DETERMINATION NO. 23.09.02

Adjudicator's Determination pursuant to the Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant

and

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator, determine on 3 September 2009 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) ("the Act") that the amount to be paid by the Respondent to the Applicant is $nil.

Contact Details

Applicant	Respondent

Solicitors	Solicitors
Minter Ellison	Cridlandsmb
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Appointment as Adjudicator

1. The applicant applied on about 6 August 2009 for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) (the Act), consequent upon which I was appointed adjudicator on 13 August 2009 by the Law Society of the Northern Territory to determine this application. The Society 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.

Documents Received by Adjudicator

2. I received and have considered the application supported by the Statutory Declaration of [AB] and the attachments thereto numbered 1 to 47, the tender request, a quotation, a subcontract agreement, the payment claim and the other documents contained in volume 1 of the applicant's material the Law Society delivered to me.

3. I received and considered the Adjudication Response dated 20 August, the letter of 4 February 2009, the Statutory Declaration of [BC] dated 20 August 2009 and the attachments numbered sn-1 to sn-54, the notice of dispute, but not sn-15 nor the photos numbered 98 to 173.

4. On 24 August 2009 the applicant's solicitor raised the issue that the respondent had delivered documents as part of its response, on 21 August 2009. One day late. The applicant pointed out the effect of section 29 and section 34 of the Act and submitted that the adjudicator should not consider the two further submissions of the respondent.

5. On 25 August 2009 the respondent submitted that the documents referred to in the applicants solicitors letter where not delivered, by error, and that the adjudicator should receive them because they were not an after thought and the intention of the Act was to allow material omitted in error.

6. The respondent submits to the adjudicator should request the provision of the documents which would alleviate the prejudice to the respondent and which would cause no real prejudice to the applicant. The prejudice to the respondent is not spelt out.

7. Section 34 says the adjudicator must act informally and if possible make the determination on the biases of ....(ii) if a response has been prepared and served in accordance with section 29, the response and its attachments; ....

8. Section 29 provides that the respondent must within 10 working days prepare a written response to the application. Subsection 2(c) provides that the response must state or have attached to it all the information, documents and

submissions on which the party making it relies in the adjudication.

9. I am of the view that the dates set out in the Act relating to compliance with certain steps so far as they relate to questions of what is often called jurisdiction, are to be strictly adhered to.

10. If the notice of dispute is one day late the whole of the sums claimed in the payment claim become payable. If the adjudication application is one day late then it must be dismissed. I am of the view that similarly, if an adjudication response is not delivered to the applicant within 10 days the adjudicator must determine the application in accordance with section 33 and not consider the response.

11. I am of the view that further submissions or further documents are not to be considered unless of course there is some natural justice issue with respect to an issue that arises from the material that is properly delivered.

12. I refuse to consider the volume of documents delivered by the respondent entitled sn-15 and the photographs numbered 98 to 173.

13. The response was delivered on 20 August 2009 making my determination initially due on 3 September 2009.

Circumstances

14. In 2006 the applicant issued tender requests for painting works on a building.

15. The respondent submitted a quote which was accepted and a subcontract was entered into.

16. The works commenced in 2008 but in 2009 the applicant was of the view that the painter was in breach by not remedying defects and not mitigating delay and by not proceeding with due diligence and was failing to take instructions.

17. The applicant issued a notice pursuant to the contract alleging breaches of contract and requiring the respondent to substantially complete the works within 7 days.

18. The applicant subsequently took over the works and completed them and made a claim against the respondent for the costs, losses, expenses and damages the applicant alleged it had suffered.

19. The claim was a payment claim for the purposes of the Act and the respondent delivered a notice of dispute purportedly in accordance with the implied terms relating to such notice as provided for in the Act.

20. The applicant challenged the effectiveness of the notice of dispute.

21. The respondent challenged the effectiveness of the notice of breaches.

Jurisdiction

22. Section 33 of the Construction Contracts (Security for Payments) Act ("the Act") requires the adjudicator to, within the prescribed time, dismiss the application without consideration of its merits if one of the following are true:

    22.1 The contract concerned is not a construction contract.

    22.2 The requirements of section 28 of the Act have not been complied with.

    22.3 Other not relevant factors.

Construction Contract

23. The applicant submits that the parties had entered into a construction contract.

24. The respondent agrees that the parties had entered into a construction contract.

Section 28 Compliance

25. Section 28 requires the following:

    25.1 The applicant must

        25.1.1 be a party to the contract and

        25.1.2 serve the written application within 90 days of the dispute arising.

        25.1.3 The applicant must provide any deposit of security for the cost of the adjudication that the adjudicator requires.

        25.1.4 The application must be prepared in accordance with the regulations and

        25.1.5 State the details of or have attached to it the construction contract or relevant extracts and

        25.1.6 Any payment claim that has given rise to the payment disputes and all the information documents and submissions on which the party making it relies in the adjudication.

The Contract

25.2 The applicant and the respondent both accept as part of the contract the document entitled subcontract agreement has appears in Section 3 Volume 1 of the application for adjudication.

25.3 The applicant is a party to that contract. The respondent does not dispute this assertion.

Service of the Application

26. Service of the Adjudication Application has to be within 90 days of the payment dispute arising.

27. The statutory declaration as to service states that the application was served on 6 August 2009.

28. The timing of the various documents is as follows. 6 August is less than 90 days after 22 May 2009 which is when of the respondent delivered a notice of dispute. 6 August is 90 days after 8 May 2009 when the Payment Claim was served. The notice of dispute was delivered 22 May 2009, which is 14 days after 8 May 2009 when the payment claim was delivered. This 14 days complies with the time period allowed in the implied terms relating to the dispute of payment claims, assuming of course the notice of dispute is a valid notice.

29. The payment claim complies with the provisions of clause 23 of the subcontract agreement with respect to the provisions relating to the making of the payment claim and the notice of dispute complies with the implied terms provided for in section 20 of the Act and which relate to responding to payment claims.

The Payment Dispute

30. Section 8 provides that a payment dispute arises relevantly when the amount claimed in a payment claim is due to be paid under the contract or the claim has been rejected or wholly or partly disputed.

31. It is a precondition therefore to a payment dispute arising that the amount claimed in the payment claim is due to be paid under the contract.

32. The section does not mean that the adjudicator has to carry out a determination on the legal liability of the respondent to the claim to determine whether the sum claimed is due but rather the adjudicator has to decide, whether the demand has been created and delivered in accordance with the terms of the contract.

33. The assessment on legal liability comes later.

34. Where the respondent asserts AR[38] that the clause 23 notice was incompetent and therefore the payment claim is incompetent and therefore there is no payment dispute and therefore there is no compliance with section 28 of the Act and therefore the application must be dismissed, I reject that submission.

35. The respondent asserts the payment claim is not competent but I find that this assertion is not made in the sense that the payment claim does not comply with Section 8.

36. I find that there is a payment dispute no matter whether the applicant's argument that the notice of dispute was not competent, succeeds or not.

Compliance with Section 33(1)(a)

37. I find the contract concerned is a construction contract and that the application has been prepared and served in accordance with section 28 of the Act.

38. I find there is no order, judgment or the finding about the dispute that is the subject of the application.

39. I am not satisfied as to the matters contained in Section 33(1)(a)(iv).

40. Given that the Application is not dismissed the adjudicator has to move to the second stage of the determination.

Determination - Section 33(1)(b)

41. The Act provides that if the application is not dismissed because of the matters provided for in section 33(1)(a) then the adjudicator has to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment. Section 33(1)(b)

The Notice of Dispute

42. The applicant raises an issue as to the payment dispute. Adjudication Application at [19]

43. The applicant asserts that the purported notice of dispute is noncompliant with the implied terms of the contract relating to notices of dispute.

44. The applicant asserts that the notice of dispute fails to identify each item of the claim that is disputed and fails to state for each of those items the reasons for

disputing it.

45. The applicant asserts that the respondent has not complied with the implied terms set out in the Act as its notice of dispute is a bare denial and does not provide the reasons the respondent relies on to assert the respondent did not breach the contract.

46. If the payment dispute is noncompliant and therefore should be disregarded it is probable that I would have to find that the sums claimed in the payment dispute are payable by the respondent to the applicant without more. AA[20]

47. Is the payment dispute non compliant?

48. The payment claim consists of hundreds of documents including lists of defects and lists of unfinished work and invoices.

49. For example, the first section in the payment claim refers to defects for internal of apartments and the second defects list is entitled "defects list [xx]". The list contains 42 items most of which have sub-items.

50. In Volume 3 Part B Section 3 there is a list of the hours spent by the applicant on doing work on [xx]. This indicates the work required to rectify any alleged defect has been done.

51. At the time of the delivery of the payment claim of 8 May 2009 the work had been done by the applicant to rectify the defects contained in the defects list section 7. The respondent therefore could not attend to inspect the defects to obtain information that may have assisted the respondent in providing a detailed answer to each of the individual items listed nor was the respondent able to make an assessment as to the work that would be required to rectify the defects and the cost of that work.

52. The respondent in the short time available to it to provide the notice of dispute could not provide the detailed answer that the applicant asserts the respondent should have given.

53. The Act requires the party to give a notice of dispute within 14 days of receiving the payment claim. Section 20

54. One of the objects of the Act is to provide for the rapid resolution of payment disputes arising under construction contracts.

55. The notice of dispute is to state the reasons for believing the claim has not been made in accordance with this contract and/or to identify each item of the claim that is disputed and state for each of the items the reasons for disputing it.

56. This is distinct from the payment claim which requires the claimant to:

describe the basis for the claim in sufficient detail for the contractor to assess the claim;

57. The cases which discuss the requirements of similar sections in other Acts dictate that this sort of provision requires a payment dispute to have sufficient precision and particularity to such a degree as to sufficiently apprise the parties of the real issues in the dispute. The notice of dispute has to advise the claimant of the issues to be raised.

58. The cases prescribe that a payment dispute must give the essence of the reason for withholding payment to such a standard as to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in adjudication.

59. The cases hold that the sufficiency of the particularity will depend on the custom within the industry and the familiarity of the parties with the subject matter of the dispute.

60. The payment dispute is not required to be as precise nor as particularised as a pleading in the Supreme Court. Some want of precision and particularity is permissible.

61. These principles are extracted from *Multiplex Constructions Pty Ltd v Luikens [2003J NSWSC 1140 (approved in Clarence Street Pty Ltd v Isis Projects Pty Ltd [2005J NSWCA* 391 as referred to by the respondent and which cases consider the New South Wales equivalent of the Act.

62. The New South Wales Act with which the above cases were concerned provides:

> Section 14
>
> *(2) A payment schedule:*
>
> *(a) must identify the payment claim to which it relates, and*
>
> *(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).*
>
> *(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment."*

63. I find that the respondent has set out the issues in its notice of dispute.

64. For example with respect to the defects list in [xx], the respondent challenges the assertion that there is a defect and declares the work was done by the respondent in accordance with the subcontract. The respondent argues in the alternative that if there is a defect in the painting, the respondent is not liable to remedy that defect as the defect was caused by the applicant's failure to comply with its obligations under the contract or the defect was the result of the conduct of others.

65. I note the respondent has followed the same method of setting out the issues with respect to each list and claim for the balance of the notice of dispute as it did for the "List of Defects [xx]".

66. I refer to the material contained in the Application and the Answer and I find the applicant knew of the issues to be raised in the notice of dispute prior to the payment claim being made, and that knowledge waives any need for the respondent to answer the payment claim with minute detail as asserted by the applicant.

67. I note the notice of dispute contains a general statement as to the issues in the first two pages.

68. I find, given the short period within which the respondent has to reply to the payment claim and the voluminous allegations made against the respondent in that claim and the fact that the defects have been remedied by the applicant and because of the knowledge of the applicant, there is no more that the respondent could or was required to do so as to provide a valid notice of dispute.

69. I find the notice of dispute has provided the applicant with the essence of the reason the respondent has for believing the claim has not been made in accordance with the contract and that it has identified each item of the claim that is disputed and stated the reasons for disputing each item and has made such statements to such a standard as to enable the claimant to make a decision whether or not to pursue the claim and to enable it to understand the nature of the case it will have to meet in adjudication.

70. The applicant pursued the claim.

71. I note the applicant in its application has covered the allegations made in the Adjudication Response.

    71.1 The applicant has covered the allegation that the applicant had failed to comply with the contract in such a manner so as to relieve the respondent of any obligation to comply with the clause 23 notice issued by the applicant. The applicant says that the respondent has failed to substantiate this claim.

    71.2 The applicant asserts the respondent's works were not compliant with

the contract.

71.3 The applicant relies on repeated notices given to the respondent of breaches in relation to delay and poor workmanship. The applicant refers to the lists and photographs of defects provided in part A of attachment 8 of the application.

71.4 The applicant asserts the respondent did not issue any notifications of delay.

71.5 The applicant asserts that the respondent did not have sufficient painters on the job as agreed.

71.6 The applicant asserts it supplied the respondent with an appropriate and compliant notice pursuant to clause 23.

71.7 I find, if I am required to do so, and prejudice is seen to be the essence of the applicant's submission, that the applicant suffered no prejudice as a result of the notice of dispute sufficient to make the notice non compliant.

The Section 23 Notice

72. The respondent asserts it is not liable to make a payment to the applicant because the foundation for the applicant's claim is incompetent.

73. The respondent's allegations are in part that the applicant had to have a realistic programme so as not to have a detrimental affect on the subcontractors programme.

74. Further, the respondent asserts that the applicant had an obligation to run the project so that the respondent could perform the sub contract in accordance with the terms of the sub contract.

75. The submission by the respondent is that the applicant did not have a schedule and so the applicant was in default and the default had a detrimental effect on the respondent being able to carry out the terms of the contract.

76. The history of the claim is that the applicant's claim arises out of a notice as to defects delivered pursuant to clause 23 of the subcontract agreement.

77. The contract provides that if the respondent did not comply with that notice then the applicant could take out of the respondents hands the whole of the works remaining to be completed and suspend payment.

78. The contract further provides that if the applicant properly exercised its right under clause 23.1.e then the applicant could employ others to carry out and complete the works (clause 23.2) and claim all the applicant's costs, losses, expenses and damages from the respondent. Clause 23.3

79. The respondent says the applicant wrongfully purported to act in reliance on clause 23.1 because the notice was noncompliant and incompetent and hence the applicant could not rely on clause 23 to take the works out of the hands of the respondent and further could not use others to complete the works and could not make the claim provided for in clause 23.3.

80. The applicant alleges that on 3 February 2009 it issued to the respondent a notice pursuant to clause 23.

81. The notice is stated 3 February 2009. je39

82. The notice advises that the respondent has seven days notice of breaches of contract under clause 23.1.d.

83. The breaches the notice alleges that the respondent has committed are as follows:

    83.1 Failure to give the applicant a program under clause 17.1.

    83.2 Failure to address many areas of painting throughout the project.

    83.3 The respondent is unable to complete the painting by seven February.

    83.4 The respondent has failed to mitigate delays pursuant to clause 18.1.

    83.5 The respondent has shown disregard for the urgency of completing the project in a timely manner.

    83.6 The respondent has failed in the last three weeks to keep the promise of having 20 Painters on site.

    83.7 The respondent has vowed to keep time schedules.

    83.8 The respondent has let the applicant and the purchasers down.

84. The applicant then requires the respondent to remedy the situation within seven days and to have the work substantially complete by 4 PM 10 February 2009. The sanction for failure is that the applicant will enforce clause 23.1.e.ii and take all the reminding works out of the respondent's hands. The Applicant also gives notice that it may exercise its rights under clause 23.2.

85. The notice is stated to be given under clause 23.1.d.

86. Pursuant to clause 23.1.d the notice can contain notification of breaches which relate to:

    86.1 breaches by the subcontractor to proceed with the subcontract works with reasonable diligence or

    86.2 breaches by the subcontractor to proceed with the subcontract works in a competent manner, or

86.3 breaches which are a failure by the subcontractor to comply with a notice from the builder requiring a subcontractor remove and replace defective work or improper materials.

87. The authors in *Building and Construction Contracts in Australia* by Dorter & Sharkey state: Provisions for termination need to be viewed rather differently to most other provisions of building contracts. The consequences of a successful resort to a termination provision are grave, particularly where the conduct complained of cannot be said to be repudiatory, and the courts therefore strictly construe such provisions: *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310; *Essendon & Flemington, Mayor of v Ninnis* (1879) 5 VLR (L) 236 at 241; *Lodder v Slowey* (1904) AC 442; *Summers v Commonwealth* (1918) 25 CLR 144 [PDF] at 151; *Eriksson v Whalley* [1971] 1 NSWLR 397 [PDF] at 399; *Matthews v Brodie* (unreported, Vic Sup Ct, 2 April 1980), p 12. Add to this also *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340;

88. I am of the view that the sentiments above apply to clause 23 of the subcontract agreement. I am of the view that if the notice was compliant and the respondent was noncompliant with the notice then the actions the applicant would take pursuant to clause 23 are of the same ilk as is if there was a termination.

89. The notice therefore had to refer to matters referred to in clause 23.1.d.

90. I find a notice to require a program is not a proper subject for a notice pursuant to clause 23.1.d.

91. The applicants first relevant allegation is that the respondent has failed to address many areas of painting throughout the project and that would seem to be notice of a breach by the Respondent to proceed with a works with reasonable diligence. There are no particulars given as to the breaches.

92. Is this lack of particulars of the breach fatal to the notice? I considered the following propositions when considering this question.

> A default can be specified in two ways; one is by directing attention to the provision in the contract in respect of which default is made. The other is by giving particulars of the manner in which a breach has occurred. In order to specify the default I think at least the former must be pointed out. *Re Stewardson Stubbs and Collett Pty Ltd v Bankstown Municipal Council* (1965) NSWLR 1671 at 1675; cf *FPM Constructions Pty Ltd v Council of the City of BlueMountains*, [2005] NSWCA 340 at [147]; cf *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970) 1 Ch 233 at 265.

> The question of what precisely constitutes a failure to proceed with reasonable diligence is a matter of some difficulty. However, it is an allegation of a general failure to proceed with that degree of promptness and efficiency that one would expect of a reasonable builder who has undertaken a building project in accordance with the terms of the contract in question." *Re Stewardson Stubbs and Collett Pty Ltd v Bankstown Municipal Council* (1965) NSWLR 1671 at 1675; cf FPM Constructions Pty Ltd v Council of the City of Blue Mountains, [2005] NSWCA 340 at [147]; cf *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970) 1 Ch 233 at 265.
>
> A contractual notice should be read with the understanding which will be brought to the exercise by the recipient, including his or her knowledge of the circumstances in which it is given. *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 at [151];
>
> the builder should not be left to guess at the provision said to have been breached, nor as to the particular conduct said to be in breach, if that has not been specified and if there is doubt as to its identity. FPM Constructions at [151]
>
> Further, in considering whether a particular notice is adequate to identify a particular breach, a court may take into account the response of the builder. That is not, of course, to say that the builder can demonstrate inadequacy by simply claiming that no response can properly be given; however, where an appropriate response is provided, the adequacy of the notice may be difficult to dispute. FPM Constructions at [151]

93. The applicant has not in the notice, referred to any clause in the contract when referring to a lack of diligence. Where the issue is referred to in the Application and Response, the lack of particulars is not fatal to the notice.

94. The respondent has replied to the allegations made by the applicant in the adjudication application and has done so as to challenge the facts and matters which support the allegations contained in the notice.

95. I find the content of the documents accompanying the application and the response are an indication of the issues between the parties as at 3 February 2009. The content of those documents and the issues raised therein are the particulars to the allegations in the notice and the particulars of the respondents argument as to why the notice is non compliant.

96. I summarise below some of the issues between the parties which are apparent

from the application and the response to the application. I state the date of the event and then the applicant's reference No to the document or paragraph of the document. I then state my summary of the event as appears in the document. I then set out my summary of the reply the respondent gives to the applicant's allegations.

96.1 2/2/09 aa36: Unit [a] and [b]. Respondent could not be contacted to complete. The respondent has to finish and there is nothing stopping the respondent finishing. The applicant employed another pursuant to clause 18.1.d to do the work. Request that respondent act in a diligent manner.
REPLY sn[249]: the tiles in the courtyard had not been laid. Also see the interior was painted by others.

96.2 2/2/09 aa33 windows and tiling in apartments [a] and [b]. Applicants spent 14 hours to clean courtyards and balconies. Apartment inspection cancelled because respondent did not finish the job.
REPLY: respondent not been there. The applicant has put its own painters into these units and so the damage is by others.

96.3 2/2/09 aa32 re units [a] and [b]. Apartment inspection cancelled because of respondent. Balcony in courtyards not completed by 9:30 AM. Notification respondent will be charged interest clause 18.4.b
REPLY: The applicant's painters have caused this damage.

96.4 2/2/09 conversation 7:40 a.m. The respondent promised to complete apartments [a] & [b]. The respondent had no cleaners on site after having promised 2 would be available.
REPLY: not ready for painting sn[249]; deny any conversation about car park but held 30/1.

96.5 31/1/09 aa31 apartments [a] & [b]. Applicant gives notice these not ready for handover. Columns not painted, pinholes in the walls, soffits pictured but not finished. Balcony needs work. Courtyard needs work.
REPLY sn[249.e]: The courtyards and balconies were not ready to be painted because the silicon had not been applied. The courtyards were not ready to be painted because the tiles on the floors had not been laid and because silicon had not been applied.

96.6 30/1/09 aa30 apartment [c] Applicant does not accept quality of paintwork. No detail. Note: this apartment should have been completed on 27 January.

96.7 30/1/09 aa29 delay in the car parks. "your time is running out". Applicant employs others as respondent had no paint. Respondent had 3 painters and stopped applicants painters from working. Applicant to employ

others under clause 18.1.d. REPLY sn. 249.j: Some parts of the carpark are not ready to complete because of all the materials stored there. Further the applicant had just patched sections of the carpark.

96.8 30/1/09 aa28 fire stairs and soffits not touched. Because the respondent does not have enough painters. This work is not on a timetable. noticed by applicants: applicant will carry out the work 3243 m²
REPLY: The respondent had put two coats on the fire stairs by the end of January and the only areas unpainted were used by other trades. The applicant has to repair cement on many floors. These areas were painted by the respondent. sn [249]

96.9 29/1/09 aa25 unit [d] Respondent still in this apartment. Balcony work has been rejected. Pin holes in the paint work. Warning to be careful of the glass tiles etc. notice: applicant already cleaned at respondent's expense. Notice of inspection.
REPLY [227]: carpenters, the gyprocker and the air conditioning contractors were still working in the unit

96.10 29/1/09 aa24 apartment [e] respondents delay, still in the apartment. Inspection today. Applicant will claim interest from respondents. Paintwork rejected by purchaser last week.
REPLY [227]: carpenters, the gyprocker and the air conditioning contractors were still working in the unit.

96.11 29/1/09 aa23 unit [f] notice: respondent not carrying out quality inspections. Notice: applicant employing others to fix defects in apartment [f]. This was to be finished by 30/1/09. Notice: applicant not finished units [g], [c], [h], [i], [j], [k] & [l] as per 1414. Notice: applicant delivers defects list for All Trades 27/1/09.
REPLY: Units [f] and [g] had been finished about eight weeks prior to this complaint. The damage was caused by others.

96.12 24/1/09 aa21 respondent states the only people in the units are cleaners and furniture installers. Applicant has dotted defects at level [xy]. Note: respondent is the only trade not finished.
REPLY: This is not true.

96.13 24/1/09 aa20 Refers to a defects lists dated 15 and 16 January. If further delay the applicant will employ others.

96.14 23/1/09 sn-42 purchases defects list for unit [m]. REPLY: Of the 12 complaints in the list 3 required work to be done by the respondent and as that 28 January 2009 7 items had to be completed by others.

96.15 22/1/09 unit [a] aa18 applicants painters have repainted unit [a] at

respondent's cost. Notice: respondent to complete exterior by 23/1/09
REPLY sn[227]: As at 24/1/09 other trades were in the apartment and if the applicants painters have repainted how are the later problems with this unit those of the respondent.

96.16 22/1/09 aa17 unit [b] notice: due to the lack of painters applicant employing other plaintiffs to finish at respondents cost. Requesting the respondent to finish outside by 24 January.
REPLY sn[249.e] In this unit the balconies were not ready to finish as at 31 January 2009. If others have finished this unit how are later defects those of the respondent?

96.17 22/1/09 aa16 unit [e] painting in this unit is rejected.
REPLY: This unit still had the carpenter and gyprocker and airconditioner installers working in it on 24/1/09. sn[227]

96.18 22/1/09 aa14 applicant provides the respondent with a timetable regarding the painting of apartments. Request for program. notice: applicant has others painting in units [b] and [a].
REPLY: The applicant did put in others to do this work and so this direction was not applicable on 3 February 2009.
Further REPLY 22/1/09 sn-38: the respondent delivered a list of all the items to be completed by other trades before the respondent could access the units listed in the list referred to in paragraph 24.19 above, to finish the painting. These include the defects of units [a], [b], [e].

97. Comparing the applicant's list of 22 January 2009 of the 42 units the applicant wanted painted, with the respondent's list of 22 January 2009 as to the defects or outstanding works that were required to be done in those apartments, all but 4 apartments had work to be done by the applicant before the painter could finish its job or productively enter the unit.

98. The respondent’s document No. sn-52 is a list of the items the respondent submits the applicant had to do before the respondent could carry out its obligations pursuant to the contract and the items were partially backed up by photographs. I found the numbering of the photographs contained in volume 2 of the response, bear no correlation to the index, but I did look at the index and the photos. I did not, for the reasons expressed above, look at the photos in the third volume of the response. It is clear to me, from the index and the photographs that I could look at, that there were many defects and much uncompleted work that needed to be completed by the applicant before the respondent could complete its work.

99. The index at sn-52 shows that even as at 19 April many other trades had not completed their work. The allegation is made by the respondent that even after

the date of the notice much work had to be done by other trades before the painting could be finished.

100. The respondent submits that the applicant's failure to diligently and competently discharge the applicant's obligations as builder, as described in the application response at [12] and disentitles the applicant from relying and acting on any nonperformance [or breach] of the subcontract alleged against the respondent including its purported reliance on clause 23 of the general conditions.

101. The respondent asserts that the applicant could not by its conduct cause the default in the performance of the subcontract works and then rely on that default to bring a payment claim against the respondent under the subcontract, relying on clause 23 of the general conditions, AR[30]

102. The respondent relies on

> *GR Securities Pty Ltd v. Baulkham Hills Private Hospital pty Ltd* (1986) 40 *NSWLR* 631 *at* 637; *Foran v. Wight* (1989) 168 *CLR* 385 *at* 433 *and Paltara Pty Ltd v. Dempster* (1991) 6 *WAR* 85 and *Doe d Bryan v. Bancks 106 ER* 984 *at* 987; *Alghussein Establishments v. Eaton College [1991]* 1 *All E R* 267 *at* 273 *and 274; Quinn Villages Pty Ltd v. Mulherin [2006] QCA* 433 *at [23][24] and International Jockey School v. Walsh [2007]* QSC 227 *at [27].*

103. It is apparent from the information contained in the application and response and I find on the balance of probabilities that with respect to the delay and the defects put at the feet of the respondent, the respondent was not the total or major cause of the delay complained of.

104. I find on the balance of probabilities that trades other than the respondent were behind in completing their work and they were hindering the respondent from completing its work.

105. I find the applicant was to have the other trades finished so that the respondent could do its work.

106. I find that because the applicant failed to ensure the other trades were finished before requiring the respondent to complete the works, the applicant could not rely on its non performance and then rely on the non performance of the respondent caused by the applicant’s non performance, in order that it might subsequently rely on a notice issued pursuant to clause 23.1.d.

107. The applicant’s allegations in the notice that:

107.1 the respondent has failed to address many areas of painting throughout the project;

107.2 the respondent has not mitigated any delays in the clause 13.1;

107.3 the respondent has shown disregard for the urgency of completing the project in a timely manner;

107.4 the respondent has on numerous occasions failed to meet time schedules,

would seem to be notice of a breach by the respondent to proceed with a works with reasonable diligence.

108. I find that the applicant has caused the circumstances which at first glance enabled it to allege that the respondent has failed to proceed with the works with reasonable diligence and which in other circumstances could have been a relevant default.

109. I find the applicant cannot rely on the above allegations so as to use them as a breach of a term of the contract in a notice to rectify breaches of the contract issued pursuant to clause 23.1.d.

110. I find on the balance of probabilities that the reason the respondent has failed to address many areas of painting throughout the project and has failed to comply with the notice with respect to the other relevant allegations contained in the notice and set out in paragraph 37 above is because other trades have not finished their work so as to deny the respondent the opportunity to complete its works.

111. I find the other trades have not finished their work because the applicant has not complied with its duties as required by or implied into the contract.

112. The final allegation in the notice is that the respondent is unable to complete the painting by 7 February 2009.

113. The applicant does not provide any particulars as to a breach of contract with respect to this allegation.

114. The notice does not refer to any section of the contract which has been breached as it should as a minimum to be part of a valid notice.

115. The declaration of [AB] provides some particulars as to this allegation.

> Je 11(g) On 16 January 2009 [BC] of [the respondent] met with myself and [CD of the applicant] to discuss the progress of the works. After a lengthy discussion, [BC] agreed that he would provide a program for all works to be executed by 7 February 2009 and all defect rectification be completed by 14 February 2009.

116. This appears to be a complaint that the respondent has failed to proceed with the subcontract works with reasonable diligence.

117. I find that this allegation is not a breach of contract as the time for the breach has not arrived.

118. Another allegation made in the notice is that the respondent has not had 20 painters daily on site as promised. I find this allegation if true does not amount to a breach of contract.

119. There are no particulars given with respect to this alleged breach.

120. The declaration of [AB] provides some particulars.

121. Paragraph 11.g of [AB]'s Declaration refers to a meeting that occurred on the 16th, the 16th being the date the applicant says the respondent promised 20 painters, but does not refer to 20 painters.

122. In je13 [AB] states:

> "THIS IS A START BUT NOT THE 20 MEN YOU PROMISED LAST THURSDAY 16TH. "
>
> "This is mainly because you have 11 to 12 people available not the 20 you promised [CD] & I last week."
>
> Subcontract Agreement. Schedule 4: " [The Respondent has] 6 men permanently employed but can man the project to complete 3 units a week. I.E. rolling them over. We would see around 20 men on site as a peak work force."

123. At paragraph 213 of the Declaration of [BC], the respondent answers the allegation. He advises that the applicant has work to do before the respondent can do the painting work and that the number of painters he has on site is sufficient.

124. I find that it was not a term of the contract that the respondent would have 20 men on the site. I find that the allegation is not an allegation as to a breach of contract. I find that the applicant cannot rely on this allegation in order that it might enforce its rights as provided in clause 23.

125. The applicant in its notice and after the allegations as to breaches of the contract, then requires the respondent to remedy the situation in seven days and have the works substantially complete by 4 PM Tuesday 10th February 2009.

126. I find that the requirement that the respondent substantially complete the works by 10 February 2009 it is not something the applicant can require with respect to a notice issued pursuant to clause 23.1.d.

127. That requirement is not a relevant breach nor is it a valid requirement provided for in the contract.

128. I find for the reasons expressed above that the notice dated 3 February 2009 and entitled “Default by [the Respondent]” and purportedly issued pursuant clause 23.1.d has and had no effect pursuant to the contract.

129. There being no breach of a clause 23.1.d notice by the respondent, the applicant could not and had not right to exercise the rights set out in clause 23.1.e. of the contract nor those set out in clauses 23.2 or 23.3 and that was because the clause 23.1.d notice was non compliant.

130. I find further that the notice is and was defective in that it does not require the respondent to remedy any breach but rather requires the respondent to substantially complete the works by the end of 10 February 2009.

131. I find that Clause 23.1.d has to be strictly interpreted as the ramifications of failure to comply with the notice are quite drastic. I note that the notice itself can be a little difficult to understand and still be a compliant notice.

132. I find the provisions in the contract as to delay do not provide an exhaustive contractual mechanism so as to exclude the finding that the notice is noncompliant and therefore of no effect.

CONCLUSION

133. I find the applicant could not rely on the matters referred to in the notice of 3 February 2009 as breaches of contract and I find therefore there is no default by the respondent. There being no default by the respondent with respect to a compliant notice, which the relevant notice was not, there is no power given by clause 23 of the contract, to the builder, to take the works out of the respondent's hands. That being so, the respondent is not responsible for the costs, losses, expenses or damages the applicant may have incurred by reason of the builder employing other persons to carry out and complete the subcontract works.

134. The costs, losses, expenses or damages the applicant may have incurred by reason of the builder employing other persons to carry out and complete the subcontract works are the subject of this Adjudication Application and for the reasons given above the applicant is not entitled to them.

COSTS

135. Clause 36(1) of the Act requires the parties to bear their own costs.

136. Clause 36(2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

137. The submissions from the parties have merit on both sides and are neither frivolous nor vexatious.

138. I find that the obligations as to costs as set out in Clause 36(1) should not be altered.

DETERMINATION

139. In accordance with s 38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant is $nil.

140. I make no order as to costs.

141. I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

142. I draw the parties' attention to the slip rule in s 43(2) if I have made some correctable error.

Dated:

_____

David Alderman
Registered Adjudicator