DETERMINATION NO. 25.13.01

Adjudicator's Determination

pursuant to the

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

I, Simon Lee, determine on 17 May 2013 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is $163,141.78, inclusive of GST being the amount owing of $161,940.21 plus interest of $1,237.57 to today. Interest accrues on the sum of $161,940.21 at the rate of $39.92 per day from today until payment.

I also decide and determine that the respondent pay the applicant its costs of the determination in the sum of $5,000.

The total sum of $168,141.78 is payable by the respondent to the applicant on or before 20 May 2013. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Appointment as adjudicator

1. On 23 April 2013 I was appointed adjudicator by the Law Society Northern Territory to determine this application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act). The Law Society Northern Territory is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

2. On 23 April 2013 I emailed the applicant and the respondent. In the correspondence attached to that email I inquired of the parties whether there was any objection to my acting as adjudicator and indicated that the respondent had until 8 May 2013 (there being two intervening public holidays, ANZAC Day and May Day) to file its response. There was no objection by either party and I accordingly accepted the appointment.

Documents received by adjudicator

3. I received and have considered the application for adjudication (dated 22 April 2013) provided by Mr Paul Maher, Solicitor, Darwin, for the applicant and the response (dated 8 May 2013) from the respondent provided to me by Mr Emanuel Confos, Partner of Gilbert + Tobin, Sydney.

4. The parties did not dispute that the application had been served on 22 April 2013 and that the respondent's response was due on 8 May 2013, on which day it was received.

5. My determination was therefore due on 22 May 2013.

JURISDICTION

6. The parties did not dispute any of the following:

   (a) there was a construction contract – s 27;

   (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;

   (c) a payment dispute had arisen – s 8;

(d) the dispute was not the subject of an order, judgment or other finding.

7. The parties have accepted my jurisdiction and I have satisfied myself independently that I have jurisdiction because there was a (1) payment claim, (2) under a construction contract (subject to my comments under the heading "Authority"), and (3) an application for determination in time. I find that I have jurisdiction.

THE CLAIM

8. The claim is based on an alleged oral contract for the dry hire of earth-moving and handling machines (a Sandvik screen, a Komatsu 430 front end loader and a Komatsu excavator) by the applicant to the respondent.

9. The contract is alleged to have been made between [AA] the sole director of the applicant, and Mr [BA], the then project manager of the respondent in about the last week of August 2012 (see par 17 of the application).

10. The respondent does not deny that all the work claimed by the applicant was completed but says (1) there was no contract as [BA] had no authority to bind the respondent, and (2) the rates agreed by [BA] (without authority) and charged by the applicant were unreasonable. Those were the sole grounds on which the respondent opposed the adjudication (see par 1.1 if the respondent's submissions). In fact, the respondent admits it owes the applicant $75,137.00 for the work, saying that that amount is a reasonable amount, rather than the unreasonable amount charged by the applicant. I will deal with the respondent's submissions under the headings of Authority and Reasonableness of the Rates.

AUTHORITY

11. The respondent submitted that [BA] had no authority to bind the respondent for two reasons. First, because he did not follow his employment contract with the respondent which required him to report directly on all issues to its Chief Operating Officer (COO). Second, because the respondent's Management Systems Manual required him to obtain three competitive quotes and "sign-off" by COO or Board approval, which he allegedly failed to do.

12. I should note that the respondent appeared to make a faint suggestion at a fine distinction between [BA]'s authority to bind the respondent generally, and his authority to bind it to the rates agreed with the applicant (see par 1.3(b) of its submissions). This suggestion was made in the executive summary of the submissions but was not developed in that way in the discussion in par 2.3. If the suggestion is seriously made, I reject it as being too fine a distinction between authority to make an agreement and authority to agree rates in the agreement. There is no suggestion that [BA]'s authority was limited as to the value of a contract.

13. The applicant says [BA] had apparent authority to bind the respondent. He was the respondent's project manager and there was nothing to suggest any limitation on his authority.

14. There is no dispute that [BA] was the respondent's project manager. In the normal course of construction contracts, a project manager would be expected to have authority to enter contracts of this nature. The respondent has not pointed to anything in the material in the adjudication that would have indicated to the applicant that there was any relevant limitation on [BA]'s authority.

15. The respondent does not say that the applicant was shown or made aware of the contents of [BA]'s employment contract or the respondent's Management Systems Manual. In any case, a requirement in his employment contract that [BA] report directly on all issues to the COO does not indicate he did not have the usual authority expected of a project manager. "Report directly to" is not the same as "obtain approval from".

16. The Management Systems Manual regulated the respondent's internal procedures. Failure to follow those procedures internally could not negate a contract entered into by someone with apparent authority (absent fraud), especially if neither the manual nor its contents were disclosed to the applicant. I note parenthetically that the corporate structure set out in the manual puts the Project Manager as apparently the second most senior officer of the respondent, reporting directly to the Chief Executive Officer (see p 8 of 15).

17. Anyone dealing with an officer or agent of the company is entitled to rely on the indoor management rule as it is expressed in s 129(3) and (4) of the *Corporations Act 2001* (Cth). Those subsections say:

> (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:
>
> (a) has been duly appointed; and
>
> (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.
>
> (4) A person may assume that the officers and agents of the company properly perform their duties to the company

18. The applicant was entitled to do assume that [BA] had the authority customarily exercised by a project manager in terms of sub-s (3)(b), and that he had properly performed his duties to the company in terms of sub-s (4), that is, that in this case he had followed his employment contract and the Management Systems Manual.

19. However, I would have come to the same conclusion on the respondent's submission as to [BA]'s lack of authority without considering s 129.

20. But there are two other matters which also undermine the respondent's argument that [BA] did not have authority. These are:

(a) the respondent's knowledge of the contract and the rates;

(b) the respondent's taking no jurisdiction point,.

I will deal with those in turn.

Respondent's knowledge of the contract and rates

21. First, the respondent's accountant [BB] and [BC] were copied on emails between the applicant and Mansfield in October 2012 requesting details establishing an account for the respondent with the applicant, and setting out details of the rates agreed for the equipment.

22. On 11 October 2012, [AB] on behalf of the applicant emailed [BA], asking for details necessary to set up a record in the applicant's accounting system, and clarification of other issues about the contract.

23. [BA] replied to that email on 12 October, copying [BB] and [BC], and saying (quoting verbatim):

> Thanks for contacting me I will send this on to our account [BB] and I will also be in contacting to let you know the hours on the equipment to keep you updated
>
> We started on site Wednesday 26/9/12 with your Komatso Loader start hours 6546 and at the end of today 12/10/12 6624 hours 78 hours
>
> and the power screener started with 2 hours and now has 81 hours and yesterday your 450 excavator started the hours 15589.0 and I stopped today with 15595.3
>
> our claim goes in to [head contractor] on 25 the of each mouth.
>
> [AA] priced the Screen at $ 250:00 per hour including GST
>
> Front End Loader and excavator at $ 200:00 per hour including GST
>
> And 50% of the mob costs
>
> Hire cost to Date $37,050:00 including GST

24. [AB] then replied to [BA], [BB] and [BC] at 3.15pm on 15 October expressing concern at the lack of response, at the need to issue an invoice, and at the apparent suggestion from [BA] that the applicant would be paid when it was paid by [the head contractor].

25. [BB] replied to this email at 4.09pm on 15 October, saying "I have passed your message to [BC]. He is the one who can decide about payment date."

26. On 15 October 2012, the applicant rendered its first invoice for $37,049.93, which the respondent paid in full on 7 December 2012. That invoice charged the rates set out in [BA]'s email of 12 October quoted above. Further, the applicant rendered its second invoice (invoice numbered 250) at the same rates on 21 November, two weeks before the first invoice was paid in full.

27. Thus the contract and the rates were brought to the attention of [BB] and [BC]. We know [BB][was the respondent's accountant, but who was [BC]?

28. The applicant says it does not know the status of [BC] within the respondent but that he had apparent authority on its behalf (see par 5 of the application).

The question then becomes apparent authority to do what? Nevertheless, when the applicant was chasing payment of its invoices in October 2012, [BB] wrote in an email to the applicant dated 15 October 2012 that "I have passed your message to [BC]. He is the one who can decide about payment date".

29. It was also [BC] with whom the applicant dealt in person in attempting to resolve issues about payment of the outstanding invoices in January and February 2013 (see pars 32-34 of the application)

30. [BC] wrote two emails to the applicant on 12 February 2013, the first (very detailed) following a meeting with the applicant on 29 January 2013. In those emails, [BC] writes as one having authority on behalf of the respondent, referring to the respondent as "we", making an offer on behalf of the respondent, and being "happy to await your suggested action with either elevating it to a formal arbitration process or court proceedings." (see Annexure 6 to the application).

31. The respondent does not address [BC]'s position or authority, and says in par 1.4 of its submissions that a failure to respond directly to a submission of the applicant should not be taken as an admission. I do not take the respondent's silence on the position and authority of [BC] to be an admission, but I am left only with evidence from the applicant, where the respondent was the party with the knowledge and ability to provide contradictory evidence (see *Jones v Dunkel* (1959) 101 CLR 298)

32. On the evidence before me, it appears that [BC] was in a position of authority within the respondent, apparently with authority to decide if and when invoices were paid, to make offers on behalf of the respondent, to attend settlement meetings on behalf of the respondent and to generally negotiate settlement.

33. The existence of the contract and the rates agreed were thus brought to the attention of officers or agents of the respondent other than [BA] before the first invoice was rendered and paid. If [BA] in fact had no authority to enter the contract, and if the rates in fact were unacceptable to the respondent, the time of the emails mentioned above and the rendering of the first invoice was the time to raise those issues (October 2012). Even though work had commenced, it could have been terminated had the respondent been

genuinely concerned about either the existence of the contract or the agreed rates. Not only was the work not terminated, but no voice was raised about the rates following the emails, the invoice was paid without comment after receiving the second invoice, and the work was allowed to continue.

34. These matters would have confirmed in the mind of the applicant (or a reasonable hirer in the position of the applicant) that there was a valid contract in existence with the respondent at the rates agreed with [BA] and of which [BB] and [BC] had been informed. Neither party has mentioned confirmation or ratification of the contract by the respondent, and I make clear that I do not decide this determination on that basis, but if in fact [BA] lacked authority, in my view the contract was confirmed or ratified by the respondent by these actions – the receipt by [BB] and [BA] of the emails mentioned, their silence, payment of the first invoice without comment and after receipt of the second invoice, and allowing the work to continue. These matters would probably also raise an estoppel preventing the respondent from denying the existence and terms of the contract as alleged by the applicant, but I do not need to address that probability and I do not take it into account.

35. In *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 682, Lord Hatherley adopted the language of a concession by Mr Herschell QC as sound, saying:

> he says that he will not contend that this agreement is not to be held to be a binding and firm agreement between the parties, if it should be found that, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them.

36. Similar may be said here.

No jurisdiction argument

37. The second matter which tells against the respondent's assertion of [BA]'s lack of authority is its response in this adjudication. It did not argue that I had no jurisdiction on the basis there was no construction contract. Such a contract is fundamental to an adjudicator's jurisdiction. If there is no contract, there is no jurisdiction to entertain an application: s 27.

38. Yet the respondent effectively admits the jurisdiction point and then claims there is no contract because of want of authority. If there is no contract, there can be no jurisdiction. And concomitantly, if there is jurisdiction, there must be a contract.

39. Having taken no jurisdiction point, effectively admitting the existence of a construction contract, the respondent cannot then say there is no contract. The respondent did not put its arguments in the alternative – for example, there was no jurisdiction because of no contract due to lack of authority, or alternatively that the rates were unreasonable. This would have been more consistent with an argument of no authority and therefore no contract. I do not think the respondent can approbate and reprobate in this way.

Conflict of interest

40. The respondent raised another matter apparently in relation to [BA]'s lack of authority. It said in par 2.13 that [BA] was "in a position where there was a conflict of interest" because of an apparent prior relationship with [AA], and the respondent "queries whether [BA] was acting in the best interest of the Respondent". It said this is evidenced by [BA] commencing employment with the applicant immediately after termination of his employment with the respondent.

41. Four things may be said of that allegation. First, the respondent does not say how that affects the contract. It does not expressly say that the contract is void, voidable or otherwise affected as a result. The allegation is raised without stating its relevant legal significance.

42. Second, without using the word, the respondent seems to be hinting at fraud on the part of [BA] and [AA]. That would seem to be the only legally relevant matter between the parties which accommodates the facts alleged (it may be relevant to other legal matters as between the respondent and [BA], but those matters are not relevant here). Those facts all fall far short of a proper and sustainable allegation of fraud, and the allegation of a prior relationship remains no more than the mere "point of conjecture" [BC] admitted it was in his email of 12 February 2013.

43. Third, the statutory declaration of [BD] supporting the allegation simply says that on 17 October 2012, [BA] informed [BD] "that he would be working at

[work site] as plant operator until his departure to France. He informed me that [AA] had offered short term employment after he left [the respondent's] employment" (quoted verbatim).

44. [BD]'s statement is said to support the suspicion of a prior relationship between [BA] and [AA]. But it is equally consistent with there being no relationship before the contract and an offer of short term employment being made to a recent, available, contact. I note that [BA] went from being Project Manager of the respondent to plant operator with the applicant and that the employment was only until he departed for France. It has the flavour of an ad hoc, last minute arrangement arising because of [BA]'s unexpected and temporary availability, and the applicant's immediate need. I do not positively find that to be the case, and I do not need to. But neither do I accept [BD]'s statement as proof of a prior relationship between [AA] and [BA], leading to the alleged conflict of interest.

45. Fourth, over three months have passed since the respondent through Procter raised the question of [BA]'s relationship with the respondent, and at the same time indicated it was anticipating legal proceedings and would "test this point of conjecture if this matter proceeds to court" (see Annexure 6 to the application containing [BC]'s email of 12 February 2013 at 1.09 pm). Although having had more than three months to investigate and prepare to test the conjecture in proceedings it was anticipating, the best evidence the respondent could produce was the statement from [BD], which was equally (if not more) supportive of there being no prior relationship.

46. The submission at par 2.13 of the response is devoid of both legal significance and evidentiary basis. Given the potential seriousness of the allegation, it should not have been made here without some legal purpose and a proper foundation in evidence, rather than remaining mere conjecture more than three months after it was raised.

47. For those reasons, I find that [BA] had authority to bind the respondent to the contract alleged by the applicant and to the rates [BA] agreed in his email, copied to [BB] and [BC].

REASONABLENESS OF THE RATES

48. The respondent says the rates charged by the applicant must be reasonable because of s 17 and Div 2 of Schedule. Section 17 provides:

> The provisions in the Schedule, Division 2 are implied in a construction contract that does not have a written provision about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

49. There is an argument that the section is not triggered because [BA]'s email of 12 October 2012 amounted to such a written provision. Neither of the parties addressed this argument so I take it no further.

50. Division 2 provides:

> **Division 2 Contractor's entitlement to be paid**
>
> **2 Contractor entitled to be paid**
>
> (1) The contractor is entitled to be paid a reasonable amount for performing its obligations.
>
> (2) Subclause (1) applies whether or not the contractor performs all of its obligations.

51. Although being an entitling provision, Div 2 naturally contains the limitation of the amount of payment being reasonable. I accept the respondent's submissions on this requirement.

52. The respondent says that the amounts charged by the applicant were excessive and unreasonable, being significantly more than rates quoted by two other hirers of similar equipment from whom the respondent obtained quotes. The respondent says that the applicant was charging the respondent 228% more for the excavator, 249% more for the loader and 131% more for the power screen than the market rate.

53. [The first] quote is dated 6 November 2012. This was (1) after the applicant rendered its first invoice on 16 October, (2) two weeks before the applicant rendered its second invoice on 21 November, (3) one month before the respondent paid the first invoice in full on 7 December 2012, and (4) five weeks before the final invoice was rendered on 14 December (in other words, work continued for some time).

54. If the rates were so excessive and unreasonable to the respondent, why did the respondent pay the first invoice apparently without comment one month later, and allow work to continue for so long without suspending or terminating the contract, or at least endeavouring to renegotiate the contract on the basis

of the quote? No explanation is offered by the respondent, although it had the quote from sometime after 6 November 2012.

55. [The first] quote contained a number of conditions not contained in the contract with the applicant, such as:

    (a) an excess charge for working over one ten hour working shift per day;

    (b) a minimum daily charge;

    (c) minimum periodic charge for wet weather stand downs;

    (d) an environmental levy charged at off hire;

    (e) an excess cleaning charge;

    (f) minimum 20 working days per month.

56. The second quote is dated 24 April 2013 and required:

    (a) a minimum hire period of 3 months;

    (b) a minimum 250 hours per month.

57. The applicant acknowledges the high rates but says there are reasons, principally (for the loader) because (1) of the high dust levels involved in the work, (2) the applicant was not in the business of hiring out the equipment which would not be available to the applicant if it did so, and (3) the respondent could not guarantee the number of hours the loader would be worked (and therefore charged) each day.

58. The respondent answers these in par 2.7 by saying those "issues are standard industry conditions/terms and should not be taken to justify higher charge out rates". But this is not supported by the quotes tendered by the respondent in its response. Both quotes were from firms whose business it is to hire out equipment, and both quotes had minimum periods of hire or working hours, or both (as set out above). These are considerable differences from the situation of the applicant and its contractual terms.

59. The applicant also says it had difficulty sourcing the equipment, to which the respondent replies that it had no difficulty in obtaining the quotes and that [the

company that provided the second quote] had six power screens available in Darwin (in April 2013).

60. This raises the question again as to why the respondent did not replace the equipment from the applicant with equipment from [the company that provided the second quote] in November 2012. It does not address the situation of the applicant not being in the business of hiring out equipment, but being a user of the equipment itself. And the fact that [the company that provided the second quote] had six screens available in Darwin in April 2013 does not saying anything of availability at the relevant time.

61. In my view, the quotes tendered by the respondent are not comparable to its contract with the applicant – the quoters are in the business of hiring out equipment (the applicant is not); both quotes required a minimum hire time each month (the applicant did not); [the company providing the second quote] required a minimum three month hire (the applicant did not); [the company that provided the second quote] imposed multiple charges other than the hire charge (the applicant did not); and [the company that provided the second quote] quoted in April 2013 (some seven months after the applicant's contract).

62. Further, neither [of the companies that provided quotes] commented on the applicant's concerns of dust. It is not known whether they knew of the exact conditions in which the equipment would be operating.

63. The applicant says in par 39 that the reasonableness of the rates is irrelevant since the rates were agreed. Because of s 17 and Div 2, I do not agree that oral agreement of rates renders their reasonableness irrelevant. But neither do I think the oral agreement of rates is irrelevant to their reasonableness. This is particularly the case where there is written evidence of that agreement, as here, followed by payment of an invoice rendered at those rates after two such invoices were rendered. In other words, not only is there written evidence of the oral agreement, the objective conduct of the parties supports the oral agreement.

64. In my view, while the agreement does not render the question of reasonableness irrelevant, the agreement and the subsequent conduct of the parties are evidence of reasonableness in the circumstances. That conduct

was the silence of [BB] and [BC] after receiving notice of the contract and the rates, the receipt of two invoices at the agreed rates before paying the first invoice in full, and not terminating or suspending or endeavouring to renegotiate the contract after receiving an apparently lower quote from [the company that provided the first quote], and paying the applicant's first invoice after receipt of that quote without endeavouring to renegotiate the contract.

65. In my view, those facts go to show that the rates agreed and paid were reasonable. The respondent has offered no explanation as to why:

(a) [BB] or [BC]r did not object to the rates at the time of [BA]'s email of 12 October 2012;

(b) it did not suspend the contract or the work after receiving either [BA]'s email of 12 October or the applicant's first invoice;

(c) it did not terminate the contract and instead hire equipment from [the company that provided the first quote] (or someone else) after the first invoice or after receiving the [first] quote;

(d) it did not endeavour to renegotiate the contract after receiving [the first] quote;

(e) it paid the first invoice after receiving [the first] quote and the applicant's second invoice;

(f) it allowed work to continue after the second invoice.

66. In my view, those facts suggest that the rates in the contract and as agreed by [BA] to the knowledge or [BB] and [BC] were reasonable in all of the circumstances described by the applicant and discussed here, and I so find. I find that the quotes tendered by the respondent in this adjudication are not comparable to the contract with the applicant for the reasons given above and that they do not indicate that the applicant's rates were unreasonable. I find that [BA]'s agreement to the rates, to the knowledge or [BB] and [BC], combined with the other facts set out in the immediately preceding paragraph, is further evidence that the rates were reasonable.

CONCLUSION

67. I have dismissed the respondent's only two objections to the applicant's claim, namely that [BA] lacked authority to bind the respondent and that the rates charged by the applicant were unreasonable. I find that the applicant's payment claim of 12 March 2013 is made out on the material before me, and therefore find in favour of the applicant.

AWARD

68. I award the applicant the sum claimed of $161,904.21 plus interest.

69. Entitlement to interest is under s 21 which implies into a contract silent on interest the provisions of Div 6 of the Schedule. Combined with s 35, those provisions entitle the applicant to interest at 9% (the prescribed rate) from the day after the amounts became due under the contract until they are paid.

70. The payment claim was delivered on 12 March 2013 and by the terms of Div 5, s 6(2)(b) of the Schedule was to be paid within 28 days, being 9 April 2013. From and including 10 April to the date of this determination, 17 May, is 31 days, and interest is calculated as follows:

$161,904.21 x 9% x 31/365 = $1,237.57

71. I award interest in the sum of $1,237.57 from the date of the payment claim to the date of this determination.

72. The total amount of the award of principal plus interest is $163,141.78.

73. Interest accrues from today at the rate of $39.92 per day.

COSTS

74. Both parties seek costs, governed by s 36 which 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.
>
> (4) Divisions 4 and 5 apply (with the necessary changes) to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

75. Under subsection (2), the enquiry is as to whether a party has incurred costs of the adjudication because of either:

(a) of frivolous or vexatious conduct of; or

(b) unfounded submissions by,

another party.

76. In my view, the submissions of the respondent that [AB] did not have authority and that the rates were unreasonable were unfounded, particularly having regard to the knowledge [BB] and [BC] had of both the contract and the rates, their silence, the respondent's payment of the first invoice after receiving the second invoice and allowing work to continue, none of which was explained by the respondent. Further, the quotes the respondent tendered were so dissimilar from the terms of the applicant's contract as described above as to render the submissions based on them to be unfounded. In fact, the submission that the applicant's reasons its rates were standard industry issues were contrary to the terms of the quotes, as I have explained.

77. I find that the submissions of the respondent were unfounded in the sense that they were unsupported by and in some cases contrary to the evidence. I find that the applicant incurred the costs of the adjudication because of those unfounded submissions of the respondent.

78. I also find that the submissions of the respondent that [AB] had a conflict of interest were frivolous or vexations conduct. Those submissions were no more than mere conjecture (as admitted by [BC] on behalf of the respondent

in his email of 12 February 2013), despite more than three months passing since that email and during which time the respondent was anticipating legal proceedings in which it said it would test the conjecture. The submissions were not supported by the only evidence tendered, which was equally, if not more, consistent with there being no such conflict. Further and perhaps more importantly for the question of frivolous or vexations conduct, the submission was advanced without any apparent legal purpose or utility, as I have explained above.

79. I invited the parties to notify me of their costs. The applicant's costs were "just on $5,000", while the respondent's costs were $25,000, being $10,000 legal fees and $15,000 "[business name used by the respondent] (commercial advisors) costs". On the face of it, the respondent's costs are excessive, particularly those of the commercial advisors, particularly given the lack of factual foundation to the respondent's submissions.

80. The applicant's costs of $5,000 appear reasonable having regard to the issues raised, the amount involved and the work necessary to be performed.

81. I decide that the respondent pay the applicant its costs of the adjudication in the sum of $5,000, and that that amount is payable on or before 20 May 2013.

DETERMINATION

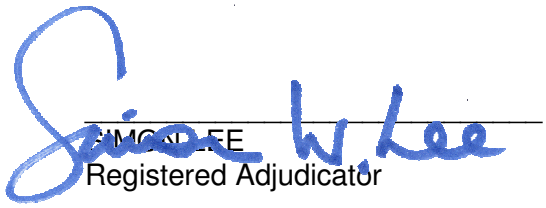
82. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant under the payment claim is $163,141.78, inclusive of GST being the amount owing of $161,904.21 plus interest of $1,237.57 to today. Interest accrues on the sum of $161,904.21 at the rate of $39.92 per day from today until payment.

83. In addition, I determine that the amount to be paid by the respondent to the applicant for its costs of this adjudication are $5,000.

84. The total sum of $168,141.78 is payable on or before 20 May 2013.

85. I draw the parties' attention to the slip rule in s 43(2) if I have made an error capable of correction.

Dated: 17 May 2013



SIMON LEE
Registered Adjudicator