CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

DETERMINATION 07.09.01

Adjudicator: **DS ELLIS**

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Applicant:

Respondent:

Date of Adjudication Claim: 19 February 2009

In respect of the applicants' adjudication claim dated 19 February 2009, I determine that the amount to be paid by the respondent to the applicant is "nil".

The reasons for my determination are annexed as Schedule 1.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2.

Date:

_____

Registered Adjudicator

Schedule 1: Reasons for Determination

("applicant") and ("respondent")

Introduction

1 This adjudication arises out of a contract pursuant to which the applicant agreed with the respondent to install [*omitted*].

2 The applicant claims that substantial problems arose from changes to the [*scope of the works*] and from difficulties with access necessary to carry out the work. The applicant seeks payment of $3,240,023, plus interests at 9%.

Procedural background

3 The application was dated 19 February 2009 and comprised a "Subcontractor's notice of dispute", to which was attached a "consolidated payment claim" ("Consolidated Claim"). The consolidated payment claim itself had 6 appendices. The appendices include:

(a) tax invoice no 1183 dated 28 November 2008 ("tax invoice")for the sum of $4,153,843.90 (excluding GST), which is identified in the notice of dispute as the payment claim giving rise to the payment dispute the subject of this application;

(b) a document entitled "claim for additional payment regarding project delays and associated costs" ("First Claim");

(c) a document entitled "claim for additional payment regarding project delays and associated costs, second claim 20 September to 26 October 2008" ("Second Claim"); and

(d) copies of documents apparently relating to the contract between the parties including:

(i) letter dated 23 July 2008 from the respondent to the applicant;

(ii) unsigned "Incorporated Contractor's Agreement" dated 26 July 2008 between the respondent and the contractor ("ICA");

(iii) an unsigned and undated document entitled "Project Contract for Construction Only Construction of [*project*] Package No 200002350" ("Project Contract"). Although the contract

contemplates that it will be entered into between [*omitted*] ("*XX*") and another party, that party is not identified in the copy provided to me;

(iv) document entitled "standard terms for construction only" ("Standard Terms"), which appears to have been prepared by XX; and

(v) a further document entitled "NFN Design Report CP20001980/SP10011340 SP10009987 [*project*]".

4 The First Claim was delivered to the respondent on or about 10 October 2008 and the Second Claim on or about 20 November 2008. Both these documents were provided to the respondent on 2 December 2008 with the tax invoice.

5 On 11 December 2008 a payment of $799,068.08 was made by the respondent. The present application is for the amount identified in the tax invoice, less this payment.

6 The respondent was served with the application on 23 February 2009.

7 I was appointed as adjudicator by the Institute of Arbitrators and Mediators Australia by letter dated 26 February 2009. I notified the parties that I had been appointed by letter dated 27 February 2009.

8 I received a response from the respondent on 6 March 2009.

The contract

9 The parties agree that they entered into a contract in the terms of the ICA.

10 The parties also agreed that the Project Contract and the Standard Terms were prepared in connection with the contract between [*the Respondent*] and XX for the performance of the works. Schedule 1 to the ICA contains a table of 20 items: Item 1 is as follows:

Item	Clause	Details
1	Commencement date (clause 1.1)	The date of execution of the Project Contract, as specified on the signing page

The form of this item is typical of the other 20. The clause number referred to under the heading "clause" appears to reflect the relevant clause of the Standard Terms, rather than the clauses of the ICA because the clauses of the ICA are not numbered. The references to clause numbers in other items appear to also reflect clauses in the Standard Terms. Schedule 2 of the ICA refers to "Schedule 10". This appears to be a reference to Schedule 10 to the Project Contract, which suggests that at least Schedule 10 of the Project Contract was intended to have contractual effect.

11 There was a dispute between the parties whether a letter dated 23 July 2008 from the respondent to the claimant formed part of the contract. The letter notified the claimant that the respondent had been awarded the contract for the works. It appears that this letter enclosed a contract because the letter required the claimant to "confirm receipt of the letter and acceptance of the accompanying contract." This leads me to conclude that it was the accompanying contract which was intended to have contractual effect, rather than the letter itself.

12 The applicant also contended that a spreadsheet entitled "Option C" was used to calculate the final subcontract price and formed part of the contract. The respondent denied that it formed part of the contract. Although any price arrived at is a term of the contract, the material provided to me provided no basis for concluding that the spreadsheet formed part of the contract.

13 An issue between the parties was the extent to which the terms of the Project Contract and the Standard Terms actually operated as part of the contract between the parties. The applicant contended that the Project Contract and the Standard Terms were part of the contract but the terms of the ICA took precedence over the terms of the Project Contract and the Standard Terms, to the extent of any inconsistency. The respondent did not appear to dispute this approach in principle, although the respondent differed as to the existence and extent of the inconsistency in particular circumstances.

14 It is plain from the reference in the ICA to the other documentation, and the parties agreed, that the Project Contract and the Standard Terms had some contractual effect. I do not consider that it is helpful to apply the notions of "priority" or "precedence" since the parties did not take the trouble to specify

an order of precedence for the documents or expressly deal with their status. I consider that the better approach is to examine the operation of each of the documents in respect of particular obligations on a clause by clause basis, having regard to the fact that the ICA was the document which was directed to the specific relationship between the parties.

Jurisdiction

Summary

15 The first matter for consideration is whether I am obliged to dismiss the application under s 33(1)(a) of the Act. For the reasons which appear below, I consider that I do not have jurisdiction in respect of so much of the applicant's claim as is a claim for damages and I am obliged to dismiss that part of the application. I consider that I have jurisdiction in respect of so much of the application as is a claim for compensation under the contract. My reasons are set out below.

Consolidated claim

16 The respondent argued that I did not have jurisdiction to determine the matter because the Consolidated Claim which accompanied the application was not a document which had been previously provided to the respondent as part of the claim said to give rise to the payment dispute. Section 28(2) of the Act states that the claim must "state the details of or have attached to it ... any payment claim that has given rise to the payment dispute". The applicant contends that the "payment claim" giving rise to the dispute comprises the tax invoice and the First and Second Claims, effectively accepting that the Consolidated Claim does not form part of the payment claim giving rise to the payment dispute. However, the documents with which I was provided include the all the documents which might comprise the payment claim, so s 28(2) of the Act has been satisfied[1].

[1] The respondent also argued that I should not take the Consolidated Claim into account. I disagree. The applicant is entitled to support the claim or claims made in the First and Second Claims by the provision of additional material or evidence. It is not confined to the material in the First and Second Claims and the tax invoice. It may, if it chooses, provide further documentation adding to the original claims or supporting them on somewhat different grounds. It may not, however, make a different claim under the guise of supporting the claims previously made. I consider that the Consolidated Claim does not depart from the First and Second Claims in an objectionable way.

Claims for damages

17 The respondent also argued that the claims made by the applicant were not "payment claims" within the meaning of that expression in section 4 of the Act because they were claims for damages. If this argument is correct, it would mean that no "payment dispute" arose in respect of the claims, and any application was not made within 90 days after the dispute arose, in accordance with section 28 of the Act and I would be obliged to dismiss the application under s 33(1)(ii) of the Act.

18 Section 4 of the Act defines "payment claim" to mean:

> "payment claim means a claim made under a construction contract –
>
> (a) by the contractor to the principal for payment of an amount owing in relation to the performance by the contractor of its obligations under the contract"

Section 6 of the Act provides that a "payment dispute" arises when a "payment claim" is disputed or is not paid by the time it is due for payment. It is apparent that the existence of a payment claim is necessary for a payment dispute to arise. It is only payment disputes which may be referred to adjudication.

19 The applicant contended that an adjudicator has power under the Act to "award damages ... for breach of contract".

20 Two questions arise:

(a) are claims for damages "payment claims" within the meaning of that expression in s 4 of the Act; and

(b) if the claims for damages are not "payment claims", to what extent are the applicant's claims properly categorised as claims for damages?

21 The meaning of the expression "payment claim" in section 4 has not, so far as I am aware, been considered by a court. In the context of arbitration clauses, an expression such as a "claim under a construction contract" would now be given a broad interpretation which would include claims for damages for breach of contract, claims for rectification of the contract and, quite possibly, claims based on statutory provision such as breaches of s 52 of the *Trade Practices Act 1974*, provided that those claims were sufficiently closely related to the contract

(see *Commandate Marine Shipping v Pan Australia Shipping* [2006] FCAFC 92, 157 FLR 45, *Fiona Trust & Holding Co v Privalov* [2006] EWHC 2583 (affirmed as *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40)). I do not consider that this interpretation is applicable to the Act. The purpose and scope of the Act is not to provide a "one stop shop" for the resolution of all disputes in relation to a construction contract[2]. Quite the contrary. The Act specifically contemplates final resolution of disputes about payment by mechanisms other than the informal and accelerated mechanisms established by the Act. Further, section 6 of the Act determines when a dispute arises. It does so by reference to when a payment claim "becomes due". Claims for damages for breach of contract do not "become due". I consider that the expression, "a claim under a construction contract" should be limited to claims to contractual entitlements based on the operation of contractual provisions, and not to claims for damages for breach of contract.

22 This interpretation of the scope of the definition of "payment claim" is consistent with the approach taken in respect of the security of payment legislation in the Eastern States[3]. In *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58 ("Hervey Bay"). At [32], McMurdo J said:

> In, for example, an arbitration to finally determine the rights and obligations under this contract, it would be open to the arbitrator to award a component for delay, if persuaded that extensions of time ought to have been granted. But according to the contract, and absent the benefit of such an outcome in an arbitration or other proceeding which finally determined the parties' rights, there would be no amount presently due for delay costs absent an extension of time. Apart from the Payments Act, there would be no accrued cause of action by which the Contractor could have sued for the delay costs as a debt then due. The determination of this Clause 36 point ultimately depends upon the scope of an adjudicator's powers, and in particular his power to "calculate" the amount of a progress payment. Consistently with the above authorities, an adjudicator is able to make his own calculations and is not bound by those of the Superintendent. If the Contractor has an entitlement to an extension of time, the grant of which would entitle it to delay costs, then the Contractor could be said to have an entitlement to a progress

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2 Cf *Fiona Trust* at [19].

3 I am mindful of the differences between the "Eastern States" legislation and the Act commented on by Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19.

> payment in an amount, according to s 13, "calculated" under the contract so as to give effect to that entitlement. This is an example of the way in which, as Basten JA explained in *John Holland v Roads and Traffic Authority*,[12]

23 This passage proceeds on the basis the Queensland *Building and Construction Industry Payments Act 2004* is concerned with due debts, not claims for damages and that a claim for damages for delay is not "due" within that legislation. It shows that an entitlement under a specific provision of a contract to a payment where there has been delay or an extension of time for the performance of the works is a claim under the contract which may due in accordance with the terms of the contract. It confirms the ability to an adjudicator to, in effect, make his or her own assessment of matters ordinarily the subject of certification by Superintendents and to proceed on the basis of that assessment.

24 Some contracts contain clauses which confer a contractual entitlement to a payment on the occurrence of events which might otherwise give a right to damages for breach of contract. Clause 36.10 of the Standard Terms is an example. The payment may be calculated having regard to matters which would ordinarily be taken into account in quantifying a claim for damages. In such cases, the entitlement is an entitlement under the contract. I will refer to such entitlements as an entitlement to "contractual compensation".

25 In section 4 of its submissions, the applicant broke down its claim for delay and disruption into three broad aspects:

(a) delay and disruption caused by difficulties accessing the site of the works;

(b) delay and disruption caused by variations to the work under contract; and

(c) delay and disruption caused by the unavailability of monitors and by actions of traditional owners of the land along the route.

For present purposes, delay and disruption caused by the monitors, indigenous people and anthropologists may be treated as a subcategory of access difficulties.

26 In section 4 of the submissions, the applicant put its claim for compensation in respect of delay and disruption on a variety of bases:

(a) it said at page 8 of the submissions:

> "All of [the delays identified in paragraph 24(a) to (c) above] ... constituted acts of prevention by [*the Respondent*] which prevented [*the Applicant*] carrying out its work under the ICA in an orderly and timely manner and constitute breaches of contract by [*the Respondent*], giving [*the Applicant*] an entitlement to damages as now detailed in the Consolidated Payment Claim".

(b) the applicant also appeared to argue that it was entitled to an extension of time either under the clause in the ICA headed "Time". It said, in section 2 of its submissions, that the respondent had breached its fundamental obligation under the contract to provide access to the applicant. The applicant also called in aid the obligation of a superintendent to grant an extension of time, even if the applicant had not made an application for an extension of time, relying on *Abigroup Contractors v Peninsula Balmain* [2002] NSWCA 211, *Abigroup Contractors v 620 Collins Street Pty* [2006] VSC 491 and *Hervey Bay*. It argued that an extension of time carried with it an entitlement to compensation (as well as an entitlement to damages).

(c) The applicant relied on clause 36.10 of the Standard Terms to found a right to compensation for delays and disruptions caused by ABB. The submissions were not entirely clear on this point, but I think this claim was in addition to the basis for the claim specified in the previous paragraph.

(d) In relation to the delays and disruptions flowing from the variations, the applicant contended that it was entitled to compensation under clause 38 of the Standard Terms.

(e) The applicant also contended that the respondent had breached section 52 of the *Trade Practices Act 1974* by the respondent's false

representations that it would be given timely and uninterrupted access to enable the work to be carried out.[4]

27 For the reasons given above, I consider that a claim for damages does not give rise to a payment claim which can become "due" so as to give rise to payment dispute, capable of resolution under the Act. Accordingly, I do not have jurisdiction to deal with the claim of the applicant, in so far as it is a claim for damages for breach of contract or for breach of the *Trade Practices Act 1974*.

28 The argument relying on *Abigroup Contractors v Peninsula Balmain* [2002] NSWCA 211, *Abigroup Contractors v 620 Collins Street Pty* [2006] VSC 491 and *Hervey Bay* is asserted to give a right to contractual compensation and is, therefore a matter within jurisdiction[5].

29 The applicant argued, in the alternative, that it could rely upon clause 36.10 of the Standard Terms. Clause 36.10 is an express contractual provision giving an entitlement to compensation under the contract. If the applicant is entitled to rely upon this provision, its claim is a claim for payment under the contract, which can be dealt with under the Act. A similar reasoning process applies to compensation in respect of the claim based on clause 38. The operation of clause 38 also gives rise to a contractual claim, which can be the subject of adjudication.

30 In brief, the claims based on the *Abigroup* and *Hervey Bay* cases, clause 36.10 and clause 38 may be dealt with under the Act. The balance of the claims may not.

Time for making the application

31 It is now necessary to consider whether the application has been made within time. The Act requires that the claim be made within 90 days after the payment dispute arose. The applicant identified the tax invoice as the claim and a date 14 days thereafter as the date on which the claim became payable. The respondent did not contend that this was incorrect. The application was made

[4] The legal grounds for the claims were formulated somewhat differently in part 5.3 of the Consolidated Claim. The submissions placed greater emphasis on the provisions of the ICA. I have endeavoured to summarise all the legal bases on which the claims were put forward.

[5] I note that, at this stage, it is not appropriate to consider whether the applicant can bring itself within the operation of clauses 36 and 38 of the Standard Terms, or indeed, whether those clauses apply at all. The question at the moment is the characterisation of the nature of the claims.

within 90 days after the submission of the tax invoice and within 90 days after the due date under the clause dealing with remuneration in the ICA.

32 The respondent did submit, in effect, that the application was premature because the respondent was waiting on further information relating to the applicant's claims, so that it had not rejected the applicant's claims and no dispute arose. While I accept, in principle, that parties can reach an understanding or agreement deferring consideration or rejection of a claim and the date on which the claim became payable, the dealings between the parties in this case are not such as to lead me to the conclusion that there was an understanding of that nature in this case.

Construction Contract

33 The contract is a construction contract within the meaning of that expression in the Act.

The merits of the applications – section 33(1)(b) of the Act

34 There remain three aspects of the application which require consideration on their merits. By that I mean, a consideration whether I should determine that under s 33(1)(b)(i) that any amount is to be paid to the applicant by the respondent. This involves looking at whether the claims made by the applicant are claims validly made under the contract between the parties and, if so, the quantum of the amount payable. The remaining claims made by the applicant are:

(a) the applicant is entitled to contractual compensation under calculated in accordance with the Time Clause and clause 36.10 of the Standard Terms;

(b) the applicant is entitled to an extension of time by virtue of *Abigroup Contractors v Peninsula Balmain* [2002] NSWCA 211, *Abigroup Contractors v 620 Collins Street Pty* [2006] VSC 491 and *Hervey Bay* and to compensation as a result; and

(c) the applicant is entitled to additional payment under the contract by virtue of variations to the work.

35 The first remaining claim involves all the delaying events and depends upon the combined operation of the Time Clause in the ICA and clause 36.10 of the Standard Terms. The Time Clause reads:

> "Time is of the essence of the Agreement for the obligations of the Contractor provided that the parties shall be entitled to an extension of time for performing any of its obligations under the Agreement if the party is delayed by any event beyond its reasonable control and provided further that the other party is notified by the delayed party within 7 days of the date the delayed party first became aware of the event causing the delay."

36 The Standard Terms contain a provision dealing with claims in respect of delay, clause 36. Salient features are:

(a) the entitlement to an extension of time is limited to "Qualifying Events" as defined in clause 1.1 of the Standard Terms. The definition of "Qualifying Events" is different from the language of the Time Clause;

(b) immediate notice of any event likely to delay the WUC must be given;

(c) within 14 days after the Qualifying Event, the contractor must give notice containing specified information (cl 36.3(a));

(d) The Superintendent must give a written direction evidencing the extension of time within 28 days after receiving the claim (cl 36.6);

(e) the Superintendent may issue a direction notwithstanding that a claim has not been made by the contractor (cl 36.6);

(f) where an extension of time has been granted, the contractor must submit a claim for delay damages within 7 days after the date of that determination (cl 36.10(a)). The contractor is only entitled to compensation if the claim is made within this time (cl 36.10(c));

(g) the Superintendent must assess as soon as reasonably practicable "the extra costs necessarily and reasonably incurred" (cl 36.10(d)); and

(h) the entitlement under clause 36.10 is expressed to be the contractor's sole entitlement to compensation for delay and disruption. It is expressed to be in substitution for any other rights the contractor may have.

37 The applicant argued that:

(a) cl 36.1 to 36.9 did not have any operation because of the presence of the Time Clause in the ICA; and

(b) because the Time Clause did not deal with the financial consequences of a delaying event, clause 36.10 continued to operate to enable the applicant to claim an entitlement to "delay damages" or contractual compensation under clause 36.10.

38 I agree with the applicant that there is inconsistency between the Time Clause and clause 36 of the Standard Terms. The events upon which the Time Clause operates are different from the circumstances in which a claim can be made under clause 36. Clause 36 applies only to the contractor. The Time Clause applies to both parties. The notice requirements are different. 7 days must be given under the Time Clause. Immediate notice, followed by a claim within 14 days, is required under clause 36 of the Standard Terms. The Time Clause does not involve a superintendent. A superintendent is central to the operation of clause 36. I accept that subclauses 36.1 to 36.9 cannot operate in the face of the provisions of the ICA. However, I do not accept the second part of this argument. In my opinion, cl 36.10 cannot operate effectively with the earlier parts of clause 36. The possibility of a claim for delay damages is conditioned upon the grant of an extension of time. It is not, in my opinion, permissible to rewrite clause 36 or the Time Clause so that the two can operate in tandem. Clause 36.10 stands or falls with the rest of clause 36 and, for the reasons I have given, the rest of clause 36 falls.

39 The entitlement of the applicant to an extension of time is determined having regard to the Time Clause only. Whether the applicant is entitled to an extension of time is a matter of fact. It would be open to me, if I concluded that the applicant was entitled to an extension of time because of events beyond its control, such inability to obtain access, to proceed on the basis that an extension of time was granted. However, the mere fact that the applicant is entitled to an extension of time does not, of itself, confer any entitlement to a contractual compensation under the contract. If the applicant was delayed in the progress of the works by a breach by the respondent of its obligations under the contract, the applicant would, in my opinion, have its ordinary contractual rights, ie a right to claim damages for breach of contract. If the delaying event was beyond

the control of the applicant but did not involve a breach of the contract by the respondent, any losses would lie where they fell[6]. Whether I regard this interpretation of the contract as a commercially desirable allocation of risk for the claimant and the respondent, it is not obviously completely unreasonable. The contract between the parties does not give a right to contractual compensation for delay in the progress of the works. No sum is payable by way of contractual compensation based on the operation of the Time Clause and Clause 36.10.

40 My understanding of the effect of the Time Clause also disposes of the applicant's argument based on *Abigroup Contractors v Peninsula Balmain* [2002] NSWCA 211, *Abigroup Contractors v 620 Collins Street Pty* [2006] VSC 491, *Hervey Bay* and the assertion that the respondent has committed acts of prevention. If the works have been delayed by breaches of contract by the respondent, for example, breaches of an obligation to provide access, it would not profit from them. It would be liable in damages (although that claim could not be dealt with in an adjudication). There is no basis for implying a right to contractual compensation.

41 I turn now to the claim based on variations to the works.

42 The ICA does not contain any provision dealing with variations. Variations are dealt with in clause 38 of the Standard Terms. It is reasonable to conclude that the parties would have intended that clause 38 would apply, with such changes as are necessary to take into account the fact that the parties did not have a superintendent. Clause 38 empowers the Superintendent to direct that the contractor undertake variations (cl 38.1(b)). The Superintendent may also give the contractor written notice of a proposed variation under clause 38.2(b). Where a notice is given under clause 38.2(b), the contractor must notify the Superintendent of the contractor's estimate of the effect on the program, if any, and the costs. The Superintendent may also request a detailed quotation. The Superintendent is required to price each variation as soon as possible in accordance with clause 38.4 of the Standard Terms. The price assessed by the

[6] Although the applicant would still be entitled to an extension of time.

Superintendent becomes part of the Order Contract Sum, that is, the amount payable under the contract.

43 Clause 38.6 provides:

> "The Contractor shall not be entitled to any payment (pursuant to the Project Contract or otherwise at common law or equity) in relation to any Variation unless the Contractor has been directed in writing to carry out the Variation and unless the Contractor has provided an estimate."

The respondent argued that the provision of an estimate was a condition precedent to the applicant's entitlement to a variation. In my opinion, the clause should be construed so that the provision of an estimate is a pre-condition only where a notice has been given under clause 38.2 and an estimate was required under paragraph (b). Where an estimate is not required under the clause, it is not a pre-condition.

44 The respondent argued that the applicant had failed to comply with the requirements for submission of claims under clause 36 of the Standard Terms. I consider that the clause of the ICA headed "Remuneration" ("Remuneration Clause") governs the submission of claims for remuneration under the contract. If the applicant complies with the requirements of that clause, a claim for remuneration has been validly made under the contract. I note that, at this stage, I am only considering the claim based on the variations. A variation results in a change in the Order Contract Sum which is appropriately claimed under the Remuneration Clause.

45 The respondent also argued that:

(a) the applicant failed to seek written directions from the respondent prior to carrying out the alleged variations;

(b) claims for variations are not a suitable mechanism by which compensation may be obtained for delays in the performance of unvaried work; and

(c) the applicant's claim was a "global" claim.

46 The difficulties which I have with this aspect of the claim are perhaps similar to those identified by the respondent, but I would express them differently.

47 In part 5.3 of the Consolidated Claim, the applicant puts forward a number of calculations of the amount claimed by it. The effect of these various

formulations of the applicant's claim is that it asserts that the whole of the costs it incurred were the result of both the variations directed by the respondent and delays in the provision of access. I understand that the applicant contends that many of the variations were the result of difficulties in obtaining access. However, the two things, and their consequences, are quite different. If, for example, work stopped because access could not be obtained to a particular area of the proposed path of the cable for, say a week, then the applicant was directed to take a different route, the delay and disruption during the week of waiting is not attributable to the variation and cannot be claimed on the basis of the variation.

48 The applicant's claim can fairly be described as a global claim. No attempt is made to identify the costs of specific variations. As a matter of principle, a global claim for delay may be made. But in order for it to be successful, the claimant must exclude causes of delay for which the respondent is not responsible. The exclusion of other possible causes of delay provides the causal link between the respondent's conduct and the delay (*John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 8 VR 681).

49 In the present context, where there is a global claim for delay associated with variations, it is necessary for the applicant to exclude causes of delay other than the variations. It has not excluded delay and disruption resulting from problems with obtaining access. On the contrary, the Consolidated Claim suggests that delay and disruption was primarily caused by difficulties with access to the site. "Appendix 2 – Schedule of Delays" to the Consolidated Claim is a list of delays during the period 18 August 2008 to 15 November 2008. The "Delay Notes" indicate that there were many delaying events. Most of them are identified as relating to monitor problems, lack of approved areas, waiting for clearances, equipment breakdowns and access restrictions. Appendix 2 is persuasive evidence that there were delaying factors at work other than the variations.

50 The impression that access problems impacted on the progress of the works is reinforced by the body of the Consolidated Claim. Section 3.4 deals with delays and disruption alleged to have been cause by difficulties with land access. Section 3.5 of the Consolidated Claim deals with delay and disruption caused

by the non-availability of monitors. Clause 3.6 deals with instances where the progress was interrupted by indigenous people and government authorities. Clause 3.9 deals with the additional equipment shifts that were required, but does not differentiate between shifts that were the result of variations and shifts that were not.

51 Sections 3.2 and 3.7 deal with restricted work areas ("RWAs"). The applicant contends in the Consolidated Claim that the RWAs were added to the drawings after the contract was entered into. It appears that the addition of the RWAs is the variations complained off. Three "Sample Revised Drawings" are included in Appendix 1 of the Consolidate Claim. The effect of the revisions appears to have been to indicate areas where access was restricted and, in the case of Minabuy to Nhulumbuy section, to indicate an area where work was "awaiting "design review" and re-staking". I was not provided with details of any changes in the design or the re-staking referred to in the note on that drawing and do not know whether the route was extended or reduced as a result. Some information about the problems associated with the RWAs is set out in section 3.7. This information confirms that the RWAs appear to have resulted in delays to access. The item for 13 September 2008 of page 10 of the Consolidated Claim indicates that there was some re-staking of a previously marked out route in RWA5. It is not clear whether the change made the route longer. I was given no information about the work involved in restaking. At page 11, the Consolidated Claim says:

> "On these occasions, due to the sensitive nature of the area, UGC halted construction until the individual issues had been resolved. These continual access issues caused substantial reductions in productivity."

This confirms the general impression that that the predominant effect of the RWAs was to cause delays in access. The applicant might have a claim for damages for breach of contract associated with a failure to provide access because of the RWAs. I express no view on this question. However, the information provided to me does not allow me to conclude that there is a claim for compensation under clause 38 in respect of variations to the works associated with the RWAs.

52 If there is a claim based on variations to the work, it is not possible for me to make any assessment of the value of it. The calculations of the value are not

specifically linked to particular variations. If there has been any changes to the route taken (or to the method of work, if that can amount to a variation), I cannot form any opinion about the extent of the financial consequences of the variations on the applicant or the amount of compensation which it might be entitled to recover.

Summary

53 In summary, I consider:

(a) claims for damages for breach of contract or breach of the TPA are not "payment claims" within the meaning of that expression in the Act. They do not give rise to "payment disputes", so an application in respect of them cannot be made within 90 days of after a claim for damages is made. To the extent that the applicant's claim is for damages, it must be dismissed under s 33(1)(a) of the Act;

(b) extensions of time are governed by the Time Clause in the ICA. The ICA does not give a right to contractual compensation for delay, although the applicant may have a claim in damages if a delay have been caused by a breach of contract by the respondent, that is not a claim to contractual compensation; and

(c) I am not satisfied on the material provided to me that variations to the work caused loss and damage to the applicant or, alternatively, any loss and damage capable of assessment on the material provided to me. The documentation provided to me is directed primarily to issues associated with access problems, not variations.

54 Accordingly, I determine that the amount to be paid by the applicant to the respondent is "nil".

Date:

DS Ellis
Adjudicator

Schedule 2: Confidential Information

The following information is confidential:

(1) the identity of the parties;

(2) the identity of contractors and individuals referred to in the reasons; and

(3) the location and nature of the works.

Date:

DS Ellis
Adjudicator