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

No 02.12.01(2)

BETWEEN:

and

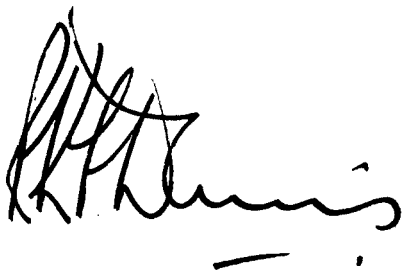
DETERMINATION

For the reasons that follow, I make the following determination:

1. the Respondent is liable to pay the Applicant $692,414.27, which sum includes GST; and

2. the Respondent is to make payment of the sum due on or before 27 April 2012.

DATED: 12 April 2012



RKF Davis
Adjudicator

Perth WA

REASONS FOR DETERMINATION

1. The applicant served this application for adjudication of a payment dispute on the Institute of Arbitrators and Mediators Australia, as a prescribed appointer under the Act, and on the respondent on 29 February 2012. By letter to the parties and to me, dated 6 March 2012, IAMA nominated me to adjudicate the dispute.

2. There is a history to this matter that I should record. On 19 December 2011, the Applicant served on IAMA and the Respondent an application to adjudicate a payment dispute that was, in all material respects, in identical terms to the present application. The Respondent filed a response and, on or about 27 January 2012 I delivered a determination, essentially finding in favour of the Applicant. The Respondent then filed an application with the Supreme Court of the Northern Territory seeking a declaration that the determination was void. It argued that I should have dismissed the application on the grounds that because the application was premature no payment dispute arose and I therefore lacked jurisdiction. The Applicant then submitted the present application to cover itself in case the Respondent succeeded with its application. No doubt for reasons of costs and efficiency, IAMA appointed me to adjudicate the second application as well. In the event, the Respondent did succeed: in a judgment dated 3 April 2012, Barr J ordered that the adjudication was void for jurisdictional error.

3. Before delivering its response to this application the Respondent, through Mr David de L Winter, wrote to me to submit I should not proceed as adjudicator. First, Mr Winter submitted, the second application was precluded by section 27 of the Act in that the same payment dispute was the subject of the earlier application and the determination had been registered as a judgment of the NT Supreme Court. Second:

> "We should also note that, if in spite of these matters you were considering embarking on a consideration of the matters under s.33(1) in respect of the second application, our client respectfully would object to you determining the matter.
>
> As you noted in your determination, the service of the application just prior to Christmas on the last occasion treated [the Respondent]

> unfairly in relation to the time it had to prepare its response. In its response to this new application, [the Respondent] will put in new material which was not before you on the last occasion and will argue that your conclusions were incorrect for various reasons, some of which were not put to you on the last occasion.
>
> Our client considers that the fact of your earlier determination (by which you necessarily have expressed a clear view about the merits of application and the subject payment dispute) "firmly establishes" a "reasonable apprehension of bias by reason of prejudgment": *Re JRL; Ex parte CJL* (1986) 161 CLR 342 per Mason J at 352."

On 12 March 2012, I responded to Mr Winter's letter, rejecting his submission. I did not accept that the fact of my earlier determination would lead an officious bystander to suspect that I am in any way committed to the conclusions I drew in the first determination nor that I could not be persuaded to a different view by additional argument. I noted that I would consider the section 27 submission if it was repeated in the response.

4. I note:

4.1 now the previous adjudication has been declared void, a nullity *ab initio*, section 27 does not preclude this second application; and

4.2 The Respondent's response does not, in fact, contain any new submissions or material. Its submissions are in materially identical terms to those in the first application, even so far as to repeat its submission in relation to the Applicant's premature submission of the first application on 19 December 2011. Further, in my letter of 12 March to Mr Winter, I suggested that in the unusual circumstances the Respondent might wish to submit a formal response to the second application, on my undertaking to call for further submissions under section 34(2) of the Act, should the need arise. On learning of the court's decision, on 5 April 2012 I asked Mr Winter whether he wished to make any further submissions or submit additional material. I did not receive a reply to that inquiry. There is consequently no submission or material before me that could cause me to change the substantive view I formed on the first application.

4.3 Further, the basis for the Respondent's bias submission no longer exists.

5. In the application, the Applicant seeks payment on a claim for what it describes as additional stand-by and design costs incurred as a result of what it alleges were principal caused delays in performance of the contract, up to 12 October 2012. The Applicant claims to be entitled to payment of $899,239.32, plus GST. There is no dispute between the parties that, for the purposes of the Act, the contract between them is a construction contract. However, the Respondent does dispute, now on two remaining discrete procedural bases, that there is a payment dispute capable of adjudication under the Act. It also disputes that there is any contractual or legal basis for the Applicant's claim. I will return to those submissions.

The Facts

6. Except where otherwise indicated, I find the basic material facts to be as follows. Following a tender process, on 24 May 2010 the parties executed a construction contract by which the Applicant was to carry out certain works for The Respondent, described in the contract document as [project description]. There are 5 work sites, designated Design A to Design E, that are separable portions under the contract. Overall practical completion was to be achieved by 3 August 2010. The contract provides for the Applicant to design and construct the works to be carried out. Before the Applicant can commence construction on each of the sites it is required to obtain approval from the Respondent. With respect to each site, except Design B, the Respondent is responsible for obtaining clearances for the works required from the Aboriginal Areas Protection Authority (**"AAPA"**) and those clearances are required before the Respondent can grant approval to the Applicant to commence construction.

7. The general conditions of the contract are NPWC 3 (1981), amended in a number of material respects and subject to special conditions. The tender documents are also incorporated into the contract documents. The contract is on a schedule of rates, for which the tendered price was $1,578,100.76. The contract requires the Respondent to appoint a Superintendent and the Superintendent, in writing, to appoint a Superintendent's representative. GC 42.1, as replaced by clause 2.12 of the amendments, sets out the procedure for progress claims. GC 35.4 sets out the procedure for extensions of time for

completion and provides for claims for delay costs, for principal caused delays only. The procedure includes a power in the Superintendent, of his own motion, to extend the time for practical completion of the works. By clause 4.9 of the preliminary clauses, the Applicant is required to contact "Dial Before You Dig" at least 2 working days before planning to excavate. By clause 4.10, prior to commencing any excavation or other soil breaking activity in the vicinity of Telstra underground cables, the Applicant is required to obtain the location of the cables from Telstra. I note these requirements take effect shortly before excavation is contemplated, not at the time of survey inquiries for tender. The Applicant was not required to make itself aware of and allow in its tender for the presence of Telstra cables, as the Superintendent has suggested in one of his letters to the Applicant. The Respondent is required to supply some construction materials for use by the Applicant on site.

8. Given the bureaucratic hurdles to be overcome, a 12 week time frame for complete performance of the contract was clearly unrealistic but there were delays from the very beginning: the letters from the Applicant started early. Design B, [project B site], did not require an AAPA permit for construction to commence, so that component moved faster than the others. The Applicant took the first step in obtaining approval to begin construction for Design B, submission of the design report, on 13 July 2010. On 13 September 2010 it submitted the draft drawings for approval. With the interposing of a requirement to conform to [relevant] standards and undertake the surveys and checks those standards required, and a number of amendments to the design, the Respondent gave its oral approval for construction to proceed on 11 November 2010. Construction commenced on 29 November and was substantially completed by 16 December 2010. The outstanding items had not by then received approval from the Respondent. While 16 December 2010 was well outside the date for practical completion of 3 August 2010, it is the only portion of the works to be completed to date. The design phase of the remaining four separable portions of the works did not proceed so quickly.

9. In a letter to the Respondent dated 12 December 2011, the Applicant provided a table, Table 1, in which it calculates the number of days it claims to have been delayed for lack of AAPA permits. The material dates do not appear to be disputed by The Respondent. The table contains the following details:

Site	Date of the Respondent's Application	Date AAPA Permit Issued to the Respondent	Date Permit Sent to the Applicant
Design A (project A site)	11 Feb 2010	5 July 2010	12 October 2011
Design B (project B site)	No permit required		
Design C (project C site)	14 April 2011	4 October 2011	1 November 2011
Design D (project D site)	No permit issued, as yet		
Design E (project E site)	9 Feb 2010	25 August 2010	6 April 2011

As at 12 October 2011, only Design E had AAPA clearance to proceed with construction. As at 19 December 2011, while construction work had commenced on Design E, the only site for which the Respondent had given its final approval for the Applicant to commence construction was Design B, [project B site]. The situation summarised in paragraph 2.16 (e) of the Applicant's application, which I accept as uncontradicted, can fairly be described as astonishing.

10. It is clear from the correspondence that bad weather prevented some work on Design B and would have prevented work on other sites had the Applicant been otherwise able to proceed. The Applicant also claims to have been delayed in its performance of the site between 12 and 27 May 2010 because the Respondent had not made available a Superintendent's representative from whom it could obtain approval to appoint its design subcontractor. While I accept the Respondent's evidence as to the unavailability of a Superintendent's representative, the extent of that delay, while real, in the overall scheme of things pales into insignificance. As for the delays in approving design reports and design drawings, the Applicant contends, first, that the drawings submitted for approval simply sat on someone's desk for months, unattended. Second, the Applicant asserts that the Respondent continually and frequently amended the specifications and scope of works. In

this adjudication, the Respondent contends that the delays resulted from the Applicant's failure to comply with the specifications and other requirements of the scope of work. The Applicant alleges further principal caused delays were failure to deal promptly with a Telstra fibre-optic cable and failure to ensure supply of materials it was required by the contract to provide.

11. The contractual basis on which the Applicant has sought compensation for the costs it has incurred as a result of these delays is unusual, to say the least. It has submitted a number of applications for extension of time for practical completion pursuant to GC 35.4. Early in the contract period, the Superintendent granted 30 days EOT for the Respondent's added requirement to conform to the [relevant] standards. It has very recently granted other minor extensions. On 21 June 2011, the Applicant wrote to the Respondent requesting a variation under GC 40. The Applicant attached to its letter a number of documents entitled respectively engineering Design Delay Claim Consolidation, Initial Draft Schedule of Works – 12 Week Schedule, Schedule of Works Setting Out Key Events and Design Delay to 10 March 2011. In the body of the letter, the Applicant included the following:

> "Accordingly, our requested variation is as follows:
>
> | | |
> |---|---|
> | • Engineering Design Delay Standby Costs | $898,401.18 |
> | • Add GST | $ 89,840.12 |
> | TOTAL COST | $988,241.30 |
>
> Please note: This design delay cost is up to and including 10 March 2011 and is calculated from 21 June 2010, the at or about date design was to be finalized in the contract. The component of design delay is set out below."

The letter and attachments were clearly intended to be a claim for compensation for the costs incurred as a result of principal caused delays. The contract provided for such a claim but not as a variation to the contract. The correct procedure was to apply to the Superintendent for an EOT under GC 35.4 and seek reimbursement of the direct costs incurred as a result of the principal caused component of the total. On 8 September 2011, the Applicant followed up its letter of 21 June 2011 with another, to which it attached a tax invoice seeking payment of $754,269.65, which included GST.

12. On 21 September 2011, three months after the Applicant's claim letter (the same period as allowed for the entire performance of the contract), the relatively recently appointed Superintendent replied in an equally confusing manner. The Superintendent took the Applicant's claim to be one for demobilisation costs "for design delay caused between 21 June 2010 to 10 March 2011". The Superintendent continued:

> "Without more evidence to substantiate the Applicant's claim that design delay and subsequent demobilisation costs have been caused by the Principal, your claim must be rejected.
> ...
> As previously and repeatedly advised, the Applicant has failed to demonstrate that its failure to commence either design work or construction work in accordance with the construction program has been due to circumstances caused by the Principal."

First, the Applicant was clearly not seeking demobilisation costs. Second, the Superintendent was not rejecting the claim on the grounds it was not in accordance with the contract, but rather the Applicant had failed to establish that the causes of the delay were the fault of the Principal. In my opinion, that was one aspect of the claim the Applicant had established, certainly in part: there was clearly enough information to enable the Superintendent to open discussions with the Applicant. Without the necessary the Respondent approvals and without AAPA permits from the Respondent, the Applicant could not even commence construction.

13. Between 4 August 2010 and 10 March 2011, the Applicant made four requests for EOT, for a total of 241 days. A draft reply dated 5 May 2011, apparently drafted by the Respondent's legal advisors, was circulated but the letter was never delivered officially. The letter, over the signature of the then Superintendent's representative, purported to reject the applications for EOT on the grounds of insufficient information. Had the letter been delivered, the itemised requests for information appear to have been reasonable and justified. Other than that draft, the Respondent has not, until very recently, replied to the Applicant's claims. On 8 June 2011, the Applicant wrote to the Respondent and referred to the draft letter of 5 May, which a representative of the Applicant said had been handed to him at a meeting on 6 May 2011. He continued:

> "Given that the contract, a 12 week contract, was to be practically completed on 3 August 2010 and it is now some 45 weeks beyond that date, and:
>
> 1. engineering design for the works is not yet fully complete and at the approved for construction stage;
>
> 2. site access and [Respondent] issued site permits have either expired or are yet to be issued for some of the sites;
>
> 3. there are continual ongoing delays with materials from [the Respondent's] supply quarries;
>
> 4. the non acceptance of any of the four [Applicant] extension of time requests for the works;
>
> 5. the failure by [the Respondent] to reset time in the contract despite there being an express provision in the contract to do so:
>
> TAKE NOTICE THAT
>
> [The Applicant] herewith notifies [the Respondent] that Time is set at Large in the contract.
>
> [The Respondent] has had ample opportunity to reset time in the contract under the express provisions of clause 35 of the General Conditions and has failed to take any action and extend time to complete the works."

The Applicant's principal complaint, that caused it to purport to set time at large, was that the Superintendent had failed to take action pursuant to GC 35.4 to extend the time for practical completion. The Applicant's representative expressed the Applicant's intention of submitting a detailed claim on each basis of delay and offered to meet to discuss that intention. I will consider below the effectiveness of the Applicant's action in purporting to set time at large.

14. On 25 July 2011, the Superintendent wrote to the Applicant seeking further information on the Applicant's claims for EOT. The Superintendent then addressed the then current causes of delay, as follows:

> "The [Respondent] remains focussed on having the Applicant complete the construction phase of this contract. An assessment is being made on the works required to complete(d) [project B]. Alternative parking bays have been found and environmental clearances are progressing. Alternative material sources for [project E] have been identified. Updated reports from Telstra indicate that site works at [project A] are expected to be completed by mid August.

> It is the Department's intention to seek a new construction programme from the Applicant, following the resolution of the remaining site issues."

All the causes of delay identified by the Superintendent in that passage appear to be the responsibility of the Principal.

15. By letter dated 27 July 2011, the Applicant replied to the Superintendent, reiterating that time had been set at large "and all [the Applicant's] requests for additional time in the contract are withdrawn". In [the Applicant's] view, its only remaining obligation was to complete the works within a reasonable time, while retaining the right to claim reimbursement for the costs of principal caused delays. It addressed the Superintendent's requests for further and better particulars in the following terms:

> "Again, time has been set at large in this contract and all requests by [the Applicant] for additional time to complete the contract have been withdrawn. [The Respondent] had an express provision in the contract and has had ample opportunity to reset time in the contract. [The Respondent has] failed to take any action and extend time to complete the works under contract.
>
> In the circumstances, provision of further and better particulars is largely irrelevant."

16. The Superintendent responded by letter dated 12 August 2011. He rejected the Applicant's attempt to set time at large because:

> "(G)enerally, time is set at large if there is an unworkable or unclear mechanism to extend time. The extension of time (EOT) provisions in the current contract are neither unclear nor unworkable."

He confirmed that an EOT had been granted for the [relevant] standards requirement and continued:

> "I understand subsequent requests have been made and not processed for various reasons which I do not propose to explore here but, again, would be happy for you to come in and discuss.
> ...
> To move this forward, please be advised that I will consider all reasonable and demonstrable delay costs that are due to the acts or omissions of the Principal.
> ...
> I hope to be in a position next week to provide an update on the status of clearances and alternative work areas."

The reference to alternative work areas appears to relate to discussions between the parties for the Respondent to provide work for the Applicant elsewhere in order to keep them occupied while the works on this contract continued to be delayed. By letter dated 23 August 2011, Mr Imhof replied to the Superintendent to further argue the Applicant's case. On 31 August 2011, the Superintendent replied to that letter, suggesting a meeting. The meeting took place but, for the Applicant, was evidently unsatisfactory. In a letter dated 19 September 2011, the Applicant expressed general discontent with the way in which the Respondent was administering the contract and included the statement, "In effect, [Respondent has] not provided *anything* they have promised" and accused the Respondent of a dismissive and cavalier approach.

17. On 2 December 2011, the Applicant wrote to the Superintendent a comprehensive letter headed "Claim for Engineering Design Delay – Provision of Further and Better Particulars of Claim". In the letter it referred to the Superintendent's letter of 21 September 2011 and the request for further and better particulars. The Applicant included in its letter the detailed chronology of events that has been replicated in the Applicant's present application for adjudication. It also elaborated at some length on "(t)he inability of the various Respondent representatives to decide and settle on this design (which) is at the very heart of the delay in this contract." From the evidence presented by both parties, as a whole, I am satisfied as to the accuracy of that statement. As with the original claim of 8 September 2011, the Applicant again attached detailed documents setting out the particulars of the Applicant's claim for delay costs, including as attachment 1, the original tax invoice of 9 September, an updated tax invoice dated 25 November 2011 with an attached list of expenses totalling the sum claimed of $899,239.93. Attachment 2 included a Delay Events Schedule with a Concurrency Schedule, said to be "per Site and Event". Attachment 3 was the Schedule of Rates on which the Applicant had calculated its monetary claims. There was a considerable amount of information in the letter and attachments. Whether it was sufficient to enable the Superintendent to determine whether money was payable and, if so, how much is another matter.

18. The Superintendent replied by letter dated 14 December 2011. He accepted the Applicant's characterisation of its costs as additional stand-by and design costs and not demobilisation costs. The remainder of the letter was essentially directed to advice to the Applicant as to how to approach a standard delay cost claim, on a most superficial level. The Superintendent did not seriously address the Applicant's consolidated claims of 9 September and 2 December 2011 in any helpful way. For example, in relation to delay caused by the lack of AAPA certificates, he commented:

> "It appears that [the Applicant] does not fully appreciate how to assess the impact of delays. [The Applicant] must be able to demonstrate how the delay affected a critical activity on the critical path. [The Applicant] failed to do this."

The statement is obviously correct in strict theory but, in the circumstances of this claim, meaningless. The claims all relate to delays that prevented the Applicant from even commencing on the critical path for construction. Until the design was approved, all activity was on the critical path. There would obviously be concurrency when there were delays in approving more than one site but overall, a day lost in obtaining approval to commence construction meant that completion of the works on that site would be a day behind, no more and no less.

19. The Superintendent wanted the Applicant to provide:

> "1. Evidence of directly incurred costs.
>
> 2. Evidence that clarifications and comments on the design constitute a variation to the scope of works.
>
> 3. Evidence that [the Applicant] requested approval for its subcontractor before 27 May 2010.
>
> 4. Evidence that lack of AAPA clearance prevented [the Applicant] from carrying out its design obligations or otherwise took it off the critical path."

The Applicant had provided considerable evidence in satisfaction of request 1: if the Superintendent wanted more he should have been more specific. Request 2 is not a proper request for particulars: it is not necessary for conduct by the Respondent in the course of considering the Applicant's design reports, subsequent design drawings or construction drawings to constitute a

variation to the contract to cause delay that entitles the Applicant to compensation for costs thereby incurred. Inaction, requests for unnecessary or irrelevant details, design changes within specification or scope of work and many other acts or omissions could cause delay for which the Applicant would be entitled to claim. The information sought by request 3 should have already been in the hands of the Superintendent, but in any event, would be easily satisfied. The delay in appointing a contactable Superintendent or Superintendent's representative, though real, was a minor element, as I have found. Request 4 is also difficult to understand. If as the evidence discloses, it is the responsibility of the Respondent to obtain AAPA clearances and those clearances are required before work can commence on the material site, there would appear to be nothing more to be said. Certainly, the Applicant could complete and submit its design and negotiate it through to approval for construction but construction could not commence until the clearance was obtained. As with delays to approval of the design, if commencement of construction is delayed for a day for lack of the required AAPA clearance, that is a day lost on the critical path for that site. It was impossible for the Applicant to comply with request 4 and, in any event, any attempt to comply would have been meaningless. As the Applicant pointed out in its reply dated 16 December 2011, the Superintendent himself said in the same letter, "I confirm that an AAPA certificate is required before any construction works can be undertaken". Finally, the Superintendent maintained his disagreement with the Applicant that time had been put at large.

The Respondent's Submissions

20. It is in the context of these findings of fact that I consider the submissions put for the Respondent. Those submissions raise all the material issues: I will consider them in the order raised by counsel.

21. First, it is said there is no payment dispute because the Applicant's tax invoice dated 25 November 2011 does not satisfy the requirements of a valid tax invoice. GC 42.1, as amended, requires the Applicant to submit every month a progress claim in the form of a tax invoice that meets the definition of that term in the GST Act. The Respondent included a copy of the contents pages to *A New Tax System (Goods and Services Tax) Act 1999* with the response,

which themselves ran to 30 pages, but did not include the material section, apparently section 29-70, that requires a tax invoice to identify "what is supplied, including the quantity (if applicable) and the price of what is supplied". I accept that is what the section requires. The Respondent submits the Applicant's claim of 2 December, with purported tax invoice dated 25 November 2011 included, does not satisfy the requirement. This is an arid submission indeed and I reject it. First, GC 42.1 refers to monthly progress claims, not to claims for compensation for delay costs pursuant to GC 35.4, or otherwise. Second, I have no doubt the Applicant's tax invoice of 25 November 2011, for all practical purposes and in detail, conveys the subject matter of the payment sought: what was claimed for, how much of it and the unit prices. It incorporates, by reference, the attached list of "standby and design additional costs" but, in any event, must be read with the Applicant's letter and all the attachments. The recipient, the Respondent, could have been in no doubt as to the subject matter of the payment sought, or in the terms of the GST Act, the "services supplied". I note, finally, that the Superintendent made no mention in his letter of 14 December 2011 to the supposed deficiencies in the tax invoice. He gave a number of reasons for declining to pay but that was not one of them.

22. Second, the Respondent submits that the Applicant's application for adjudication is premature. It does so on two grounds, the first being that the contract gave the Superintendent 30 days from receipt of the payment claim to respond. The application for adjudication was made 19 December, only 17 days from submission of the claim on 2 December 2011. That submission has been dealt with and upheld by the Supreme Court. It is not relevant to this, the second, application.

23. The Respondent then submits that the Superintendent's letter of 14 December 2011, when properly read, did not constitute a rejection of the Applicant's claim either wholly or in part. I am unable to accept that submission. It is true that the Superintendent advised the Applicant that "(I) still require more information from [the Applicant] to determine the claims contained in [the Applicant's] letter". I have already commented on the nature of the further information he sought. But the Superintendent also said, at page 4.4:

> "It appears that [the Applicant] does not fully appreciate how to assess the impact of delays. [The Applicant] must be able to demonstrate how the delay affected a critical activity on the critical path. [The Applicant] failed to do this."

The reader is left in no doubt that the Superintendent was refusing to pay on the Applicant's claim, as submitted. The Superintendent conveys that if the claim were to be reframed it may have some chance of success but that is not spelled out explicitly. He offers to meet the Applicant to discuss the claim, preferably with lawyers present. The Superintendent's letter of 14 December was a rejection of the Applicant's claim of 2 December 2011.

24. The Applicant submitted its claim to the Respondent on the basis that time was at large under the contract. It had given the Respondent advance notice of its position in that respect but the Respondent had consistently rejected the assertion and the Applicant's purported action in setting time at large. In this adjudication, the Respondent submits that if time is at large the Applicant lacks a contractual basis for its claim. If it is not, which the Respondent still maintains, then the Applicant has not applied for an EOT on which a claim for principal caused delay costs could be based.

25. The Respondent's submission raises complex issues that come down to the question: in the events that occurred, is there a proper contractual basis for the Applicant's claim? To establish the "events that occurred" I need to articulate some further findings from the facts I have outlined. I make the following findings.

25.1 While the contract allowance for performance of the works was unrealistic, there has been inordinate delay in the performance of the contract works.

25.2 I am satisfied from the 3 detailed claims submitted by the Applicant, the correspondence, the Applicant's chronology, however flawed, and the application of logic, that the fault for a high proportion of those delays must be laid at the feet of the Respondent, as principal. I am satisfied that the delays the Applicant experienced in obtaining approvals to commence construction were largely the result of inaction and failure to make decisions on the part of representatives of the Respondent.

Further, the failure to obtain AAPA clearances, without which work could not commence in any event, was solely the fault of the Respondent. I will consider, later, concurrency and causes of delay for which the Respondent was not responsible, such as adverse weather conditions.

25.3 Over approximately 12 months from May 2010, the Applicant made a number of applications for EOT. With one exception, these were either ignored or treated dismissively by the Superintendent.

25.4 When the Applicant made a major submission on the issue, by letter dated 21 June 2011, the Superintendent failed to reply until reminded by another in early September 2010. His reply, dated 21 September 2011, was not a considered or reasonable response.

25.5 While the Applicant's submissions were not well presented, they were sufficient to put the Superintendent on notice that the Applicant considered it was entitled to an EOT and delay costs. They also provided the Superintendent, together with information he can be presumed to have already possessed, sufficient information on which he could make an informed assessment of the Applicant's entitlement. He may reasonably have required further information on some aspects of the claim but his deliberations never reached that point.

25.6 The Applicant repeatedly requested the Superintendent to exercise his discretion under GC 35.4 to "reset time" for performance of the works under the contract.

25.7 The overall effect of these circumstances was that the Applicant found itself severely financially prejudiced by delays to its performance of the contract over which it had little or no control. Its efforts to have the Superintendent consider and determine its resulting entitlements were achieving nothing. The Applicant's response to this situation was to advise the Superintendent that it considered time under the contract to be at large, which, in its view, had the effect of requiring the Applicant to complete the contract works within a reasonable time and enabled it to claim its direct costs of principal caused delays up to the date of the

claim. There is an issue as to whether that was a proper response to the situation: the Respondent submits it was not.

26. I have read and considered the authorities referred to by both parties and a few others besides. I note that most of them are primarily concerned with claims by the principal to liquidated damages and the operation of the prevention principle on that right in various circumstances. I am not here concerned with a claim for liquidated damages.

27. With respect to the role and obligations of the Superintendent, I make the following observations:

27.1 Despite the absence in this contract of an explicit requirement on the Superintendent to act honestly, reasonably and fairly, as for example in GC 23 of AS 2124 1992, the law nevertheless imposed such an obligation upon him. As McDougall J noted in *Walton v. Illawarra* [2011] NSWSC 1188, at [39]:

> "The starting point of any analysis must be the language used by the parties in their contract. The Superintendent was not a party to the contract, but someone appointed under it. No doubt she was required to act honestly, fairly and reasonably. But those obligations were imposed on her, at least in the first instance, by operation of law, by reason or as an incident of the position that she held, and not by the terms of the contract to which she was not a party."

27.2 An adjudicator is able to step into the shoes of the Superintendent and determine whether he has met the required standards, that is, whether the contractor has received its contractual entitlements: *Ibid*, [56-57].

27.3 As I have noted, GC 35.4 bestows on the Superintendent, notwithstanding that the contractor has not made a claim, power to extend time for practical completion of the contract "at any time and from time to time and for any reason he thinks sufficient". Such clauses have been the subject of much comment and judicial consideration. I accept as applicable to the circumstances of this case, with respect, the summary of the law on the topic expressed by Osborn J in *620 Collins Street Pty Ltd v. Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491 as follows:

> "[26] In my view the Arbitrator was correct in his decision:
>
> (a) The primary mechanism of cl.35.5 gives the contractor an entitlement to an extension of time, subject to compliance with special conditions;
>
> (b) The penultimate paragraph reserves a discretionary power to grant an EOT in other circumstances effectively where it is just and equitable to do so;
>
> (c) Such power is expressly directed to situations where "the contractor is not entitled to or has not claimed an extension of time ...";
>
> (d) It is expressed to arise on a separate and distinct basis from the provision for the extension of time pursuant to the primary mechanism;
>
> (e) The grounds for exercise of the reserve power are expressed in the broadest possible terms as "for any reason";
>
> (f) The potential prejudice to the principal flowing from a failure by the contractor to comply with s.35.5 is a matter going squarely to the equitable exercise of the Arbitrator's discretion."

See also *Wunda Projects Australia Pty Ltd v. Kyren Pty Ltd* [2010] SADC 96, per Herriman J at [454]. For present purposes, I conclude that the Superintendent was obliged to exercise his independent discretion to extend time in appropriate circumstances.

28. While the question is not free from doubt, I accept the Respondent's submission to the effect that the Applicant's action in purporting to put time under the contract at large was ineffective. The Applicant's argument, essentially that the Respondent's disregard for the original contract program has made a nonsense out of the notion of a date for practical completion, has considerable force. The fact remains, however, there is a machinery in the contract to deal with extensions of time and the costs arising therefrom, no matter how extensive the delay may be or how egregious the conduct that gave rise to them. It was not necessary for the Applicant to effectively throw up its hands in despair and declare that it was henceforth unable to work within the contract mechanism. The Respondent goes further, of course: it submits that by purporting to put time at large the Applicant has effectively

disqualified itself in this adjudication from successfully seeking a determination that it is entitled to an EOT and, without it, is unable to recover its costs of delays. Put colloquially, the Respondent effectively submits the Applicant's claim now "falls between two stools". I do not accept the Respondent's further submission.

29. In paragraph 17 of its response, the Respondent submits that even if a breach of contract has been shown on the part of the Respondent in relation to the Superintendent's failure to grant an extension of time, "the remedy is to assess the parties' rights as if the appropriate extension of time had been granted, and not to abandon entirely the agreement in relation to the programming of the works". I do not agree that the Superintendent has breached the contract here. As McDougall J observed in *Walton v. Illawarra* (supra), the Superintendent is not a party to the contract. I have found that the Respondent has, materially, breached implied terms of the contract in a number of respects (as to which see *D&M (Australia) Pty Ltd v. Crouch Developments Pty Ltd* [2011] WASCA 109, per Murphy J at [26]) but if the Superintendent was obliged to exercise his discretion under GC 35.4 and failed to do so, that failure is simply a denial to the Applicant of its contractual entitlements. As adjudicator, I am not empowered to determine that one party must pay to the other damages for breach of the contract. I am required by the Act to determine the contractual entitlements of the parties and determine that one party pay the other any sum due.

30. I am satisfied that, in the circumstances of this project, the Superintendent was required by his obligation to act honestly, fairly and reasonably to exercise his discretion under the fourth paragraph of GC 35.4 to extend time. It should have been obvious to him that the Applicant was being delayed for lack of approvals and AAPA clearances. Only one of the 5 portions of the works had proceeded and even that one was late. The Applicant had made at least an arguable case that it did not even have a superintendent's representative to approve the appointment of its design subcontractor at the commencement of the contract period. The Telstra fibre optic cable and the unavailability of construction materials the Respondent was to provide also caused delays. Those minor causes are of relatively little consequence in the

context of the Respondent's failure to approve the designs for construction and to obtain the required AAPA clearances.

31. On the other side of the ledger, there was some delay on the part of the Applicant in submitting its design reports. According to the Applicant's chronology, these were submitted on the following dates:

Design A	11 November 2010
Design B	13 July 2010
Design C	17 August 2010
Design D	22 September 2010
Design E	21 February 2011

With a date for practical completion of 3 August 2010, four of the design reports were late, even allowing for the 30 days EOT granted for the design changes. Wet weather had an impact on the construction program for Design B. The fact remains, however, that the Applicant had its men and equipment on standby for months waiting for the Respondent to consider and approve design drawings and for AAPA clearances, before it could even commence construction. It could not have deployed the resources elsewhere because the approvals and clearances could have come through at any time. From the evidence before me, I am not satisfied that the delays in approving design reports and construction design drawings resulted, to any significant extent, from the Applicant's failure to comply with the specifications and other contract requirements.

32. These facts were, or should have been, known to the Superintendent from his own involvement in the administration of the contract but, as I have noted, he was repeatedly reminded of them by the Applicant. As I have also noted, the Applicant's claims of 21 June, 9 September and 2 December 2011 were by no means model claims for EOT and delay costs but the circumstances were difficult. The delays were ongoing, with no end in sight. The Applicant's previous attempts to enter into a dialogue with the Superintendent on the question had met with no success. To act fairly and reasonably, the Superintendent was required to properly assess at least the 9 September and 2 December 2011 claims and provide the Applicant with a reasoned

assessment of the Applicant's entitlement. Because the Applicant had formed what I have found to be an erroneous interpretation of the contract with respect to time, it had made no claim for EOT but it was well within the power and resources of the Superintendent to make that assessment in any event.

33. The Respondent deals with the merits of the Applicant's claim in Part C of its response. I have considered above many of the submissions raised in those paragraphs but make the following further points:

33.1 With great respect, I agree entirely with the passage the Respondent cites from Dyson J's judgment in *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 33. It is certainly a question of fact whether a particular event has caused a delay to the works. In this case, however, analysis of activities in relation to the critical path is of little assistance. If, for example, an approval or clearance was lacking for one part of the work but the Applicant had approval to proceed on the remainder, a question would arise as to whether the resources for the stalled portion could have been usefully deployed on the others that were proceeding on schedule. A critical path issue would need to be addressed. But where, as here, work on one portion, Design B, was completed relatively early in the overall time frame while all of the remaining four portions were delayed for lack of approvals and clearances, such considertions are only marginally applicable. There was a critical path for the design phase but it was very simple to analyse – at any given time, the question was, who was responsible for the delay? The Applicant could not even get onto the critical path for construction. The Applicant's lack of success in conveying to the Superintendent these fairly obvious facts has clearly caused the Applicant's representative considerable frustration.

33.2 As to the points the Respondent raises in paragraph 22 of its response, I note Dyson J's comment in the passage cited: "(I)t is impossible to lay down hard and fast rules". The Superintendent, rightly in my view, rejected the Applicant's view that time was at large but states he "is still considering whether further extensions of time should be granted under clause 35.4 of the contract". With respect to the Superintendent, this

statement exemplifies what has gone wrong with this contract. The time for performing that task is long past. The Superintendent appears to acknowledge his responsibility to consider further extensions and, in paragraph 22.2, an intention to certify payment of proper costs due but believes he needs further information to enable him to do so. I have already commented on the further information the Superintendent requested in his letter of 14 December 2011. He already had considerable evidence of directly incurred costs and the three other requests were meaningless. I do not accept that the Superintendent's failure to act was justified for the reasons submitted for the Respondent.

33.3 I do accept, however, that in assessing the Applicant's entitlement to an EOT and consequent delay costs, full account must be taken of any delays caused by the Applicant itself and also the matters set out in paragraphs 22.5 - 22.7 of the response. The Applicant has made little attempt to address those issues in its claim submission.

Quantum

34. Adjudication of payment disputes is an interim measure intended to "keep the money flowing" on construction projects. It is frequently an inexact process. I have found that the Applicant is entitled to payment for additional direct costs it has incurred as a result of principal caused delays to practical completion of this contract, up to 12 October 2011. In its claim letter of 2 December 2011, the Applicant supplied information is believes is sufficient to enable the Superintendent to calculate that entitlement. It comprises a letter outlining its case which includes a chronology of events the Applicant asserts discloses the principal caused delays. It summarises those delays in attachment 2 to the letter. The Applicant annexes to the letter a tax invoice with annexed sheet headed Engineering Design Delay Claim Consolidation to 12 October 2011 and a schedule of rates. The Applicant explained in its initial claim letter of 21 June 2011 the reason it included the schedule of rates:

> "It is important to note at this point that the schedule of rates in the contract contains no specific hire or day work rates for machinery and equipment and, ... it is difficult to successfully extract these rates with any accuracy or certainty.
>
> With this in mind and to maintain pricing parity with our tender submission that was accepted by [the Respondent] and forms part of our contract documents, we have extracted our normal equipment rates used as part of the tender submission and then reduced these rates to direct stand-by cost rates to further mitigate the overall harm to you in the contract."

From the schedule of rates, the Applicant first calculated the stand-by rate of hire for each piece of equipment and the direct daily costs incurred when the Applicant was delayed. The resulting total figure for stand-by costs was $1,905.17 per day. The Applicant's representative has described that process as the "first stage of mitigation", though it is difficult to discern how the exercise is mitigatory. Armed with those rates, the Applicant then calculated the number of days it could re-hire each item of equipment and the total time involved. That is said to be the "second stage of mitigation". From the resulting sub-total of days, the Applicant then deducted the number of days the equipment could be expected to lie idle "during any one year of trading the business": the "third stage of mitigation". From this process, the delays for all sites up to 12 October 2011 is said to be 472 days. Those 472 days were allocated between the five separate sites, by a process that is not entirely clear to me. The calculation of lost days does not appear to allow for the deductibles to which the Respondent refers in its response and for which I have accepted allowance should be made.

35. While the Superintendent has rejected the claim, he has not disputed the figures in substance. He has not challenged the veracity of the base figures nor any of the calculations. He has simply asked for some largely irrelevant further information. In these circumstances, an adjudicator must paint with a broad brush. As I have noted, in calculating the Applicant's entitlement it is necessary to take into account those factors that reduce the Respondent's liability for delay costs, namely concurrent bad weather and other independent causes of delay, the Applicant caused delays and previously allowed claims. The starting point must be, however, that as at 12 October 2011, the Applicant still did not have approval to proceed with construction on four of the five sites.

The causes of delay at that time were the sole responsibility of the Respondent. The Respondent must bear by far the greater share of the overall liability.

36. Doing the best I can with the information available, I am satisfied that the Applicant is entitled, at the very least, to reimbursement of direct stand-by costs for 70% of the total number of days it claims to have been delayed. I consider that this assessment allows a significant margin of error in the Respondent's favour but the imprecision of the material on which it is based requires that allowance. If either party considers I have erred by too great an amount, the contract, at GC 45, provides the machinery for revisiting the assessment.

37. 70% of $899,239.32 is $629,467.52. With GST added, the Respondent is liable to make a payment to the Applicant of $692,414.27. I will make a determination to that effect.

38. I have made no attempt to stipulate a date to which practical completion should be extended. That will follow to some extent from the immediate liability for delay costs I have found in the Respondent but the precise allocation of the days the project had been delayed up to 12 October 2011 between those caused by the Respondent, those caused by the Applicant and those for which neither party is responsible but for which an EOT must be granted, is a matter for the Superintendent. As I have found, he has a contractual obligation to undertake that exercise.

Interest and Costs

39. In the circumstances of this claim, it is not appropriate to require the Respondent to pay interest. I consider 14 days a sufficient time for the Respondent to make payment.

40. I make no decision as to the costs of the adjudication pursuant to section 36(2). While I agree the timing of the application was unfair to the Respondent, neither party has acted frivolously or vexatiously. The parties must bear their own costs.