

Adjudicator's Determination

Pursuant to the

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

Adjudication Number	39.14.04
Prescribed Appointor	The Institute of Arbitrators & Mediators
Adjudicator	David Richard Baldry ¹
Applicant:	[REDACTED]
Applicant's contact details:	[REDACTED] [REDACTED]
Applicant's solicitor:	[REDACTED]
Applicant's solicitor's contact details and applicant's service address:	[REDACTED] [REDACTED] [REDACTED] [REDACTED]
Respondent:	[REDACTED]
Respondent's contact details:	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
Project:	[REDACTED]
Amount to be paid by Respondent	\$NIL including GST
Due date for payment	Not applicable
Adjudication Fees Apportionment	Applicant: Not applicable Respondent: Not applicable
Date of Determination or Dismissal	29 October 2014

¹ Registered Adjudicator Number 39

Payment Claim	Claimed Amount : \$13,542.00 including GST Dated : 6 June 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : \$14,180.34
Adjudication Application	Dated: 2 October 2014
Adjudicator Acceptance	Dated: 3 October 2014
Adjudication Response	Dated: 15 October 2014

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DETERMINATION

- 1) I, David Richard Baldry², the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act (NT) (Act)*, for the reasons set out below, determine that the respondent must pay the applicant \$NIL (the “adjudicated amount”).

BACKGROUND

- 2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the Act for construction work carried out under a construction contract for [REDACTED] in the Northern Territory (**Project**).
- 3) The contract was partly oral and partly in writing.
- 4) The written part consisted of the following quotations based on drawings provided by the respondent:
 - a) a quotation dated 21 June 2013, emailed to the respondent on that date, totalling \$52,690, inclusive of GST, to:
 - i) supply and install HDPE sewer to new grease trap and connect to main;
 - ii) supply and install DWV pvc sewer to all other fixtures and connect to sewer;
 - iii) supply and install all hot cold temp water line in copper to fixtures;
 - iv) supply and install solar HWS; and
 - v) all gas works; and
 - vi) fit off all fixtures supplied by others,which also stated that there would be an initial progress payment of \$20,000 after all sewer ground works had been completed, a 2nd progress payment of \$16,000 after the rough in stage and a final payment of \$16,690 on completion;
 - b) a second quotation dated 21 June 2013, which was emailed to the respondent on that date, totalling \$18,590.00, inclusive of GST, to:
 - i) demolish old storm water pits;
 - ii) supply and install 5 new concrete 450 grated pits;

² Registered Adjudicator Number 39

- iii) supply and install 2 new concrete 600 mm grated pits;
 - iv) connect all to existing drain;
 - v) connect 100 mm dwv from pits to downpipe point; and
 - vi) connect into existing drain 3 100 mm points for down pipes;
- c) a third quotation dated 30 June 2013, which was emailed to the respondent on that date, totalling \$9,350.00.00, inclusive of GST, to:
- i) supply and install a 2000ltr concrete grease trap; and
 - ii) connect it to the sewer line.
- 5) The applicant says that the oral part consisted of an acceptance of such quotations by the respondent on or about 30 June 2013, there being no schedule of works or any requirement for the applicant to account to the respondent for its time spent performing the works.
- 6) The works were conducted over a 6 month period from 2 July 2013 to 6 December 2013, the works having been inspected and certified on about 24 December 2014.
- 7) The applicant contends that the respondent directed the timing of the applicant's works to co-ordinate with the various other trades and at no time was the applicant able to or required to schedule its works or received a schedule of work for the project from the respondent.
- 8) The applicant says there were a number of variations requested by the respondent some in writing and other requested orally.
- 9) The applicant progressively invoiced the respondent in August, September, November and December 2013, totalling \$76,843.00, including GST of which the respondent made a payment on 1 October 2013 of \$34,731, including GST in respect of invoices rendered in August and September 2013, and the respondent retained \$3,859 including GST in relation to the August 2013 invoice.
- 10) By March 2014 the respondent still, had not paid the other invoices, which totalled \$42,112.00 including GST and the respondent referred a number of small defects notified by the respondent's client to the applicant and the applicant attended on site, and, where it considered necessary, rectified them.
- 11) The respondent later made further defect claims and stated it would retain other monies.
- 12) On 30 May 2014 the applicant credited back the unpaid invoices, because they did not comply with the s. 19 of the Act implied terms.
- 13) On 6 June 2014 the applicant rendered a final payment claim totalling

\$43,542.00, inclusive of GST.

- 14) The applicant has also claimed for additional legal costs and interest, which I will deal with later in this determination.
- 15) By letter dated 20 June 2014, the respondent:
 - a) asserted there were a number of outstanding defects and possible future defects entitling it to withhold \$3,842.14, inclusive of GST;
 - b) accepted variations totalling \$5,057, inclusive of GST, but rejected variations totalling \$1,430.00, inclusive of GST;
 - c) issued a payment certificate for \$38,269.57 which:
 - i) started with \$69,857 for contract works of \$64,800 and variations of \$5,057;
 - ii) added GST of \$6,985.70 to arrive at \$76,842.70;
 - iii) deducted a retention of \$3,842.14 and a previous payment of \$34,730.99 to arrive at \$38,269.57.
 - d) offered to settle the payment claim, by paying the applicant \$38,269.57, inclusive of GST, if the parties entered into a Deed of Settlement and Release.
- 16) On 8 August 2014 the Respondent part paid \$27,458.12, leaving a balance of \$14,142.35 owing on the payment claim.
- 17) On 11 August 2014 the Respondent paid the applicant \$30,000, including GST, in part payment of the payment claim dated 6 June 2014 and sent a letter setting out why it considered it should not have to pay the balance, due to damage suffered (claiming that previously notified defects had not been rectified and adding 2 new defects to the defects list) and entitlement to retain retention monies.
- 18) In the response the respondent has contended that:
 - a) the payment claim is a repeat claim and is therefore invalid, it being a repeat claim because earlier invoices claimed for the same works and, the 90 day time limit under s. 28 of the Act for applying for adjudication has elapsed when one calculates that period from the dates upon which those earlier invoices were payable and not paid, which earlier invoices were issued on or about 22/09/2013 (Invoice No. 167), 21/11/2013 (Invoice No. 181) and 19/12/2013 (Invoice No. 191) and each due for payment 28 days later, i.e. on 20/10/2013 (Invoice No. 167), 19/12/2013 (Invoice No. 181) and 16/01/2014 (Invoice No. 191) – the dispute dates;
 - b) the payment claim does not strictly comply with the requirements of the

implied Divisions 3 and 4 of the Schedule to the Act because it:

- i) includes a claim for something which was not “in relation to the contractor’s obligations it has performed” – i.e. a claim for \$1,573, inclusive of GST for costs incurred to attempt to recover payments, admin time, phone calls, travel (s. 3 of Division 3 of the Schedule to the Act); and
- ii) does not comply with the requirements of s. 5(1)(f), 5(2)(a),(b) and (c) of Division 4 of the Schedule to the Act because the claims for withheld payments on invoice 167, outstanding invoices 181 and 191 are vague, does not describe the obligations the applicant is claiming to have performed and does not state what proportion of the contract works it is claiming,

and is therefore invalid;

- c) where the payment claim is found to be invalid I lack jurisdiction to determine the claim on its merits;
- d) in the alternative, if I find that a failure by the applicant to comply with the strict requirements of the Act does not invalidate the whole of the payment claim I should consider whether each part of it strictly complies with the requirements of the Act for the contents of payment claims pursuant to those parts of the Act;
- e) there is no basis for the applicant to claim that I should order the respondent to pay the costs of the applicant relative to the adjudication or to order the respondent to pay all of my fees;
- f) the works carried out by the applicant includes incomplete work defects which the applicant failed or refused to rectify and which the respondent values at \$10,338.12, inclusive of GST;
- g) where the applicant has failed to rectify its defective works the respondent has incurred costs to engage other contractors to perform the rectification works;
- h) the payment claim includes claims for amounts which do not relate to any contractual obligations the applicant was required to perform under the contract; and
- i) the contract included express oral terms that the respondent could withhold a 5% retention until the end of the defects liability period, and that the defects liability period would be for the period of 12 months from the date of practical completion (the amount it considers it is entitled to retain being \$3,842.14) - the applicant denying that the contract included either of those terms;

APPOINTMENT OF ADJUDICATOR

- 19) Pursuant to section 28(1)(c)(iii) of the Act, the applicant served its adjudication application dated 2 October 2014 on the Institute of Arbitrators & Mediators on 3 October 2014, which is a prescribed appointor under the Act.
- 20) On 3 October 2014 the adjudication application was referred to me as adjudicator by the Institute of Arbitrators & Mediators pursuant to section 30(1)(a) of the Act.
- 21) On 3 October 2014 I sent a letter to the applicant, the applicant's solicitor and the respondent by post and by email, which amongst other things of a procedural nature:
 - a) notified them of my appointment as the adjudicator of this matter by the Institute of Arbitrators & Mediators;
 - b) advised that I did not consider that any circumstance existed which would require, pursuant to s. 31 of the Act, that I be disqualified as the adjudicator of this application;
 - c) notified the parties that I accepted my appointment as adjudicator, subject to considering any submissions by them concerning whether they considered that any circumstances existed under that section of the Act which would require that I be disqualified as the adjudicator and allowed them until close of business on Tuesday 7 October 2014 to deliver any such submissions to me;
 - d) asked the parties to advise me by close of business on Tuesday 7 October 2014 when and how the application and supporting documents were served; and
 - e) asked the parties to indicate whether, they were willing, pursuant to s. 29 of the Act, to consent to another adjudication application by a different applicant, but involving the same respondent company and works at the same construction site as in this matter, being adjudicated simultaneously with the payment dispute the subject of this application.
- 22) On 4 October 2014 I received an email from the applicant's solicitor which, amongst other things, stated that:
 - a) the applicant had no objection to me acting as the adjudicator of this adjudication;
 - b) the adjudication application and supporting documents were served on the respondent on 2 October 2014 by facsimile transmission; and
 - c) the applicant was willing to consent to me adjudicating this application simultaneously with the aforesaid other adjudication application.

- 23) On 7 October 2014 I received an email from a director of the respondent which, amongst other things, stated that:
- a) the respondent was unaware of any circumstance which would require me to be disqualified as the adjudicator of this adjudication;
 - b) the adjudication application and supporting documents were served on the respondent on 2 October 2014 by facsimile transmission; and
 - c) the applicant was unwilling to consent to me adjudicating this application simultaneously with the aforesaid other adjudication application.
- 24) As s. 29 only permits 2 or more adjudication applications being adjudicated simultaneously if all parties consent to that happening, on 8 October 2014 I advised the parties that I would determine both adjudication applications separately.

DOCUMENTS

- 25) The following documents were provided to me:
- a) Adjudication application submissions dated 2 October 2014 and supporting documents in 15 tabs in 1 ring binder;
 - b) Adjudication response submissions dated 15 October 2014 and supporting documents in 49 tabs in 1 ring binder;
 - c) The respondent further submissions dated 21 October 2014;
 - d) The applicant's further submissions dated 21 October 2014;
 - e) The respondent's further submissions dated 22 October 2014;
 - f) The applicant's further submissions dated 22 October 2014;
 - g) The respondent's further submissions dated 23 October 2014;
 - h) The applicant's further submissions dated 28 October 2014; and
 - i) The respondent's further submissions dated 28 October 2014.

IMPLIED AND PROHIBITED TERMS OF CONTRACT

- 26) The applicant has submitted that because the Contract did not have written or orally agreed terms about certain matters ss. 16 to 25 of the Act operate so as to impliedly include the terms set out in Divisions 1 to 9 of the Act as contractual terms.
- 27) I do not consider that s. 17 of the Act operates by implying a term about the amount, or any way of calculating an amount that the contractor is entitled to

be paid, because it was a lump sum contract based on quotes.

- 28) S. 24 of the Act can imply terms in the Schedule, Division 9 of the Act to contracts, which do not have a written provision about the status of an amount retained by the principal for the performance of the contractor of its obligations under the contract. I consider that that section would only apply if there was an oral term in the contract, which allowed retention monies to be retained.
- 29) I have found on the balance of probabilities in paragraph 58 that there was no oral agreement reached between the parties for a 5% retention to be retained by the respondent until the end of a 12 month defect liability period even though there was agreement for there to be a 12 month defect liability period. I therefore find that, as there were no express terms relating to retention monies, no terms of the contract were implied pursuant to s. 24.
- 30) S. 25 does not provide for the implication of any terms. It is an interpretation provision.
- 31) The only other terms implied pursuant to the rest of those sections of the Act which are pertinent to this matter are the terms implied by ss. 19 (dealing with making payment claims), 20 (dealing with responding to payment claims and time for payment) and 21 (interest on overdue payments) and I find that all of those sections operated in this Contract so as to imply the relevant terms in the Schedule to the Act dealing with those topics.
- 32) I find that in accordance with the terms implied as terms of the Contract by virtue of s. 20 of the Act:
 - a) within 14 days after the respondent receiving the payment claim the respondent was required to:
 - i) give the applicant a notice of dispute;
 - ii) if the respondent disputed 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;
- 33) I also find that on the balance of probability the payment claim dated 6 June 2014, was served on the respondent on 6 June 2014, because the covering letter from the applicant's solicitor dated that date states it was being emailed to a director of the respondent, whose email address was also stated, the contract had no express written term for specifying the method of service of payment claims and the parties mostly communicated with each other by email.
- 34) I also find that the payment claim dated 6 June 2014 was therefore due to be paid by **Friday 4 July 2014**.

PAYMENT CLAIM AND PRIOR INVOICES

- 35) The payment claim dated 6 June 2014 is found at tab 2 of the application.
- 36) It consists of:
 - a) a letter dated 6 June 2014, signed by the applicant’s solicitor which:
 - i) is addressed to the respondent at [REDACTED] and by email to [REDACTED], a director of the respondent;
 - ii) has a reference line under the salutation in which it refers to the project by reference to the construction site and states it is a final claim;
 - iii) states it encloses a final claim invoice no. 00000268 dated 6 June 2014 for \$43,542.00, inclusive of GST;
 - iv) states it is due to be paid on or before Friday, 4 July 2014;
 - v) states the claim is being made under the provisions of the Act;
 - vi) rejects the Respondent’s payment schedule dated 26 May 2014 and says it encloses a copy of such payment schedule; and
 - b) invoice no. 00000268 stating it is being rendered by the applicant, is addressed to the respondent and totals \$43,542.00, inclusive of GST, and which is made up as follows:

i) withheld payment on invoice 167	\$3,859.00
ii) outstanding invoice 181	\$16,000.00
iii) outstanding invoice 191	\$22,253.00
iv) additional cost to recover payments	\$1,430.00
- 37) Tab 2 of the application also includes:
 - a) a Scott schedule providing details of all invoices rendered by the applicant to the respondent under the Contract, payments made and credits given by the applicant; and
 - b) a letter from the applicant to the respondent dated 30 May 2014 and a credit notes:
 - i) No. 00000167 crediting \$3,859.00, inclusive of GST;
 - ii) No. 00000181 for \$16,000.00, inclusive of GST; and
 - iii) No. 00000191 for \$22,253, inclusive of GST.

- c) A CBA transaction statement evidencing the respondent's payment to the applicant of \$34,731.00 on 1 October 2013;
 - d) Invoice No. 00000158 dated 14/08/2013 from applicant to respondent for \$20,000.00, inclusive of GST, which the applicant treated as having been paid in full using part of the \$34,731.00 payment;
 - e) Invoice No. 00000167 dated 22/09/2013 from applicant to respondent for \$18,590.00, which the applicant treated as having been part paid using the rest of the \$34,731.00, leaving a balance owing of \$3,859.00, inclusive of GST;
 - f) Invoice No. 00000181 dated 21/11/2013 from applicant to respondent for \$16,000.00, inclusive of GST;
 - g) Invoice No. 00000191 dated 19/12/2013, inclusive of GST;
 - h) Email from respondent's Alok Jain to the applicant's lawyer sent on 11/08/2014 and attached remittance advice from Respondent dated 11/08/2014 for \$30,000.
- 38) The application is somewhat confusing in this regard, but I find on the balance of probabilities that none of the documents referred to in the previous paragraph formed part of the payment claim dated 6 June 2014.

NOTICE DISPUTING PAYMENT CLAIM AND DATE OF PAYMENT DISPUTE

- 39) On 20 June 2014 the respondent sent a letter to the applicant's solicitor, presumably sent on that date by email, because it states it was being sent by post and by email. I provided extensive reasons for disputing the payment claim and I find that it complied with the notice of dispute provisions required by s. 6 of Division 5 of the Schedule to the Act, which I find in paragraph 31 was in the circumstances of this Contract one of the implied terms of the contract.

APPLICATION FOR ADJUDICATION

- 40) Section 28(1) of the Act entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.
- 41) I am satisfied that the payment dispute occurred on 4 July 2014.
- 42) The applicant applied for adjudication of the payment dispute on 3 October 2014, which is within the time permitted by and in accordance with section 28(1) of the Act. Specifically:
- a) the application is in writing as required by section 28(1)(a) and 28(2) of the Act;
 - b) the application was served on the respondent on 2 October 2014 by

facsimile transmission, pursuant to s. 25 of the *Interpretation Act*, NT and s. 28(1)(b) of the Act; and

c) the application was served on the Prescribed Appointor on 3 October 2014 pursuant to section 28(1)(c)(iii) of the Act.

43) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the Act.

ADJUDICATION RESPONSE

44) Pursuant to section 29(1) of the Act, the respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the applicant.

45) The respondent served its adjudication response on 16 October 2014.

46) I am satisfied, therefore, that the respondent served its response within the timeframes prescribed in the Act.

REQUESTS FOR FURTHER SUBMISSIONS AND FINDINGS IN RELATION TO SAME

First request

47) On 19 October 2014 I sent an email to the solicitor for the applicant and the respondent's contact, [REDACTED], which, amongst other things, requested the following further submissions pursuant to s. 34(2) of the Act:

"I agree that because the response raises an important jurisdictional question, in order to afford the parties procedural fairness, I should seek further submissions from [sic from] both parties pursuant to s. 34(2) of the Act. I therefore request further submissions from both parties concerning whether I should treat the payment claim as a repeat claim and therefore as an invalid payment claim under the Act. I request that these further submissions be delivered to me by 5:00 pm on Tuesday 21 October next."

48) Both parties provided their further submissions in the time requested by me.

49) The respondent's submissions on that topic were as follows:

a) The respondent cited the first instance decisions of *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34 and *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14.

b) In those decisions earlier invoices were rendered and a later payment claim was rendered and held invalid as a repeat claim, because to allow a repeat claim amounts to an attempt by a claimant to re-set the 90 day deadline for applying for adjudication in s. 28 of the Act.

- c) The same situation applies in this matter and, therefore, the payment claim dated 3 June 2014, was a repeat claim, was invalid and I should dismiss the application without deciding the claim on its merits.

- 50) The applicant made submissions on the following topics:
 - a) whether the payment claim does not strictly comply with the requirements of the Act;
 - b) whether the payment claim contains amounts which are not amounts under the contract; and
 - c) whether the payment claim is a repeat claim and therefore invalid.
- 51) The applicant's further submissions concerning the topics in paragraphs 50(a) and (b) were not the submissions I requested in my email sent on 19 October 2014.
- 52) The applicant's submissions concerning whether the payment claim was a repeat payment claim and therefore invalid were as follows:
 - a) the invoices rendered by the applicant before the payment claim dated 6 June 2014 did not strictly comply with the implied payment claim provisions in cl. 5 of the Schedule Division 4 of the Act, and in particular cl. 5(1)(h), because it was not signed, and therefore were not valid payment claims.
 - b) Reliance was made on the NT Supreme Court of appeal decisions in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 and *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1, which provided that, when an adjudicator is considering whether a payment claim is valid, he or she must firstly determine whether it complies with the terms of the contract and, where those terms are mandatory, whether it strictly complied with those terms.
 - c) As the earlier invoices were not valid payment claims the payment claim dated 3 June 2014, which did strictly comply with those terms, was not a repeat claim and was therefore a valid payment claim.
- 53) I find that:
 - a) the 1st instance decisions cited by the respondent in relation to repeat claims were over-ruled by the court of appeal decisions for those cases cited by the applicant;
 - b) invoice Nos. 00000167, 00000181 and 00000191 did not comply with the mandatory requirements of s.5(1)(h), because they were not signed and, therefore they were not valid payment claims under the terms of the Contract; and

- c) the payment claim dated 6 June 2014 was not a repeat claim even though it claimed the balance owing under those invoices; but
- d) as stated in paragraphs 65(d) below I find that certain components of the payment claim dated 6 June 2014 did not contain sufficient details of some of the claims made and in paragraph 86 I find that no monies were owing in respect of other components of the claims made in the payment claim dated 6 June 2014.

Second request

- 54) On 21 October 2014 I sent the following email to the parties:

“Having now read the response in more detail I consider I need to seek further submissions as detailed below.

The respondent’s defect rectification set-off, retention money and defects liability period claims.

In paragraph 67 of the response submissions the respondent has submitted that in pre-contractual discussions between [REDACTED], presumably for the respondent, and [REDACTED], for the applicant, it was orally agreed that the respondent would be entitled to deduct up to 5% of the contract sum as retention monies, and that it would be held for the duration of a 12 month defect liability period.

The respondent’s defect rectification set-off claim appears to total \$10,338.20 inclusive of GST, the manner of calculating same for the first time appearing in the response.

*The applicant would not have been able to make submissions about the set-off claims in the application submissions, because, even though there was correspondence between the parties regarding possible defect rectification set-offs, requests for allegedly defective works to be inspected by the applicant and rectified by it and for the retention of some of the monies claimed by the applicant, the applicant could not have known which of such defective works rectification costs claims would be maintained by the respondent in its adjudication response or how it would calculate them. I therefore request that the applicant also provide further submissions to me by email (copied to the respondent) **by 5:00 pm on Wednesday 22 October 2014** dealing with -*

1. *any pre-contractual oral discussions between the parties’ representatives concerning retention monies and a defects liability period; and*
2. *the applicant’s answer generally to each set-off item, both regarding liability and amount claimed.*

In the same general area, whilst it should be understood that I have not as yet formed a view in this regard, on the assumption that I find there were no pre-contractual discussions between the parties’ representatives concerning retention monies and a defects liability

period, I seek submissions from both parties regarding whether the respondent has any contractual right to claim a set-off for defective workmanship rectification costs? I request that both parties provide these submissions to me by email (and copied to each other) by 5:00 pm on Wednesday 15 October 2014.”

- 55) The parties provided these further submissions within the time requested.
- 56) The respondent submitted that:
- a) in note 11 of Drawing no. B13 – 3640 (H005 of 5), which formed part of the Contract, it states – “THIS CONTRACTOR SHALL BE RESPONSIBLE FOR THE FOLLOWINGPROVIDING 12 MONTHS WARRANTY AND MAINTENANCE PERIOD” so this evidences that there was an express term to the effect that there would be a 12 months defects liability period;
 - b) given that that was the case, one can imply that there was a term entitling the respondent to withhold retention monies and the applicant was well aware that that was the case and consented to it, evidenced by an email sent on 29 May 2014 (see tab 51 provided with this further submission);
 - c) the details of the set-off claims are given in the response; and
 - d) it is an industry standard in any construction contract that a party may withhold payment from a contractor for the estimated costs of defects when the contractor’s works are defective; and
 - e) when valuing works by a contractor one must have regard to whether they were defectively performed.
- 57) The applicant submitted there were no pre-contractual discussions or agreement in relation to retention monies or a defects liability period and also made submissions concerning the alleged set-off claims for the cost of rectifying the alleged outstanding defective works by the applicant. I will refer to those submissions again later in this determination.
- 58) I find that:
- a) there was an express term of the Contract that there be a defects liability period due to the drawing note cited by the respondent;
 - b) on the balance of probabilities there was no pre-contractual discussions for the withholding of retention monies and the email cited by the respondent above does not effectively evidence such an agreement, because it post dated the date of entering into the contract and only possibly indicates that the applicant did not oppose such retention monies being retained at that time or soon after, because he considered he lacked the power to force those monies to be paid to him or was unaware, without having had the benefit of receipt of legal advice at that time, the respondent did not have

the contractual right to retain retention monies;

- c) the assertion of an industry practice for withholding money for the expected cost of rectifying defective works does not prove the practice, more expert evidence being needed for such a finding; but
- d) whilst I agree that, when valuing works, regard should be had as to whether there is a right to claim a set-off for the cost of rectifying defective works, without an express contractual term entitling a builder to retain such monies, it would have no right to do so and would be left to enforcing its right to claim the cost of rectifying defective works in a claim for damages in court proceedings, in a payment claim of its own, possibly followed by an adjudication of any dispute about such payment claim or as a set-off, as the respondent has done in this adjudication.

Third request

- 59) On 22 October 2014 I sent the following email to the applicant's lawyer and to the Respondent's [REDACTED]:

[REDACTED] further submissions attached to the email below dealt with some matters which were additional to my request for further submissions, which were limited to submissions regarding whether the payment claim should be treated as a repeat claim, and, if so, whether it cannot be treated as a valid payment claim under the Act. The additional matters related to:

1. *whether the payment claim did not strictly comply with the provisions of the Act; and*
2. *whether the payment claim contained amounts which are not amounts under the contract.*

*Whilst I would normally ignore submissions going to matters in addition to those requested by me, in this case I do not consider it appropriate for me to ignore these additional submissions, because, arguably, both of those additional matters may be relevant to whether I have jurisdiction to determine the claim on its merits. In those circumstances, I consider I should take the applicant's submissions into account, but, in order to afford the respondent procedural fairness, I request that the respondent provide any further submissions in reply it may want to make in relation to the matters listed a paragraphs 1 and 2 above and I request that such further submissions be delivered to me by email **by midday on Thursday 23 October 2014**. I note however, as the respondent has already made submissions about these matters in its response, it need not make any further submissions on these matters if it does not wish to do so."*

- 60) On 22 October 2014 I received the following email from the Respondent's [REDACTED]:

"We refer to your recent emails seeking further submissions regarding whether

the respondent has a contractual right to claim a set-off for costs of rectification of defective works by 5pm today, 22 October 2014. You have also requested further submissions relating to the issue of jurisdiction to determine the matter.

It is our position that the authorities are clear and unequivocal, and where the claim made by the applicant is for an amount of \$13,542, the issue of jurisdiction should be determined first.

If it is found that there is no jurisdiction for you to determine the purported application, then the parties will not have incurred unnecessary expense in preparing submissions regarding the respondent's entitlements to set-off for rectification costs.

We would be grateful if you could confirm that the issue of jurisdiction will be determined before the parties are required to provide submissions regarding our entitlement to set-off for rectification costs."

- 61) On the same day I responded to that email (and copied the applicant's lawyer in on my email), as follows:

"An adjudication determination is not conducted in a piecemeal fashion. I therefore request that you provide the further submissions I have requested by the time requested. If you require more time to do so please let me know and I will consider allowing further time."

- 62) The respondent provided further submissions in answer to my request for further submissions in paragraph 59 within the time requested. The applicant did not provide any further submissions in that regard.
- 63) The applicant's submissions on whether the payment claim strictly complied with the provisions of the Act were:
- a) that, as the payment claim was a final payment claim, it should be read as being a composite claim comprising all its elements (covering letter, associated scope drawings and tax invoice), which, as required by cl. 5(1)(f) of the Schedule, Division 4 of the Act, described the claim in sufficient detail for the respondent or a competent contract administrator to assess the claim; and
 - b) that it should be taken to have done so, because the respondent was able to assess it and make part payment of it.
- 64) The respondent's submissions on whether the payment claim strictly complied with the provisions of the Act were that the verbiage of the claims made in the payment claim did not comply with s. 5(1)(f) and 5(2)(a) to (c) of Division 4 of the Schedule to the Act because:
- a) the references to previous invoices which the applicant says did not strictly comply with the requirements of the Act by stating they were 'outstanding' is frivolous and vexatious; and

- b) the details in the applicant's quotations indicate that the claims could have been described in more detail than what was stated in the payment claim dated 6 June 2014.

65) I make the following findings in relation to the question of whether payment claim strictly complied with the provisions of the Act:

- a) I find that the first item in the payment claim "withheld payment on invoice 167" provided sufficient detail for the respondent to assess it because obviously relates to retention monies withheld by the respondent when part paying invoice 167.

- b) I find that the second item in the payment claim "outstanding invoice 181" is sufficient for the respondent to assess this aspect of the claim, because:

- i) there is no dispute that the respondent received invoice 181 and the works claimed for in same i.e. "...progress payment 2 as per quote rough in stage complete"; and
- ii) the claim in the payment claim claiming the amount unpaid in respect of invoice 181,

this item in the payment claim dated 6 June 2014 provided sufficient detail for the respondent to assess;

- c) I find that the third item in the payment claim "outstanding invoice 191" is sufficient for the respondent to assess this aspect of the claim, because:

- i) there is no dispute that the respondent received invoice 181 and the works claimed for in same (including variations); and
- ii) the claim in the payment claim claiming the amount unpaid in respect of invoice 191,

this item in the payment claim dated 6 June 2014 provided sufficient details to enable the respondent to assess the claim;

- d) I find that the fourth item in the payment claim "Additional cost to recover payments, admin time, phone calls, travel do not provide sufficient detail to enable the respondent to assess the claim, even though the amount claimed of \$1,430 was probably a reasonable amount to claim for such costs.

66) However, despite such findings I refer to my further findings in relation to each item in the payment claim in paragraphs 69, 76, 77 and 85.

67) The applicant's submissions on whether the payment claim contained amounts which are not amounts under the contract were that:

- a) the payment claim cannot be invalidated by any one part being disputed as

not being an amount under the contract and the remaining parts of a claim, if correctly disputed on that basis and any other parts are properly claimable under the contract, the payment claim is not invalid;

- b) the failure by the respondent to make payment in the prescribed time caused the applicant additional costs to get payment; and
- c) such additional costs were associated and incidental to the contract and therefore form part of the contract.

68) The respondent's submissions regarding whether the payment claim contained amounts which are not amounts under the contract were that:

- a) the applicant's claims for admin time, phone calls and travel in item 4 of the payment claim dated 6 June 2014 do not describe the obligations of the contract performed in sufficient detail for comply with s. 5(1)(f) in Division 4, of Schedule to the Act for the respondent to assess; and
- b) it does not comply with s. 5(2) in Division 4, of Schedule to the Act because it does not state what proportion of the contract sum to which it relates;
- c) the applicant's contention that a single disputed amount in a payment claim does not make the rest of the payment claim due and owing under s. 6(2) of in Division 5, of Schedule to the Act, because the respondent has disputed all the components of the payment claim.

69) I find that the claims for the time spent by the applicant's personnel trying to obtain payment were not claims arising from the applicant's performance of its contractual obligations, because, in simple terms, the only obligations to be performed by the applicant under the contract was to perform plumbing works for a lump sum as quoted. Activities and costs incurred by the applicant to enforce the respondent's obligations to pay monies it owed to the applicant under the contract do not form part of a contract unless there are clear and express terms to that effect, which was not the case here.

70) In any event, I also find that attempting to claim such costs, which would have been referable to attempts to enforce the payment of invoices, which were not valid payment claims under the contract, are not maintainable.

71) I also find, even though these parts of the payment claim were not properly claimed, that does not make the whole payment claim invalid.

Fourth request

72) On 28 October 2014 I sent the following email to [REDACTED]

[REDACTED]:

"I am currently considering making a finding that no monies are owing by the respondent on the payment claim dated 6 June 2014 for the following reasons:

1. *The 4 entries in the payment claim are as follows:*

<i>(a) withheld payment on invoice 167</i>	<i>\$3,859.00, incl of GST</i>
<i>(b) outstanding invoice 181</i>	<i>\$16,000.00. Incl of GST</i>
<i>(c) outstanding invoice 191</i>	<i>\$22,253.00. Incl of GST</i>
<i>(d) Additional cost to recover payments, admin time, phone calls, travel</i>	<i>\$1,430.00. Incl GST</i>

2. *If I find the respondent had no contractual right to retain retention monies until the expiration of the defects liability period, the first entry would be payable, because it relates to the withholding of retention monies.*

3. *I am struggling to see how the 2nd and 3rd entries can be claimable, because, soon prior to the payment claim dated 6 June 2014 being rendered, the applicant gave full credits to the respondent for the amounts rendered in invoices 181 and 191. So it could not be said that \$16,000 and \$22,253 was respectively owing on those two invoices when the payment claim dated 6 June 2014 was rendered.*

4. *In relation to the 4th entry, I also fail to see how costs incurred by the applicant to attempt to obtain payment from the respondent for its invoices is something the applicant can claim under the contract, because there was no express term of the contract entitling it to do so. Although, even if I find that that amount is payable, it would not result in any monies being owing by the respondent in relation to the payment claim dated 6 June 2014, because of what I say in the next numbered paragraph.*

5. *If the 2nd and 3rd entries are not properly claimable in the manner they have been claimed, there would currently be no monies owing by the respondent in relation to the payment claim, because its payment of \$30,000 on 11 August 2014 would be an overpayment of \$26,141 (\$30,000 - \$3,859).*

As I do not think either party has made any submissions concerning the above analysis of the payment claim, I request that you provide me with further submissions concerning the above possible findings and that they be provided to me by 5:00 pm today, 28 October 2014."

- 73) The parties provided these further submissions within the time requested.

- 74) The respondent's further submissions:
 - a) simply agreed with my above analysis of the payment claim;
 - b) asked whether, if I determine that the respondent has overpaid the applicant on account, whether my "determination would reflect same";
 - c) assumed that I would still need to form an opinion on the respondent's counterclaims.

- 75) The applicant's further submissions were as follows:

- a) My above analysis overlooks the evidence provided by the applicant in its application and the respondent in its response and could not, in any event, be a correct interpretation of the liability due and owing under the Contract.
- b) The payment claim was a final payment claim and that hold significant obligations and entitlements between the parties, from which the liability or credit will be shown between the parties and the Scott schedule, provided by the applicant at Tab 2 of the application, summarised that liability.
- c) The respondent acknowledged the Final Payment claim on 20 June 2014 and set out its position in its Payment Schedule 3 as being \$76,842.70 incl of GST, including variations agreed between the parties, of which the respondent paid \$64,731.00 and that shows that an overpayment has not been made.
- d) The payment claim set out in invoices 181 and 191 were not payment claims made strictly in accordance with the implied provisions of the Act, that is the terms of the construction contract between the parties, and, as such, may not be pled as a payment dispute under the Act.
- e) The Applicant credited those invoices, as is normally done in a construction contract within the construction industry so as to remove the liability, strictly on an accountancy basis, from the Respondent.
- f) The Applicant then made its **Final Payment Claim** under the implied provisions of the Act for the making of a payment claim, which included a covering letter and signed Invoice 268. The claim was a Final Payment Claim made in the construction contract and means that it is for **all** the obligations carried out under the construction contract between the parties and for those total monies due and outstanding in the construction contract at the time of making the Final Payment Claim.
- g) There can be no consideration of Invoices 181 and 191 as the liability for the Respondent both under the construction contract and the payment dispute under the Act now arises in Invoice 268 of 6 June 2014.
- h) This is not an uncommon process in the construction industry.
- i) The Respondent acknowledged and part paid the Final Payment Claim on 11 August 2014, citing payment of \$30,000.00 to Tax Invoice 268.
- j) The Adjudicator cannot now unwind the part payment of a legitimately made, acknowledged and part paid payment claim on the basis of the line entries on the invoice. The line entries on the invoice were clearly understood by the parties, they were for the overall works carried out in the construction contract and the monies outstanding.

- k) Practical Completion was long past completed, the industry defects and liability warranty was exercised by the Respondent and defects counterclaims were attempted to be levied against sums outstanding in the construction contract.
- l) The line entries referencing Invoices 181 and 191 were for sums outstanding in the construction *as a whole* and were invoiced as tax Invoice 268 on 6 June 2014 as a Final Payment Claim in the construction contract between the parties.
- m) The implied provisions of the Schedule, Division 4 s. 5(2) and 5(3) of the Act provide for an aggregate claim made in a construction contract for the contract sum and total obligations.
- n) The Applicant made its Final Payment Claim in the construction contract between the parties for the contract sum owing, minus payment already made.
- o) The Respondent clearly understood the claim the Applicant made and the obligations it had performed. This much is clear from the Applicant's quotations to the Respondent and the variations agreed to the scope of work under the contract.
- p) The issue in this construction contract is that there is no and there never has been a scoping document that could be used to identify each portion of the work as it was invoiced. The only mechanism available in the construction contract was a total sum minus payment made mechanism on an accountancy basis.
- q) The Applicant followed this process to the best of its ability and cannot now be penalised for so doing.
- r) The Applicant has made its claim strictly in accordance with the terms implied into the construction contract by the Act and has done so for the total liability of the contract sum for the obligations it has performed.
- s) The Applicant quoted the work and it billed the work and an overpayment could not be said to exist when reviewing the contract as a whole construction contract.
- t) To attempt to unwind the claim on a narrow interpretation specific to line entry on an invoice, when the overall liability clearly exists in the construction contract when read down as a whole construction contract, would defeat the objects of s. 3 and s. 26 the Act.
- u) The legislation has been introduced into the construction industry so that a party to a construction contract may reasonably expect timely payment of its claim or the rapid resolution of a payment dispute that may arise in that claim.

- v) It is not the object of the Act to defeat the claim by narrow interpretation but rather to provide a fair and balanced outcome of the dispute arising in the claim.
 - w) The Applicant submits that its Final Payment Claim has been correctly made for the obligations it has performed in the construction contract and the liability due and owing to the Applicant from the Respondent should be **\$13,542.00** including GST, as set out in the Scott Schedule in Tab 2 of the Application.
- 76) As I have found in paragraph 58 that the respondent had no contractual right to retain retention monies until the expiration of the defects liability period, I find that the entry in the payment claim dated 6 June 2014 “withheld payment on invoice 167” in the sum of \$3,859.0, inclusive of GST is payable by the respondent, because it relates to the withholding of retention monies.
- 77) In relation to the entry in the payment claim dated 6 June 2014 “Additional cost to recover payments, admin time, phone calls, travel”, as I have found in paragraph 65(d) that costs of that nature are not contractually claimable pursuant to the terms of the Contract, I find that none of the amount claim for such costs (being for \$1,430.00, inclusive of GST) are payable by the respondent.
- 78) Unfortunately, I cannot agree with the applicant’s further submissions in relation to the claims made in the payment claim dated 6 June 2014 referable to invoice nos. 181 and 191. Clearly the contents of a payment claim, whether it be an interim payment claim or a final payment claim, is of great significance in the context of both construction contracts generally and in relation to the system of adjudication of payment claims under the Act. A clear example of this is the term that was implied as a term of this Contract pursuant to s. 19 of the Act dealing with how a party must make a claim to the other party for payment and I have already found that cl. 5 in Division 4 of the Schedule to the Act (expressed in mandatory terms) was implied as a term of this Contract.
- 79) I have already found that the failure by the applicant to render invoices 167, 181 and 191 in accordance with those mandatory terms meant that they all failed to comply with the terms of the Contract and were invalid payment claims.
- 80) That failure afforded the applicant what, would normally be expected to be, the unexpected opportunity, to attempt to render a valid payment claim, which included claims for the works the subject of those previous invoices, together with any other claims it considered it was then entitled to make under the Contract.
- 81) The payment claim dated 6 June 2014 was the applicant’s attempt to render a valid payment claim in accordance with the requirements of that clause.
- 82) Obviously, the description of the claims made in the payment claim are the foundation for the claims made in it.

- 83) I do not agree with the applicant that I can effectively disregard the meaning of the claim “line entries” by coming to some sort of nebulous understanding of the parties’ intentions pursuant to all the evidence provided by the parties in the adjudication documents relative to the Contract history or that I should do so in order to achieve the basic purpose of the Act to provide an quick, cost-effective and informal procedure for contractors to enforce payment of payment claims in the construction industry.
- 84) Nor can I agree with the applicant that the part payment made by the respondent coupled with the Respondent’s 3rd payment schedule evidences the respondent’s agreement that the claims made in the payment claim dated 6 June 2014 was to that extent accepted by the respondent, because the respondent has said that the payment it made and the method of arriving at same was a payment on account, and I find that that was the case.
- 85) I therefore find that:
- a) the entries in the payment claim dated 6 June 2014 “outstanding invoice 181” and “outstanding invoice 191” were claims for monies purportedly owing by the respondent in respect of those invoices rather than being a claim for the works claimed to have been performed in those invoices;
 - b) as the applicant issued full credits amounts rendered in invoice numbers 181 and 191, prior to rendering its final payment claim dated 6 June 2014, as at 6 June 2014, there were no monies owing by the respondent to the applicant in relation to those two invoices by virtue of the claims made relative to them in the payment claim dated 6 June 2014.
- 86) Accordingly, I also find that:
- a) no monies are owing by the respondent to the applicant in respect of these parts of the payment claim; and
 - b) the payment by the respondent to the applicant of \$30,000 on 11 August 2014 was an overpayment of \$26,141 (\$30,000 - \$3,859).
- 87) However, my finding in relation to such overpayment cannot result in me making an order that the applicant should pay the overpaid monies to the respondent, because my task in this adjudication is to assess and value the payment claim dated 6 June 2014 and consider whether the respondent’s claim for a set-off for the alleged costs of rectifying allegedly defective works by the applicant can be substantiated and, if so, in what amount, which amount would then be set-off against any amount I find is otherwise payable in respect of the payment claim.

JURISDICTION

- 88) The parties entered into a contract to carry out plumbing works relating to the Project (Contract) at [REDACTED] in the Northern Territory

on or about 30 June 2013³.

- 89) It was partly oral and partly in writing.
- 90) The Contract was entered into after the commencement of section 9 of the Act.
- 91) The work carried out under the Contract is '*construction work*' as defined in section 6(1) of the Act, because it involved constructing part of a building on land in the Northern Territory.
- 92) Accordingly, the Contract is a construction contract as defined in section 5(1) of the Act and the Act applies to payment disputes arising under the Contract.
- 93) S. 19 of the Act applied so as to imply terms into the contract dealing with making payment claims.
- 94) Pursuant to section 9 of the Act, the applicant claimed an amount in a '*payment claim*' dated 6 June 2014 under the Contract.
- 95) S. 20 of the Act applied so as to imply terms into the contract dealing with responding to payment claims and, therefore, payment claims were due to be paid within 28 days after the date of delivery of the payment claims to the respondent.
- 96) The payment claim dated 6 June 2014 was served on the respondent 6 June 2014.
- 97) The payment claim was due for payment on 4 July 2014. The amount claimed in the payment claim was not paid in full and, accordingly, a payment dispute arose on 4 July 2014 for the purposes of the Act.
- 98) Pursuant to section 27 of the Act, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.
- 99) The applicant submitted an application for adjudication on 3 October 2014 in accordance with the Act. The respondent submitted its response on 16 October 2014 in accordance with the Act.
- 100) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or other person or court or other body dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the Act.
- 101) Given that I have found against various additional jurisdictional challenges made by the respondent (see my findings in above section headed requests for further submissions and findings in relation to same), I am, therefore, satisfied that I have jurisdiction to determine the adjudication application pursuant to the Act.

³ para 2.2 of the application submissions

MY FINDINGS IN RESPECT OF AMOUNTS PAYABLE IN PAYMENT CLAIM

- 102) I find that the only amount claimed in the payment claim which was properly claimable was the claim for \$3,859.00, inclusive of GST for the withheld payment on invoice 167, because it was withheld by the respondent as retention monies and the respondent had no right under the Contract to retain retention monies, but because the respondent made a payment to the applicant of \$30,000 on 11 August 2014 the respondent had effectively overpaid the applicant in respect of the claims made in the payment claim dated 6 June 2014 by \$26,141 (i.e. \$30,000 - \$3,859) and there is therefore no monies, which I need to determine as being payable by the respondent to the applicant under this adjudication claim.
- 103) I therefore find that amount that is payable by the respondent to the applicant in respect of the payment claim dated 6 June 2014 is **\$NIL**.

RESPONDENT'S SET-OFF CLAIMS FOR DEFECTS

- 104) Given that I have assessed the amount payable under the payment claim dated 6 June 2014 is \$NIL there is no need for me to assess the respondent's set-off claims for the alleged cost of rectifying allegedly defective works performed by the applicant.

COSTS

- 105) I do not consider that either party incurred costs of the adjudication, because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the other party and I am therefore not willing to depart from the normal position in relation to the allocation of costs between the parties under s. 36(1).

INTEREST

- 106) As I have found that no monies are payable to the applicant the question of interest does not apply.

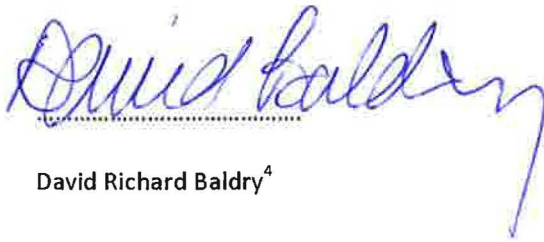
THE DETAILS OF THE DETERMINATION

- 107) Pursuant to s 34(1)(a) of the Act, I have made this determination on the basis of the application and its attachments, the response and its attachments and the further submissions by the parties requested by me.
- 108) Pursuant to s 33(1)(b), I have determined that the respondent must pay the applicant \$NIL
- 109) Pursuant to section 36(1) of the Act, each party shall bear its own costs in relation to this adjudication.
- 110) Pursuant to section 46(5) of the Act, both parties shall share the costs of the adjudication equally.

CONFIDENTIAL INFORMATION

- 111) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.
- 112) In any event, pursuant to s. 38(1)(e) of the Act I consider that the following information, because of its confidential nature, is not suitable for publication by the Registrar under s. 54 of the Act:
- a) the identity of the parties; and
 - b) the identity and location of the project.

Signed:



David Richard Baldry⁴

Date: 29 October 2014

⁴ Registered Adjudicator Number 39