each original invoice [if it was a payment claim] if the invoice was either rejected, disputed or partly disputed, partly unpaid or unpaid when the amount invoiced was due for payment under the construction contract (at [48]).
6. An application for adjudication with respect to some of the later unpaid original invoices rendered by the first respondent may have been prepared within time if such an application was prepared at the time the application was prepared in this proceeding. However, the first respondent elected not to make such an application (at [48]).
7. A contract may enable repeat claims. However section 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat payment claim in respect of the performance of the same obligations under a construction contract (at [49]).
8. In the circumstances,

The application was not prepared and served within the time prescribed by s 28(1) of the Act and;

The application did not comply with the requirements of s 28(2)(b)(ii) of the Act;

The criterion specified by s 33(1)(a)(ii) of the Act was not fulfilled and;

The adjudicator lacked the jurisdiction to determine the payment dispute on the merits (at [50]).

I note the majority judges did not allow the payment disputes that were out of time to be severed from the application so that the adjudicator could assess only the claims that were within time. This may have been because the way of making the claim, namely providing a list of the invoices that were actually the payment claims and not the invoices themselves, even though the invoices were attached to the application.

The majority judges found that the inclusion in the list of claims out of time meant that the adjudicator did not have jurisdiction to assess the application as the application did not comply with section 28 as it did not state the details of or have attached to it the payment claims that have given rise to the payment dispute, and the adjudicator must dismiss the application. They said this despite the application having attached to it the unpaid invoices, including the ones that were not out of time for section 28.

In the AJ Lucas case, the relevant payment claim was asserted to be an invoice that was an accounting in relation to the total amount of outstanding under all previously rendered tax invoices. The invoice delivered to the respondent was not included in the application. The Court ignored that fact and discussed the delivered Tax Invoice as if the payment claim was attached to the Adjudication Application.

In this matter the payment claim is a tax invoice and payment claim that includes claims for work done not claimed before and for work done but claimed before. Does The AJ Lucas case mean that the Application should be dismissed?

Consideration of the Jurisdiction Problem

In *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 Mildren J held that "the Act does not envisage that, a payment claim, which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28, to be available for adjudication."

Mildren J found that if a payment claim includes in the claim, a claim for work done that has already been the subject of a payment claim and that payment claim is out of time, then the first mentioned payment claim is not available for adjudication.

Riley J and Southwood J held that a list of payment claims some of which are within time and some which are no longer in time is not a payment claim. The invoices themselves are the payment claims. The applicant the judges held could have prepared adjudication applications with respect to the invoices [payment claims] that were within time and they could have been adjudicated upon. The list of prior payment claims is not a payment claim and could not be adjudicated upon.

They also found that the invoice was a repeat claim for the previous payment claims for which there was already a dispute.

In this matter the applicant has phrased the payment claim as a percentage completed of the whole of the adjusted contract price less the payments made.

According to Mildren J, if there is included in a claim, which claims the percentage completed of the whole of the adjusted contract price, a claim for an amount which has been the subject of a previous payment claim and which payment claim was out of time for adjudication when the application for adjudication was served, then the payment claim proffered for adjudication by the Applicant is not available for adjudication.

Riley J and Southwood say that creating a list of payment claims, some of which are out of time and some of which are not, is not a payment claim, it is merely repeating claims which of themselves were the payment claims.

Riley J and Southwood J did not say that a payment claim that contained a claim for an amount that had been the subject of a prior payment claim and claims that had not been the subject of prior claims was not a payment claim. They held that the invoices that were the payment claims could be the subject of adjudication applications if they were in time.

I refer to the contents of the payment claim dated 26 June 2009, being claim 7.

The document states that:

1. The adjusted contract sum is \$14,347,631.
2. The sum claimed for the whole job to the date of the claim is \$1,775,237.
3. The sum paid by the applicant to the respondent is \$1,348,217.

4. The balance due is \$427,021.05 exclusive of GST and that is the sum claimed in the payment claim.

Without adjustment for disagreement as to the amount of work done, claim 7 includes \$277,393 for work done since March and since payment claim 6.

The balance of claim 7 is made up of a claim for variations.

The total of variations claimed in claim 7 is \$287,628.

Clearly the sum claimed for work done since March and for variations is more than the \$427,021 claimed in claim 7.

I must now look at the prior progress claims and determine whether they are payment claims and whether any sum included in those claims which are payment claims are included in the subject payment claim.

The October claim was a payment claim and the amount not paid to the Applicant was \$127,023.

The time within which the Applicant could bring an adjudication application with respect to the unpaid amount expired well before 20 July 2009.

The November claim was a payment claim and the amount not paid was \$107,668

The time within which the Applicant could have brought an adjudication application expired well before 20 July 2009.

The December claim was not a payment claim. No sums were left unpaid.

The January claim was a payment claim. No sums were left unpaid.

The February claim was not a payment claim. No sums were left unpaid.

The March claim, claim 6, was a payment claim. The sum of \$244,197 was left unpaid.

The time by which an adjudication application had to be made with respect to the unpaid sum was at the latest 21 July 2009.

I have looked at the tax invoices for the variations included in claim 7 and all but one predate the date shown on claim 6 which is dated 24 March 2009. Variation claim 10 is dated 26 March 2008 and claims \$1,237.15.

However the Respondent has submitted an email showing an amended claim 6 was sent on 30 March 2009.

The Respondent has also submitted a variation register for claim 6 which was delivered to the Respondent by the Applicant on 27 March 2009. These are the variations included in claim 6. The sums claimed for variations and contained in the register equate with the variation claims made in claim 7. The difference is variation 6 and variation 17. The differences in the sums claimed for variations when the variations in claim 6 is compared to the variations in claim 7, is \$28,564. It appears that in claim 7, \$28,564 was claimed for variations not claimed in claim 6.

Prima facie the new claims made in claim 7 amount to $\$28,564 + \$277,393 = \$305,953$. This is \$121,064 short of the claim of \$427,021.

Prima facie some of the claims made in claim 7 were included in claim 6 or previous claims.

Claim 6 was a payment claim. The Applicant claimed \$375,433 and was paid \$131,236. The Applicant was not paid \$244,197 and that sum was the amount involved in a payment dispute which arose at the latest by 27 April 2009. An adjudication application in relation to payment claim 6 in which \$244,197 was not paid or was disputed by the Respondent had to be made by 26 July 2009.

The Applicant submits that the AJ Lucas case decision does not apply to these circumstances for the following reasons.

1. The application attached to the application is the same as served on the Respondent. I agree but that does not exclude the application of the court's decision. This point was not considered in the reasons for decision in the *AJ Lucas* case.
2. Claim 7 is a progressive claim. I agree and that is probably the difference between the claim in the AJ Lucas case and the claim in this adjudication. The difference is that the payment claim championed by Mac Attack was a list of all prior claims. In this matter the payment claim is a mixture of repeat claims for work and sums claimed in prior payment claims and for work done and not previously claimed for in prior payment claims.

3. The variations were not the subject of any previous payment claims. I disagree. The variations in claim 7, save for Variations 6 and 17, were included in claim 6 and were assessed and allowed at 0%.
4. The adjudication application with respect to claim 7 was made in time. I agree that the application with respect to the payment dispute was made in time but the question is whether the payment claim is as required by the Act.
5. The claim submits for the first time the value of the works done from the date of the last claim to the date of the claim as well as new variation claims. I agree that the claim does claim for new work and new variation claims but it also appears to make a claim for variations that were the subject of a prior payment claim.

I find the variations were assessed and were part of the payment claim 6 and that a payment dispute arose with respect to claim 6 and no adjudication application was brought in time with respect to that dispute.

On about 24 March 2009 the Applicant presented claim 6 to the Respondent by the Respondent's contract manager. On 25 March 2009 the Respondent told its contract manager not to allow the variations made in claim 6 as they had not be approved yet. The quantity surveyor on 25 March 2009 for the Respondent allowed: 0% for variations and \$131,236 for work done since claim 5, in the claim 6 assessment. On 25 March the contract manager told the Applicant that the mark-up on the variations was unacceptable. On 27 March the Applicant delivered to the Respondent amended variations. On March 27 the Applicant delivered to the Respondent a variation register that included claims for the variations included in claim 7 save for Variations 6 and 17. On 30 March the Applicant delivered to the Respondent an amended claim 6 which included the said variations as part of the claim. The amended claim 6 was a payment claim and only \$131,236 was paid. \$244,196, being the sum claimed for variations was unpaid. I find the variations save for Variations 6 and 17 were considered to be part of claim 6 which claim was a payment claim and which payment claim was only partly paid.

If that is not the case, then the date of each of the tax invoices rendered by the Applicant to the Respondent that made a claim for payment for variations, were payment claims, and, save for variations 6 and 17, they are well out of time for the purposes of claim 7 and section 28 of the Act.

6. Claims in the accumulative manner are allowed but they have to be accompanied by supporting information before they can be said to be payment claims. The Applicant refers to the case of *Merym Pty Ltd and Methodist Ladies College* [2008] WASAT 164 in support of this submission. I find that the contract in *Merym* had a specific precondition as to the supporting information being provided before a claim could be a payment claim in that case. There is not such precondition in the contract relevant to this adjudication. The Applicant cannot rely on the inclusion of extra information in claim 7, if it is new information, to make a repeat claim a new claim. The non-inclusion of that information in claim 6 does not stop claim 6 being a payment claim for the variations. I agree claims in an accumulative manner are allowed.

The Respondent asserts with respect to the repeated claims in claim 7, their existence in claim 7 means the application for adjudication should be dismissed the application contained claims which were out of time for referral to the adjudication.

The Respondent points to the tax invoices relating to the payment claims, and notes their dates are prior to 30 March 2009 and that they were not paid. The Respondent notes that they are repeated in claim 7.

I find that the majority of judges in the *AJ Lucas* case do not preclude a payment claim, containing partly a claim for work done which has been the subject of a prior payment claim which is relevantly out of time, from being the subject of a valid adjudication.

The situation in this matter is that the claim is for the difference between what % of work was done when the last claim was made and the % of work done to the time of claim 7 plus a repeat of part of claim 6 which claims are out of time for referral to adjudication plus a claim for variations which are new – i.e. not claimed before.

The relevant payment claim is not a repeat of all claims 1 to 7 and including all claims for variations. The relevant payment claim in the *AJ Lucas* case was such a claim. It was a repeat of all claims and not partly a new claim and partly a repeat claim.

The repeating of claims in claim 7 which were part of claim 6 or which were payment claims in themselves, such as the tax invoices for the variations, does not preclude the claim being adjudicated upon on the

merits. If that were so then an applicant could make a mistake in a payment claim of repeating a claim for \$20 which was part of a prior payment claim that was out of time, in say a \$1.1 million claim for new work and the adjudication on that claim would have to be dismissed.

As the majority pointed out in the AJ Lucas case, an adjudication application can be made with respect to an unpaid original invoice. That is the case here. The fact that claim 7 includes claims previously made and which are relevantly out of time, does not exclude the assessment of the payment claim. The adjudicator can ignore the claims previously claimed. That is what the quantity surveyor would have done in this case had the quantity surveyor produced a report for the Respondent. As the Respondent submits that is the nature of accumulative claims and the Respondent would and in this case did with respect to earlier claims, exclude the claims previously made and assessed.

I find the application for adjudication in this matter is with respect to an unpaid original invoice and not with respect to a list that repeats claims previously made and the inclusion of claims included in previous claims does not mean claim 7 is not available for adjudication.

For the reasons set out above I find that the application has been prepared and served in accordance with section 28.

Compliance with Section 33.1

1. I find the contract concerned is a construction contract and that the application for adjudication has been prepared and served in accordance with section 28 of the Act.
2. I find there is no order, judgment or other finding about the dispute that is the subject of the application.
3. I am not satisfied as to the matters contained in Section 33(1)(a)(iv).
4. I obtained from the Registrar on 13 November 2009 an extension of time within which to arrive at my decision, to close of business 16 November 2009
5. For the reasons that appear above I do not dismiss the application.

Determination - Section 33(1)(b)

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)).

Assessment

The payment claim is claim 7 for the period ending 19 June 2007.
The claim is for:

\$178,000 for concrete

\$3,618.65 for doors and locks

\$94,827.42 for preliminaries

\$287,626 for Variations

The adjudicator cannot look at claims that are repeat claims. The inclusion of claims that have been the subject of prior payment claims that are unpaid or partly paid or disputed but have not been made the subject of an adjudication within time are not able to be re-triggered by including them in a subsequent payment claim.

All the claims made in claim 6 that are repeated in claim 7 are not able to be considered in the adjudication.

Those matters that can be included are the claim for work done between claim 6 and claim 7 and the claims for variations not previously claimed.

The variations not included in claim 6 are variations 6 and 17 amounting to \$28,564.

The new claims made in claim 7 amount to \$28,564 for variations, plus \$277,393 for work done between claim 6 and claim 7. The maximum the applicant can be paid is \$305,957.

Concrete

The claim for concrete is \$111,365.

In support of the claim for concrete the applicant provides an invoice dated 6 May 2009 re steel fixing at \$33,168 and an invoice from Onesteel for \$163,718.45.

I note the steel fixing claim includes invoice 93 dated 21 December 2008 and invoice 96 dated 27 February 2009. These invoices are also included as being support for variation 2 which was included in claim 6 of 30 March 2009. At most this claim can be a claim for \$8,849.

The Onesteel account is broken up into \$76,939.28 delivered to site and \$113,165.63 not yet delivered. Some credit must have been given for the goods not delivered to site. This is not explained.

The statutory declaration of [AB] does not explain the claim and the variance between the claim and the invoices and whether there was any allowance for the steel not delivered after 17 April when the contract was terminated. There is no proof of payment or in this case the extent to which Onesteel or Jimmy's Steelfixing have claimed in the liquidation. I allow only \$76,939.28 for steel.

The Respondent says it has had [BD] assess the works on the basis of the percentage of the works complete compared to the whole. [BD] says that the whole of the work done as a % of the whole contract scope of works is 8.16%. The Respondent's quantity surveyor when assessing the claim for claim 6 advised the Respondent that 15% had been completed and the Respondent has paid the sum equivalent to the increase from claim 5.

The Respondent does not explain this difference in the findings of the experts it relied upon nor does it make any explanation of why the claim by the Applicant for the work done since claim 6 should not be allowed.

The Respondent is now claiming an increase of 6.12% from the % allowed in claim 6 by the Respondent.

[BD] may be well qualified but the Respondent cannot say the sums agreed and paid were on account and subject to a later assessment by [BD] or other qualified expert at the end of the contract when the contract did not contain such a term.

I reject that the evidence of [BD] is persuasive as to the sum to be allowed or not in claim 7.

I allow the sum of \$85,788.28 for this claim.

Doors and Hardware

The claim is for \$3,618.65.

In support the applicant has supplied an invoice from Nortruss dated 6 May 2009, in the sum of \$3619.76 excl GST for door frames.

The Respondent says it has had [BD] assess the works on the basis of the percentage of the works complete compared to the whole. [BD] found that only \$555 or .60% worth of goods and labour have been expended on doors. The Respondent's Quantity Surveyor had allowed 1.5% of the works completed in respect of claim 6 in March and the Respondent has paid that sum. I reject the submission that the percentage of work done is now less than was done by claim 6.

The Applicant has shown that an account has been received for the fire doors.

I allow the claim at \$3619.76

Preliminaries

The claim is for \$94,827.42.

The claim is not explained nor supported by documentation whereas the respondent allowed 27% for this category of claim up to claim 6 and paid that amount on the same information.

The claim is not denied by the respondent save with respect to a global denial based on the quantum meruit argument which failed. [BD] says only 14.2% of preliminaries have been completed despite 27% already having been allowed and paid. The Respondent has not provided any argument with regard to the extent of the claim made by the Applicant in claim 7 which is an increase of 3.3% for the period as compared to the whole of the works.

I allow on the balance of probabilities the sum of \$94,827.42 for this claim.

Variation 6

The claim is for \$11,534.

The Respondent says the variation is based on an allegation that a slab was uneven and therefore a change was needed. The Respondent says the unevenness was there when the Applicant examined the site before he put in his tender and therefore should have allowed for the unevenness in its tender price. In short it rejects the claim for a variation with good cause.

The Applicant does not explain that the variation was agreed to by the Respondent.

I find that, as there is no agreement and no explanation for the variation, on the balance of probabilities the variation should not be allowed.

Variation 17

The claim is for \$17,030.

The claim is for, back-propping requirements resulting from meetings with Connell Wagner. The junction between the precast panels to slab details - clarified. Back-propping section and details for the crane outriggers - design issued - 849 props x 0.68 each = \$577.32 per day - costs from 16/03/09 - 09/04/09 – Back-props were off hired on 09/04/09. Other than this, the Applicant provides no explanation of the claim.

The Respondent provided the report of [BD] who considered this variation claim. [BD] recognised the claim but said that the claim was excessive and allows 6% of the claim.

I allow 6% of the claim namely \$1021.80.

Defects

The Respondent says the adjudicator should take into account the cost of defects. The Respondent alleges defects to the ground and first floor ramps. The Respondent alleges the cost of the defects may cost in the order of \$300,000.

I find that this claim for defects is not something that an adjudicator can take into account in an adjudication. A claim for the cost of defects in this matter is a claim for damages for breach of contract and as such is not allowed to be considered in this adjudication.

Reconciliation

Concrete	\$85,788.28
Doors	\$3619.76
Preliminaries	\$94827.42
Variation 6	\$0.00
Variation 17	\$1021.80
<hr/>	
Total	\$185,257.30

I find the sum payable by the respondent to the applicant is \$185,257.30 exclusive of GST.

Interest

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

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.

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

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.

The due date for payment was 7 August 2009.

The date of the determination is 16 November 2009. The claim was due to be paid 101 days ago.

As at the date the payment dispute arose the sum claimable was \$185,257.30 exclusive of GST.

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

Interest on the sum payable exclusive of GST is to the relevant date \$19,452.02 pa or \$53.29 per day.

I determine the interest payable to the date of the determination is \$5,382.61

I allow interest until payment on the sum payable of \$185,257.30 exclusive of GST at the rate of \$53.29 per day until payment.

Costs

Section 36(1) of the Act requires the parties to bear their own costs.

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.

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 on 16 November 2009 is \$209,165.64 being the amount owing of \$203,783.03 inclusive of GST, plus interest of \$5,382.61 to 16 November 2009 under s 35(1)(a). Interest accrues on daily rests on the sum of \$185,257 exclusive of GST or such amount of that sum which is unpaid at the rate of 10.5% pa from and including 17 November 2009.
2. The sum of \$209,165.64 inclusive of GST is payable on 16 November 2009.
3. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).
5. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctable error.
6. I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Dated:

David Alderman
Registered Adjudicator