CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT (NT)

DETERMINATION

Adjudication Identification Number: **07.09.02**

Adjudicator: **DS ELLIS**

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Applicants' Name:

ABN:

Address

Phone Number

Fax Number

Respondent's Name:

ABN:

Address

Phone Number

Fax Number

Date of Adjudication Claim: **12 June 2009**

In respect of the Applicants' adjudication claim dated 12 June 2009, I make the following determination:

1 I determine I consider that the Respondent pay the Applicant $23,019.43, plus GST within 7 days of the date of this adjudication.

The reasons for my determination are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.

Date:

_____

Registered Adjudicator

Schedule 1: Reasons for Determination

("Applicant") and ("Respondent")

The application

2 This application for adjudication arises from a contract for [works] for the Respondent's [project name omitted].

3 The application is based on the document described as a payment claim dated 9 April 2009 ("[redacted] 14") seeking $1,378,686.28 (including GST) from the Respondent.

4 [Redacted] 14 includes a schedule or spreadsheet identifying components of the total amount claimed. Most components are claims in respect of variations to the work the subject of the contract. One, VO213, is a claim for the costs of delay.

5 In so far as claim consists of claims for variations, I consider that:

(a) a fresh dispute arose on the failure of the Applicant to make payment in respect of VO 101, VO 163, VO 202, VO 203, VO211 and VO224 within 30 days after submission of [redacted] 14. The Respondent approved these variations; and

(b) disputes in respect of the balance of VO 75, VO 159, VO 160, VO 182, VO 184, VO 190, VO 201, VO 205, VO 206, VO 207, VO 210, VO 213, VO 216, VO 218, VO 219, VO 223 and VO233 arose more than 90 days prior to this application being made, that is, before 17 March 2009. The application in respect of these variations must be dismissed in accordance with s 33(1)(a)(ii) of the Act.

6 In respect of VO 213, the claim for "delay damages", I am satisfied that it is not possible to fairly make a determination because of the complexity of the matter. The application must be dismissed in relation to VO213 pursuant to s 30(1)(a)(ii) of the Act.

7 I note that:

(a) clause 15.7 does not apply to VO213; and

(b) clause 6 of the Schedule to the Act does not operate as an implied term of the contract.

8 I consider that the Respondent should pay the Applicant $23,019.43, plus GST within 7 days in respect of the application in so far as it relates to VO 101, VO 163, VO 202, VO 203, VO211 and VO224. Payment should be made within 7 days.

Procedural background

9 The application was commenced on Friday, 12 June 2009. The Applicant contended that the application was served on 12 June 2009. The Respondent contended that the application papers were delivered to it at its offices in the Northern Territory on Monday 15 June 2009. I accept that delivery took place on 15 June 2009, when that when the Applicant referred to the date of service, it referred to the date on which it dispatched the documents, not when they were received.

10 I assume that service was effected on the nominated appointor in the same fashion and on the same day. The nominated appointor failed to make an appointment within 5 working days of 15 June 2009 and, accordingly, I was appointed by the Registrar on 26 June 2009.

11 I was served with the response on 29 June 2009.

12 I requested and received further submissions and materials in relation to the date on which the Applicant left site, the progress claims made prior to the claim the subject of this application and the effect of a decision of the Western Australian State Administrative Tribunal in *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 ("*Blackadder"*). I also received some uninvited submissions from the Applicant in relation to a change in the form of the progress claims used by the Applicant and the process adopted to deal with claims in variations. The submissions in relation to the change in the form were irrelevant. The submissions in relation to the process for dealing with claims in respect of variations effectively reproduced submissions made by the Respondent. I took that material into account.

Factual and contractual background

13 Much of the factual and contractual background was not in dispute.

14 It was common ground that the parties entered into the contract and that the contract between the parties was contained, partly, in a document entitled "Key Terms", identified as contract no 56000017652 and signed by the Applicant on 4 September 2009 and by the Respondent on 25 June 2009. The "Key Terms" stated that the contract comprised a number of other documents, including the General Conditions[1]. In the contract, the Applicant is referred to as the "Contractor" and the Respondent as the "Company".

15 The parties also entered into another contract for the performance of works on the [redacted] plant, numbered 5600018340 ("R Contract").

16 The contract does not specify when the works the subject of the contract were to start. However, the works were to be practically complete by 6 June 2008. I was informed by the Respondent that the Applicant left site on or by 12 December 2008. Information from the Applicant indicated that demobilisation was in December 2008.

17 The contract contemplated that the Applicant would make claims for payment from time to time. Clause 15.2 provided for the Applicant to make claims at the "Payment Claim Times", which was an expression defined in clause 1.1 by reference to the Key Terms. Opposite the heading "Payment Claim Times" in the Key Terms, appears the expression "20% upon execution of Contract, balance on monthly progress claims". Neither the General Conditions nor the Key Terms specify a particular date in the month on which claims must be made.

18 Clause 15.2 is headed "Contractor to prepare Progress Claims" and provides:

> "Unless otherwise provided in the Contract, at each of the Payment Claim Times, the Contractor must prepare in reasonable detail and in a form approved by the Company Representative, and submit for approval, a Progress Claim (***Progress Claim***) showing the Contract Value of the Parts of the Works performed by the Contractor since the preceding Progress Claim, or, in the case of the first Progress Claim, since the Commencement Date."

[1] References to clause numbers is a reference to clauses in the General Conditions, unless stated otherwise.

"Contract Value" is defined in clause 1.1 to mean "the monetary value of the relative part of the Works performed, which is calculated by reference to the Contract Price Breakdown". The Contract Price Breakdown is also defined, and refers to Schedule D of the Contract. It appears that the reference to Schedule "D" should be a reference to Schedule B of the contract which is a listing of the price of particular parts of the Work and items of work.

19 Clause 15.5(a) provides:

> "Together with the submission of a Progress Claim, the Contractor must, unless otherwise agreed with the Company, render an Invoice to the Company in relation to the provision of the Works to which the particular Progress Claim [relates] and calculated by reference to the prices, fees or other amounts specified in Schedule B Prices".[2]

Clause 15.5 goes on to provide that the Invoice must contain a brief description of the Works provided in the period covered by the Invoice and any further information required. Clause 15.2 also requires the Applicant to furnish a report on the progress of the works compared with the Works Timetable and "full details of any action proposed to overcome any failure by the Contractor to adhere to the Works Timetable".

20 Clause 15.6 and clause 15.7 both need to be set out in full:

> "15.6 Payment of Invoices
>
> Subject to Clauses 15.7, 17, 21.4, 37.10(e) and 40.2(b) the Company must pay to the Contractor the amount shown on the Invoice within 30 days of receipt of the Invoice."
>
> 15.7 Disputed Invoices
>
> If the Company disputes any amount shown on an Invoice, it must notify the Contractor within 21 days of the receipt of the Invoice and must pay any amounts not in dispute in accordance with clause 15.6, provided that the payment by the Company is not to be considered as an acceptance of the amount in dispute or of the Company's liability to make that payment."

21 The Applicant made a number of claims during the course of the work. It appears that 13 claims were made prior to [redacted] 14 which were, or purported to be, made pursuant to clause 15 of the Contract.

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[2] It appears that the word, "reference" has been omitted after "Claim" where it appears the second time.

22 By letter dated 6 July 2009, the Respondent made further, uninvited, submissions about how claims in respect of variations were dealt with. The effect of those submissions was to assert that "the procedures implemented by the Respondent specifically required variations to be approved before the Applicant included those variations in a payment claim". The Applicant provided copies of a number of emails exchanged by the parties during 2008. The email of 20 June 2008 sets out the outcomes from a meeting held on 19 June 2008. The purpose of the meeting is described as "Re-confirm process for variation claims". The outcomes of the meeting are set out in 5 bullet points:

> "• [Applicant] to ensure that [supervisor] register contains all issued variation notices- weekly ...
>
> • Variation notices to be costed as soon as possible – NO to complete all site inputs and forward to ... CB
>
> • Variation claim to be submitted to [supervisor] by CB for approval
>
> • Approved variation claims to be invoiced – CB
>
> • Variation status and issues to be discussed at weekly meetings"

[redacted] The Respondent also asserted that the approval practice in relation to claims for variations differed from the general practice for considering claims under clause 15. The Respondent also relied on the email of 20 June 2009, although the Respondent asserted that the procedure for consideration of variation claims involved a meeting between representatives of the parties. I accept that the practice of the parties was in accordance with the meeting of 19 June 2009. Although it is likely that the parties did meet to discuss variation claims, nothing turns on this.

23 [Redacted] 14 is dated 9 April 2009 but appears to have been sent to the Respondent as an attachment to an email from [the Applicant] on 12 April 2009 at 8.02pm[3].

24 The overall form of [redacted] 14 is similar to earlier claims. [Redacted] 14 is made up of two parts. The first is headed "payment certificate" and appears to be a draft payment certificate which the Respondent could simply sign, if it

[3] The email is included as part of the responsive email from the Respondent dated 21 April 2009 at 12.53pm. The Applicant's covering email indicates that the claim would be sent in 5 parts, presumably attached to 5 separate emails.

accepted the whole of the claim ("draft certificate"). The draft certificate includes a table breaking down the claim into various broad categories of work. The table distinguishes between the value of previous claims and the value of the work the subject of [redacted] 14. The effect of the table in [redacted] 14 is that:

(a) $1,253,351.16 is identified as "Payment To Date";

(b) the whole of the $1,253,351.16 is attributed to "Variations";

(c) the $1,253,351.16, together with GST, is the whole of the amount claimed in [redacted] 14 and in the application, namely $1,378,686.28

25 The draft certificate states that "This Claim is for Work up to "09.04.09". The date appears in a shaded box. Other draft payment certificates read "This claim is for Work done during [a specified month]", with the specified month appearing in the shaded box.

26 The rest of [redacted] 14 is a printout from a program such as excel. The final part of the spreadsheet lists a large number of variations, most of which appear to have been dealt with prior to [redacted] 14. The final ones appear not to have been included in Previous Claims and are the subject of this claim.

Variation Number	**Description**	**Amount**
[redacted] 0075	[redacted]	8192.40
[redacted] 101	[redacted]	1437.30
[redacted] 159	[redacted]	134,915.00
[redacted] 160	[redacted]	12,927.48
[redacted] 163	[redacted]	4905.76
[redacted] 182	[redacted]	39,789.41
[redacted] 184	[redacted]	51,212,67
[redacted] 190	[redacted]	769.36
[redacted] 201	[redacted]	1929.48
[redacted] 202	[redacted]	21,978.39
[redacted] 203	[redacted]	4,497.62
[redacted] 205	[redacted]	19,546.78
[redacted] 206	[redacted]	1,615.56
[redacted] 207	[redacted]	10,230.00

Variation Number	Description	Amount
[redacted] 210	[redacted]	6,000
[redacted] 211	[redacted]	4916.14
[redacted] 213	Delay and Disruption (overall project)	895,143.00
[redacted] 216	[redacted]	7112.00
[redacted] 218	[redacted]	194.34
[redacted] 219	[redacted]	1,457.55
[redacted] 223	[redacted]	1622.64
[redacted] 233	[redacted]	11,999.75

27 On 18 April 2009, the Respondent sent an email to the Applicant. The email was expressed to be "with reference to [the Applicant's] correspondence dated 12 April 2009" and contained a table dealing with the items in [redacted] 14, together with some other variations as well.[4] A similar document was sent on 21 April 2009 and appears to have superceded the earlier email. The body of both emails contained a table listing variations referred to in [redacted] 14. The columns of the table include columns headed "Variation", "Amount Claimed", "Amount Approved" and "Comment". The Applicant contended that the email of 21 April 2009 admitted that $24,456.82 (plus GST) owed. An invoice for this sum was sent to the Respondent under cover of a letter dated 7 May 2009 which also formally maintained the Applicant's claim that it was entitled to the full $1,253,351.16, plus GST. It contended that this sum had not been paid.

28 It was agreed between the parties in their submissions that progress claims under clause 15.2 did not need to be accompanied by an invoice[5]. The practice seems to have been that an invoice would be issued after there had been discussions about amounts claimed and the invoice would be issued based on the amount the Respondent was prepared to pay. The Applicant also contended, and the Respondent did not dispute, that claims were usually, but not always made on the 25th day of the month.

[4] VO 93, VO157 and VO224.

[5] Applicant's submissions at [4.4(2)] and Respondent's submissions at [15].

Claims for variations

29 For reasons which I give later, VO213 is not a variation. It is convenient to treat the Applicant's claim in relation to the claim in respect of VO 213 separately from the balance of the items claimed in [redacted] 14.[6]

30 The Applicant's argument in respect of the Variations[7] was that the Respondent failed to notify the Applicant of the amounts in [redacted] 14 that it disputed within 21 days after that document was provided to the Respondent. By virtue of clause 15.7, the amount claimed became due.[8] The Applicant referred to the decision of the Queensland Court of Appeal in *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49 ("Daysea").

31 While I accept that clause 15.7 may apply to impose a liability to make a progress claim where the Respondent fails to give notice disputing amounts, liability under clause 15.7 only arises where the conditions for making a claim under clause 15.7 have been satisfied. This is the effect of *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576. In that case, the New South Wales Court of Appeal held that the deemed liability provisions of clause 42.1 of AS2124 – 1992 unless a condition precedent, namely the provision of information, had been satisfied. Clause 42.1 of the contract in *Brewarrina* applied to all amounts due to the contractor, including amounts for breach of the contract. In the present case, I consider that clause 15 of the contract has a more limited operation than clause 42.1 of AS 2124 -1992.

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[6] VO 75, VO 101, VO 159, VO 160, VO 163, VO 182, VO 184, VO 190, VO 201, VO 202, VO 203, VO 205, VO 206, VO 207, VO 210, VO 211, VO 213, VO 216, VO 218, VO 219, VO 223, and VO 233 ("the Variations").

[7] And in respect of VO213.

[8] In so far as the Applicant argues that the Respondent is prevented from contesting *any part* of the amount claimed in [redacted] 14, this argument does not reflect the language of clause 15.7 or the effect of the email of 21 April 2009. Clause 15.7 clearly contemplates that the respondent will be able to dispute particular items in the Progress Claim and that any obligation under clause 15.7 is only to pay those items which are not disputed. Conversely, and contrary to the Respondent's submission at [81], the respondent is obliged to dispute individual amounts claimed. The Respondent's email of 21 April 2009 deals specifically with a number of the items identified in [redacted] 14. The email generally gives an "amount approved" for itemised variations, frequently zero, and generally gives a reason for the assessment. In some cases[8], no figure is given in the "amount allowed" column, but the comment refers back to another variation. For a number of the claimed variations, no figure is given and no meaningful comment is made. The Respondent treated only the following variations in this fashion: VO159, VO182, VO205 and VO213. In my opinion, if clause 15.7 operates in respect of [redacted] 14 at all, it can operate only in respect of VO159, VO182, VO205 and VO213. The other items claimed in [redacted] 14 were disputed within 21 days after receipt of [redacted]14.

Clause 15, in my opinion, only applies to progress claims and, in particular, claims for progress made since the last Progress Claim. I draw this conclusion from the following:

(a) the heading to clause 15.2 reads "progress claims";

(b) the claims are defined as "Progress Claim";

(c) clause 15.2 requires that the Progress Claim show the value of the work performed by the contractor since the previous claim;

(d) the Invoice ordinarily submitted with the claim must calculate the price by reference to the work done and the prices for that work[9];

(e) the Invoice must contain a description of the Work in the period covered by the Invoice[10]; and

(f) the Key Terms contemplates that claims will be made monthly.

One of the conditions of a claim under clause 15.2 is that it relates to work done since the preceding Progress Claim. To the extent that [redacted] 14 is not a claim for work done since the preceding "Progress Claim" it does not fall within clause 15 and, as a consequence, clause 15.7 does not apply either.

32 The Variations in [redacted] 14 are not claims for work done since the previous Progress Claim. All the Variations must all have been done while the Applicant was on site. The Applicant left site in December 2008. The previous Progress Claim ("[redacted] 13") was the March 2009 Progress Claim. It follows that none of the work the subject of the variations can have been completed after the March 2009 Progress Claim.

33 Clause 15.7 does not apply to the Variation Claims for another reason as well - the parties had adopted a different payment regime in relation to variation claims. As indicated above, amounts in respect of variations were only to be included in Progress Claims to the extent that they had been accepted during the variation assessment process. I was also provided with an email from a

[9] Clause 15.5(a). The fact that the parties agreed not to submit invoices does not mean that the clauses 15.5 are irrelevant. Where the parties had agreed that Invoices need not be submitted with the Progress Claims, the Progress Claim ought to contain the same information.

[10] Clause 15.5(b)(ii)

representative of [the supervisor] to the Applicant dated 6 January 2009. [Supervisor] appears to have acted on behalf of the Respondent in relation to assessment of variations. That email reports on the results of a review of variations. Another email from [supervisor] to the Applicant, dated 6 January 2009, also deals with "[Applicant] rejected variations". It rejects a number of claims.

34 Because the claims for the Variations do not fall within clause 15.2, clause 15.7 does not apply to them. A failure to respond to [redacted] 14 within 21 days does not mean that the Respondent is deemed liable to pay those amounts.

35 The other consequence of the special process for the assessment of variations is that all the Variations included in [redacted] 14, other than VO233, had been rejected by the Respondent by the time [redacted] 14 was sent to the Respondent. The result of the assessments is contained in the two emails I refer to above. The assessments of the Variations may be summarised as follows:

Variation	**Description**	**Amount claimed**	**Email of 21.01.09 from Mr [W] to Mr [B][11]**	**Email of 6 January 2009 from Mr [A] to Mr [B][12]**
VO 75	[redacted]	8192.40	Rejected – valves and support issued on 8/2/08	
VO 101	[redacted]	1437.30		10 hours not 33 hours accepted
VO 159	Extra structural steel	134,915.00		Rejected
VO 160	Extra hand rails	12,927.48		Already claimed under VO 95 – nil
VO 163	[redacted]	4905.76		Double up with VO 93 – $Nil
VO 182	[redacted]	39,789.41		Part of scope of works – $nil.
VO 184	[redacted]	51,212,67		Refer VO157 – Nil
VO 190	[redacted]	769.36		Double up with VO192 – Nil
VO 201	[redacted]	1929.48	Rejected – fittings part of [redacted] scope of works	
VO 202	[redacted]	21,978.36	Agreed as to $8,700 only,	

[11] This email forwarded an email of 6 January 2009 from Mr A of [the supervisor].

[12] This email is part of an email from Mr [B] to Mr [W] dated 8 January 2009.

Variation	Description	Amount claimed	Email of 21.01.09 from Mr [W] to Mr [B][11]	Email of 6 January 2009 from Mr [A] to Mr [B][12]
			balance part of original scope	
VO 203	[redacted]	4,497.62		10 hours acceptable for [redacted], not 36
VO 205	Extra structural steel	19,546.78	Rejected- material is for [redacted], that is part of scope of work	
VO 206	[redacted]	1,615.56	Rejected - refer 0222	
VO 207	[redacted]	10,230.00	Rejected - part of scope of work	
VO 210	[redacted]	6,000	Rejected - trenching part of scope of work.	
VO 211	[redacted]	4916.14	Rejected - trenching part of scope of work.	
VO 213	Delay and Disruption (overall project)	895,143.00		
VO 216	[redacted]	7112.00		20 hours acceptable, not 60 hours.
VO 218	[redacted]	194.34		
VO 219	[redacted]	1,457.55	Rejected - task not performed	
VO 223	[redacted]	1622.64	Rejected - part of associated variations re additional lengths	
VO 233	[redacted]	11,999.75		

36 It is apparent from the above that each of Variations, except VO233, was disputed by the Respondent no later than 21 January 2009, when Mr [W] of [the Respondent] provided a copy of [the supervisor's] email of 6 January 2009. In *Blackadder*, the State Administrative Tribunal held, in effect, that a dispute under s 6 of the WA Act arises when a claim is disputed or the time limited for payment passes, whichever is the earlier. Section 6 of the WA Act is not relevantly different from s 8 of the Act. It follows that a payment dispute arose in respect of the Variations no later than 21 January 2009. The present application was made on 16 June 2009, which is more than 90 days after 21 January 2009.

37 In respect of VO233, I was not provided with any evidence relating to its rejection. However, it appears that a claim for payment in respect of this variation was made on 11 January 2009. The contract, and the arrangements between the parties, does not provide a formal timetable for assessment of claims may be lodged. In such circumstances, it is, in my opinion, an implied term of the contract that the Respondent must pay meritorious claims under the contract within a reasonably time after the claim is made. The term is to be implied in order to give business efficacy to the contract. If the Respondent does not pay the claim within a reasonable period after the claim is made, a "payment dispute" arises and an application for adjudication can be made.

38 The Applicant made its claim in respect of VO233 on 11 January 2009. What is a "reasonable period" for the claim to be assessed and paid may be determined having regard to the provisions of s 13 of the Act, which provides that a provision of a contract which requires payment to be made more than 50 days after payment is claimed is to be read as requiring payment to be made within 28 days after the claim. In light of this provision, a reasonable period is not more than 50 days. Accordingly, a dispute arose in respect of VO 233 on 2 March 2009, which is more than 90 days before the date of this application.

39 Ordinarily that would have the consequence that all the Variations would have to be dismissed pursuant to s 33(1)(a)(ii) of the Act.

40 However, in respect of some of the originally disputed variations, the Respondent eventually approved the variations in its email of 21 April 2009. The variations approved in the email of 21 April 2009 were:

Number	**Amount approved**
VO 101	1,437.00
VO 163	4,905.76
VO 202	8,700.00
VO 203	4,497.52
VO211	4916.15
Total	**24,456.43**

41 It is open to the parties to a construction contract to agree to treat an earlier rejection of a claim as something less than a rejection or, alternatively, to agree that the claimant may put forward the claim for reconsideration. Where this occurs, the earlier rejection of the claim will not prevent a renewed claim giving rise to a fresh payment dispute[13]. In light of the approval of these variations in the Respondent's email of 21 April 2009, the parties must be taken to have reached some sort of arrangement of this nature, with the consequence that a fresh dispute may arise in respect of these specific claims.

42 The Applicant's invoice of 7 May 2009 incorporated the approved amounts for VO101, VO 163, VO 202, VO 203 and VO 211to arrive at a total of $24,456.82 (excluding GST). The Respondent asserted, the Applicant did not dispute and I accept that VO 101 was paid, which reduces the admitted liability. The Respondent did not suggest that any of the other items listed above have been paid. I infer that they have not. I consider that the Applicant is entitled to payment in respect of the outstanding balance $23,019.43, plus GST. Payment should be made within 7 days.

43 I turn now to consider VO213. VO213 is described as a claim for delay damages by the Applicant. In fact, it appears from page 5 of the Applicant's "Delay and Disruption Claim" that the Applicant relies on clause 9.2(b) of the General Conditions (as amended by Schedule F of the Contract". Clause 9.2(b) provides:

> "It is agreed that the Contractor will be entitled to delay and disruption costs where amendments to the Works Timetable are made in accordance with Clause 9.2, except where such amendments to the Works timetable and associated costs are a breach by the Contractor to the Works Timetable. Delay and disruption costs shall include as a minimum direct Site Based Costs, including but not limited to Contractor's Personnel and Contractor's Equipment which are actually engaged at the Site in the Performance of the Works and which are directly affected by the Amendments to the Works Timetable. Clause 9.2(a)(ii) Force Majeure is exempt from this provision.
>
> It is agreed that when submitting variations the Contractor will advice the total cost of the variation, including any prolongation of extension of time costs."

[13] See *Merrym Pty Ltd and Methodist Ladies College* [2008] WASAT 164 at [35] and [36].

The Applicant's entitlement under clause 9.2(b) is not a claim for damages for breach of contract. It is a claim for an entitlement due under the contract.[14]

44 As indicated above, clause 15 applies to claims for progress in the works since the date of the previous payment claim. The matters the subject of VO213 must have been events which occurred while the Applicant was on site, and must have occurred prior to March 2009, when the Progress Claim prior to [redacted] 14 was made. Clause 15 does not, therefore, apply to VO213 and clause 15.7 does not, therefore, apply to deem the Respondent liable for failing to specifically deal with VO213 in its email of 21 April 2009.

45 It appears that VO213 was first sent to the Respondent by email dated 17 March 2009. If a dispute in respect of VO213 arose on that occasion, it arose not more than 90 days prior to 12 June 2009, the date of this application. Therefore, the claim in respect of VO213 does not need to be dismissed under s 33(1)(a)(ii) of the Act.

46 The Respondent complained that there was a difference between the form adopted by the Applicant in [redacted] 14 and the form adopted in previous Progress Claims. I do not regard the change in form as being so substantial that [redacted] 14 fails to satisfy a condition precedent to the operation of clause 15.7 (if it were otherwise applicable). The real is whether the substance of the claim and whether the work was done after the prior claim.

47 The Respondent also argued that there was no liability because no invoice had been issued and the time limit for payment under clause 15.6 was calculated by reference to date on which the Invoice was submitted. I do not accept this argument. If the parties agreed that no invoice was required, that agreement cannot be undermined in this way. Where there has been an agreement about the Invoice, the time limit runs from receipt of the Progress Claim.

Clauses 3, 4, 5 and 6 of the Schedule

48 The Applicant put forward an alternative argument based on the premise that clause 15 did not apply to VO213. The Applicant argued that if clause 15 did not apply to VO213, then the contract did not have a written provision dealing

[14] The claim is a "payment claim", not a claim for damages, within the meaning of that expression in s 4 the Act, unlike the claim which I considered in Determination 07.09.01, which was referred to by the

with the subject matters referred to in sections 18, 19 and 20 of the Act, with the consequence that VO213 should be determined in accordance with the claims procedure contained in clauses 3, 4 5 and 6 of the Schedule.

49 Sections 18, 19 and 20 provide:

> 18 Contractor's entitlement to claim progress payments
>
> The provisions in the Schedule, Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed.
>
> 19 Making payment claims
>
> The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.
>
> 20 Responding to payment claims and time for payment
>
> The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:
>
> (a) when and how a party must respond to a payment claim made by another party;
>
> (b) by when a payment must be made."

50 It is clear that the contract has a written provision dealing with how claims may be made. That provision is clause 15. Sections 18 and 19 do not require that the written provision about claims be comprehensive. In particular, sections 18 and 19 do not require that the contract have a written provision about all types of claims which a contractor may wish to make. The fact that clause 15 does not apply to claims under clause 9, to Variations or to claims in respect of work done prior to the previous Progress Claim does not mean that the contract is devoid of written provisions dealing with claims. It simply means that the written provision dealing with claims is limited. There is no basis for concluding that clauses 3, 4 or 5 of the Schedule apply.

51 The question whether the contract has a written provision dealing with "when and how" to respond to claims within section 20(a) of the Act is not as clear cut. The contract does not contain a provision requiring the Respondent to give reasons for disputing any element of the claim. In *Blackadder*, the Western

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Respondent (see esp at [24] of that determination).

Australian State Administrative Tribunal considered that the preferable meaning of "respond" in the equivalent context under the WA Act connoted the sense of 'answer, give reply', rather than 'non-communicative return'. However, the contract provides that notification of specific disputed elements of the Invoice (or Progress Claim) must be communicated by the Respondent to the Applicant within 21 days of receipt of the payment claim. Clause 47 contemplates that notice must be given in writing. Clause 15.7 provides for the consequences of a failure to provide the notification of dispute. The scheme under the contract is more comprehensive than the contractual provision considered in *Blackadder*, which contained no specific time scale for the principal to get back to the contractor about the contractor's claim and which left the contents of the principal's assessment entirely at large. I consider that the contract does contain a written provision dealing with when and how the Respondent must respond to the progress claim. Accordingly, s 20(a) of the Act does not apply and clause 6 of the Schedule is not implied in the contract.

Back charges

52 Alternatively, the Applicant argued that it is entitled to payment of a further sum of $417,906.91 on account of back charges imposed by the Respondent.

53 The Applicant identified the back charges in dispute as the back charges detailed in an email from the Respondent to the Applicant dated 13 January 2009. That email deals with 9 separate items which were to be discussed at a meeting to be held on 15 January 2009. Included among the items listed in the email are the following (using the numbering in the email):

3. Installed [redacted] quantities – the email asserts that the Applicant performed less work than claimed under VOs 157 and 184 for installing various [redacted] work. The Respondent asserts that the Applicant had been paid $63,714 more than the value of this work.

4. [Redacted] – the email asserts that [redacted] were not installed in accordance with Australian standards and were not correctly routed or aligned. [supervisor/Respondent] estimated the value of this item at $347,906.91.

9. Works not completed. [supervisor/Respondent] estimated that there was 3 weeks work for 3 persons to be done, which it valued at $70,000.

54 If the status of the back charges is that the Respondent put forward the back charges in its email of 15 January 2009, then it may well be that a dispute had arisen in relation to the back charges at or about that time, or, in any event, more than 90 days before the date this application was made. If that is the case, the application in relation to the back charges must be dismissed under clause 33(1)(a)(ii) of the Act.

55 The Applicant stated that the basis for its claimed entitlement to payment of $417,906.91 is set out in its letter of 20 May 2009. That letter is a response to an email from the Respondent dated 20 May 2009 (I was not provided with a copy of that email). The Applicant's letter of 20 May 2009 is headed "without prejudice". I assume that the subject matter of this letter and the Applicant's claim relate back to the amounts identified in items 4 and 9 of the Respondent's email of 15 January 2009 because the total of items 4 and 9 in the email add up to the amount claimed in paragraph 10.4 of the Applicant's submissions. However, the submissions do not make this clear.

56 Paragraph 10.4(1) of the Applicant's submissions states that the Applicant's letter of 20 May 2009 "indicates the basis of the dispute of this claim". This letter is headed "Without Prejudice". In respect of "[work description redacted]" the letter of 20 May 2009 suggests that the issue "needs to be resolved as part this dispute resolution". "[T]his dispute resolution" appears to refer to the process flowing from a dispute notice dated 11 May 2009 under clause 42 of the contract. It also mentions that a variation has been raised in respect of the work, but does not provide substantive material about whether or not the work had been performed. Under the heading "Works not completed", the letter of 20 May 2009 details correspondence between the parties in which the Applicant complained that photographs of the incomplete work had not been provided. The correspondence is indicative of a lengthy dispute.

57 The Applicant's submissions state that the Applicant "has agreed" that the Respondent is entitled to $69,649.70 and that this agreement is recorded in a copy of a letter dated 19 May 2009, identified as annexure 12. However, annexure 12 does not contain a letter dated 19 May 2009. Annexure 12 is the

notice of dispute dated 11 May 2009[15] and the amount assessed by the Applicant as owing to the Respondent is $66,452.19, not the $69,646.70 referred to in the submissions. The figure "agreed" by the Applicant does not reflect the amount claimed as a net overpayment in respect of [redacted] work under item 3 in the email of 13 January 2009. The figure identified in the Applicant's submissions is also different from the amount of the back charges referred to in the Respondent's email of 21 April 2009.

58 The Applicant indicated that the back charges in dispute between the parties relate to the two contracts, but did not identify which of the disputed back charges relate to this contract and which to the [redacted] Contract.

59 The Applicant did not provide evidence or indicate in its submissions that the Respondent had taken any steps in relation to the back charges which it claimed. The Applicant did not point in its submissions to material which showed that the Respondent had retained the amount of its claimed back charges from sums otherwise due to the Applicant. Unless it has retained monies, the Applicant is not entitled to payment to it of the back charges.

60 In this state of uncertainty, I am unable to be satisfied on the balance of probabilities that the Applicant is entitled to payment of the $417,906.91 claimed.

Assessment of VO213

61 For the reasons which I have given above, the disputes in respect of the Variations, except VO 233, arose more than 90 days prior to commencement of this application and I do not have jurisdiction to deal with the merits of so much of the application as relates to these matters. I have also concluded that the Variations, including VO233, could not be claimed pursuant to clause 15 of the contract.

62 However, VO213 was not put forward as a claim more than 90 days prior to commencement of the application and I am not precluded from exercising jurisdiction by s 33(1)(a)(ii) of the Act.

[15] There is another dispute notice, which presumably relates to the R Contract.

63 The Respondent argued, and I have accepted, that the subject matter of VO213 was not such that the claim could form part of a Progress Claim under clause 15. More generally, a claim for additional costs cause by delaying events is not a claim for progress in carrying out the works. However, clause 15 does not comprise the exclusive method by which claims may be pursued. It does not prevent the Applicant pursuing other types of claims which it may have under the contract.

64 Clause 9 of the contract gives the Applicant a contractual entitlement to an additional payment where the conditions of clause 9 have been satisfied. Clause 9 does not provide a formal mechanism by which claims may be lodged (and clause 15 does not apply to claims based on clause 9). In such circumstances, a claim is made by the Applicant requiring a payment to be made to it. (That claim must be made in writing under clause 47.) The requirement for payment constitutes a "payment claim" within section 4 of the Act. The date on which the dispute arises can be determined in accordance with the reasoning at [37] and [38] above. The Applicant submitted VO213, on 17 March 2009. A dispute arose in respect of VO 213 not more than 50 days after the claim was made, when the Respondent failed to pay the claim. That is less than 90 days before the date of this application. Section 30(1)(a)(ii) of the Act does not apply.

65 However, I satisfied that I am not able to deal with the application fairly because of the complexity of the matter and the application, in so far as it consists of VO213 must be dismissed under s 33(1)(a)(iv) of the Act. My reasons for this conclusion are as follows.

66 The process under clause 9.2 involves two steps:

(a) ascertaining the change to the Works Timetable;[16] and

(b) determining the amount of additional costs payable to the Applicant flowing from those changes.

[16] I am able to assess changes to the program of works as part of the process of determining a claim for money: *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58.

67 The circumstances in which there may be a change to the Works Timetable are identified in clause 9.2(a). The amount of additional costs is dealt with in clause 9.2(b).

68 Clause 9.2(a) requires the Applicant to give notice to the Respondent of an event falling within sub-paragraphs (i) to (vi) of paragraph 9(a) of the contract. The notice must apply to amend the Works Timetable, set out the reasons for the application and establish the delay in question. The notice must be given within 14 days of the delaying event. The events referred to in sub-paragraphs (i) to (vi) includes variations directed by the company and breaches by the company of any provision of the contract. Clause 9.2(b) contemplated that variations would specify any prolongation or extension of time costs, so a variation claim could function as a notice under clause 9.2(a).

69 The Respondent contended that the obligation to give notice in accordance with clause 9.2(a) was a precondition to an extension of time and that, in the absence of complying notice, the claim for a variation to the Works Timetable must fail. The Respondent relied on *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1994) 11 BCL 360 ("*Opat Decorating*").

70 The delay claim contained the following notices under clause 9.2;

Date	Change sought
18 June 2008[17]	"Amendment in Work Timetable, from 11 March to 5 April 2009 for staggered start between [redacted] and [redacted] Projects
11 January 2008	Change in [redacted] Project Commence Construction from 31 March 2008 until 5 April 2008.
27 May 2008	Change in [redacted] Project Commence Construction from 25 February 2009 to 5 April 2008

71 Although I was provided with these notices, VO213 is not confined to delays associated with these notices. The Applicant's claim extended to delays caused by variations including, it alleged, increased scope of works, company design errors, changes in specifications, and company supplied errors and errors in company supplied items. I was not provided with copies of the documentation in relation to all these variations, although I did receive some documents relating to specific Variations included in [redacted] 14. An example is a letter dated 17 September 2008 from the Applicant to the Respondent dealing with VO 95. That letter states that "pursuant to clause 9.2(b) [the Applicant] reserves the right to claim for delay and disruption costs which will be submitted separately." It is not clear that a statement of this nature satisfied clause 9.2.

72 Assuming, without deciding, that *Opat Decorating* is otherwise applicable to bar the Applicant's claim for delay costs, there may be a course of dealing between the parties which ameliorates the effect of this decision. I have not been provided with material which would enable me to properly consider this issue. It appears likely that the material necessary to properly consider this issue would be voluminous and complicated.

73 The Respondent also sought to categorise the VO213 as a "global claim", that is, a claim in which the claimant does not seek to establish any link between specific delaying events and delays in the work. Leaving the delays associated with the staggered start to one side for the moment, this categorisation appears to be correct. While labelling a delay claim as a "global claim" is not necessarily fatal to it, a global claim proceeds on the basis that there were no delaying events other than events for which the principal is liable. In the present case, the Respondent has alleged that the Applicant contributed substantially to the delay in the progress of the works. The Applicant conceded that there were some delays which resulted from difficulties in achieving manning levels. The Applicant asserted in its letter of 6 July 2009 that the claim made in VO213 only had the effect of extending the date for practical completion to 29 August 2008. This submission implies that the effect of the manning levels is adequately taken into account by the difference between 29 August 2008 date arrived at by its calculations and the actual demobilisation in December 2008. It is not clear that is right. If there was a build up in personnel over time, issues with manning levels would be felt at the beginning and middle of the project, more than at the end. The material provided to me does not enable me to evaluate this aspect of the claim.

74 It was common ground between the parties that there was a change in the Works Timetable associated with the parties adopting a staggered start from the [redacted] and [redacted] contracts. It appears that a notice under clause 9.2 was given in respect of the change to a staggered start of the two contracts, so the argument relying on *Opat Decorating* does not apply. However, the Respondent has dealt with a claim by the Applicant in respect of this delaying event, and has made a payment on account of it. VO213 did not specifically address whether this payment was adequate. VO213 did not address the question whether the payment on account of the staggered start prevents the Applicant making any further claim in respect of this period or, alternatively, whether it is simply obliged to take the payment into account in a claim for damages overall.

[17] This appears to be a revision of an earlier claim.

75 VO213 proceeded on the basis that it was sufficient to simply take the payment on account of the staggered start into account. There was a dispute between the parties about whether that change in the Works Timetable had been accounted for adequately in VO213. The Applicant identified a total cost based on the average daily costs for the whole of the project, multiplied that by the number of delay days to arrive at a total figure and then deducted the amount of the payments previously made by the Respondent. This process assumes that the costs incurred by the Applicant were evenly spread over the life of the project. In particular, the Applicant's calculation assumes that the Applicant's costs in the period prior to commencement of work on site were the same as its costs once work had started on site. There is no material before me which enables me to determine how accurate this assumption might be.

76 I also considered whether I ought to request an extension of time and request further, more detailed information from the parties. I formed the view that the fair resolution of this aspect of the application would require such extensive information and so substantial an extension of time as to effectively transform it from an adjudication into an arbitration or mini- litigation.

Date: _____

DS Ellis

Schedule 2: Confidential Information

The following information is confidential:

(1) the identity of the parties;

(2) the identity of contractors and individuals referred to in the reasons; and

(3) the location and nature of the works.

Date:

DS Ellis
Adjudicator