DETERMINATION NO. 25.13.02

Adjudicator's Determination

pursuant to the

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

Applicant

and

Respondent

I, Simon Lee, on 20 September 2013 dismiss the application under s 33(1)(a)(ii) of the *Construction Contracts (Security of Payments) Act 2004* (NT) without making a determination. There is no information in these reasons which is unsuitable for publication by the Registrar under s 54.

Contact details:

Applicant:	**Respondent:**

Prescribed Appointer:

Institute of Arbitrators and Mediators

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Appointment as adjudicator

1. On 2 September 2013 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) (the Act), and on 5 September 2013 I was appointed adjudicator by The Institute of Arbitrators and Mediators Australia to determine this application. The Institute is a prescribed appointed under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment.

Documents received by adjudicator

2. I received and have considered the application supported by the documents at Tabs 1-14 of the application, together with the response dated 16 September 2013. I also received and considered submissions in response to invitations as set out in these reasons.

JURISDICTION

3. By s 33(1)(a)(i) to (v) I must dismiss the application if:

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

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

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

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

4. I am satisfied of matters in pars (i) and (iii) above, namely that the contract was a construction contract as defined in the Act and that the dispute was not the subject of an order, judgment or other finding. The respondent did not assert otherwise.

5. Was the application prepared and served in accordance with s 28? The first requirement of s 28(1) is that the application be prepared and served within 90 days after a payment dispute arises. The occurrence of a payment dispute as defined by s 8 of the Act is thus critical to the application. This is also the effect of s 27 giving the right to bring an application in these words:

   > If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless:
   >
   > (a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

6. By s 8, a payment dispute arises, relevantly, where a "payment claim" has not been paid by the due date for payment. A "payment claim" is defined to mean:

> a claim made under a construction contract:
>
> (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
>
> (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.

7. If there is a written provision about how a claim for payment is to be made, the claim must follow those written provisions to be a valid payment claim. If there is no such written provision, the requirements of Division 4 of the Schedule as to payment claims are implied into the contract by s 19 which says:

> 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.

8. Division 4 of the Schedule lists the form and content of a claim to be a valid payment claim under the Act where there is no written provision in the contract about how a claim is to be made. The relevant part says:

> **5 Content of claim for payment**
>
> (1) A payment claim under this contract must:
>
> (a) be in writing; and
>
> (b) be addressed to the party to which the claim is made; and
>
> (c) state the name of the claimant; and
>
> (d) state the date of the claim; and
>
> (e) state the amount claimed; and
>
> (f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and
>
> (g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and
>
> (h) be signed by the claimant; and
>
> (i) be given to the party to which the claim is made.

9. On a preliminary reading of the application before I received the response, it appeared that the contract was partly oral and there was no written provision about how claims for payment were to be made. If that was the case, s 19 applied.

10. There was also a question as to whether the 12 invoices of May 2013 said to form the payment claim the subject of this application complied with Division 4. In particular, on their face, they were not “signed by the claimant” as required by par (h).

11. Accordingly, to give the parties an opportunity of making submissions on whether Div 4 applied and if the invoices complied, on 10 September 2013 I wrote to them by email in the following terms:

> I have now received notification from both parties that the amounts I sought in respect of fees have been paid. A preliminary reading of the application and supporting documents suggests there may be an argument that the 12 invoices of May 2013 upon which the application is based may not be valid payment claims under the Construction Contracts (Security of Payments) Act (the Act)
>
> This appearance flows from the following: There appears to be written provision in the contract about how the applicant is to make a payment claim. If that is the case, s 19 of the Act says that Div 4 of the Schedule applies. That section provides:
>
> *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.*
>
> Div 4 requires, amongst other things, a payment claim to be "signed by the claimant". The invoices do not appear to be "signed" by the claimant in the traditional sense of that word.
>
> If the invoices are not valid payment claims, no payment dispute can have arisen and the application is invalid. I would have no jurisdiction to determine the application.
>
> Because this matter goes to my jurisdiction, I thought it appropriate to write to the parties and invite submissions on the following questions:
>
> (1) whether s 19 and therefore Div 4 apply to the contract;
>
> (2) if so, were the invoices or any other accompanying document "signed" within the meaning of Div 4 such that they are valid payment claims?
>
> I invite submissions on those questions from the applicant by close of business on Friday 13 September, and submissions from the respondent by close of business on Wednesday 18 September.
>
> I stress that this is only a preliminary view formed on an initial reading of the papers. I have not formed a concluded view and will not do so until all submissions of the parties have been received and considered.

12. I wrote to the parties again by email on 11 September 2013 as follows:

> It has occurred to me that it might be possible for the respondent to misunderstand my email of yesterday (copied below), inviting its submission on the two questions by Wednesday 18 September. I want to make it clear that this does not extend the due date for the

> respondent's response. The response must still be delivered by Monday 16 September. I do not have power to extend that time. But in addition to the response, I invited the respondent to deliver submissions on the two questions in my email of yesterday. Of course, it would be ideal if those submissions were included in the response, but because time is short following the applicant's delivery of its submission on those questions, I have allowed further time for the respondent to deliver its submissions on those questions.
>
> The response is still due on Monday 16 September 2013.

13. I received submissions from the applicant on 13 September 2013 which said, in summary:

    (a) the provisions of Div 4 were not implied into the contract;

    (b) the form a payment claim is to take is not prescribed by the Act; the parties to the contract are able to agree on the form the payment claim is to take;

    (c) the claim mechanism in the contract for making a payment claim was by submission of a tax invoice which complied with the Tax Act;

    (d) the invoices complied with the Tax Act;

    (e) in any case, the final demand letter of 5 July 2013 was signed and forms a valid payment claim taken together with the invoices.

14. I received submission from the respondent in its response and on 18 September 2013 which argued that Div 4 applied and that the invoices did not comply in that they were not signed and they did not itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim, as required by par (f).

THE CLAIMS

15. The applicant says in par 7.1 of the application that “there are four payment claims in this dispute”, being:

    Claim 1. a claim for the twelve (12) unpaid invoices for May 2013 in the sum of $380,413.91 plus GST;

    Claim 2. a claim for interest pursuant to section 21 of the Act in the sum of $8,921.49 plus GST (being 107 days at $83.38 rounded per day);

    Claim 3. a claim for the applicant’s internal costs for attending to the application in the sum of $4,467.50 plus GST; and

    Claim 4. a claim for the applicant’s external costs of this application in the sum of $9,783.08 plus GST.

16. I will deal with each claim in turn. As will be explained, I am of the view that Claim 1 amounts to 12 separate claims and not one claim as seems to be assumed by the

applicant. I am also of the view, as explained below, that Claims 2, 3 and 4 are not the subject or result of "payment claims" as defined, and I suspect the applicant did not, strictly speaking, mean for them to be considered as "payment claims", but merely as claims consequent upon success on the application. Nevertheless, since they have been cast as "payment claims", I will consider whether in fact they are.

Claim 1

17. Claim 1 is the substantive claim in the application. It is for non-payment of 12 invoices rendered in the month of May 2013 for the provision of labour, plant, equipment and materials to construct plumbing and civil work on the XXXXXXXXXXXXXXXXXXXXX in the Northern Territory. Those invoices were:

Invoice Number	Date
1523, 1524, 1525	1 May
1529, 1530, 1531	8 May
1532, 1533, 1534	15 May
1538, 1539, 1540	30 May

The contract

18. The applicant says that the contract was partly oral and partly written, being formed on 9 August 2011 between Mr Y on behalf of the applicant and Mr Z on behalf of the respondent. The written part of the contract was contract documents including rates documents (with changes), mobilisation and induction requests, typical plans of the scope of work, inspection and test plans and aggregate specifications associated with the work.

19. The contract terms were "mainly oral, says the applicant, with it being initially agreed that the respondent would pay the applicant's invoices weekly. This was changed on 30 October 2012 to the applicant's weekly invoices being paid within 14 days after the end of the month in which they were rendered. There is no relevant disagreement as to these matters by the respondent.

Payment claims

20. The applicant appears to have assumed that there was only one payment claim in respect of all of the 12 invoices. This cannot be, given the definition of payment claim in s 4 and the nature and content of the 12 invoices.

21. There is no single document presented by the applicant to the respondent which includes all of the items claimed in each of the invoices. Each invoice claims a different amount for different work or items under the contract. This means that each invoice must be considered as a separate payment claim.

Was there written provision about payment?

22. Section 19 implies the provisions of Div 4 into a contract where there is no *written provision* about how a claim is to be made. The applicant has not pointed to any such *written provision* in this contract. It says at par 2.8 of its further submissions that the "May 2013 tax invoices … satisfies [sic] the *documented written requirements* in the contract … for the making of a payment claim" (emphasis added). But the applicant does not point to where those "documented written requirements" are in the *contract.*

23. It is true, as the applicant says, that the parties are free to agree on the form of a payment claim and the mechanism of how it is to be served and paid. But it is also true that if that agreement is not reflected in a written provision about how a claim for payment is to be made, the provisions of Div 4 will be implied into the contract.

24. That is the case here. The agreement that the applicant would submit invoices to the respondent was wholly oral. There is no other written provision of the contract about how a claim for payment was to be made.

25. It is not to the point, as the applicant submits, that the invoices complied with the *Tax Act*. They may well do so, but to be valid payment claims to found this application they must comply with the Act.

26. The applicant has not pointed to any part of the invoices which might satisfy the requirement of being "signed by the claimant". It made reference to the decision of Southwood J in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another* [2008] NTSC 42 where his Honour set out the essential contents of a payment claim. However, his Honour was not dealing with a contract with no written provision about how a claim for payment was to be made. He was not dealing with a case where the provisions of Div 4 were implied into the contract, but he mentioned the consequences where that was the case at [45].

27. Furthermore, his Honour was answering the question of whether an adjudicator's decision was void for jurisdictional error if it incorrectly found a claim to be, or not to be, a payment claim (at [46] and [64] et seq). His Honour did not say that a payment claim was valid if it failed to comply with the requirements of the contract, whether those requirements were expressed in writing or implied by the Act. Nor did he say that a claim was valid if it ignored the requirements of the contract but complied with the "essential requirements" set out at [67] of the judgment.

28. This was explained by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* (2011) 29 NTLR 1 at [112] to [116], expressly rejecting the argument now advanced by the applicant. Special leave to appeal to the High Court was refused: [2011] HCATrans 272.

29. If there is no written provision in a contract about how a claim for payment is to be made, s 19 operates to imply into the contract the requirements of Div 4, one of which is that a claim for payment must be signed by the claimant. If a claim under such a contract is not signed by the claimant, it does not comply with the contract, is not a valid payment claim, cannot give rise to a "payment dispute" and cannot found an application.

30. In this case the applicant has not pointed to any written provision of the contract about how claim for payment is to be made nor has it argued that the invoices were signed. I find that the contract contained no written provision about how claim for payment was to be made and that the 12 invoices of May 2013 themselves were not signed within the meaning of Div 4 of the Act.

31. Nevertheless, the applicant argued that its final demand letter of 5 July 2013 supplied the necessary signature to make the invoices valid payment claims if I found they were themselves not signed.

32. The applicant's letter of 5 July 2013 is signed by Mr. Y, a director, refutes the respondent's claim of an overpayment, recites history relevant to that claim, and ends with a final notice that the applicant will "proceed in this matter" if payment of the outstanding invoices is not received within seven days.

33. The letter does not attach the 12 invoices or comply with the following requirements of Div 4:

- par (e) - state the amount claimed;
- par (f) - itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim.

34. In my view, the letter cannot be read together with the invoices to form one payment claim, or even a multiple of payment claims. The 12 invoices founding the application were rendered through the month of May 2013, with three each being sent on 1, 8, 15 and 30 May.

35. The letter was sent too late after the invoices to enable them to be read together in some way. It might have been different if the invoices were sent with the letter, or if the letter contained the essentials of the invoices so as to comply with Div 4.

36. I find that the letter of 5 July 2013 does not supply the necessary signature to the invoices to convert them to valid payment claims under the Act, nor does the letter contain the requirements of Div 4 so as to amount to a valid payment claim itself.

37. I find, then, that no valid payment claim has been made to found the application for Claim 1 and that therefore no payment dispute has arisen as defined by s 8. I dismiss the application in respect of Claim 1 under s 33(1)(a)(ii) on those grounds.

Claim 2 - Interest

38. The applicant seeks interest under s 21 and Division 6 of the Act as a further "payment claim". Clearly a claim to this type of interest cannot be a payment claim within the definition. Neither can the applicant be entitled to interest where it has not succeeded on the substantive claim. I dismiss the application in respect of Claim 2 under s 33(1)(a)(ii) on the grounds that it is not the subject of a valid payment claim, no payment dispute has arisen and in any case, the applicant is not entitled to interest where the substantive application has been dismissed.

Claim 3 – Internal costs

39. The applicant claims $4,467.50 for its internal costs of "preparing and collating the evidence of the Application and the overdraft costs associated with their cash-flow shortfall over the May, June and July quarter directly attributed to THE RESPONDENT'S failure to pay the May 2013 invoices".

40. Again, the applicant says this is a "payment claim", but again clearly it is not since it is the costs involved in the preparation of the application and does not fall within the statutory definition. I dismiss the application in respect of Claim 3 under s 33(1)(a)(ii) on the grounds that it is not the subject of a valid payment claim and no payment dispute has arisen.

Claim 4 – External legal costs

41. In addition to the internal costs, the applicant seeks recovery under s 36 of the fees it has incurred to external legal counsel in preparation of this application in the sum of $9,783.08.

42. Again, this is not a "payment claim" as asserted by the applicant and I formally dismiss the application in respect of Claim 4 under s 33(1)(a)(ii) on the grounds that it is not the subject of a valid payment claim and no payment dispute has arisen. I will consider separately the parties' entitlement to costs under s 36 other than as a "payment claim".

CONCLUSION ON PAYMENT CLAIMS

43. None of the four claims in the application is based on a valid payment claim and payment dispute. I have dismissed the application in respect of each claim and dismiss the application as a whole.

COSTS

44. I wrote by email to the parties on 18 September 2013 inviting submissions on costs by close of business on 20 September 2013 if I dismissed the application on the basis that there was no valid payment claim and therefore no payment dispute as defined. My email said:

> I invite submissions from the parties on the question of costs under s 36 if I find that there was no valid payment claim and therefore no payment dispute, and I dismiss the application under s 33(1)(a)(ii). I point out the following which the parties may wish to address in their submissions.
>
> 1. Section 36 refers to costs of parties to a *payment dispute*. It does not refer to costs of parties to an *application* or to an adjudication. If I find that there was no valid payment claim, it appears to follow from s 8 that there is no payment dispute as defined. If that is the case, do I have power under s 36 to award costs to the parties, since that section only appears to grant power to award costs to parties to a payment dispute, not parties to an application or adjudication? I draw the parties' attention also to s 46 and in particular to subsection (6).
>
> 2. Does the making of the application where there has been no valid payment claim fall within the meaning of "frivolous or vexatious conduct" or "unfounded submissions" in s 36(2)?
>
> If either party seeks costs, they should provide evidence of the amount claimed.
>
> I invite these submissions and evidence by email by 5 pm on Friday 20 September 2013.

45. Both parties submitted I had no power to award costs if there was no payment dispute because of their being no payment claim. The respondent did not seek costs in any event. But since the applicant sought costs in the application, I should consider the relevant costs provisions, ss 36 and 46.

46. Section 36 provides:

> **Costs of parties to payment disputes**
>
> (1) The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute (including the costs the parties are liable to pay under section 46).
>
> (2) However, if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.
>
> (3) If an appointed adjudicator makes a decision under subsection (2), the adjudicator must:
>
> (a) decide the amount of the costs and the date on which the amount is payable; and

(b) give written notice of the decisions and the reasons for them to the parties.

47. Two questions arise from that section, as set out in my email above. They are:

1. Does an adjudicator have power to award costs where the application has been dismissed under s 33(1)(a)(ii) on the basis that there was no valid payment claim and hence no payment dispute?

2. Does the making of this application in circumstances where the alleged payment claims did not comply with the Act amount to frivolous or vexatious conduct on the part of, or unfounded submissions by the applicant?

Power to award costs where no payment dispute

48. As I set out in my email to the parties, s 36 clearly refers to the costs of parties to a payment dispute, rather than parties to an adjudication or application. It does so twice, in subs (1) and (2). This appears to be deliberate, given that in the same subsections it refers to an adjudication. Subsection (1) relevantly says:

> The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute …

The wording could easily have been "The parties to an adjudication" had that been intended.

49. Subsection (2) relevantly provides:

> However, if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication …

Again, the wording could have been "a party to an adjudication" if that had been intended. In both subsections, the draftsman was alive to the possibility of using the word "adjudication" since it is used in both in close proximity to "payment dispute".

50. It is difficult to discern the reason or policy behind denying an adjudicator power to award costs to the respondent to an adjudication where an application has been dismissed for absence of a payment claim (and hence payment dispute) where there has been frivolous or vexatious conduct on the part of, or unfounded submissions by the applicant.

51. Perhaps it was intended to provide for this situation by s 46(6), to which I referred the parties. Relevant parts of s 46 provide:

46 Costs of adjudications

(1) This section applies if:

(a) an adjudicator is appointed to adjudicate a payment dispute; and

(b) one of the following applies:

(i) the party who applied for the adjudication withdraws the application under section 28A;

(ii) the adjudicator dismisses the application for adjudication under section 33(1)(a);

(iii) the adjudicator makes a determination of the dispute under section 33(1)(b).

(1A)- (3) [not relevant]

(4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(6) Subsections (4) and (5) do not prevent a decision being made under section 36(2).

(7) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the costs or anticipated costs of the adjudication.

(8) A prescribed appointer, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the costs or anticipated costs of the adjudication.

(9) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (5), the appointed adjudicator may decide that another party must pay to the first party the amount of the costs that would result in all the parties paying an equal amount of the costs.

(10)-(11) [not relevant].

(12) In this section:

"costs of an adjudication" means:

(a) the entitlements of the appointed adjudicator under subsection (1A); and

(b) the costs of any testing done, or of any expert engaged, under section 34(2)(c)(ii) or (iii).

52. Section 46 applies in this case because I have dismissed the application under s 33(1)(a) – see s 46(1)(b)(ii).

53. The same formula of words used in s 36 – referring to parties to a payment dispute but then referring to an adjudication – is used in subsection (4). But a different formula is used in subsections (5) and (9), where reference is simply to a “dispute”,

rather than to a "payment dispute". "Dispute" is not defined in the Act. Naturally one would expect the reference to "dispute" in subsections (5) and (9) to mean a "payment dispute", but it is curious that the apparently deliberate reference to the latter has been abandoned in favour of an undefined term. The argument that "dispute" is intended to mean "payment dispute" is supported – but by no means concluded – by the phrase "the dispute" at the end of subsection (4), clearly intending to refer to the "payment dispute" previously mentioned in that subsection.

54. A further variant appears in subsection (7), with reference merely to "parties" without specifying to what they are parties – whether dispute, payment dispute, adjudication or application. One reason may be that at the time an adjudicator is likely to ask for a deposit or security on receipt of the application (or perhaps on receipt of the response) it is too early to determine if there is a valid payment claim and a payment dispute as defined. Another reason may simply be the variable use of language as in the apparent interchangeable use of "dispute" and "payment dispute".

55. Subsection (6) says "Subsections (4) and (5) do not prevent a decision being made under section 36(2)". In my view, the effect of that subsection here is simply to preserve the adjudicator's power and discretion under s 36(2), making it clear that an adjudicator may make an order for costs, including "costs of an adjudication", where s 36(2) applies.

56. I have examined s 46 for these two reasons – to determine if it assists in construing the power of the adjudicator to award costs of "parties to a payment dispute" rather than of "parties to an adjudication" (or "application"), and if s 46(6) assists the parties.

57. I am of the view that s 46 does not assist in either of those ways. That section appears to use "payment" dispute" and "dispute" interchangeably, and to contrast them deliberately with "adjudication". As with s 36, the words "adjudication" or "application" could have been used in place of "payment" dispute" and "dispute"(with perhaps very minor consequential changes) with no detriment to the purpose and effect of the section. That those words have not been used in that way, when they have been used elsewhere in the section, suggests that the choice of words was deliberate.

58. The somewhat regrettable result is that an adjudicator has no power to award costs under s 36 or 46(4) and (5) (at least) where the application has been dismissed under s 33(1)(a) for absence of a valid payment claim and payment dispute. This still leaves work for s 46(6) as there are situations where an application will be dismissed under s 33(1)(a) (thus attracting the operation of s 46) for reasons other than want of a valid payment claim and payment dispute – eg, if the contract is not a construction contract, the application is served after the 90 day period or does not comply with s 28, an order, judgment or other finding has been made about the dispute or it is not possible to fairly make a determination.

59. The question of frivolous or vexatious conduct or unfounded submissions does not arise since I have come to the conclusion I do not have power to award costs and the successful party, the respondent, has not sought costs. I therefore say nothing more about those issues.

60. I stress that these findings do not reflect in any way upon the merits of the application and the parties' claimed entitlements to the amounts in the application and the response. I have not touched on the merits because I have no jurisdiction as a result of there being no payment claim and payment dispute.

61. I dismiss the application and draw the parties' attention to the slip rule in s 43(2) if I have made some correctible error.

Dated: 20 September 2013

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SIMON LEE
Registered Adjudicator