Determination No 24.09.01

ADJUDICATOR'S DETERMINATION

UNDER THE

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT) ACT 2004 (NT)

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

Paul W Baxter (Adjudicator)

ISSUED

30th November 2009

ADJUDICATOR REF. 09/024/NT

CONTENTS

1. DETAILS OF PARTIES

Contract To Which Payment Dispute Relates
Project Contract 0747/15.100

Applicant

Applicant's Solicitor
Minter Ellison Lawyers
Level 4 Minter Ellison House
66 Smith Street,
DARWIN
NT 0800
Attention: Mr. C Cureton
Tel: (08) 8901 5900
Fax: (08) 8901 5901

Respondent

Adjudicator
Mr. Paul William Baxter
5 Little Street
FANNIE BAY NT 0820
Tel: (08) 8947 1174
Fax: (08) 8947 0297
Email: pbaxter@pwbaxter.com.au

2. ADJUDICATOR'S DETERMINATION

I, Paul William Baxter, the appointed Registered Adjudicator in the matter between the Applicant and the Respondent of the dispute over payment between the Applicant and the Respondent determine on 30 November 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.

3. BACKGROUND

1. The Applicant is a company which carries on business as a construction contractor in the Northern Territory. The Respondent is a company which carries out, inter alia, painting works.

2. In or about December 2007, the Applicant entered into a contract with [principal] to construct the [project] located at [project site] ('**site**').

3. On 27 January 2008, the Applicant requested the Respondent provide a quote for painting works at the site (annexure JE 1 of the statement of J.E. at **Attachment A**) ('**project**').

4. On 25 February 2008 the Respondent by its manager submitted a quote to the Applicant for the interior and exterior painting of the Project as per the plans and specifications provided in the request (annexure JE 2 of statement of J.E. at **Attachment A**).

5. In or about May 2008, the Applicant provided the Respondent with a copy of the Subcontract to be signed. The Respondent returned the Subcontract to the Applicant in about July 2008 (see the '**Subcontract**' at annexure J.E. 3)

6. In September 2008, the Client became concerned about the quality and progress of the painting works, expressing these concerns in emails to the Applicant dated the 15th and the 17th of September 2008 (provided at annexure J.E. 6).

7. By the practical completion date of the 26/09/2008, the Applicant claims that all works were completed with the exception of the Painting works subcontracted to the Respondent. The Client began site occupation, with the Applicant instigating a process of vacating floors for the Respondent to enter and correct defects which had yet to be rectified.

8. In early October 2008, the Client informed the Applicant of a deduction of $60,000.00 from the progress payment owing to the Applicant due to unsatisfactory works which had yet to be rectified.

9. The first major issues of dispute became apparent on or about the 20th of October 2008, following a meeting with representatives from the Applicant and the Respondent in which a final contract sum was discussed, as well as the completion of the painting works to an acceptable industry standard to honour the contract agreement. Both the Applicant and the Respondent presented the other parties with a large sum of costs to be requested.

10. In or about early November 2008, the Client and Applicant agreed to hold off painting the outside of the building until after the wet season, agreeing to resume painting the exterior on the 1st of April 2009.

11. By late January 2009, the internal painting works had not yet been completed, and the Client and Applicant agreed upon contracting another painting company to complete some of the works internally.

12. On 28 February 2009, the Applicant issued a Notice of Default under Clause 23.1 of the subcontract via RFI 1328 dated 28 February 2009. The Applicant's attempt to transmit the Notice via facsimile was unsuccessful, and the Notice of Default was instead issued via registered post (annexure J.E. 7). A further notice was sent to the Respondent on 7 April 2009 informing him that the Applicant wished to take over the whole of the works (annexure JE8).

4. APPOINTMENT OF THE ADJUDICATOR

The applicant applied 2 November 2009 for an adjudication under the *Construction Contracts (Security of Payments) Act* (NT) (the Act), consequent upon which I was appointed adjudicator on 6 November 2009 by the Master Builder's Association of the Northern Territory to determine this application. The Master Builder's Association NT 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.

5. CONFLICT OF INTEREST

I have known the directors of the Applicant's company for a period of over 20 years, mainly through my association with the Territory Construction Association and the Master Builders Association of the Northern Territory. I first met the Respondent 16th November 2009 when he delivered his response to the adjudication. I have also had past dealings with the Solicitor for the Applicant. I have conducted no business with either of these two parties over the last few years and I therefore see no reason for disqualification due to conflict of interest under S.31 of the Act.

6. JURISDICTION

Jurisdiction is determined by the following factors:

1. That the adjudicator be appointed by either the Registrar or by a prescribed Appointer (refer s28 (1) of the Act).

2. That the contract for the works was formed after the date of proclamation of the Act being 1st January 2005 (refer Part 1 s.2 (1)).

3. That the works be a “site in the Territory” (refer Part 1 s.6 (1)).

4. That there is a payment dispute, as given in Part 1 s.8 of the Act.

5. That the applicant applying for adjudication be a party to the contract as defined in Part 3 s 27 of the Act, noting the exceptions under sub clauses (a) and (b).

6. That the application for adjudication be made within 90 days after the dispute arises, as defined under Part 3 s. 28 (1) of the Act.

7. That the matter relates to “construction work”, as given in the definition of this term, Part 1s.6 of the Act.

With respect to the specific facts of this case, I deal below with each of the issues in points 1 to 7 above:

1. The manner of appointment has been dealt with above. The Application has been satisfactorily served in accordance with the requirements of S28.

2. The Contract was dated 6th May 2008, which is after the commencement of the operation of the Act.

3. The site is within the Northern Territory.

4. There is a payment dispute within the meaning of the Act. The dispute arose 4 August 2009 due to non-payment of Payment Claim Tax Invoice 1092 22nd July 2009.

5. The Applicant is a Party to the contract.

6. The application for adjudication was made on 2 November 2009, which was within 90 days after the time for the payment of the claim arose.

    a. On 22 July 2009 the Applicant served a payment claim on the Respondent for the Applicant's costs incurred up to that date by leaving a copy of it at the Respondent's address in the Contract and registered office, and by providing a further copy to the Respondent's solicitor for the amount of $150,059.89 (**'Payment Claim'**).

    b. Clause 23.3 of the Contract (paragraph 8 (1) above) makes written provision for the Applicant to make a claim against the Respondent in the present situation. However, the Contract does not state when and how a party may respond to a payment claim or when it must be made. In Adjudication Determination 16.08.04, an adjudicator determined that the terms of section 20 (Schedule, Division 5) of the Act are implied into a contract containing clause 23.3 as found in this Contract.

    c. Division 5 of the Act, which is implied into the Contract as a contractual term, states that the amount claimed is due to be paid under the Contract 28 days after receipt by the Respondent. That brings the notice of 4 August 2009 within the 90 day period for an application in accordance with section 28 of the Act (see paragraphs 17 to 23 of Adjudication Determination 16.08.04 shown below).

    17) Section 28 of the Act requires an application to be brought within 90 days after a payment dispute arises. By virtue of s 8, a payment dispute relevantly arises when an amount claimed is due under the contract but unpaid (to paraphrase).

18) Under clause 23.3, a claim by the builder against the subcontractor is a debt due and payable upon notice being given. No time is allowed for the subcontractor to pay, no doubt because of the circumstances in which such a claim would be made. Therefore, to use the words of s 8, the amounts claimed were "due to be paid under the contract" on the date notice was given to the respondent.

19) That, however, is not the end of the matter. Section 20 implies into a contract certain provisions relating to responding to and paying payment claims where there is no written provision about when and how a party must respond to a payment claim and by when a payment must be made. That section says:

> *The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:*
>
> *a. when and how a party must respond to a payment claim made by another party;*
> *b. by when a payment must be made.*

20) This contract contains no written provision about those matters in relation to a claim by the builder against the subcontractor under clause 23.3. The provisions of Division 5 of the Schedule are therefore implied into the contract, which states:

Division 5 Responding to payment claims

6 Responding to payment claim by notice of dispute or payment

(1) This clause applies if –

(a) a party receives a payment claim under this contract; and

(b) the party –

(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(ii) disputes the whole or part of the claim.

(2) The party must –

(a) within 14 days after receiving the payment claim –

(i) give the claimant a notice of dispute; and

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must –

(a) be in writing;

(b) be addressed to the claimant;

(c) state the name of the party giving the notice;

(d) state the date of the notice;

(e) identify the claim to which the notice relates;

(f) if the claim is being rejected under sub clause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract;

(g) if the claim is being disputed under sub clause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

21) By sub clause (2), the respondent had 14 days from receipt of the notices to dispute them, failing which it had 28 days from receipt to pay them. Remembering that Division 5 is implied into the contract as a contractual term, the amounts claimed were "due to be paid under the contract" (s 8) 28 days after receipt by the respondent.

22) That brings the notice 22nd July 2009 to within the 90 day period for an application.

23) I find that the application is in time in respect of the payment claim 22nd July 2009.

d. The Payment Claim complied with the implied terms of the Contract (see paragraph 9 above), in that it:

i. was in writing;

ii. was addressed to the contractor ('the Respondent') as the party to which the claim is made;

iii. stated the Applicant as the claimant;

iv. stated the date of the claim;

v. stated the amount claimed;

vi. described the basis for the claim in sufficient details for the contractor to assess the claim;

vii. was signed by the claimant ('the Applicant'); and

viii. was given to the Respondent, being the party to which the claim is made.

7. The matter related to the supply of labour and supervision for the site and the work clearly falls under the definition of "construction work"

Finally neither party has raised any suggestion that there exists any judgment or other finding about the dispute that is the subject of the application.

I am therefore satisfied that I have jurisdiction in this matter.

7. DOCUMENTS RECEIVED BY ADJUDICATOR

The Applicant submitted the following documents for consideration by the Adjudicator:

- Application for Adjudication of Payment Dispute
- Attachment A: Statutory Declaration of J.E. dated the 2nd of November 2009
    - Attachment A1: 9 pages of Technical Data
    - Attachment A2: Respondent's Quotation
    - Attachment A3: Sub-Contract Agreement A747/15.100
    - Attachment A4: Contract Drawings
    - Attachment A5:
        - RFI/ Site Instructions 1201;
        - Email from Architect;
        - Letter from Architect;
        - Details of Painting Defects & Inspections;
        - RFI/ Site Instructions 1220;

        - RFI/ Site Instructions 1230;
        - RFI/ Site Instructions 1239;
        - RFI/ Site Instructions 1225;
        - Email from Client;
        - RFI/ Site Instructions 1229;
        - Email from Client;
        - RFI/ Site Instructions 1233;
        - Invoices;
        - RFI/ Site Instructions 1236,
        - 1236 confirmation of delivery of RFI/ Site Instruction 1236 by Registered Mail;
        - RFI/ Site Instructions 1240;
        - Photographs/ pictures of painting defects.
    - Attachment A6: Emails from Client
    - Attachment A7: Notice of Default Clause 23.1
    - Attachment A8: Applicant's Letter 4351/pe/pe, RFI/ Site Instructions 1239
    - Attachment A9: Change Order No. 1(a)
    - Attachment A10: Change Order No. 8
    - Attachment A11: Change Order No. 9
    - Attachment A12: Change Order No.'s 10,11 & 12.
- Attachment B: Statutory Declaration of G.A.S. dated the 2nd of November 2009
- Attachment C: Tax Invoice No.1092 dated the 22nd of July 2009;
    - Part A1: External Defects;
    - Part A2: Defects for Fire Stairs;
    - Part A3: Defects for Ground Floor;

- Part A4: Defects for Service Areas;
- Part A5: Floor Plans.
- Part B1: Summary of Cost of Works to 22nd July 2009;
- Part B2: Summary of Employees Accrued to 22nd July 2009;
- Part B3: Locations Spreadsheet;
- Part B4: Date Spreadsheet;
- Part B5: Invoices Received from Respondent.
- Part C1: Summary of Change Orders;
- Part C2: Payments to Respondent Under Terms of Subcontract Agreement

- Appendix 1: Copies of Timesheets and Invoices
- Attachment D: Notice of Dispute from Respondent
- Attachment E: Painting Defects
- Attachment F: Statutory Declaration of H.P.D. dated the 2nd of November 2009
- Attachment G: Statutory Declaration of A.P.T. dated the 2nd of November 2009
- Attachment H: Statutory Declaration of E.W.I. dated the 2nd of November 2009
- Attachment I: Statutory Declaration of T.F. dated the 2nd of November 2009

The Respondent submitted the following documents for consideration by the Adjudicator:

- Preface: Photographs of ['Site'] and working conditions within

1. Formal Response to Applicant's Application for Adjudication
2. Statutory Declaration of S.N., dated the 15th of November 2009
3. Previous Determination between the above opponents

4. Statutory Declarations by Respondent's Employees & Final Balance Claim
5. Photographs from 25/07/2008: Paint Inspection
6. Photographs from 28/08/2008: Paint Inspection
7. Attachment (a1)- (a10) Responding to Claims
8. Telstra telephone records
9. Invoices
10. Cheque Details.

As well as these documents issued to the Adjudicator by the Applicant and the Respondent, I have also taken into consideration the *Construction Contracts (Security of Payments) Act* (NT) for the determination of this Adjudication.

8. COMPLIANCE ISSUES

Compliance with Section 33(1)(a)

1. 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.

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

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

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

Determination - Section 33(1) (b)

5. 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)

9. THE NOTICE OF DISPUTE

1. The applicant raises an issue as to the payment dispute. Adjudication Application at [22]

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

3. 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.

4. 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.

5. 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]

6. Is the payment dispute non compliant?

7. The payment claim consists of parts A, B, C and D including lists of defects and lists of unfinished work and invoices.

8. For example, the first section A in the payment claim refers to defects for externally to fire stairs, ground floor and service areas and the second defects list is entitled "defects list [xx]". The list contains 42 items most of which have sub-items.

9. In Volume 3 Part B Section 3 there is a list of the hours spent by the applicant on doing work on various defects, costs of work, location spreadsheet and date spreadsheet. This indicates the work required to rectify some of the alleged defects has been done.

10. At the time of the delivery of the payment claim of 22 July 2009 most of 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.

11. 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.

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

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

14. 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.

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

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

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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."*

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

23. 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.

24. 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]".

25. 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.

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

27. 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.

28. 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.

29. The applicant pursued the claim.

30. Section 8 of the Act 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.

10. THE SECTION 23 NOTICE

The Respondent refers to Adjudication Determination (23.09.02) in a dispute between the Applicant and the Respondent in which the Adjudicator found in favour of the Respondent.

The Respondent asserts it is not liable to make a payment to the applicant because it has not breached the Subcontract.

The Respondent's allegations are in part that the Applicant's inability to facilitate the proper scheduling and programming of the works.

Furthermore, the Respondent asserts that the claim by the Applicant has been caused by a change to the subcontract works.

The submission by the Respondent is that the Applicant's claim has been caused by the Applicant's failure to meet its obligations under the subcontract, including its failure to provide suitable plant equipment and other facilities for the execution of the subcontract.

77) The contract provides that if the respondent did not comply with that notice then the applicant could take out of the respondent's 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.

The Respondent claims that each and every item claimed by the Applicant has not been claimed by it in the exercise of any entitlement it may have under the terms of the Subcontract.

The Applicant alleges that on 7 April 2009 it issued the Respondent a Notice of Removal of Works (Attachment A8).

The Notice advises the Respondent that they will take the appropriate steps necessary under Clause 23.1 of the Subcontract.

The appropriate steps are to be taken because of the following alleged breaches:

- Failure to provide a programme of your remaining subcontract works as decided
- Failure to undertake the works in a proper and diligent manner
- Failure to attend to and rectify incomplete and ineffectively executed painting as has been repeatedly made apparent to you
- Failure to mitigate your delay of your contracted works and upcoming directions given under Clause 18.1 of the Subcontract
- Failure to undertake steps as requested by the Applicant to reschedule or carry out necessary activities

The Applicant then advises that he has taken all remaining works out of the Respondent's hands. 23.1(e)(II) of the Subcontract, and that all subcontractor's payments are suspended under Clause 23.3.

The Applicant further states that the actions of the Respondent constitute a repudiation of the subcontract and the applicant will pursue money of damages he suffered as a result of breaches of the subcontract and the repudiatory conduct of the respondent.

The value is stated to be as specified under Clause 23.1. (e) (ii) of the Subcontract.

Pursuant to Clause 23 (e) (ii) the Notice can contain notification

(i) To take out of the subcontractors hands the whole or part of the subcontract remaining and suspend payment until it becomes due and payable under Clause 23.3.

I am of the views expressed in Adjudication Determination No. 23-09-02.

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.

I find that the notice to require a programme is not a proper subject of a notice pursuant to clause 23.1.d.

The Applicant has not in the Notice referred to any clause in the contract when referring to lack of diligence.

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 this notice.

Contentions of the Parties

The Applicant's Statutory Declaration dated 2nd November 2009 states:

14) Both the Tender Documents and the Subcontract clearly specified that the progress of the Project was half a floor a week.

In the Respondent's Statutory Declaration response, he disputes the validity of this claim:

24) In paragraph 14 of the Applicant's Statutory Declaration, he reiterated the specification that the Applicant will deliver to the Respondent one half of one completed floor per week. This meant the entire six floor project would have been handed to the Respondent over the contracted term of 12 weeks.

The programme dated 17-02-2008 indicates that setting walls and ceilings would be completed by the 1st week of July 2008. Photos in the Respondent's Preference 16-9-2008 shows walls still to be gyprocked.

Clause 30 - 71

The Respondent expresses concern about the programming of works in Annexure 7 items A1, A2 & A3.

The Applicant's Page 15(e) of the Application does not address these notices by the Respondent. The Site Manager's Statutory Declaration G.A.S. 2nd November 2009 states that detailed programming schedules were drafted and updated on a regular basis. In addition, weekly meetings were convened by the Applicant and the respondent and his Representative did not attend all meetings.

Clause 21 and 22 of the Applicant's Statutory Declaration states:

21) I held a subcontractor meeting with all of the subcontractors on a weekly basis including some of the client's subcontractors who were carrying out the civil works on the project. The purpose of these subcontractor meetings was to provide the necessary coordination with the subcontractors. At each meeting I handed out some small programs and discussed the next 3 week forecast targets so that each trade know the manpower, materials and the logistics of everything that was required in order to stay on target.

22) The Respondent only ever attended a couple of the earlier meetings and in the weeks leading up to practical completion he was absent from all meetings even though our site clerk telephoned all of the subcontractors on the morning of the meeting to request their presence on site.

The Respondent disputes this claim in Clause 31 of his Statutory Declaration.

31) In paragraph 22 he asserts that I only attended "a couple of... meetings". This is not true. I attended every single meeting following the commencement of painting works.

Programming is a critical issue in this claim.

The Respondent notified the Applicant early in his painting programme that he was having problems finishing his work because of programming problems.

The Applicant fails to acknowledge this notification and his Site Manager declares that detailed programming schedules were drafted and updated and site meetings were held each week. There is no evidence to support any updating of the programme or rescheduling of the works.

The Applicant also states that the external paint is a dull colour and there is no body in the paint and that he suspects the paint may be watered down.

The Applicant's Statutory Declaration dated 2nd November 2009 states that the painting was substandard because:

- In some areas it looked as though the painters had applied one heavy coat of paint, as opposed to three coats.

- Some areas were painted the wrong colour.
- In the conference room the wall & ceiling colours were reversed.
- It looked as though the paint had been watered down.
- One door frame was half painted.

This was around 2nd December 2008 and the Building had been occupied for some 3 months.

The Applicant contends the Respondent had tradesmen that were of a poor quality and were continually having to rectify defects.

The Applicant has provided:

Part A – Section External Defects

15-9-2008 – 8 pages of Defects all connected with painting.

29-1-2009 – 1 page of photos, no description of defects. I find the details in the photos hard to make out, and the lack of a description of defects an issue of concern.

23-2-2009 – 3 pages of painting defects

23-2-2009 – 8 pages of photographs, again without a description of the defects. Details in the photos are hard to make out.

Part A Section 3 – Defects to Ground Floor

30-6-2008 – 2 pages of defects mainly painting

Part A Section 4 – Defects to Service Area

29-1-2009 – 3 pages of photos – hard to make out.

Attachment E

90 pages of painting & other defects at various dates throughout the contract.

The Respondent argues in Clause 32 of his Statutory Declaration that the problem was not with his services.

> 32) In paragraph 23, he refers to annexure JE 5, in which he states his concerns about the Respondent's performance Three days before we received RFI 1201 on 21st of August 2008, we cautioned the Applicant concluding, "I can understand that you are under considerable pressure to deliver, But I am not the problem. You need to deliver me a finished product capable of passing inspection and not as shown on this second floor '1000 touch ups identified' before I can deliver to you a competent and professional painting job". Long before that, as far back as June 22nd, we cautioned the Applicant that if we are forced to paint parts of the building which in our professional opinion are not ready for painting we undertake to comply with these formal instructions, but we disclaim responsibility for the finished work. See attachment (7a1), (7a2) and (7a3).

7a4) 05-09-2008	At a quick glance there are at least 50 outstanding items to be completed. It is almost impossible to do my work.
7a5) 05-09-2008	We do not accept the proposition that we are at fault in the late completion of the project.
7a6) 10-10-2008	1) Changing of Applicant's staff to Respondent is not acceptable 2) Once you have removed glue silicon and other painting issues or defects, I will bring my own cleaning staff to attend to any painting defects and remove paint from windows, door sills etc.
7a7) 13-10-2008	Respondent states that the Applicant can retain or finish painting cost of $26,000.00 until the work has been completed to their satisfaction

The Respondent asserts that the claims by the Applicant that his painters and materials were of poor quality were "spurious".

The Applicant does not provide any evidence to validate his claim that the exterior paint was watered down.

The Applicant relies on a list of 5 defects given by the new painter contracted after he commenced work on site some 3 months after the date for practical completion.

It is clear to me from the statements made in Annexure 7 that there were many defects and uncompleted work that needed to be completed by the Applicant before the Respondent could realistically be expected to complete his own work.

The Applicant has failed to specifically address any of the Respondent's claims in Annexure 7, instead using these failures by the Respondent to assert that he had used poor quality materials and tradesmen of poor quality.

The project was completed in a very brief construction programme but is obvious the finishes trades did not have enough scheduled time allowed to successfully complete their tasks.

The removal of the external scaffolding and the installation of the client's furniture had a severe impact on the painter's ability to complete their project as directed, severely affecting the final outcome of the project.

From the information contained in the application and response, I find it apparent and on the balance of probabilities that with respect to the poor quality materials and poor quality tradesmen provided for use by the Respondent, the Respondent was not the total cause of the low-quality product complained of.

I find that the programming for the project did not allow the Respondent to present a proper, tradesman-like product as would be expected under normal circumstances.

11. APPLICANT'S RIGHT TO PAY OTHERS

In this dispute, whether the Applicant has the right to issue an instruction to the Respondent and if the Respondent does not reply to that instruction, the Applicant then has the right to pay and engage others to execute any work necessary to give effect to that instruction is pertinent to this adjudication.

Correspondence shows that the Applicant instructed others to carry out works that he alleges the Respondent had been instructed to carry out. He subsequently provided a claim for these costs.

Refer RFI1239 dated 7/4/2009, RFI 1233 dated 17/1/2009 for sum of $359.00+GST and $480.00+GST. RFI 1236 dated 20/2/2009 for $1848.28+GST, RFI 1242 dated 3/5/2009, RFI 1238 28/2/2009.

Refer to the Statutory Declaration of Respondent dated 15/11/2009. The respondent contends as follows:

19) It was obvious that the quality of the building work on the carcass of the building was far below the standards required to meet standard building practices. In particular there were deep furrows on both sides of the Ritek panels, of which the building comprised, and the Respondent started swearing, saying "N.S. hasn't got the fucking crane ready yet. We are

having to bring them in by hand and all the stones and rubble is causing the damage". If a crane had been onsite this damage would have been avoided.

20) I cautioned him that irrespective of who fixes the damage, it will still cost the Applicant a lot of money to repair the damage. He said "I fucking know that".

26) In paragraph 18 of the Applicant's declaration, he states the gyprock was of an excellent standard. Interestingly, there was no planned for use of gyprock on that project. A few gyprock ceiling panels were eventually used to cover irreparable damage to concrete ceilings.

27) In paragraph 19 of his declaration, the Applicant's assertion that the Respondent were responsible for texture and finishing coats to the ceilings was incorrect. The scope of work in the contract did not specify texture coat for the ceilings. It specified a heavy membrane coat with lambswool roller. I approached the Applicant before we started and told him the standard of the ceiling base was not even close to good enough for us to proceed with that coating. As he did not know exactly what he wanted, I suggested that he went across the road from the Evolution project, and have a look at the ceilings and walls of Luma Luma apartments which had been finished using a similar process, but using an extra fine texture roller. He came back to me and said it was suitable and he suggested I proceed in that manner. I explained that using such a roller, would use more product, but this would only add one or two dollars per metre to the cost. To demonstrate the process we prepared a sample room. We called him to inspect the preparation which he then said was okay, and we should commence painting in the manner agreed (using a fine texture roller). We completed the room and asked him to inspect it. He looked at it and said "It's fucking shit". I agreed. He asked for my guidance and I suggested we try the application with a medium roller. I made a particular point to tell him that if we used a medium roller (using far more product) the extra cost would be $8 per metre. He asked me to proceed. We applied the second coat and as I expected, the result was accepted by the Applicant. He said therefore that this was how he now expected the Respondent to continue. I understood this to mean the extra cost would be paid. (Approximately 8,000 square metres at $8 per metre is $64,000.00, or the same rates as we had discounted for the change in cost of the exterior walls, to bring the final cost from $369,480.00 to $433,380.00). We have not yet received this $64,000.00.

32) In paragraph 23, he **['The Applicant']** refers to annexure JE 5, in which he states his concerns about the Respondent's performance. Three days before we received RFI 1201 on 21st of August 2008, we cautioned the Applicant concluding, "I can understand you are under considerable pressure to deliver, but I am not the problem. You need me to deliver a finished product capable of passing inspection and not as shown on this second floor '1000 touch ups identified' before I can deliver to you a competent and professional painting job". Long before that, as far back as June 22nd, we cautioned the Applicant that if we are forced to paint parts of the building which in our professional opinion are not ready for painting we undertake to comply with these formal instructions, but we disclaim responsibility for the finished work. See attachment (7a1), (7a2) and (7a3).

40) In the Applicant's Statutory Declaration paragraph 32, he asserts the project was completed and occupied and that only the painting was incomplete. We attach photographic evidence to the contrary.

Photographs 16 and 18 09 attached at Annexure 1 depict defects in the external surface of the building. Defects shown include:

- Protruding bolts;
- Exposed conduits and cables;
- Gaps in concrete; and
- Holes in concrete.

Depicted defects to the internal works include:

- Builders' rubble
- Unfinished walls and carpenters still finishing work
- Exposed cables hanging over finished doors
- Carpet damaged by tradesman hanging doors
- General builders rubble
- Removalists' rubble
- Walls requiring flushing

In the respondent's Statutory Declaration, this photographic evidence is supported by Clause 41, which states

41) In paragraph 33, the Applicant says the Motel's business had to be significantly disrupted so repainting could take place. Hallways, walls and doorframes had to be repainted in some cases receiving up to seven coats because the Applicant failed to keep an account of the damage done to surfaces by successive trades people trying to complete the job in the worst of industrial circumstances.

The Applicant contends in his Statutory Declaration A1 dated the 2nd of November 2009 the following:

23) Throughout the project I was extremely concerned with the performance of the Respondent. Copies of the RFI/ Site Instructions to the Respondent evidencing my concerns are attached at Annexure JE 5.

24) The Applicant's client, John Robinson was also extremely concerned about the quality and progress of the painting as evidenced by his emails to me dated 15th and 17th September 2008 (Annexure JE 6).

26) The Respondent also was unable to maintain his workforce. It appeared to me that he was having major staffing difficulties, judging by his staff turnover and the quality of the workmanship. It soon became apparent that the Respondent could not maintain enough men to keep up with the program.

27) The Respondent began to get further behind the program because they simply did not have enough tradesmen on site. The tradesmen they did have were of poor quality that they were continually having to rectify defects which put them even further behind the program.

38) On or around the 20th of October 2008 I met with The Respondent's Director, CK (The Applicant's contracts administrator) and NS (The Applicant's other director) to agree on a final contract sum and to confirm that The Respondent would in fact honour their contract agreement and complete the painting of the Airport Inn to a acceptable industry standard. During that meeting The Applicant had a large sum of costs that were to be charged to the Respondent in the vicinity of $93,000 and the Respondent believed that they had some costs that he also was going to request of the Applicant. The final agreement in the negotiations on the 20th of October 2008 was that the Applicant would back charge and reduce the Respondent's contract by $20,000 on the provision that the Respondent completed the contract painting works in November 2008 so that the Applicant could claim its $60,000 back from the client on or around the 30th of November 2008. During this meeting the Respondent admitted that they were required to rectify the painting works externally and that they would be responsible for the hire the boom equipment and any access equipment necessary to access the outside of the building. The Respondent agreed that he would bear the cost of the boom equipment and cherry picker because he was unable to complete the exterior painting whilst the scaffold was in place. Based on

that agreement a change order was issued. That change order became obsolete as the Respondent did not honour that agreement.

45) By late January 2009 the internal painting was still not completed and the Client who was furious. In order to get the job done, I offered to have another painting company carry out some of the works internally.

In the application the applicant states on page 17q “sole cause of the delays and sequencing of internal fit out trades was the Respondent”.

The Architect’s Letter dated 20th August 2008 states recent defects inspections have identified defects that require re-sanding, flushing and re-painting, in particular to scratches and gouges on walls, poor and different gloss finishes to doors and poor ceiling finishes.

On August 18th 2008, the Respondent admits he is surrounded by deficiencies, inadequacies and numerous construction and finishing items on the second floor that have not been attended to by the Applicant’s men.

I determine therefore that:

The contract provides for the Applicant to engage and pay others to execute the works necessary to comply with an instruction issued by the Applicant and this is a legitimate part of the contract.

The applicant did issue RFI/ Site Instruction to the Respondent at different stages of the project. He has set a list of Architect’s defects and Applicant’s own defects to be rectified. The list of defects is detailed and substantial. I have no doubt they existed.

My problem is with the cause of the defects.

The Respondent makes substantial accusations in Annexure 7 A1-3 dated 22-7-2008 that disclaimed responsibility for the painting quality because the apartments were not ready to be handed over for painting.

These issues have not been addressed in the Application by the Applicant. I believe that these are critical to the reason why there are so many defects. If the Respondent is being instructed to paint on faulty surfaces in order to maintain a

programme and not quality of workmanship then it is obvious that the quality of the finished paint present will not be adequate.

Statutory Declaration DWI 2nd November 2009 states that all of the plastering work was of industry standard or better. This is at odds with the G.I.C. letter dated 20th August 2008 Appendix 5 where the letter states that past defects inspections have identified defects that have required re-sanding flushing and painting. The painting quality is also of concern to the Architect.

This reinforces the advice from the Respondent that there were deficiencies and inadequacies that had not be attended to by the Applicant's crews.

Statutory Declaration GAS 2nd November 2009 states:

> Respondent was always running behind schedule. The Respondent had significant staffing problems and did not have enough numbers to complete work. Further, it appeared as though some of their action force was unskilled.

It also appeared to him that there was very little of any supervision of staff. All of these problems led to a very inefficient project management.

In the Architect's letter dated 20th August 2008, it is indicated that the Applicant's trades and the Applicant's inspection regimes must increase in quality if the Applicant is to mitigate the defects being indentified at handover.

I must note the wording of the RFI/ Site Instruction. On the middle top left hand side of this form there is an item called Cost Impact. This appears to mean the impact the site instruction will have on the construct sum of the company it is being sent to. In all of these RFI/ Site Instructions issued to the Respondent the Cost Impact is noted as none. To me this means that there will be no contract sum adjustment to the Respondent's Contract because of impact of the RFI/ Site Instruction.

Hence I find that although the Applicant has a right under the contract to engage and pay others to comply with an instruction issued by the Applicant he has no basis to his claim.

The Applicant has failed to provide adequate surfaces for the Respondent to carry out the work.

The Applicant has failed to provide adequate supervision for the Respondent to be allowed to carry out his work in a tradesman like manner.

The Applicant in all of his RFI/ Site Instruction to the Respondent has stated that there will be no cost impact on the Respondent.

12. SUMMARY OF CONTRACT

Summary of Contract

Contract Sum	$363,000.00	
Delete high blend texture roller finish	-27,200.00	
Change Order 1	0.00	
Change Order 8	0.00	
Change Order 9	-998.00	
Change Order 10	0.00	
Change Order 11	0.00	
Change Order 12	0.00	
Total Changes		-28,198.00
		-28,198.00
Revised Contract Amount		$ 334,802.00
GST		33,480.20
Revised Contract Amount incl GST		$368,282.20
Amount paid by Applicant incl Retention		$348.011.00
Amount owed to Applicant by Respondent		$nil

13. VARIATIONS

Change Order Number 1 is provided in Annexure JE 9.

The Applicant asserts that $15,315.00 was a back charge cost that the Applicant incurred from the Client as a Head Contract Reduction.

The Respondent asserts that he does not agree with the calculation and cannot understand the means through which the final figure was determined.

JE 9 shows Changed Contract Amount $311,308.81.

This change represents the Adjustment of the cost of Change Order 1.

Adjustment to costs as per Respondent bringing the total for Change Orders to -$15,315.00 + GST

	Pre tax	$685.00
	GST	$68.50
	GST Inclusive	$5153.50
Revised Contract Value		$316,462.31

The Applicant asserts that this Change Order was for a deduction of $15,315.00 whereas the Actual Change Order shows an addition of $5,153.50 including GST to the Revised Contract Value.

I agree with the Respondent in that I cannot understand the means through which this final figure was determined by the Applicant.

I therefore determine that the actual value of Change Order No. 1 is $nil.

Change Order No. 8

The Applicant asserts that as there was significantly less painting works required due to the deletion of the membrane to the external paint system, he issued a change order and the Contract Price was subsequently reduced.

The Respondent contends that this change order is based on completely false data.

The costs of membrane coating is $78.00 per 15L including GST and the cost of Sun proof per 10L is $115.00. The cost difference has not been paid to the Respondent.

Change Order No. 8 describes Taubmans or weather installed instead of membrane paint.

This Change Order appears to reflect the deduction for the cost of not applying the membrane cost, but does not reflect the extra over costs for the application of the finishing coats.

The Respondent asserts that each of the finishing coats is more than double the cost of the membrane coat.

The Applicant does not address the alleged extra material costs in his Change Order.

I find on the balance of probabilities that there was a deduction for the cost of applying a membrane coat but there were additional costs in materials for the application of the final coats as described.

The Applicant has failed to reflect the additional costs of material on his Change Order.

I have no submissions before me as to the extra costs of materials so in that matter I feel I am unable to true and accurate assessment.

The only finding i can make is that the deduction of $13,600.00 + GST for the deletion of the membrane is not a true cost for this Change Order.

I therefore determine that the only valid valuation I can make for this Change Order in this Adjudication is $nil.

Change Order No.9, provided at Annexure JE 11

The Applicant asserts that as a result of design changes, 995 lineal metres of cornice were no longer required to be painted at a cost of $2.00 per lineal metre.

This resulted in a deduction to the Contract Amount of $1,996.00

The Respondent argues that whether cornices are present or not, the painting still had to be cut into the ceilings, therefore the amount of work was exactly the same and no Change Order should apply.

There appears to be a typographical error on the Change Order, where 9984 lineal metres should in fact read 998.4 lineal metres.

The Applicant does not address the cost of painting the area covered by the cornice on the ceiling. There is no painting to walls in the wet area.

Here I find that the total amount of labour and material is halved be deleting a cornice to the wet areas. The Respondent does not question the quantity of cornice deleted.

I therefore determine that the deletion of 998.4 lineal metres of cornice reduces the painting contract by $998.00 plus GST.

Change Order No. 10 is provided at JE 12

The Applicant alleges that the Respondent agreed to engage one of the Applicant's apprentices to physically check off painting defects.

The Respondent argues that the apprentice was not employed by the Respondent, who never agreed to pay wages for a worker not directly contracted or employed by the Respondent.

The Applicant argues that the work consisted of

(i) (ii) (iii) (iv) (v)

all this work with the exception of

(i) Check that the painters had enough paint

would appear to be the work necessary for a competent Building Contractor to complete a contract, not the work of a subcontractor.

I find that the apprentice employed by the Applicant in this instance was most probably carrying out the work of a competent Building Foreman and not the work of a Subcontractor.

I therefore determine the value of Change Order No. 10 to be $nil.

Change Order No. 11 is provided at JE 13

The Applicant alleges that he had his Site Supervisor supervise and co-ordinate the work over a 3-week period.

The Respondent argues that the Applicant had over 80 tradesmen on the job and the Supervisor was never employed by the Respondent.

The Applicant makes no reference to any work done by his Supervisor in relation to the Respondent's work. In fact, the Applicant says his Site Supervisor was supervising and co-ordinating work.

I find that the Site Supervisor did not work for the Respondent and was never employed by the Respondent.

I therefore determine the value of Change Order No. 11 to be $nil.

Change Order No. 12 is provided at JE 14

The Applicant alleges he engaged 3 cleaners, 1 carpenter and 1 apprentices to ensure the Client was presented with a fully functional, clean and fresh motel room and that these staff were necessary as the Respondent was still painting after the 26th September 2008. The staff worked for 3 weeks after the practical completion date.

The Respondent argues that the Applicant is not entitled to any money under this Change Order.

The Respondent relies on 7a6, which is referring to another project.

Photographic evidence shows that the Applicant's carpenters, flushers and cleaners, and the Client's own removalists were the main cause for this dispute. Pictures Preface 16-9-2008 shows carpenters working, building rubble and removalists rubble.

The date for Practical Completion was 26-9-2009. The pictures taken showing carpenters working, building rubble and removalist's rubble were taken dated 16-9-2008, little over a week before Practical Completion.

It is apparent from the above information that the Respondent was not the total cause for the necessary clean up complained of.

I find on the balance of probabilities that cleaners and tradesmen were required to complete the Builders Contract to clean the motel.

I therefore determine that the value of Change Order No. 12 is $nil.

14. SUMMARY OF ADJUDICATION

1. The Respondent submits that the applicant's failure to facilitate the proper scheduling and progress of the works, damage to the subcontract works caused by others, and the Applicant's failure to meet its obligations under the subcontract as described in the Notice of Dispute. This entitles the applicant from claiming each and every item in his claim under the terms of the subcontract.

2. 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.

3. 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.

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

5. 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(e)(i)

The Applicant alleges that the Notice of Breach referred to the apparent abandoning of the project under 23.1(e)(ii).

I find that the requirement that the Applicant take out of the subcontractors hands the whole or part of the subcontract remaining to be completed and suspend payment until it becomes due and payable pursuant to Clause 23.3 is not something the Applicant can require with respect to a notice issued pursuant to Clause 23.1(e) (ii).

I find for the reasons expressed above that the notice 'Notice of Removal of Works' and purportedly issued pursuant to Clause 23.1(e) (ii) has and had no effect pursuant to the contract.

There being no breach of Clause 23.1(e) (ii) notice by the Respondent, the Applicant had no right to exercise the rights set out in Clause 23.1(e)(ii) of the subcontract nor those set out in 23.2 or 23.3 and that was because the Clause 23.1.d notice was non compliant.

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 programme works, manpower, equipment, material or how the Respondent will manage rectification works.

The claim by the Client to the Applicant in the amount of $60,000.00 and the claim by the Respondent dated 14th of September 2009 are items which I, as an Adjudicator, have no authority to determine.

Conclusion

I find the applicant could not rely on the matters referred to in the notice of 28 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.

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

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

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.

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

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

Determination

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.

I make no order as to costs.

I determine there is no information in this determination which is unsuitable for

publication by the Registrar under s 54 of the Act.

Dated: 30th November 2009

_____

Paul Baxter
Registered Adjudicator