

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) ("**The Act**")

BETWEEN:

(**"Applicant"**)

and

(**"Respondent"**)

REASONS FOR DECISION

1. On 22 May 2015 the Applicant served its Application, dated 22 May 2015, on the Master Builders Northern Territory ("MBNT") as prescribed appointer under the Act. The Respondent has confirmed it was also served a copy of the Application on 22 May 2015. By letter from MBNT dated 22 May 2015, I was appointed Adjudicator to determine the payment dispute between the parties. I received the letter on 22 May 2015 and collected the Application from MBNT's offices on 25 May 2015.
2. On 27 May 2015 I contacted the parties by telephone, advised my appointment as Adjudicator and sought a single point of contact for the conduct of the Adjudication. Both the Applicant and the Respondent confirmed their respective contact details for the purposes of the Adjudication.
3. On 4 June 2015 I received by courier a copy of the Response to the Application for Adjudication.

4. On 6 June 2015 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment. In my letter of 6 June 2015, and after reading the Application and the Response documents, I also indicated that I would be seeking further submissions on several issues I had identified in the documents.
5. On 9 June 2015 I received an email from the Applicant referring to the Response, the jurisdictional matters raised by it and inviting me to seek further submissions under section 34(2) of the Act. The Applicant's request followed the decision of Southwood J in *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 at [42] which compels an adjudicator to request additional submissions if a party to the adjudication makes such a request. In any event, I had indicated in my letter of 6 June 2015 that I would be seeking further submissions in relation to several issues I had identified in the documents of the Application and the Response.
6. On 11 June 2015 I wrote to the parties seeking submissions to three questions as follows:

"I have carried out a detailed reading of the Application and the Response in the above matter and there are several questions on which I require further submissions.

*These submissions are requested under the provisions of section 34(2)(a) of the Construction Contracts (Security of Payments) Act ("Act") and are to be provided by **4:00pm CST, Monday 15 June 2015**.*

There are three (3) questions as follows:

1. *On what payment claim was the Dispute Notice of 23 February 2015 served;*
2. *Assuming there is a payment claim upon which that notice was served, does that payment claim pass the requisite threshold test to constitute a payment claim envisaged by the Act; and*

3. *Has there been any further correspondence between the parties after the payment claim of 19 May 2015 was served;*

In seeking these further submissions, I will also keep in mind the determination of Barr J in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 to ensure I attended to all the available evidence in this matter”.

7. On 15 June 2015, and in time, I received submissions from both the Applicant and the Respondent to the three questions on which I sought some additional information. In its covering email the Respondent raised the issue that the Applicant had included new material in its submissions, however the Respondent did not make any further submissions other than what was requested in the three questions.
8. In seeking further submissions from the Parties, I followed the reasoning of Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at [42] to ensure there was no denial of natural justice and no absence of evidence upon which a determination is to be made.
9. Having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar, with a copy to the parties, on 16 June 2015 and sought some additional time in which to make my decision under section 34(3)(a). On that same day 16 June 2015 the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 17 July 2015 to determine the dispute in relation to Payment Claim BAS1415-7A. There were no objections from the parties.

Introduction

10. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to supply a twenty-foot shipping container, [redacted] services for [redacted] Works and some [materials] to the Respondent (the "Contract"). The container, [redacted] services and [redacted] ("Goods") were to be used at the construction site of the [project] at [the project site] in the Northern Territory of Australia.
11. The Applicant claims it is entitled to be paid its Payment Claim for the Goods, dated 19 May 2015, in the sum of \$99,715.00 (including GST), which is the outstanding balance in the Contract. The Applicant has not been paid any of the Contract sum of \$99,715.00 (including GST). The total contract value is \$99,715.00 (including GST).
12. The Applicant also seeks interest on its claim at 8.5%, as the applicable rate of interest under the Supreme Court Rules, until the date of determination.
13. The Applicant seeks Costs of the Adjudication and the Application fee be paid in full by the Respondent.
14. The Respondent submits that I should dismiss the Application because it has not been properly made under the provisions of section 28 of the Act in that:
 - (i) the adjudication application does not contain the contact details of the prescribed appointer or each other party. The Respondent says that, the ABN or ACN has not been provided as part of the required information prescribed by the *Construction Contracts (Security of Payments) Regulations* ("Regulations"), pursuant to section 28(2) of the Act; and
 - (ii) the Payment Dispute arose on or about 11 October 2014, by letter from the Respondent of even date and therefore the Application has been made well out of time, presumably under section 28(1) of the Act.

15. In the alternative, the Respondent says that if the payment claim of 19 May 2015 is found to be valid for the purposes of adjudication, then the claim has been made prematurely as there is no payment dispute.
16. The Respondent submits that I should dismiss the Application without making a determination on the merits under section 33(1)(a)(ii) or alternatively determine that the Respondent is not liable to make any payment to the Applicant in relation to the 19 May 2015 Payment Claim.
17. The Respondent is silent on the question of interest payable at 8.5% on any overdue payment of the Applicant's claims and maintains that the Applicant "...is not entitled to any payment in respect of the Contract...".
18. The Respondent also seeks Costs of the Adjudication.

Procedural Background

The Application

19. The Application is dated 22 May 2015 and comprises a general submission and 6 listed attachments. The attachments, *inter alia*, include:
 - (a) a copy of the Contract;
 - (b) a copy of the Payment Claim BAS1415-7A, including Purchase Order No. 4391085012; and
 - (c) supporting evidence including drawings, calculations, specifications and letter and email correspondence between the parties relied upon in the general submission.
20. The Payment Claim was submitted to the Respondent on 19 May 2015. The Respondent has not paid, disputed or certified the Payment Claim.
21. The Application was served pursuant to section 28 of the Act.

The Response

22. The Response is dated 3 June 2015 and comprises a general submission, a statutory declaration and 8 listed attachments, namely A through to H. The attachments, *inter alia*, include:
- (a) a copy of the Purchase Order No. 4391085012 dated 15 July 2014 plus Revision 1, dated 26 July 2014 and Revision 2 dated 30 July 2014;
 - (b) the Payment Claim BAS1415-7A, dated 19 May 2015;
 - (c) copies of the Applicant's Tax Invoice No. BAS1415-3, dated 16 July 2014, and Tax Invoice No. BAS1415-7, dated 31 July 2014;
 - (d) letter correspondence between the parties; and
 - (e) a copy of Western Australia State Administrative Tribunal case law, *Marine & Civil Pty Ltd and WQUBE Port of Dampier Pty Ltd* [2014] WASAT 167.
23. The Response was served pursuant to section 29 of the Act.

Adjudicator's Jurisdiction and the Act

24. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
25. Section 4 of the Act – **Site in the Territory** – the site is at [redacted], the construction project site for the [project] and this is where the Goods, the subject of this dispute, have either been provided or appear to now be physically located. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

26. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the Purchase Order No. 44391085012 ("PO") dated 15 July 2014, Revision 1 of that PO dated 26 July 2014 and Revision 2 of that PO dated 30 July 2014 for the supply of Goods to the construction project. The parties agree that they entered into a construction supply contract in the terms set out in the Purchase Order. I am satisfied that the Contract is a construction supply contract for the purposes of the Act as prescribed under section 5(1)(b) and section 5(1)(c) of the Act.
27. Section 6 of the Act – **Construction Work** – the work is to construct the [redacted] for the [redacted], a construction project at [redacted] in the Northern Territory. I am satisfied that the work is construction work for the purposes of the Act.
28. Section 4 of the Act - **Payment Claim** – means 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; 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.”*
29. The Applicant in its further submissions says that there are no provisions in the Contract for the making of a payment claim and therefore section 19 of the Act engages the implied provisions of Division 4 of the Act to the extent of the making of a payment claim.
30. The Respondent disagrees and says that there are provisions in clause 7 of the terms and conditions of the Purchase Order of the Contract that sets out how a claim is to be made and how and by when the claim is to be paid.

31. The Respondent also submits that:
- (i) the Payment Claim Invoice No. [redacted] 1415-3 dated 16 July 2014 in the sum of \$3,795.00 (including GST) and (the “16 July 2014 Payment Claim”) and Payment Claim Invoice No. [redacted] 1415-7 dated 31 July 2014 in the sum of \$95,920.00 (including GST) (“the 31 July 2014 Payment Claim”) were valid payment claims for the purposes of the Act and both claims relate to the Applicant’s Dispute Notice dated 23 February 2015;
 - (ii) the last date for payment of the 16 July 2014 Payment Claim was 30 August 2014 and the last day for payment of the 31 July 2014 Payment Claim was 30 September 2014. From that time the Applicant then had 90 days within which to serve an application for adjudication and any application is now well out of time;
 - (iii) the Payment Claim Invoice No. [redacted] 1415-7A dated 19 May 2015 (“the 19 May 2015 Payment Claim”) is a repeat claim and cannot therefore attract jurisdiction; and
 - (iv) the Application served on 22 May 2015 based on the 19 May 2015 Payment Claim is either well out of time, after the 90 day period prescribed by section 28 of the Act, or has been made prematurely.
32. I deal with each of these issues in turn, bearing in mind that an adjudication is triggered by a *Payment Dispute* pursuant to section 8 of the Act, which first requires a validly made payment claim under section 4 of the Act.

The making of a Payment Claim under the contract

33. The Contract terms and conditions clause 7 states in part:

“7.1 Unless the contract provides for periodic progress payments or for payment by instalments (upon delivery or otherwise), the Supplier may only submit a claim for payment after all of the goods and/or services have been delivered and/or completed, and accepted by the Purchaser, such claim to be submitted by the next following 25th day of the month after acceptance;

7.2 Where the contract provides for periodic progress payments or payment by instalments or milestones, the Supplier may submit a claim for payment of the amount due in respect of the relevant goods and/or service after delivery and/or completion, and after acceptance by the Purchaser, by the next following 25th day of the month after the relevant payment period or instalment or milestone date (as applicable);

7.3 Each claim for payment under the contract shall take into account all adjustments in accordance with the contract for the period and in respect of the matters the subject of the claim, including without limitation, adjustments for any variation to the scope of the goods or services.....”;

7.7 The Purchaser shall pay the Supplier the amount of the claim due to the Supplier within 30 days after the end of the month in which the claim for payment is submitted. A claim submitted after the 25th day but by the end of the month shall be considered to have been submitted in the following month.....”

The words in clause 7 are concise and clearly stipulate the way a *Supplier* is to make a claim and by when they are to make a claim. The terms and conditions also deal with variations and late claims made by a *Supplier*. Payment is then to be made 30 days after the end of the month in which the claim for payment is submitted. While no pre-defined format for the claim to take is set out in the terms and conditions, clause 7 clearly stipulates what is required for the making of a payment claim and the payment of that claim.

34. To fulfil the payment claim definition under section 4 of the Act a claim must be made subject to the conditions of the construction contract. This requirement was discussed by Olsson AJ, and agreed with by Kelly J, in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [232] to [238] where His Honour said:

[232] It is tantamount to asserting that any specific contractual provisions regulating how and when monies are to become payable under a construction contract are irrelevant to the question of when a party to that contract may raise what can properly be categorised as a payment claim, with a view to generating a payment dispute. i.e. the statute confers jurisdiction on an adjudicator to adjudicate a claim in any case in which a claim is made for payment of monies in relation to a construction contract, there being no requirement to even prima facie relate a payment claim to any specific contractual pre-requisites for such payment.

[233] On that argument such pre-requisites only become relevant merits considerations after the adjudicator actually embarks upon the process of adjudication.

[234] In my opinion such an approach has the practical effect of ignoring the existence and significance of the word "under" in the statutory definition of "payment claim".

[235] According to its normal English connotation, that word signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.

[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract.

[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.

[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract."

35. In this contract the terms and conditions of clause 7 clearly set out how and when a claim for payment is to be made under the Contract and when that claim is to be paid under the Contract. I do not therefore subscribe to the Applicant's view that the implied provisions of the Act are engaged.

The validity of Payment Claims made under the Contract

36. Turning now to both the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim, attendance to the invoices at Tab D of the Response shows a claim in the sum of \$3,795.00 (including GST) for “*Supply of 20” Container*” on “*Order No: 4391085012*” and the sum of \$95,920.00 (including GST) for “*Various [redacted] Services including all quality documentation requirements for [redacted] Works as per PO C.O. 1” and [materials] as per PO C.O. 2*”. It is clear from both invoices submitted in July 2014, that the requirements of clause 7 of the Contract have been fulfilled and the Applicant has made claims for payment under clause 7.1 of the Contract.
37. In its further submissions of 15 June 2015, the Applicant argues that “...*The reason that invoice no. [redacted] 1415-7 was not a payment claim under the Act was that it did not comply with the requirements of Division 5 s5(1)(h) as it was not signed by the contractor. It is for this reason that invoice [redacted] 1415-7A was issued on 19 May 2015*”. It is unclear if the Applicant includes Invoice No. [redacted] 1415-3 in its reasoning, as that invoice was also issued in July 2014, similar to Invoice No. [redacted] 1415-7, and was not signed by the contractor. I have already found that the implied provisions of the Act for making a payment claim are not engaged and by attendance to the content of the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim. I am of the view that these are valid payment claims made under the terms and conditions of the Contract and therefore are valid payment claims for the purposes of section 4 of the Act.
38. In its submissions of 15 June 2015, the Respondent suggests that the last day for adjudication of both the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim is 9 January 2015. This is based on the Respondent’s assumption that the latest date of the payment dispute arose on 11 October 2014 by its letter of even date sent to the Applicant.

39. I am not with the Respondent on this issue. The July 2014 claims for payment were made on 16 July 2014 and 31 July 2014 respectively and under clause 7.1 of the Contract were therefore due to be paid, absent any notice of dispute or rejection of the supplied items, 30 days after the end of month under clause 7.7 of the Contract, that is on 30 August 2014. However, the 31 July 2014 Payment Claim was made after the 25th of the month and under the terms of clause 7.7 which say:

“A claim submitted after the 25th day but by the end of the month shall be considered to have been submitted in the following month.”

The 31 July 2014 Payment Claim was therefore due for payment on 30 September 2014.

40. Payment of either claim was not made on or before the due dates and under section 8 of the Act a dispute would then arise on 31 August 2014 for the 16 July 2014 Payment Claim and 1 October 2014 for the 31 July 2014 Payment Claim. Therefore, by calculation the last day for adjudication would have been 28 November 2014 for the 16 July 2014 Payment Claim and 29 December 2014 for the 31 July 2014 Payment Claim.

41. Turning now to the 19 May 2015 Payment Claim, attendance to the invoice at Attachment 3 of the Application shows a claim in the sum of \$99,715.00 (including GST) for:

“Invoice [redacted] 1415-3 Dated: 16/07/2014 Supply of 20” Container

Invoice [redacted] 1415-7 Dated: 31/07/2014 Various [redacted] Services including all quality documentation requirements for [redacted] Works as per PO C.O. No: #1

[materials] as per PO C.O. No: #02”

The 19 May 2015 Payment Claim also contains a copy of Purchase Order No. 44391085012 dated 15 July 2014, Revision 1 of that PO dated 26 July 2014 and Revision 2 of that PO dated 30 July 2014. It is clear by attendance to these documents that this is a repeat claim due to the non-payment and dispute of the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim.

42. The issue of repeat claims was considered by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [118] to [124] where Her Honour said:

[118] The second matter I want to comment upon is the question of “repeat claims”.

[119] In AJ Lucas, Southwood J made the following remarks:

Clause 13 of the appellant’s standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat claim in respect of the performance of the same obligations under a construction contract.

[120] The underlined words in this passage were used as the basis for a submission that, as a matter of law, the Act does not allow for (indeed prohibits) what have been referred to as “repeat claims”. It was said that s 8 defines when a payment dispute arises, and once a dispute has arisen about a particular amount, it cannot arise again. Read in the context of the whole passage, the underlined words are not authority for such a proposition.

[121] As Southwood J made clear, the contract in question in AJ Lucas provided for monthly invoices and made no provision for “repeat claims”.

[122] In this case, the contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a “rolling claim”. That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim. It is readily apparent that if any payment claim is not paid in full:

(a) *a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and*

(b) *despite that, each subsequent payment claim must include a “repeat claim” for that unpaid part.*

[123] *There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon. What the adjudicator is obliged to do when faced with a payment claim under a contract of this kind is the same as he does for any other contract: he should look at the contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the contract (if payable), and whether the application has been lodged within 90 days of that date.*

[124] *I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. In each case one must look to the contract to determine when a payment was due and hence when the payment dispute arose. One imagines that in most contracts, a “repeat invoice” claiming no new work and simply served in an attempt to “re-set the clock” for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the contract to determine when the payment dispute arose according to the express and/or implied terms of the contract.”*

43. The terms and conditions of the Contract between the Applicant and the Respondent for the supply of Goods, at clause 7, do not allow for a repeat claim as clause 7.1 specifically says:

*“7.1 Unless the contract provides for periodic progress payments or for payment by instalments (upon delivery or otherwise), **the Supplier may only submit a claim for payment after all of the goods and/or services have been delivered and/or completed, and accepted by the Purchaser** [emphasis added], such claim to be submitted by the next following 25th day of the month after acceptance....”*

The 19 May 2015 Payment Claim refers to the non-payment of the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim which had not been paid and remains active and on foot as claims against the Respondent. Only the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim would attract the opportunity for adjudication and simply issuing another duplicate claim for payment of both claims in the total amount already claimed and owing under the Contract cannot then restart the clock.

44. I am of the view that the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim are the only valid payment claims for the purposes of the Contract and are valid payment claims for the purposes of the Act. The 19 May 2015 Payment Claim is a duplicated claim repeating what has already been claimed and disputed in the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim.
45. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
- “(a) a payment claim has been made under a contract and either:*
 - (i) the claim has been rejected or wholly or partly disputed; or*
 - (ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*
 - (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
 - (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”*
46. The Applicant made valid payment claims on 16 July 2014 and 31 July 2014 in the form of the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim for the supply of the Goods set out on the Purchase Order No. 44391085012 dated 15 July 2014, Revision 1 of that PO dated 26 July 2014 and Revision 2 of that PO dated 30 July 2014.

47. The 16 July 2014 Payment Claim in the sum of \$3,795.00 (including GST) was due to be paid under the Contract on or before 30 August 2014 and the 31 July 2014 Payment Claim in the sum of \$95,920.00 (including GST) was due to be paid under the Contract on or before 30 September 2014. While there is correspondence from the Respondent dated 11 October 2014, at Tab F of the Response and Attachment 5 of the Application, summarising and claiming set-off for payment of the Goods, this did not trigger a payment dispute for the purposes of the Act. The non-payment of the 16 July 2014 Payment Claim on or before 30 August 2014 and the non-payment of the 31 July 2014 Payment Claim on or before 30 September 2014 triggered the payment dispute between the parties.
48. I am satisfied that there is a payment dispute for the purposes of section 8 of the Act and that that payment dispute commenced on 31 August 2014 for the 16 July 2014 Payment Claim and on 1 October 2014 for the 31 July 2014 Payment Claim under section 8(a)(ii) of the Act.
49. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents, the Application dated 22 May 2015 was served on the Respondent and on the Prescribed Appointer, MBNT, on 22 May 2015.
50. Before I deal with the time for adjudication, the Respondent firstly submits that I should dismiss the Application because it has not been properly made under the provisions of section 28 of the Act in that:
- (i) the adjudication application does not contain the contact details of the prescribed appointer or each other party. The Respondent says that the ABN (or ACN) has not been provided as part of the required information prescribed by the Regulations, pursuant to section 28(2) of the Act; and

- (ii) the Payment Dispute arose on or about 11 October 2014, by letter from the Respondent of even date and therefore the Application has been made well out of time (presumably under section 28(1) of the Act).

The prescribed information in an Application

51. The Regulations at Regulation 6 requires an Application to contain:

- “(a) the name and contact details of the appointed adjudicator or prescribed appointer; and*
- (b) the applicant’s name and contact details; and*
- (c) the name and contact details of each other party to the contract.”*

Under 4, “*Contact details*” are prescribed as:

- “A person who is required to give the contact details of a person must give the following details, but only to the extent those details are known to the person:*
- (a) the address and telephone and facsimile numbers of the person;*
 - (b) the ANB number of the person or the person’s business or, if the person does not have an ABN, the ACN of the person.”*

52. The Respondent submits that the Application does not contain the ABN (or ACN) of the prescribed appointer or each other party to the Contract and should therefore be dismissed.

53. I do not share the Respondent’s view on this issue. Attendance to the documents of the Application shows that the Applicant’s ABN clearly appears on the documents at each Attachment cover page and the Respondent’s ABN to be on the Purchase Order No. 44391085012 dated 15 July 2014, Revision 1 of that PO dated 26 July 2014 and Revision 2 of that PO dated 30 July 2014 at Attachment 2 and Attachment 3 of the Application. While this detail may not be in a form generally recognised in an application for

adjudication, it is in the Application nonetheless. As to the prescribed appointer's ABN, in its further submissions of 15 June 2015 the Applicant submitted a Statutory Declaration by [*name redacted*], in house Counsel for the Applicant, which stated that the prescribed appointer's ABN was not known to the Applicant at the time of service of the Application.

54. Regulation 4 specifically states: "*...but only to the extent those details are known to the person...*" and I am satisfied that the Applicant did not know the ABN details of the prescribed appointer at the time of service of the Application.

The time for making an Application for Adjudication

55. The Applicant prepared and served their Application on the prescribed appointer MBNT on 22 May 2015. The Application, dated 22 May 2015, was based on the 19 May 2015 Payment Claim and the Applicant's Dispute Notice of 23 February 2015.
56. As reasoned in paragraphs 28 to 48 above, the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim are the only valid payment claims in the dispute and the dispute commenced on 31 August 2014 for the 16 July Payment Claim and on 1 October 2014 for the 31 July 2014 Payment Claim giving the Applicant 90 days from each dispute date within which to prepare and serve an application. This would calculate to the last date for service being 28 November 2014 for the 16 July 2014 Payment Claim and 29 December 2014 for the 31 July 2014 Payment Claim, notwithstanding the letter sent by the Respondent on 11 October 2014 setting off the payment under the Contract.
57. The 19 May 2015 Payment Claim was found to be a repeated and duplicated claim that again claimed payment for the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim which were still active and on foot and disputed in any event.

58. The Dispute Notice dated 23 February 2015, at Attachment 5 of the Application and Tab F of the Response, was used in the preparation of the Application and demands payment of the 16 July 2014 Payment Claim and the 31 July 2014 Payment Claim as the valid claims in the Contract, not the 19 May 2015 Payment Claim.
59. Based upon these findings, I am satisfied that the Application has not been prepared and served in accordance with section 28 of the Act. The Application has failed the threshold test set out in section 28(1) of the Act in that it has been served out of time of the 90 days allowable after a payment dispute arises under section 8 of the Act.
60. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent’s documents in the Response dated 3 June 2015, served on the Applicant and the Adjudicator on 4 June 2015. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and by Regulation 7.

The Adjudicator’s jurisdiction

61. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response and further submissions, I find that I must dismiss the Application without making a determination of the merits under section 33(1)(a)(ii) on the following grounds:
1. the Application has not been prepared and served in accordance with section 28 of the Act in that it has been served out of time under section 28(1) of the Act; and

2. the Payment Claim made in the Application under section 4 of the Act was a repeat duplicated claim only, not recognised by the Contract, that could not have triggered a Payment Dispute under section 8 of the Act.

Merits of the Claims

62. I make no finding on the merits as I have dismissed the Application. The Respondent's set-off claim for the Goods cannot be considered in this dismissal.

Interest on the claims

63. There is no requirement to consider interest as the Application has been dismissed.

Summary

64. In summary of the material findings, I determine the Application to be dismissed under section 33(1)(a)(ii) of the Act.
65. I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked it.

Costs

66. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.
67. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

68. The following information is confidential:

- (a) the identity of the parties;
- (b) the identity of the principal; and
- (c) the location and nature of the works.

DATED: 13 July 2015

Reference: 080

Rod Perkins
Adjudicator No. 26