DETERMINATION NO. 39.14.02

Adjudicator's Determination

pursuant to the

***Construction Contracts (Security of Payments) Act 2004* (NT)**

XXXX

Applicant

and

YYYY

First Respondent

and

ZZZZ

Second Respondent

I, David Baldry, determine on 29 July 2014 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act* that:

A. the application for adjudication be dismissed under s. 33(1)(a) of the Act;

B. the amount to be paid by the respondents to the applicant is NIL;

C. I make no orders as to the costs of the adjudication pursuant to s. 36(2) of the Act.

CONTACT DETAILS:

Applicant:

Applicant's Solicitor:

First Respondent:

First Respondent's Solicitor:

Second Respondent:

Second Respondent's Solicitor:

APPOINTMENT AS ADJUDICATOR

1. On 20 June 2014 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the "Act"), and, on 24 June 2014, I was appointed adjudicator by the Northern Territory Law Society to determine this application. The Northern Territory Law Society is a prescribed appointed under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment and I do not consider that any conflict of interest would prevent me from acting as the adjudicator.

DOCUMENTS RECEIVED BY ADJUDICATOR

2. I received and have considered:

   (a) The application and submissions dated 20 June 2014. The documents listed as being relied on by the applicant in the application do not strictly correspond with such listing.

   (b) The main discrepancies are as follows:

      (i) There are copies of numerous emails provided with the application, which were not listed or even described, for example, as a bundle of [number] emails for a date period. I expect that this can be explained as being due to the body of the applicant's statutory declaration included with the application, stating that the annexure marked "GSC 11" to same consisted of copies of a bundle of emails to and from the applicant in connection with the job dated from 4 February 2014 to 25 March 2014, but that annexure instead contained four (4) copies of an email string ending in an email sent by AA to the applicant and copied to BB on 24 February 2014 at 8:32 am and, therefore that the non-listed emails were intended to be the documents to be annexure "GSC-11". Despite this processing error, I consider that I can take the non-listed emails into consideration.

      (ii) In the body of the same statutory declaration it is stated that the annexure marked "GSC12" to same is a USB stick containing recordings of conversation the applicant taped on his Dictaphone. I found that the USB

memory stick, which contained such recordings, also contained a folder of numerous works photographs. Given that no mention of those photographs is made anywhere in the application and I do not know with any particularity what each of them depict or signify, I have chosen to ignore them.

(c) However, given the incorrect listing in the application of the documents included with same I have decided that I should provide my own detailed list of the material provided with the application, so that there can be a record of what documents were in fact delivered to me, as follows:

(i) payment claim addressed to both respondents dated 4 April 2014.

(ii) notice of dispute by first respondent dated 17 April 2014;

(iii) notice of dispute by second respondent dated 22 April 2014;

(iv) statutory declaration made by the applicant on 20 June 2014 and documents annexed to such declaration;

(v) statutory declaration made by CC on 5 June 2014;

(vi) a single page document headed “The Surveillance Devices Act”;

(vii) email sent by AA to DDD and 3 others addressees, including the applicant (and copied to several others) on 4 February 2014 at 2:16 pm;

(viii) email sent by the applicant to BB on 23 February 2014 at 3:50 pm, excluding the invoice said to be attached to same;

(ix) email sent by the applicant to DD (and copied to AA) on 24 February 2014 at 7:17 pm;

(x) email sent by the applicant to BB on 25 February 2014 at 9:23 pm;

(xi) email string ending with email sent by DD to the applicant on 2 March 2014 at 9:33 pm;

(xii) email sent by the applicant to BB on 3 March 2014 at 9:18 pm, excluding the document said to be attached to same;

(xiii) email sent by DD to the applicant (copied to AA and BB) on 6 March 2014 at 9:34 am;

(xiv) email sent by the applicant to BB on 9 March 2014 at 6:21 pm;

(xv) email sent by the applicant to BB on 9 March 2014 at 6:50 pm, excluding the invoices said to be attached to same;

(xvi) email sent by the applicant to DD on 9 March 2014 at 6:50 pm, excluding the document said to be attached to same;

(xvii) email string ending in email sent by the applicant to DD on 9 March 2014 at 6:50 pm, excluding the invoice said to be attached to same;

(xviii) email sent by the applicant to DD on 9 March 2014 at 6:52 pm, excluding the invoices said to be attached to same;

(xix) email sent by the applicant to BB on 11 March 2014 at 2:24 pm, excluding the document said to be attached to same;

(xx) email sent by the applicant to AA on 13 March 2014 at 1:04 pm;

(xxi) email sent by AA to the applicant on 13 March 2014 at 3:46 pm;

(xxii) email sent by the applicant to AA on 14 March 2014 at 6:32 pm;

(xxiii) email string ending in email sent by the applicant to BB on 14 March 2014 at 9:12 pm;

(xxiv) email string ending in email sent by the applicant to AA on 13 March 2014 at 9:27 pm;

(xxv) email sent by the applicant to BB and DD on 14 March 2014 at 7:00 am, excluding the invoice said to be attached to same;

(xxvi) email string ending in email sent by AA to the applicant on 14 March 2014 at 7:32 am;

(xxvii) email string ending in email sent by the applicant to BB on 14 March 2014 at 5:33 pm;

(xxviii) email string ending in email sent by the applicant to AA on 14 March 2014 at 9:13 pm;

(xxix) email string ending in email sent by the applicant to AA on 15 March 2014 at 5:01 pm;

(xxx) email sent by the applicant to BB and DD on 16 March 2014 at 11:19 am, excluding the invoice said to be attached to same;

(xxxi) email sent by the applicant to BB and DD on 16 March 2014 at 11:40

am, excluding the invoice said to be attached to same;

(xxxii) email sent by the applicant to BB and DD on 16 March 2014 at 11:54 am;

(xxxiii) email sent by the applicant to DD on 25 March 2014 at 8:50 am;

(xxxiv) email string ending in email sent by DD to the applicant on 25 March 2014 at 10:35 am;

(xxxv) email string ending in email sent by the applicant to DD on 25 March 2014 at 12:26 pm;

(xxxvi) email string ending in email sent by EE to the applicant on 19 May 2014 at 10:11 pm;

(xxxvii) email sent by FF to GG on 14 April 2014 at 2:00 pm, excluding the payment claim said to be attached to same;

(xxxviii) email sent by FF to HH (copied to applicant) on 10 June 2014 at 5:31 pm;

(xxxix) email sent by FF to GG (copied to applicant) on 10 June 2014 at 5:31 pm

(xl) letter of service of adjudication application from II (signed by FF) to JJ dated 20 June 2014;

(xli) letter from II (signed by FF) to Northern Territory Law Society dated 20 June 2014;

(xlii) company search of the first respondent obtained on 1 April 2014;

(xliii) Business Names Extract of first respondent business name KK obtained on 1 April 2014;

(xliv) company search of the second respondent obtained on 17 March 2014;

(xlv) company search of the second respondent obtained on 13 June 2014; and

(xlvi) Business Names Extract of applicant business name LL obtained on 1 April 2014;

(d) the first respondent's response and submissions received by me on 4 July 2014 at 4:50 pm supported by:

(i) quotation from the second respondent to the first respondent dated 14 November 2013;

(ii) an order by the first respondent to the second respondent dated 25 November 2013;

(iii) letter from MM to NN dated 3 July 2014 and enclosures to same being letter from OO to the first respondent dated 18 March 2014 and invoices by the applicant for rooms 618, 619, 620 and 621;

(iv) summary of the costs incurred by the first respondent relative to the adjudication and a bundle of tax invoices and other documents evidencing same;

(v) a statutory declaration made by PP on 3 July 2014; and

(vi) a statutory declaration made by AA on 4 July 2014 and the documents annexed to such declaration;

(e) the second respondent's response and submissions received by me by email on 7 July 2014 at 11:26 pm supported by an undated and unsigned statutory declaration made by DD and the documents annexed to such declaration (NB: on 10 July 2014 I received an email from the second respondent's solicitor attaching a signed and dated copy of this statutory declaration but I have not treated it as being part of the second respondent's response, because it was provided to me outside the required 10 working day period after the date of service of the application on the second respondent);

(f) first supplementary submissions by the applicant received by me by email on 9 July 2014 at 4:52 pm;

(g) email sent by FF to me on 10 July 2014 at 12:58 pm;

(h) first supplementary submissions by the first respondent received by me by email on 10 July 2014 at 4:13 pm supported by:

(i) an email string ending in an email sent by AA to HH on 10 July 2014 at 9:27 am – being behind Document 5 sheet;

(ii) an email string ending in an email sent by DD to AA on 13 February 2014 at 3:34 pm – being behind Document 6 sheet;

(iii) an email from QQ to RR and AA (copied to 3 others) sent on 17 March 2014 at 7:33 pm – being behind Document 7 sheet;

(iv) an email from DD to SS (copied to AA) sent on 19 March 2014 at 10:19 pm – being behind Document 7 sheet;

(v) an email from QQ to SS (copied to 2 others) sent on 28 March 2014 at 8:04 pm – being behind Document 7 sheet;

(vi) an email from DD to SS (copied to 3 others) sent on 29 March 2014 at 1:43 pm – being behind Document 7 sheet;

(vii) a spreadsheet headed 'XXXX Quotation' – being behind Document 8 sheet;

(viii) an email string ending with email from DD to AA sent on 3 February 2014 at 3:37 pm, excluding document said to be attached to same – being behind Document 9 sheet;

(ix) an email string ending with email from DD to AA sent on 25 February 2014 at 9:00 am – being behind Document 10 sheet; and

(x) email sent by the applicant to DD on 24 February 2014 at 7:47 pm – being behind Document 10 sheet;

(i) email sent by HH to me on 10 July 2014 at 5:17 pm and following emails attached to same:

(i) email string ending in email sent by AA to HH on 10 July 2014 at 4:49 pm; and

(j) email sent by HH to AA on 10 July 2014 at 4:43 pm;

(j) first supplementary submissions by the second respondent (excluding the submissions in numbered paragraphs 5 to 7 and document referred to as being attachment "C", because I consider they did not relate to the matters concerning which I sought further submissions from the second respondent) received by me by email on 10 July at 4:51 pm (together with the following documents provided with same which I consider it appropriate for me to consider):

(i) email string ending in email sent by AA to DD on 19 March 2014 at 6:44 pm; and

(ii) email sent by DD to SS on 19 March 2014 at 9:19 pm; and

(k) Email sent by HH to me on 11 July 2014 at 4:18 pm and email string attached to same ending with email sent by HH to AA on 11 July 2014 at 4:12 pm.

3. On 27 June 2014 I asked the parties to advise when the Applicant served the application and supporting documents upon the first and second respondents and was subsequently advised that it was served on the first respondent on 20 June 2014 and upon the second respondent on 23 June 2014. I therefore find that the following unusual situation applies in relation to the 10 business day period under s. 29 of the Act for service of the responses upon me and the other parties:

(a) the last date for service of the first respondent's response was on Friday 4 July 2014;

(b) the last date for service of the second respondent's response was on Monday 7 July 2014; and

(c) subject to my findings below concerning jurisdictional matters, both the first the first respondent's response and supporting documents and the second respondent's response and supporting documents were served within the respectively required periods.

OUTLINE OF CONTRACT AND DISPUTES RELATING TO ITS FORMATION

4. I do not believe any of the parties to this adjudication would disagree that in basic terms the works required to be performed pursuant to the contract, the subject of this dispute, required the applicant to remove 186 old air conditioners ("ACs") installed in all the UU at the first respondent's TT known as the KK located at [address] in Darwin in the Northern Territory, replace them with new ACs (which would be supplied by the other party to the contract), reconnect them and test them, which I will refer to as the Essential Works.

5. The applicant's primary contention is that he and the first respondent entered into the contract on a wholly oral basis as a result of about 8 to 10 conversations between the applicant and BB (the first respondent's maintenance engineer), which occurred in October 2013, in essence its terms were wholly oral and to the following effect:

(a) The first respondent would supply all the materials.

(b) The applicant would supply all the labour required to remove the old ACs and replace them with new ACs.

(c) The applicant would start the works on the top floor being the 10th floor and work down to the 2nd floor, that being the lowest floor with UU;

(d) The work was expected to start on about 13 January 2014 and to last for about 4 months.

(e) Although not discussed, the applicant assumed that it was expected that he would charge for his labour at the same rate he had been charging the first respondent for previous works performed by the applicant for the first respondent at his usual charge out rate of $90 per hour plus GST and a term to that effect can be implied by virtue of those past dealings.

(f) Further terms were implied by virtue of ss. 16 to 24 of the Act.[1]

6. The first respondent denies that it entered into a contract with the applicant for the applicant to perform the essential works and instead says it entered into a contract for the second respondent to do so and for the second respondent to also supply the new ACs.[2]

7. The second respondent contends[3], supported by a statutory declaration by one of its directors named DD, that[4]:

(a) On 14 November 2013 the second respondent sent a written quotation no. 42-111413 to the first respondent to perform the Essential Works and supply the necessary ACs and associated material to the first respondent for $508,219.80 (**"Second Respondent Quote"**) made up as follows:

Description	***Qty***	***Cost***	***Total Cost***
Supply Temperzone/Daiken 22000btu 7kw with insulated tray	186	$1050.00	$195,300.00
3 way valves to suit	186	$135.00	$25,110.00
Grill to suit FCU	186	$122.00	$22,692.00

1 Applicant's submissions para 10 and statutory declaration XXXX 20/06/2014 paras 8, 9 and 10

2 First Respondent's submissions sections 4 and 5

3 Second respondent's submissions sections 5 and 6

4 Statutory declaration WW (undated and unsigned) paras 2 to 15 and annexures "FG-1" to "FG-4"

Description	***Qty***	***Cost***	***Total Cost***
Filter and inspection pull down door	186	$130.00	$24,180.00
Card switch for main door entrance	186	$60.00	$11,160.00
Supply new sub-board for power supply to unit	186	$75.00	$13,950.00
Supply insulation	1116 metres	$9.00	$10,044.00
Misc items including water balancing x 6.2 hours	186	$27.00	$5,022.00
Exhaust fans with adjustable blades	6	$650.00	$3,900.00
Installation of FCU	186	$810.00	$150,660.00
			$462,018.00
Plus GST			$46,201.80
			$508,219.80

(b) By order from the first respondent to the second respondent dated 25 November 2013 (**"First Respondent Order"**), the first respondent accepted the First Respondent Quote" without alteration.

(c) The second respondent, being based in Queensland, decided it should engage a subcontractor to perform the Essential Works, because it would not be cost effective for it to send personnel to do so from Queensland.

(d) BB *"advised him that VV of LL **(VV)** had undertaken YYYY in the past and suggested that I contact VV and discuss XXXX engaging him as a sub-contractor."*;

(e) *"In or about early to mind-December 2013 I telephoned VV and requested an estimate for VV to carry out the works pursuant to YYYY's Purchase Order. VV provided a verbal estimate and that estimate was accepted, however I insisted that VV also provide me with a written quotation."*

(f) *"After accepting VV's verbal estimate, I understand that on or about 13 January 2014, VV began removing existing air-conditioning units from YYYY's UU in*

accordance with the required works, however he was unable to commence any substantive works as XXXX had not at that stage delivered the air-conditioning units to the site."

(g) *"On 29 January 2014 VV provided to XXXX a detailed quote headed "Costing per room" bearing the reference number 6036….."* (the applicant contends that such document was provided as an estimate and the second respondent contends it was provided as a quotation, which I refer to in more detail below), which the applicant listed in such document in detail to be to:

(i) install new sub boards for the supply of power to the ACs because the old sub boards did not comply with Australian standards for same;

(ii) install a 4 pin socket and plug in each new AC to enable the new fan motors in the Acs to plug in for speedy replacement and maintenance of the fans and coils;

(iii) remove the ACs existing drains, clean them and reinstall them if still in good condition (and if not in good condition due to rusting of same, replace them with new drains to be supplied by the applicant) and connect them to new secondary drip trays to be used as back up drains;

(iv) install two ball valves on each AC air handling unit to make future maintenance easier with no interruption to other rooms;

(v) install new ACs and when doing so bleed the lines out and air pressure test for leaks;

(vi) wire up new AC thermostats and fit them in place;

(vii) remove old AC actuator valves and fit replacements;

(viii) re-wire AC valves as they are not to Australian standards;

(ix) test all AC drains and joints;

(x) carry out full electrical safety test for the ACs; and

(xi) commission each AC,

for the following amounts perm room:

Description	***Amount***
Electrical switch board	$33.87

Description	***Amount***
Safety switch	$78.96
2 x contactors 20 amp	$136.79
1 x pole filler	$1.20
1 x 4 pin plug	$11.67
1 x 4 pin socket	$13.86
Connector cable ties screws lables [sic labels] glue	$3.00
Cable	$87.25
4 x 25mm pvc elbows $18.671x25 mm T	$4.87
! [sic 1] x 40mm 4 way	$28.22
2 x reducinHHes	$7.68
2 x 25 mm ball valves	$27.71
25mm pvc pipe	$19.97
Labour $90 ph 12.5 hours	$1,125.00
Sub total	$1,598.72[5]
GST	$159.87
Total	$1,758.59[6]

(h) On 30 January 2014 the second respondent sent an order to the applicant by email which ordered that the works be performed for $1,738 per room inclusive of GST on the basis that the works be performed on a 7 day schedule per floor (**"30/1/2014 Order"**).

(i) Therefore the contract in which the applicant was engaged was a subcontract with the second respondent only and the first respondent was never a party to that contract.

8. I have multiplied $1,738 per room x 186 to calculate the total amount that would have been chargeable by the applicant (if that manner of charging was to be used throughout the applicant's performance of the contract) would be $323,268.

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5 The correct addition of these amounts is $1,580.05

6 If the correct subtotal had been used the total inclusive of GST figure would have been $1,738.10

9. The applicant has also declared that:

   a. he was first informed of the involvement of the second respondent on 17 February 2014 (although, the applicant stated in his payment claim that approximately one week after being informed on about 30 January 2014 by BB that "you are actually doing the job for XXXX a person introduced himself to the applicant as "WW from XXXX")[7];

   b. he denies having been given the 30/1/2014 Order by the second respondent, the first time that he had seen it, being when he first read the first respondent's notice of dispute to the applicant's payment claim the subject of this adjudication[8].

10. The applicant's version of events leading up to him providing the 'costing per room' document substantially differs from DD's version of events, by making the following assertions:

   (a) that at no time did he issue a quotation to the second respondent[9];

   (b) that on about 28 January 2014 while the applicant was on site working with a co-worker he had engaged named CC, BB and AA came to see them and AA asked the applicant for a costing per room, the applicant said it was not possible to provide an accurate figure, because there were too many variables, so he would provide an estimate per room[10];

   (c) that CC helped the applicant to prepare the costing per room document[11]; and

   (d) that on 29 January 2014 the applicant went into BB's office in the hotel and delivered the costing per room document to him and, when doing so, the applicant said to BB that it was an estimate only and should be treated as a guide based on the ACs being "slide out slide in"[12].

11. After referring to paragraph 19 of the applicant's statutory declaration and paragraphs 6

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7 Applicant's submissions para 13, Statutory declaration VV 20/06/2014 para 75.1, payment claim 04/04/2014 page 2 paras 4 and 5.

8 Statutory declaration VV 20/06/2014 para 75.2

9 Statutory declaration VV 20/06/2014 para 23 and 75.1

10 Statutory declaration VV 20/06/2014 para 19 and statutory declaration by CC 05/06/2014 paras 6 and 7

11 Statutory declaration VV 20/06/2014 para 19 and statutory declaration by CC 05/06/2014 para 7

12 Statutory declaration VV 20/06/2014 para 23

and 7 of CC' statutory declaration, AA has deposed that he cannot recall asking the applicant to provide a costing per room and states that the first time he saw it was after he read the applicant's payment claim the subject of this adjudication and "spoke to Andy from XXXX and he provided it to me on 16 April 2014."[13]

12. The applicant also contends that the statements made by BB on 17 February 2014 to the effect that the applicant had actually contracted with the second respondent:

    (a) had no legal effect because BB had not informed the applicant that the first respondent had assigned its obligations under the contract with the applicant to the second respondent and that BB's said statement had the effect of purporting to unilaterally claim that the contract had been between the applicant and the second respondent from its commencement; and

    (b) those statements constituted a repudiation of the contract by the first respondent, which the applicant at that point chose not to accept and continued to perform the contract until 16 March 2014.[14]

13. In the alternative, the applicant has submitted that if I find that the contract was not between the applicant and the first respondent then, as the second respondent has admitted in its notice of dispute, it is liable to the applicant in part, I should determine that the second respondent is liable to the applicant in the full amount of its payment claim together with interest thereon, such interest presumably being calculated from the date of the applicant's receipt of the second respondent's notice of dispute.[15]

14. The first respondent has also submitted that:

    (a) if I find that the applicant was not at all times contracted to the second respondent, I should find that by no later than 30 January 2014, when the applicant was advised that the second respondent was contracting him to perform the Essential Works:

        (i) any contractual relationship between the first respondent and the applicant ended (noting that the applicant had asserted that such works were being performed on a do and charge basis with no defined scope); and

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13 Statutory declaration AA 04/07/2014 para 19 and annexure "GPM9"

14 Applicant's submissions paras 18 and 19

15 Applicant's submissions paras 22 and 23

(ii) any further works performed by the applicant thereafter must have been pursuant to a contract between the applicant and the second respondent.

(b) Where the parties have not expressly entered into a contract to discharge an earlier contract, but a second contract affecting the first is inferred from their conduct, whether the second (implied) contract amounts to an implied agreement to discharge, rescind or abandon the first contract, depends on whether the second contract is substantially inconsistent with the first contract; and

(c) in addition to such an implied contract the law recognizes the possibility that the parties by their words and conduct may be precluded, that is, estopped, from denying that the contract has been abandoned and that would apply in this case because:

(i) by 30 January 2014 at the latest, the applicant was on notice that the contract for the said works was between him and the second respondent; and

(ii) by the applicant's conduct (i.e. continuing to perform the work), notwithstanding being on notice that no further contract with the first respondent existed, he has (at least from 30 January onwards) effectively consented to be bound by the new contract, invoiced the second respondent, and (until recently) solely claimed the payment of outstanding monies from the second respondent.

15. If I were to find that the respondent's first contention is correct, to the effect that the contract was between the applicant and the second respondent from its outset and that it was wholly in writing comprised of the applicant's document headed "Costing per room" and the Second Respondent Order accepting same (after correcting the incorrect addition), it would nevertheless be the case that the same terms would be implied by virtue of ss. 16 to 24 of the Act.

16. If I were to find that the first respondent's contention to the effect that, at least from 30 January 2014, the contract was between the applicant and the second respondent, it would nevertheless be the case that the same terms would be implied by virtue of ss.

16 to 24 of the Act.

17. Before I determine which parties' version of events, pertaining to the formation of the contract with the applicant, should on balance, be preferred, and who the correct contracting parties were, I need to firstly consider whether I have jurisdiction to determine this application and I do so in the section below headed "Jurisdiction".

18. However, to assist in my jurisdictional considerations I set out below details of the terms implied by virtue of ss. 16 to 24 of the Act, outlines of the payment claim and each respondent's notices of dispute.

TERMS IMPLIED BY VIRTUE OF SS. 16 TO 24 OF THE ACT

19. The terms implied as terms of the contract by virtue of ss. 16 to 24 of the Act are set out in Divisions 1 to 9 of the Schedule to the Act. I consider that only the implied terms contained in Divisions 1 to 6 are pertinent to the issues that have arisen in this matter and they are in the following terms:

> "***Schedule Implied provisions***
>
> *sections 16 to 24*
>
> ***Division 1 Variations***
>
> ***1 Variations must be agreed***
>
> *The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on:*
>
> *(a) the nature and extent of the variation of the obligations; and*
>
> *(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of the obligations.*
>
> ***Division 2 Contractor's entitlement to be paid***
>
> ***2 Contractor entitled to be paid***
>
> *(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.*
>
> *(2) Subclause (1) applies whether or not the contractor performs all of its obligations.*
>
> ***Division 3 Claims for progress payments***
>
> ***3 Entitlement to make claim***
>
> *The contractor is entitled to make one or more claims for a progress payment in relation to the contractor's obligations it has performed and for which it has not been paid by the principal.*

4 When claim can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract.

Division 4 Making claims for payment

5 Content of claim for payment

(1) A payment claim under this contract must:

(a) be in writing; and

(b) be addressed to the party to which the claim is made; and

(c) state the name of the claimant; and

(d) state the date of the claim; and

(e) state the amount claimed; and

(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and

(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(2) For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:

*(a) if this contract states that the principal must pay the contractor one amount (the **contract sum**) for the performance by the contractor of all of its obligations under this contract (the **total obligations**) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or*

(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or

(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.

(3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).

Division 5 Responding to payment claims

6 Responding to payment claim by notice of dispute or payment

(1) This clause applies if:

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

(b) the party:

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

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

(2) The party must:

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

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

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

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

(3) The notice of dispute must:

(a) be in writing; and

(b) be addressed to the claimant; and

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

(d) state the date of the notice; and

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

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

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

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

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

Division 6 Interest on overdue payments

7 Interest payable on overdue payments

(1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.

(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time."

OUTLINE OF PAYMENT CLAIM

20. The payment claim dated 4 April 2014 is addressed to both respondents.

21. The applicant says that it was served on the first respondent on 4 April 2014 and on the second respondent on 22 April 2014 and that does not appear to be in contention.[16]

22. It is set out in the following manner:

(a) It lists in a 3 column table all the numbers of the invoices rendered by the applicant in the first column (excluding one invoice which was unnumbered), the dates of each invoice and the amounts rendered in each invoice.

(b) It then totals the amounts rendered in all of same to be $297,756.36.

(c) It then states the dates upon which payments were made and the amounts of such payments.

(d) It then states that the total amount paid was $123,298.84.

(e) It then subtracts the total amount paid from the total amount rendered to arrive at the total amount claimed in the sum of $**174,298.84**.

(f) On the second page it contains 9 paragraphs of text which essentially said:

(i) the claimant trades as LL;

(ii) in October 2013 he was engaged to carry out the Essential Works at the first respondent's hotel and what those works basically comprised;

(iii) the claimant was engaged by BB, who was the first respondent's maintenance engineer and he had on several occasions during the

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preceding months engaged the applicant to perform other jobs for the first respondent;

(iv) the claimant started to perform the contract on about 13 January 2014 and on 30 January BB advised the claimant he was actually doing the job for the second respondent;

(v) about a week later a person introduced himself to the claimant as "WW from XXXX Services" who the claimant now knows is DD [sic WW] a director of the second respondent;

(vi) with the exception of invoice no. 6031 dated 29 February 2014 (relating to the replacement of faulty parts to an AC, all ACs being supplied by the second respondent) all invoices prior to 9 February 2014 were sent by email to the first respondent and there after sent to the first respondent and the second respondent;

(vii) from about late February/early March 2014 the applicant complained about delays in receiving payments and on 13 March 2014 he ceased work on the basis he would resume working once payment for all invoices were received;

(viii) by email dated 25 March 2014 the applicant was advised by WW [sic WW] that they had been experiencing a lot of defects in your installation and have asked a new contractor to rectify; and

(ix) that email was the first suggestion of faulty workmanship by the applicant.

23. There are two important matters to note about the payment claim which relate to submissions by the respondents going to jurisdiction:

(a) firstly, it does not expressly state that it is being made to each of the respondents in the alternative; and

(b) secondly, it does not provide any details about the works performed the subject of the payment claim by annexing copies of all the listed invoices or otherwise. So this latter situation would have made it necessary for the respondents to refer to the listed invoices in order to ascertain details about the works performed.

24. I make findings concerning the validity of the payment claim in the section below

headed “Jurisdiction”.

FIRST RESPONDENT’S NOTICE OF DISPUTE

25. The first respondent’s notice of dispute is dated 17 April 2014.

26. The applicant has stated it was received by the claimant’s solicitor on 17 April 2014.[17] It appears that the applicant accepts (simply because he does not contend otherwise) that that notice of dispute was therefore served on the applicant on that date.

27. I therefore find that the first respondent’s notice of dispute was served upon the applicant within the 14 day period required by cl. 6(2)(a) of Division 5 of the Schedule to the Act, because the number of days between the date after the date of service of the payment claim upon the first respondent, i.e. on 4 April 2014, and the date of service of the first respondent’s notice of dispute upon the applicant was 13 days.

28. It is set out in the following manner:

    (a) it rejects the claim under s 6(1)(b)(i), because it was not made in accordance with a contract, there never having been a contract written or oral between the applicant and the first respondent to perform the works the subject of the claim;

    (b) it says it engaged the second respondent, not the applicant to perform the works and supports that contention by annexing copies of the Second Respondent Quote and First Respondent Order;

    (c) it also relies on there having been a subcontract to perform the works between the applicant and the second respondent evidenced by annexed copies of:

        (i) an email sent by the second respondents Andy James to AA on 8 April 2014;

        (ii) the costing per room document prepared by the applicant; and

        (iii) the Second Respondent Order.

29. I also find that it complied with the requirements of cl 6(3) of Division 5 of the Schedule to the Act and note that the applicant did not assert otherwise.

SECOND RESPONDENT’S NOTICE OF DISPUTE

30. The second respondent’s notice of dispute is dated 22 April 2014.

31. The applicant has stated that it was received by the claimant’s solicitor on 23 April

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2014.[18] It appears that the applicant accepts (simply because he does not contend otherwise) that that notice of dispute was therefore served on the applicant on that date.

32. I therefore also find that the first respondent's notice of dispute was served within the 14 day period required by cl. 6(2)(a) of Division 5 of the Schedule to the Act.

33. It is set out in the following manner:

(a) it states that the second respondent was contracted by the first respondent to remove and replace 184 ACs at the KK in Darwin

(b) that while the second respondent initially intended to send a number of workers to Darwin to perform the works it decided, due to the travel costs involved, to engage a subcontractor in Darwin to perform the works;

(c) it engaged the claimant as such subcontractor, then referring to the costing per room document of $1,738 per room (which it referred to as being a quote and which on the basis that there were 184 rooms resulted in the total quote being $319,792) and the Second Respondent Order as constituting the contractual documents;

(d) it conceded that on about 13 January 2014 the claimant began removing ACs from the rooms, but was not able to commence the substantive works then, as the ACs were yet to be supplied by the second respondent;

(e) the applicant's invoicing was generally in accordance with the quote, but the applicant began to render invoices which were substantially in excess of the quote;

(f) the quote provided included all parts and labour with the only noted exception being for drip trays, if required estimated to cost $195 plus GST per tray, but the claimant did not advise the second respondent that any drip trays were required;

(g) with the exception of electrical certificates the second respondent asserted there were no variations;

(h) tables then appeared which listed amounts rendered in the applicant's invoices by reference to floors where the works had been performed and amounts

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considered by the second respondent should have been charged according to the quote then resulting in the following amounts said to have been overcharged:

(i) levels 9 and 10 $42,773.17

(ii) level 8 $15,219.46

(iii) level 7 $15,050.78

(iv) level 6 $15,234.69

(v) level 5 ($7,793.16 no overcharging asserted because level not complete)

(i) the second respondent refused to pay over charged amounts, demanded that the applicant explain the increased cost including numerous requests for itemised invoices;

(j) the applicant stopped work on the site without notice;

(k) to mitigate its loss the second respondent retained another contractor to complete the works (OO – SS) and he has found a number of defects in the works performed by the applicant;

(l) the first respondent also contacted the applicant to advise him about some defective work that required immediate rectification;

(m) the second respondent instructed OO to rectify the applicant's defective works;

(n) the second respondent contends that the cost of rectifying the defective works should be deducted from any amount attributable to be owing by the second respondent to the applicant;

(o) then a table was inserted which provided details of 4 invoices rendered by OO to rectify the applicant's defective works (stating there may be more such invoices) which each charged $156.75, $522.50, $9,054.16 and $1,810.83;

(p) the claimant stated he had completed levels 6 to 10 (100 rooms), the quoted amounts for same totaled $173,800, but the invoices rendered for them totaled $262,078.60 being $88,278.60 above the quoted amount;

(q) whilst the claimant alleged he had commenced work on level 5, all of the work on that level had been performed by OO;

(r) to date the second respondent has paid the applicant $114,499.52 and has in addition paid the applicant in full for amounts rendered by the applicant relating

to 3 electrical certificates required for levels 8, 9 and 10;

(s) the second respondent conceded it owes the claimant $59,,918.40 after deducting the amounts rendered by OO for performing the rectification works; and

(t) proposed that it pay the claimant 60% thereof being $35,172.75 upon the claimant signing a Deed of Settlement and the remaining 40% less the cost of any further rectification works be payable to the applicant upon completion of the works estimated to occur in mid-May.

34. I also find that the second respondent's notice of dispute complied with the requirements of cl 6(3) of Division 5 of the Schedule to the Act and note that the applicant did not assert otherwise.

JURISDICTION

Bases of jurisdictional considerations in Act and general statement of my findings under s. 33(1) of the Act

35. By s 33(1)(a)(i) to (iv) I must dismiss an adjudication application, without making a determination of its merits, if:

(i) the contract concerned is not a construction contract; or

(ii) the application has not been prepared and served in accordance with section 28; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied it is not possible to fairly make a determination:

(A) because of the complexity of the matter; or

(B) because the prescribed time or any extension of it is not sufficient for another reason .

36. In relation to s 33(1)(a)(i) I am satisfied that, pursuant to s. 5(1)(a) of the Act, the subcontract was a construction contract for the performance of construction work, pursuant to s. 6(1)(c) and (d), on a site in the Northern Territory and I note than none of the parties to this adjudication made any submissions to the contrary.

37. In relation to s 33(1)(a)(ii) the first respondent has submitted that I have no jurisdiction to determine any payment dispute thereunder on two bases. The second respondent has joined issue with the first respondent's jurisdiction submissions.

38. In relation to s 33(1)(a)(iii) neither of the respondents has asserted that an arbitrator or other person or a court or other body dealing with a matter arising under this construction contract has made an order, judgment or other finding about the dispute that is the subject of the application and I therefore find that this section of the Act does not apply.

39. In relation to s 33(1)(a)(iv) I am satisfied that I can make a fair determination, because:

    (a) the complexity of the matter would not prevent me from doing so; and

    (b) the prescribed time is a sufficient period for me to make my determination.

40. I have set out below the initial ground of the first respondent's submissions as to jurisdiction pertaining to s 33(1)(a)(ii) in full. I have done so, because that ground is, as far as I am aware, unique in construction contract adjudications. I do not criticise the unique nature of that contention, because it has understandably arisen due to the unusual nature of the payment claim in this case, i.e. being addressed to two respondent parties, where only one of such respondents could have been a party to the contract in question with the applicant.

41. The initial ground of the first respondent's submissions as to jurisdiction was as follows:

"No power to apply against two respondents in the alternative

"3.2 The Act does not contemplate claims being made in the alternative against two respondents under two different, mutually inconsistent construction contracts in relation to two different, mutually inconsistent payment disputes arising from two different, mutually inconsistent payment claims. The appropriate course to follow is to adjudicate against the respondent whom the Applicant believes most likely to be the other party to the contract and only to consider a second application if the original fails because an adjudicator finds that the Applicant's belief is wrong.

3.3 It is fundamental to the Act that an adjudicator has power to determine, and only determine, payment disputes: see, for example, ss. 26, 27, 28 and 33. Relevantly, "payment dispute" is defined by s.8(a) as "when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed" (emphasis added). "Payment claim" is defined relevantly by s.4 as "a claim made under a construction contract... (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract" (emphasis added). Plainly, there can only be one

construction contract.[19] *If satisfied that he or she has jurisdiction, the adjudicator "determine(s) on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security": s.33(1)(b) (emphasis added). That is all the adjudicator is authorised by the Act to do – determine the payment dispute. He is not authorised to decide the necessarily anterior questions of which of two competing alternative construction contracts, two competing alternative payment claims and two competing alternative payment disputes exist and which does not.*

3.4 This point is reinforced by the practical problems which arise from seeking to adjudicate different payment disputes under different construction contracts against different principals. Here, the First Respondent was served with the application on 20 June 2014. XXXX was served with the application on 23 June 2014. How then are the time periods in s.29(1), s.33(1) and s.33(2) to be calculated? If what the Applicant has done is valid, it gives rise to the possibility that this single application for the adjudication of one payment dispute might stand automatically dismissed against one respondent under s.33(2) but not against another, which would be a nonsense.

3.5 This application should therefore be dismissed under s.33(1)(a)(ii) of the Act because the Applicant has not applied to have an identified "payment dispute" adjudicated. Rather, the Applicant has applied to have the adjudicator determine first which of two alternative construction contracts, which of two alternative payment claims and which of two alternative payment disputes are valid and which are not. The application therefore "has not been prepared and served in accordance with section 28" as s.28 does not permit such applications."

42. The second ground of the first respondent's submissions is more conventional and pertains to what I stated in paragraph 23 of these submissions. It was put on the basis that the payment claim is not a valid payment claim, because it did not comply with some of the terms implied by s. 19 of the Act as to how a party must make a claim for payment, namely cl. 5(1)(b) and cl. 5(1)(f) in Division 4 of the Schedule to the Act.

43. The alleged non-compliance of the requirements of cl. 5(1)(b) is that it is not "addressed to the party to whom the claim is made" but instead to two parties, one of whom is not and cannot be liable, but it does not say which.

44. The alleged non-compliance of the requirements of cl. 5(1)(f) is that it does not "itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim", because it instead refers to (but does not enclose) the thirteen numbered and one unnumbered invoices the

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19 The question of whether two entities – perhaps partners – named as the principal in a construction contract can be the subject of an adjudication need not be decided. In those cases, there is one contract. On any view, here the applicant is seeking to enforce two different contracts in the alternative [NB: in the first respondent's submissions this footnote was numbered 2. It is numbered 19 here because it is utilising the footnotes in this determination]

subject of the payment claim. The first respondent cited *DPD Pty Ltd v McHenry*[20] and *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd*[21] in support of this ground.

Further submissions on jurisdiction

45. On 8 July 2014, pursuant to s. 34(2)(a) of the Act, I asked:

    (a) the applicant to make submissions in answer to the first respondent's submissions on jurisdiction by 5pm on Wednesday 9 July 2014; and

    (b) the respondents to make submissions in reply to the applicant's submissions in that regard by 5pm on Thursday 10 July 2014.

46. The parties complied with my request in that regard.

Applicant's submissions on jurisdiction

47. I set out below in full the applicant's submissions on jurisdiction:

> *"1. Paragraphs 3.2 to 3.5 inclusive of the response of the first respondent ("YYYY") are not supported by the plain words of the Act or any judicial authority and are inconsistent with the long established legal principle that in the interests of justice all potential parties to a dispute and all issues in dispute should be dealt with at the one hearing unless this would lead to unreasonable delay or costs.*
>
> *"2. At its paragraph 3.3 YYYY correctly asserts that there can only be one construction contract. The applicant ("VV") has not asserted that YYYY and the second respondent ("ZZZZ") are jointly liable under a single contract. VV alleges his contract is with YYYY, but that if the adjudicator does not agree, it is open to the adjudicator to find that the contract is with ZZZZ. VV is not asking the adjudicator to do anything he is not authorised to do by the Act.*
>
> *"3. In particular, VV is not asking the adjudicator to decide the "anterior questions of which of two competing alternative constructions contracts, two competing alternative payment claims and two competing alternative payment disputes exist and which one does not". That submission of YYYY is misguided and inconsistent with its correct assertion that there can only be one contract. Consequently, there is no "anterior question" to be decided.*
>
> *"4. Every task required of the adjudicator is in accordance with the Act, namely to serially:*
>
> *a. assess and determine the allegation made by VV that he entered into a contract with BG Hotels;*
>
> *b. determine whether the contract is a construction contract;*
>
> *c. determine whether a valid payment claim has been made;*
>
> *d. determine whether a payment dispute exists between VV and YYYY; and*
>
> *e. determine that dispute on the merits.*

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20 [2012] WASC 140 at [28]-[35]

21 (2008) 23 NTLR 123 at [67] item 5

"5. If the adjudicator, in considering the first item, namely whether a contract exists between VV and YYYY, determines the question in the negative, he has no jurisdiction to proceed to consider the subsequent questions in respect of YYYY. There is nothing in the Act to prevent him from then going through the same serial process in respect of ZZZZ.

"6 It would be open to the adjudicator to do the reverse, that is consider first whether a contract exists between VV and ZZZZ; but as VV's primary submission is clearly that his contract is with YYYY, it is more appropriate for the adjudicator to assess the existence of a contract with YYYY first. If he determines that a contract does exist between VV and YYYY, there is no need for him to even turn his mind to the existence of a contract between VV and ZZZZ, because none can exist. The response of YYYY in referring to "competing" contracts makes no sense. There can only be one contract. The contract cannot suffer competition from a non-entity. Consequently, there are only 3 alternatives open to the adjudicator, namely:

a. To dismiss VV's claim against both YYYY and ZZZZ; or

b. To find for VV against YYYY and dismiss the claim against ZZZZ; or

c. To find for VV against ZZZZ and dismiss the claim against YYYY.

It is not open to the adjudicator to find for VV against both YYYY and ZZZZ.

"7. The submission in paragraph 3.4 of the YYYY response is particularly misguided. It only makes sense if there was at some point a valid contract, and subsequently a payment dispute, with each of YYYY and ZZZZ – but that cannot be the case and has never been the contention of VV. There are no "practical problems" as alleged by YYYY. Under section 33(1)(a) the adjudicator would have to dismiss the application relating to the party with which there is no construction contract, and only have to deal substantively with the other. Section 28(1)(b) of the Act clearly contemplates that there may be more than one respondent.

"8. At its paragraph 3.5 YYYY alleges that the adjudication application has not been prepared and served in accordance with section 28 of the Act, but there is nothing in the language at section 28 which would preclude the subject application. YYYY has not specified any particular part of section 28 which is inconsistent with the present application, because there is no inconsistency.

"9. Generally, in response to paragraphs 3.2 to 3.5 inclusive of YYYY's response, VV submits that it is trite that in the interests of justice all matters in dispute between all relevant parties should be determined by the one tribunal at the one time. This is the very reason why court rules permit the joinder of parties after the commencement of proceedings. The obvious purpose of the Act is to establish a system whereby construction contract disputes are speedily, inexpensively and justly determined. To achieve that end, it is essential that the one tribunal at the one time determines all issues between all relevant parties.

"10. If VV was forced to do what YYYY submits he should have done (that is, make one adjudication application against YYYY or ZZZZ, await the result, and if unsuccessful then make an application against the other) there is the risk of two separate adjudicators reaching inconsistent decisions as to the identity of the contracting party. VV could then fail in both proceedings. That would clearly be an unjust result (see Birtles v Commonwealth [1960] VR 247 at 250).

"11. It would require clear language in the Act to contradict this long established legal principle that all matters should be dealt with at the one time, for YYYY submission to have any substance. The Act contains no such language.

"12. At paragraph 3.6(a) of its submissions YYYY makes the extraordinary submission that because VV has addressed the payment claim to two parties, it is addressed to no parties at all. That submission has no merit. What is more, section 28(1)(b) of the Act clearly contemplates the prospect of naming multiple parties to a construction contract. There is nothing in the Act which precludes the naming of multiple parties in the alternative rather than jointly.

"13. At paragraph 3.6(b) of its submissions YYYY alleges the payment claim did not itemise and describe the obligations the contractor had performed and to which the claim relates in sufficient detail for the principal to assess the claim. It acknowledges that the payment claim referred to 13 numbered and 1 un-numbered invoices and asserts that that is not sufficient to satisfy clause 5(1)(f) of the schedule. That submission is clearly wrong in the present circumstances.

"14. The authorities cited by YYYY add nothing to the terms of clause 5(1)(f), namely that the claim must "itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to be able to assess the claim".

"15. As VV has stated in his statutory declaration, all 14 invoices had been provided to YYYY. YYYY has not denied that it had all 14 invoices. It is notable that the notice of dispute of YYYY of 17 April 2014 does not allege that the invoices have not been received or that YYYY was in any doubt as to the work VV claimed he had done. The invoices are very detailed. Any person in possession of the invoices would be in no doubt of the obligations VV said he had performed and to which his claim related.

"16. YYYY seems to be asserting that the "sufficient detail" must physically accompany the payment claim. Applying that reasoning, if a claimant delivered a ring binder full of detailed information of the work he had done at 9am, and then delivered the payment claim which referred to that folder, but did not attach it, at 10am, that payment claim would be invalid. That assertion is nonsense.

"17. In this case there is no doubt (and YYYY does not allege otherwise) that upon receipt of the payment claim it was able to connect it to the detailed invoices already in its possession and so to have sufficient detail to assess the claim.

"18. As XXXX has adopted the jurisdictional submissions of YYYY, these submissions in response apply to XXXX as much as to YYYY. "

First respondent's further submissions in reply to applicant's submissions on jurisdiction

48. I set out below in full the first respondent's submissions in reply to the applicant's submissions on jurisdiction:

"A. Jurisdictional Issues

1. *The Applicant's response on the matter of jurisdictional issues shows that the Applicant has fundamentally misconstrued and mischaracterised the nature and the purpose of the Act.*

A.1 Consolidation of disputes

2. *The First Respondent does not deny that the "long established legal principle" referred to in paragraph 1 that "all potential parties to a dispute and all issues in dispute should be dealt with at the one hearing".*

3. *However, in the present circumstances, this argument is a fallacy. An adjudication is not a hearing. The Act does not provide for a hearing nor does it provide that "all issues in dispute" may be determined by an adjudicator.*

4. *The Act provides only for the security of payment. As stated by Southwood J in AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another:*[22]

> *The express purpose of the Act is confined to promoting the security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.*

5. *The Second Reading speech in Parliament for the Construction Contracts (Security of Payments) Bill made clear that the then Bill was to "operate in conjunction with any other legal or contractual remedy available to the parties" and that "the aim is to ensure that court processes are not used to destroy the efficacy of the process for speedy adjudication outside the court system".*[23]

6. *The Applicant's claim that "all issues in dispute should be dealt with at the one hearing" refers to disputes that are being heard by a court or relevant tribunal. The Act applies only to the adjudication of payment disputes under a construction contract.*

7. *Paragraph 9 refers to court rules permitting the joinder of parties after the commencement of proceedings, and that it is "essential that the one tribunal at the one time determines all issues between all relevant parties". This is fundamentally misconceived. An adjudicator under the Act is not a tribunal and does not have the jurisdiction to hear other disputes or to join parties who are not parties to the relevant construction contract.*

8. *The well-established principle that matters of dispute with a common factual matrix should be determined in the one judicial process has no application to the legislative framework that empowers an adjudicator to determine a dispute on a payment claim under a contract.*

A.2 One construction contract

9. *In paragraph 2, the Applicant alleges that there is a construction contract with the First Respondent, and if there is not, there is a construction contract with the Second Respondent.*

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22 (2009) 25 NTLR 14 [this footnote was numbered 1 in these submissions]

23 Dr Toyne (Justice and Attorney-General), 14 October 2004 [this footnote was numbered 2 in these submissions]

10. *As set out in its adjudication response, the First Respondent agrees that there can only be one construction contract and asserts that this contract is between the Applicant and the Second Respondent.*

11. *The Act very clearly is premised on there being one construction contract. This is evidenced by the language used in the Act. Section 27 provides that:*

> *If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part… (our emphasis)*

12. *Further, section 28(1) provides that:*

> *To apply to have a payment dispute adjudicated, a party to the contract must…*
>
> *(b) serve it on each other party to the contract;… (our emphasis)*

13. *There is no provision in the Act that applications can be made asserting contracts in the alternative. Doing so undermines the purpose and object of the Act as an efficient process of determining payment disputes under a construction contract.*

14. *As posited by Hiley J in Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor:*[24]

> *I consider that it is part of an adjudicator's function under s 33 (1)(a), and within his or her jurisdiction, to determine whether or not the "contract concerned", namely the contract alleged by an applicant, is in fact a construction contract. A necessary part of that exercise would be to determine whether the "contract concerned" is in fact a contract. (our emphasis)*

15. *In paragraph 2, the Applicant states:*

> *"[The Applicant] alleges his contract is with [the First Respondent], but that if the adjudicator does not agree, it is open to the adjudicator to find that the contract is with [the Second Respondent]. [The Applicant] is not asking the adjudicator to do anything he is not authorised to do by the Act."*

16. *This is wrong. The Applicant is asking the adjudicator to do something he is not authorised to do by the Act, which is to make a determination as to with whom (if anyone) the Applicant has entered into a contract. This is not the same as requiring the adjudicator to determine whether the "contract concerned" is in fact a contract (see paragraph 14 above).*

17. *Section 33(1)(a)(i) of the Act provides that the adjudicator must dismiss an application without making a determination on its merits if the contract concerned is not a construction contract. This amplifies the limits on the adjudicator's power granted under the Act as referred to in paragraph 16 above. In the present case, it is not clear what "the contract concerned" is - rather, the Applicant is asking the adjudicator to determine which of two possible contracts is in fact "the contract concerned". This is outside of the adjudicator's jurisdiction and the adjudicator should therefore dismiss the application.*

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24 [2014] NTSC 22, at paragraph 53 [this footnote was numbered 4 in these submissions]

18. *Further, and in the alternative, if the adjudicator determines that the Applicant's allegation that he entered into a contract with the First Respondent is wrong, the adjudicator has no jurisdiction to find that another contract with another person exists (whether with the Second Respondent or any other person), and the adjudicator should therefore dismiss the application under section 33(1)(a)(i).*

A.3 Service on multiple respondents

19. *The Applicant alleges in paragraph 7 that section 28(1), which is excerpted in paragraph 12 above, "clearly contemplates that there may be more than one respondent". It states again in paragraph 12, that s 28(1) "clearly contemplates the prospect of naming multiple parties to a construction contract. There is nothing in the Act which precludes the naming of multiple parties in the alternative rather than jointly." [Our emphasis.]*

20. *Section 28(1)(b) provides that an adjudication application may be served on "each other party to the contract". The reference is to "the" contract. It refers to the possibility that there may be multiple parties to one construction contract. It does not provide that an application may be made to parties under different construction contracts.*

21. *Given that the Applicant is alleging contracts in the alternative, it has served its application on one person with whom it has no contract. The Act makes no provision for this and it is in fact contrary to the stated purpose of the Act, which is to quickly settle payment disputes between parties to a construction contract.*

22. *In serving its adjudication application on two respondents, one of whom cannot by necessity have a construction contract with the Applicant, the Applicant has not served its application in accordance with section 28(1)(b) and the adjudicator must dismiss the application without making a determination of its merits in accordance with section 33(1)(a)(ii) of the Act."*

Second respondent's further submissions in reply to applicant's submissions on jurisdiction

49. The second respondent did not make any further submissions on jurisdiction. It provided further submissions concerning other matters about which I sought further submissions by the parties on 8 July 2014 in which it stated *"Where matters are not addressed below, the Second Respondent repeats and relies upon on its previous submissions dated 7 July 2014 and does not wish to provide further submissions on those particular matters."*

My findings in relation to s 33(1)(a)(ii)

Does the Act permit applications for adjudication against two parties in the alternative?

50. I agree with the first respondent's submissions that the *"Act does not contemplate claims [i.e. applications for adjudication] being made in the alternative against two respondents under two different, mutually inconsistent construction contracts in relation*

to two different, mutually inconsistent payment claims."

51. I also agree with the first respondent's submissions that it "is fundamental to the Act that an adjudicator has power to determine, and only determine payment disputes." and that the Act is premised on there only being one contract which can be the subject of an adjudication application.

52. Even so, I do not consider that the Act expressly prohibits:

    (a) the making of applications for adjudication against two respondent's in the alternative; or

    (b) adjudicators from making determinations in relation to such an application for adjudication so long as in the final analysis, at best, there can only be a determination concluding that there was one construction contract between the applicant and one of the two respondents.

53. I do not agree that adjudicators cannot determine anterior questions relating to the construction contract in question, such as the correct parties to the construction contract, which is necessary in this adjudication. I also do not agree with the first respondent's contention that an application, which asserts contracts in the alternative, would undermine the purpose and object of the Act as an efficient process of determining payment disputes under a construction contract.

54. Assuming that I find that only one construction contract was entered into in this matter, despite the applicant making the claim against two respondents in the alternative, this application for adjudication is made in quite narrow terms, because:

    (a) the applicant had to be one of the parties;

    (b) on a prima facie basis, the same Essential Works appeared to be required to be performed by the applicant, whoever was the correct other party to the contract;

    (c) on a prima facie basis, it appeared that the same works alleged to have been performed by the applicant is the subject of the payment claim, i.e. the works detailed in those of the 12 invoices referred to in the payment claim which had not been paid; and

    (d) the terms of the contract in the period when such works were performed need to be determined.

55. It is standard practice for adjudicators to consider communications between the parties to the construction contract leading up to the contract being entered into if they have a bearing on determination of whether a contract was entered into between the applicant and the respondent to the adjudication and the terms of the contract.

56. The first respondent cited, in its supplementary submissions, the decision of Hiley J in *Axis Plumbing NT Pty Ltd v Option Group (NT) Pty Ltd*[25] in support of its contention that asserting contracts in the alternative would undermine the purpose of the Act as an efficient process of determining payment disputes, because it would extend to consideration of more than a contract.

57. I am familiar with that decision, because it related to a determination made by me. It was asserted by the Axis Plumbing that I had incorrectly determined that a construction contract had been entered into and therefore that my determination should be quashed as a jurisdictional error.

58. In that case the written parts of the partly written and partly oral contract were limited to an email providing plant hire rates and an order (and the possibility that the order was subsequently amended). There was always a real question that I needed to determine as to whether the contract was entered into, because the order sent to the applicant by the respondent was expressed so that the contract would only be taken to be consummated if a later requirement occurred, i.e. that the applicant's personnel (who would perform the contract works) had to firstly be enabled and inducted.

59. As in that case, the written and oral (if any) parts of the contract in this case will need to be considered by me in order to determine whether the contract was consummated. Assuming I find that a contract was entered into, the same evidentiary matters will need to be considered in order to determine who the contracting parties were.

60. I agree with the applicant that it would not result in the achievement of the major purpose and objective of the Act, as an efficient process of determining payment disputes under a construction contract, if the applicant had to serve a payment claim upon one of the respondents and adjudicate same and, if unsuccessful, issue a second payment claim against the other and then apply to adjudicate that claim, simply

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25 Supra at paragraph 53

because the cost of conducting two applications for adjudication would be much higher and achieving a final determination for the payment of monies by one of the respondents would take longer if it became necessary to have two adjudications.

61. I also agree with the applicant's submissions that the possibility of having to conduct two adjudications with possibly two different adjudicators should be avoided, because of the possibility of conflicting findings concerning essentially the same evidence.

62. In relation to the first respondent's submission about practical problems arising due to the first respondent having been served with the adjudication application on 20 June and the second respondent having been served with same on 23 June 2014, I consider that the differences in the time periods in ss. 29(1), 33(1) and 33(2) do not pose any real problems in this case because:

    (a) insofar as s. 29(1) is concerned, as there was only a few days between the respective dates of service of the application on each of the respondents, the different deadlines for them serving their responses did not matter and they both served them within those two deadlines;

    (b) insofar as s. 33(1) is concerned, I was able to extend the time for delivering my determination to 30 July 2014 by obtaining the Registrar's consent to do so under s. 34(3)(a) of the Act, but if I had not done so, I consider that the appropriate deadline for me to do so should be taken as being the earliest date; and

    (c) insofar as s. 33(2) is concerned, it does not apply, because of the extended time to deliver my determination to 30 July 2014 and the delivery of same being within that extended period.

63. For all the above reasons I find that I have jurisdiction under the Act to determine an application made against two respondents, in the alternative.

<u>Did the payment claim comply with the requirements of cls. 5(1)(b) and 5(1)(f)?</u>

64. As clause 5(1)(b) is a clause implied as a term of the contract, one would not expect it to provide that payment claims can be addressed to more than one party, one of whom cannot be a party to the contract.

65. Even so, by addressing the payment claim to two parties, one of whom must have

been a party to the contract, if any contract existed, I find that the payment claim complied with the addressing requirements of cl. 5(1)(b) because the additional addressee can be ignored by me, once I make findings concerning the contract formation and the correct parties to the contract.

66. As regards cl. 5(1)(f), I do not consider that the cited passage in *DPD Pty Limited v McHenry* to be particularly helpful in this case, because that case primarily involved assessing whether the payment claim in question was a repeat claim due to previous invoices concerning the same claims having been issued by the adjudication applicant, it then being necessary to consider whether the 28 day period for applying for adjudication under the Construction Contracts Act 2004 WA after the deemed dispute date for payment had been exceeded. The cited paragraphs of that case simply contained a finding that the relevant section in the WA Act implying what the payment claim had to contain (which was in similar terms to cl. 5 in Division 4 to the Schedule of the Act) had been satisfied by itemisation in a document attached to an email which included brief reference to e.g. “Tiling supply - $11,820.00”. That passage cannot be taken to set out any principles of what manner of itemisation should be considered to be satisfactory in payment claims. Per force of the huge variety of construction contract claim circumstances that one finds, I consider that whenever cl. 5 in Division 4 to the Schedule of the Act is to be implied into the relevant construction contract the contents of each payment claim needs to be considered.

67. I also do not consider that the cited passage in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* is particularly helpful in this case. That well known citation lists 5 requirements, which Southwood J considered essential for valid payment claims. The 5th requirement repeats the verbiage in cl 5(1)(f). Given that cl 5(1)(f) is expressed to be in mandatory terms anyway I do not consider that citing Southwood J’s list takes the requirement any further.

68. In this matter there is no allegation that the payment claim is a repeat payment claim, because of the issuing of the 13 invoices listed in it. I expect no such assertion has been made, because there is no dispute that any of those invoices complied with the requirements of cl 5(1) and therefore could not be classified as payment claims under

the contract. There is also no submissions by the respondents that they were both not served with such invoices on or about the dates of same or that the invoices so served differed in any way to the copies of such invoices accompanying the application for adjudication.

69. It is also instructive that both respondents' notices of dispute illustrate that the respondents were in no doubt about the obligations the contractor was alleging he had performed or that they did not have sufficient detail to assess the claim and dispute it in the considered ways each of them did so in their notices of dispute.

70. For all those reasons I therefore find that the payment claim complied with the requirements of cl. 5(1)(f).

71. Also, for the purposes of s. 33(1)(a)(ii) of the Act, I also find that the 90 day requirement for preparation and service of the application for adjudication in s. 28 of the Act was complied with because, whether one uses the dispute date, for vis a vis the first respondent, as being on 17 April 2014 or, vis a vis the second respondent, as being on 23 April 2014, the dates of service of the application for adjudication on the prescribed appointer and upon the first respondent (i.e. on 20 June 2014) and upon the second respondent (i.e. on 23 June 2014), such service was effected within such 90 day period.

72. However, despite everything I have said to this point about jurisdiction, as I find in the section below dealing with the contracting parties and terms of contract, that there were two contracts in this case, i.e:

    (a) the first contract being between the applicant and the first respondent, the term of which was from about 13 January 2014 to 29 January 2014; and

    (b) the second contract being between the applicant and the second respondent, the term of which was from about 29 January 2014 to 13 March 2014 when the applicant stopped working because his invoices had not been paid,

    I therefore consider that I must pursuant to s. 33(1)(a) dismiss this application without making a determination of its merits, because the application has not been prepared and served in accordance with s. 28 of the Act, the payment claim also being based upon makes claims under two construction contracts.

WAS A CONSTRUCTION CONTRACT OR MORE THAN ONE CONSTRUCTION CONTRACT ON FOOT AND, IF SO, WHO WERE THE PARTIES TO IT/THEM AND WHAT WERE ITS/THEIR PERTINENT TERMS?

My requests for further submissions relating to the contract and further submissions provided

73. In my email to the parties sent on 10 July 2014 at 9:56 am I stated the following:

> *"There is some further information I would like to request the parties to provide to me pursuant to s. 34(2)(a) of the Act, as follows:*
>
> *A. FF – I realise that VV has stated that the first time he saw XXXX's purchased order dated 30 January 2014 was when he received and first read XXXX's Notice of Dispute dated 23 April 2014. However, WW's unsigned statutory declaration annexes at the annexure marked "FG-4" an email apparently sent by WW to VV's email address (VV) on 3 February 2014 at 10:49 am which states that it attached such purchase order. I request that you obtain instructions from VV and advise whether VV instructs:-*
>
> *1. After checking the emails on his computer, he received that email and whether it attached the purchase order.*
>
> *2. If he did receive that email and purchase order and read them soon after receiving them, I also request that you advise why VV did not declare previously that that was the case.*
>
> *3. If VV read the email soon after receiving it, but it did not attach the purchase order, I request that you advise whether he told WW that that was the case soon after reading the email (and provide any email VV may have sent to WW doing so) and, if so, why VV did not say so in his statutory declaration.*
>
> *Could you please provide this information by noon today?*
>
> *If any of the other parties wish to make further submissions concerning those matters I request they do so by 5 pm today.*
>
> *B. GG – could you please ask WW whether he is related to BB and, if so, how he is so related?*
>
> *Could you please provide that information by noon today?*
>
> *If any of the other parties wish to make further submissions concerning those matters I request they do so by 5 pm today….."*

74. By email received by me on 10 July 2014 at 12:58 pm, the applicant's solicitor *stated:*

> *"1. That the first time he* [i.e. the applicant] *saw XXXX's purchase order dated 30 January 2014 was when he* [i.e. the applicant] *received and first read XXXX's Notice of Dispute dated 23 April 2014.*
>
> *2. That his* [i.e. the applicant] *email address is correctly stated in your email.*
>
> *3. That he* [i.e. the applicant] *thoroughly checked his email records in his* [i.e. the applicant] *computer (a laptop) on Tuesday, 8 July 2014. He* [i.e. the applicant] *says that no record of the email dated 3 February 2014 from WW or any similar email was discovered.*
>
> *4. He* [i.e. the applicant] *instructs that he* [i.e. the applicant] *then made contact with Telstra's technical support.*
>
> *5. Telstra logged into his* [i.e. the applicant] *computer and advised him* [i.e. the applicant] *that no such email could be located and transferred him* [i.e. the applicant] *to an organisation called YY advising that that organisation had the ability to carry out a "forensic scan".*
>
> *6. On 10 July 2014 YY verbally advised that they conducted a "forensic scan" with no result.* ***Attached*** *is a copy of an email received from YY by VV earlier today."*

75. The email attached to the applicant's solicitor's email referred to in the last numbered paragraph was from someone named ZZ with the email address ZZ to the applicant sent on 10 July 2014 at 11:07 am. It said:

> *"We are checked your email we found there was no email available on February 3 2014 at 10:40 Am and it has never been received"*

76. By email received by me on 10 July 2014 at 11:41 am, the second respondent's solicitor stated that she had been instructed by DD that BB was his father.

77. In my email to the parties sent on 10 July 2014 at 3:34 pm I stated the following:

> *"I am not satisfied that a thorough enough attempt was made by YYYY to contact BB in order to try and obtain a detailed statement from him.*
>
> *Given that BB is WW's father, I would assume that WW would have BB's current contact details.*
>
> *I therefore request that BB provide such contact details to his solicitor and GG provide them to HH.*
>
> *I then request that GG and/or HH attempt to contact BB, send him by email or by facsimile a copy of the body of VV's statutory declaration and anything else they consider appropriate to provide to BB and attempt to obtain a complete statement from BB in answer to the pertinent parts of VV's statutory declaration. If it is not possible to send such documents to BB by email or by facsimile I request that the pertinent parts of same be read to BB over the phone.*
>
> *In the circumstances, as it appears possible that BB may be overseas, any statement obtained from BB can be done informally and need not be signed. If it is not possible to obtain a statement from BB I request that a full explanation of the further attempts made to do so be provided to me.*

I request that such statements and any further relevant submissions by the respondents pertaining to same or an explanation of why a statement could not be obtained be provided to me by 5 pm tomorrow.

I then request that if the applicant wants to provide a further statement and/or any further submissions in response to any statements or submissions provided by the respondents in this regard, they be provided by 5:00 pm on Monday 14 July next."

78. By email received by me on 10 July 2014 at 3:50 pm, the second respondent's solicitor stated:

> *"I am instructed by WW that the only contact details he has for BB is an email address, namely BB*
>
> *WW further instructs me that he was unaware that BB was no longer in Darwin. According to WW, the relationship with his father is somewhat estranged due to BB's divorce from WW's mother and BB's marriage to another woman.*
>
> *WW confirms that any contact with his father is by email to the abovementioned address.*
>
> *We have now emailed BB and requested that he contact us as a matter of urgency. When (or if) we receive a response we will notify all without delay."*

79. In my email to the second respondent's solicitor sent on 10 July 2014 at 4:05 pm I stated the following:

> *"Paragraph 12 of the statutory declaration of AA states that it is his understanding that BB has moved to Malaysia to take up a position with the ZZA. It is unclear whether an inquiry has been made to ZZA to try to ascertain if that is the case and to attempt to call BB via the relevant TT's business number."*

80. By email received by me on 10 July 2014 at 5:17 pm, the first respondent's solicitor asked me to consider two attached emails.

81. The first of those two emails was an email string starting with the above email being forwarded by the first respondent's solicitor to AA asking him if he had access to an IT expert who could *"comment on whether the instructions* [in the email referred to in paragraph 75 above] *and the email* [impliedly such email's analysis comments] *actually prove anything."* The next email in that string of emails was an email from AA to ZZB, who apparently holds the position of the NT Cluster IT Manager for the first respondent. His email stated the following:

> *"From my understanding the only way that you can really restore an email that has been completely deleted (ie from Inbox and Deleted Items) from a mail client (ie Outlook) from a local PC or Laptop is to have access to the Actual Mail Server (ie Exchange Server or whatever Bigpond's equivalent is)*
>
> *I would not imagine that any web based support company would NOT have*

access to such Servers, also, Bigpond operate their own remote support helpdesk, I can not imagine they would use or recommend a company like YY to handle any business on their behalf.

Out of interest, I called this company (YY) to see if they could assist in restoring an email that was deleted in February 2014 and what process or tools they may have use.

- *They wanted to login to the PC straight away via a remote tool call "LogMeIn"*
- *From here we started a chat session of what the issue was*
- *I stated that I had deleted an email from February 2014*
- *The support agent looked at my Outlook Full Client for a minute (the Deleted Items folder) and also check what my email address was*
- *They then asked for my username and password to log into Webmail (I naturally declined giving this information)*
- *I asked if they had any tools to retrieve an email I had deleted out of my Outlook Full Client, they answered I could not be done*
- *I then asked the question that if I had completely deleted an email from Webmail could it be retrieve, once again they answered it could not be done*

As a Full Mail Client (ie Outlook) pulls information down from a Mail Server via POP, IMAP it generally leaves a copy on the Server for a certain time period so that if you delete from the full client, you can generally log onto to webmail and retrieve it, however if you delete from both the Full Client and Webmail, then the only way to retrieve would be to get in contact with the Bigpond Mail Administrators and see if they could restore from a backup of some sort, I am not sure how long they would retain backups for, however I am pretty sure it wouldn't be longer than 90days."

82. The second of those two emails was an email from the first respondent's solicitor to AA which stated:

"*As discussed, below are the condensed comments of ZZC, our IT Manager, on the methodology employed by VV to attempt to investigate whether an email attaching the purchase order from XXXX was received:*

> *If an item within an email application is deleted, it becomes rewritable space which can be overwritten by new emails. Telstra logging onto VV's computer remotely to try to find a deleted email would not be successful in locating such an email.*
>
> *I am unsure what the term "forensic scan" means.*
> *A proper forensic analysis of data cannot be done remotely; the physical medium must be analysed outside of an active operating system of a computer (ie the hard drive should be removed or imaged). As far as I am aware, YY is a provider of generic computer support; the role of forensically recovering deleted emails is done using specialised software by people with expertise in this area. This specialised software has controlled distribution to specialised users such as law enforcement agencies, or accounting firms with computer forensic specialist teams."*

83. By email received by me on 11 July 2014 at 2:41 pm, the first respondent's solicitor advised that enquiries by the first applicant had revealed that:

a. BB was not in Malaysia yet but was in Darwin and stated BB's mobile number;

b. AA had spoken to BB briefly and the first respondent's solicitor had spoken to BB for about 25 minutes; and

c. the first respondent's solicitor would report on that discussion by email shortly.

84. An email sent to me by the first respondent's solicitor on 11 July 2014 at 4:18 pm attached an email from AA to him (sent on 11 July 2014 at 4:12 pm), which set out efforts made to contact BB and the results of such efforts. The first respondent's solicitor then asked whether I wanted him to attempt to make further contact with BB to obtain a written statement.

85. The email from AA to the first respondent's solicitor contained notes in red of comments made by BB to matters which the first respondent's solicitor had asked AA to raise with BB in another email. I set out below the contents of the email containing such comments and indicate BB's comments to the matters raised in bold capitals rather than in red coloured text:

> *"Hi AA,*
>
> *I list specific matters for you to ask BB (as alleged against him in the VV Statutory declaration) in chronological order (to make it easier for him to recall) but with the order of importance marked in red if you find that he is not keen to talk and you need to focus on the more important issues:*
>
> ***4*** *VV alleges that BB approved the following extra work and associated costs in late January /early Feb:*
> *a. rewiring actuator socket outlets;*
>
> ***NO, THIS WAS PART OF THE INSTALLATION***
>
> *b. modifying the a/c units to earth them correctly (approved by BB & AA);*
>
> ***NO, THIS WAS PART OF THE INSTALLATION***
>
> *c. special ball valves and pipes had to be sourced & changed during installation of the a/c units;*
> *d. actuator valves were wrong size so alterations and re-fittings and re-insulation required (approved by BB & AA).*
>
> ***WE HAD SITE MEETINGS EVERY WEDNESDAY DURING WHICH WE WOULD DO A WALK THROUGH AND SORT OUT ANY PROBLEMS. IF THERE WERE ANY VERY URGENT ISSUES, THEN VV WAS DIRECTED TO DO THE WORK. IF THE WORK WAS NOT URGENT, THEN I WOULD CALL OR EMAIL XXXX AND ASK THEM TO ARRANGE FOR THE WORK TO BE DONE.***
>
> ***3*** *On or about 23 February 2014, after VV submitted his invoice for level 9, VV "was assured by BB" that he would be paid, so VV commenced work on level 8.*

I NEVER SAID THIS. I KNEW THAT ZZZZ WAS BEING HELD UP BEING PAID BY THE TT (I WAS HASSLING AA) SO I SAID THAT I WILL PUSH THE TT TO PAY XXXX. I SAID SOMETHING LIKE "I'LL SEE WHAT I CAN DO ABOUT THE TT PAYING XXXX".

5 *In early March, VV told BB that the main pipes on level 7 were missing insulation and the main shut off valves were broken which meant they had to be stripped down and repaired. BB agreed the extra costs would be paid.*

(SEE COMMENT ABOVE ABOUT SITE MEETINGS EVERY WEDNESDAY).

1 *On 17 March 2014, when VV alleges he was owed $174,298.84, he and CC had a meeting in BB's office where BB assured him that he "would make sure [VV] gets paid".*

I NEVER SAID THIS. I KNEW THAT ZZZZ WAS BEING HELD UP BEING PAID BY THE TT SO I SAID THAT I WILL PUSH THE TT TO PAY XXXX. I SAID SOMETHING LIKE "I'LL SEE WHAT I CAN DO ABOUT THE TT PAYING XXXX".

2 *On 18 March 2014, BB informed VV of some defects and VV said he would only return to site if he was paid. "BB agreed to this".*

AGAIN, I NEVER SAID THIS. BY THIS STAGE I THINK THAT VV HAD WALKED OFF THE JOB AND ZZZZ WAS TRYING TO GET SOMEONE ELSE TO FINISH THE WORK. I KNOW AS A FACT THAT ZZZZ WAS COMPLAINING ABOUT THE AMOUNTS THAT VV WAS CHARGING. I SAID SOMETHING LIKE "I'LL SEE WHAT I CAN DO WITH PAYING XXXX".

If possible, ask him if you are able to record your conversation and his answers, failing which, please just type in his responses.

ME: "AT THE VERY START OF THE JOB WHEN VV WAS STRIPPING OUT THE OLD UNITS HOW DID HE KNOW THAT HE WAS DOING THE WORKS FOR ZZZZ AND NOT THE TT?"

BB: "HE KNEW FROM THE START THAT HE WAS DOING THE WORK FOR ZZZZ, HE ALWAYS KNEW. HE WAS GIVING ME THE INVOICES FOR THE WORK AND I SAID TO HIM, NO, YOU NEED TO GIVE THEM TO ZZZZ – YOU'RE DOING THE WORK FOR ZZZZ.
IN ABOUT DECEMBER I ASKED FOR A SPECIFICATION DOCUMENT FROM ZZZZ AND RECEIVED 2 SETS OF MANUALS FROM THEM IN DECEMBER (ONE OF THE MANUALS IS STILL AT THE TT). I GAVE ONE OF THESE MANUALS TO VV AND TOLD HIM THAT THIS HAD COME IN FROM ZZZZ AND FOR HIM TO LOOK AT IT, AND I TOLD HIM THAT THE UNITS WERE AT THE WHARF IN SHANGHAI. VV HAD DONE THE INSTALLATION OF THE UNIT IN THE MOCK UP ROOM (ROOM 309) AND HAD BEEN GIVEN THE SPECIFICATION, SO HE UNDERSTOOD WHAT NEEDED TO BE DONE"

86. In an email sent by me to the first respondent's solicitor on 11 July 2014 at 4:41 pm [as somewhat corrected by me in an email sent on 12 July 2014 at 10:09 am] the same day I said:

"If possible I would prefer it if a more fleshed out statement could be obtained.

Obviously, if BB is unwilling to provide it over the weekend nothing can be done about that.

I am particularly interested in what he says was discussed between him and the applicant in the lead up to the applicant commencing work, because if the applicant started working a couple of weeks before the costing per room document was prepared by the applicant and the applicant did not have any discussions with any of the second respondent's personnel until about 30 January 2014, I would presume that the contract with the applicant was negotiated between the applicant and BB as the applicant has contended. So if that is the case I presume that BB either negotiated the contract for the first respondent or for the second respondent. I need to know what he said to the applicant in that regard.

I also need to know about any conversations between the applicant and BB in relation to the applicant preparing his costing per room document (i.e. as a quote or an estimate) and their discussions about the applicant's claims for variations.

Also more detail is needed about the system used at site meetings. Were any minutes kept? If any of the second respondent's personnel were not present what system was used to inform the second respondent about what happened at such site meetings?"

87. In an email sent by the first respondent's solicitor to me on 14 July 2014 at 11:36 am the first respondent's solicitor said:

"I attempted to contact BB over the weekend as follows:

Saturday –

12.25 - left a voicemail message
6.51 PM - left a voicemail message

Sunday –

2.35 PM- went straight to voicemail
9.25 PM – went straight to voicemail

None of my messages were returned, and I have not been able to speak to BB since Friday.

I am in the process of drafting an email in response to your request in relation to the 'system' used at meetings and hope to be able to provide that to you in the next hour or so."

88. In an email sent by the first respondent's solicitor to me on 14 July 2014 at 12:56 pm the first respondent's solicitor attached copies of site meeting minutes for site meetings held on 5 February 2014, 12 February 2014 and 19 February 2014 and said:

"Further to my email below, in response to your request in relation to the 'system' used at meetings, please see ***attached*** *the following:*

1. *relevant minutes of meetings that demonstrate that DD was present on site 5/2 and 12/2 (noting that the minutes for meeting number 5 are were corrected from their incorrect date of 5/1/2014 and the minutes for*

meeting number 6 omit WW from the Present list even though he was present – see item 3.08 and also the Owner Subcontractor minutes number 1 of the same date); and

2. *minutes of meeting that demonstrate that WW was not in attendance at the site meeting held on 19/2/2014.*

By way of explanation, the minutes of meetings numbered 5,6 &7 are the project control group meetings; the minutes of the meeting 12/2/2014 numbered 1 is the Owner Subcontractor meetings (held before the PCG meetings to coordinate the various contractors ensure appropriate on site behaviour).

The presence of WW on site on 5/2 & 12/2 is consistent with him arriving in Darwin on Saturday 1 February 2014 with the fan coil units (see the email annexed as GPM 8 to the statutory declaration of AA) and is inconsistent with the assertions of VV in his statutory declaration at paragraph 39, that he met WW for the first time on about 20 February 2014 (see paragraph 38 and 39 of the VV statutory declaration).

In this respect, I refer the adjudicator to the submissions contained in paragraph 5 of the adjudication response of the first respondent, and submit that that applicant is seeking to 'push forward' the date by which it became aware that it was working for the second respondent in order to avoid the consequences set out in paragraph 5.13 of the first respondent's adjudication response, namely that the applicant has been paid in full for the works completed by him up to the date when he became aware that he was performing the works for ZZZZ.

Paragraph 33 b) of the AA statutory declaration is said to be responding to paragraph 13 of the VV statutory declaration, but is also responding to paragraph 19 of the VV statutory declaration.

AA denies that he requested a costing document from VV or from anyone. AA also denies that VV advised him that it was "not possible … to provide an accurate figure that I would charge because there were too many variables", and further denies that VV said to him that he could only provide an "estimate", and that VV accepted this. Please advise whether you require a supplementary statutory declaration to be provided to this effect."

89. The only one of those site meeting minutes which states that the applicant was in attendance is the site meeting minutes for the site meeting held on 12 February 2014 which also includes the following as the first paragraph of such minutes:

> *"**1.01 Meeting***
> *DQ* [abbreviation for a meeting attendee named RR] *suggested that a separate meeting be helod* [sic held] *with the subcontractors before the main project meeting. Resolved to hold the separate meeting on a weekly basis before the main meeting."*

90. The applicant's solicitor sent further submissions to me concerning site meetings and site meeting minutes in an email sent to me on 16 July 2014 at 10:47 am (which attached a copy of the page of the applicant's diary for 12 February 2014) and stated:

> *"The "site meeting minutes" document evidences that* [the applicant] *attended a meeting on 12 February 2014.* [The applicant] *denies that he was present at that*

meeting. He says that he attended only two meetings and those meetings were for sub-contractors only and were chaired by ZZD. [The applicant] *says that he had been invited to the "main meetings" on 4 or 5 occasions by BB but on each of those occasions BB later contacted him and advised that the meeting had been cancelled.* [The applicant] *notes:*

a. That there is no mention of him [the applicant] in the body of the minutes for the meeting of 12 February 2014.

b. That he [the applicant] *kept a diary. Attached is a copy of the page from his diary for 12 February 2014. He says that had he attended that meeting, that fact would have been recorded."*

My analysis of the parties submissions relating to formation of contract, further submissions relating to contract and my findings in relation to same

91. The applicant has contended that[26]:

a. the applicant performed between 80 to 100 maintenance and repair jobs for the first respondent, most of which were done at the KK in Darwin, but also for other TTs in Darwin;

b. all of those contracts were negotiated wholly orally between the applicant and the first respondent's BB and the applicant charged for his labour in all of those contracts at the rate of $90 per hour plus GST;

c. the first discussion the applicant had in the lead up to the contract to remove and replace all the AC's in the KK was between the applicant and BB in late October 2013;

d. there were about 8 to 10 further discussions between the applicant and BB when the basis of the contract was discussed prior to the applicant starting to perform the contract by removing the existing AC's with another tradesman the applicant had engaged to assist him to perform the contract named CC on about 13 January 2014; and

e. in none of those discussions was there any discussion about the works being performed by the applicant for a lump sum price or at an hourly rate, so the applicant presumed that he was expected to charge at his usual hourly charge out rate of $90 per hour plus GST.

92. The second respondent has contended that[27]:

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26 statutory declaration applicant 20/06/2014 paras 6 to 10

27 Second respondent's submissions para 6 and undated and unsigned statutory declaration WW paras 7 to 9

a. BB had told the second respondent's DD (on some unspecified date) that the applicant had undertaken work for the first respondent in the past and suggested that he contact the applicant and discuss the second respondent engaging the applicant as a subcontractor;

b. in early to mid-December 2013 DD telephoned the applicant during which DD:

   i. requested an estimate for the applicant to carry out the contract works pursuant to the first respondent's purchase order to the second respondent;

   ii. the applicant supplied a verbal estimate;

   iii. DD accepted that estimate; and

   iv. DD insisted that the applicant also provide him with a written quotation.

93. It is extraordinary how brief and lacking in detail DD's statutory declaration is in relation to these formation of contract discussions. For example:

   a. no details have been provided concerning what DD allegedly told the applicant about the works needed to be performed by the applicant;

   b. no details have been provided concerning what DD allegedly told the applicant about the terms of the order from the first respondent to the second respondent; and

   c. no details have been provided regarding type of oral estimate allegedly provided by the applicant for performing the subcontract or how much such oral estimate was for.

94. Before I asked the respondents to attempt to contact BB to obtain evidence from him about the discussions he had with the applicant leading up to the formation of the contract, neither of the respondents provided any evidence in that regard.

95. Even though, by the time that the adjudication application had been served, BB had left the first respondent's employ, I consider that the first respondent should nevertheless have made a better attempt to obtain evidence from him about those discussions. I consider its failure to do so until I requested that that be done, indicates that they were concerned that his evidence may support the applicant's case concerning the formation of the contract.

96. BB's assertions in the brief notes of his discussions with the first respondent's solicitor to the effect that the applicant "*knew from the start that he was doing the work for* [the second respondent]*, he always knew. He was giving me the invoices for the work and I said to him, no, you need to give them to* [the second respondent] – *you're doing the work for* [the second respondent]" do not greatly assist me in my determinations about those oral discussions, because I still lack information about what BB was supposed to have said to the applicant to the effect that the applicant's contract was with the first respondent or when such a discussion occurred before I can make any finding that the applicant had such knowledge. I also consider that if it was necessary for BB to tell the applicant that he needed to send his invoices to the second applicant rather than to the first applicant that is more likely than not to indicate that the applicant had not been told anything about the second respondent's involvement before the applicant started to remove the AC's.

97. Nor does the contention by BB in the same set of notes, that in about December 2013 the second respondent had provided him with 2 sets of manuals and he had given one of them to the applicant, assist me, because, even if that happened, without more detail of what was discussed between BB and the applicant about the manual, I am unable to form a view whether those discussions made it clear to the applicant that he was supposed to be contracting with the second respondent.

98. I therefore make the following findings concerning the formation of the contract:

    a. I find that the contract was wholly oral and that the oral part only consisted in several discussions between the applicant and BB on behalf of the first respondent commencing some time in October 2013 and ending soon prior to the applicant commencing to perform the contract on about 13 January 2014.

    b. I find that none of those discussions were between the applicant and DD.

    c. I find that on the balance of probabilities the applicant's version of the matters discussed during the discussions he had with BB leading up to the formation of the contract are correct.

    d. I find that the parties to the contract were the applicant and the first respondent, because BB was an employee of the first respondent.

99. I also find that the essential express terms of that contract were that:

a. the applicant would remove the AC's in about 186 UU at the first respondent's KK in Darwin;

b. the first respondent would supply all the materials, including the AC units;

c. the applicant would install replacement ACs, reconnect them and test they were operating properly;

d. the applicant would only have to supply labour for the works;

e. the work would commence on or about 13 January 2014 and last about 4 months;

f. the applicant would employ a sufficient number of tradespersons to complete the works in the required 4 month period; and

g. the works would commence on the top floor of the TT being level 10 and progressively work done to level 2, that being the lowest floor on which UU were located.

100. I also find that the contract contained an implied term to the effect that the applicant would be paid for the works performed at an hourly rate for the applicant and all tradespersons employed by the applicant to perform the works at the hourly rate of $90 per hour.

101. I then need to make findings regarding:

a. who asked the applicant to provide a quote or estimate and when that happened;

b. what was discussed when that request was made;

c. who the applicant provided that document to;

d. when it was provided;

e. the contractual effect, if any, of the provision by the applicant of the document headed "Costing per room";

f. when the applicant was first told that the second respondent was the principal AC contractor;

g. whether an order from the second respondent to the applicant dated 30 January 2014 was delivered to the applicant by email sent by DD on 3 February 2014 at 10:49 am;

h. if the answer to the previous subparagraph is yes, what effect, if any, that had on the contract between the applicant and the first respondent; and

i. if the answer to such subparagraph is no, whether the statement on 17 February 2014 by BB to the applicant to the effect the applicant wasn't actually doing work for the first respondent and that he was working for the second respondent, has any contractual effect.

102. It is not possible to fully test evidence in an adjudication, in the way it can be tested in a court hearing by cross examination. I consider that none of the evidence provided by the parties is as detailed as I would expect it to be for court proceedings, but I consider there is sufficient evidence for me to be able to make findings about all of the matters referred to in the previous paragraph.

103. I find, on the balance of probabilities, as follows regarding those matters:

a. I find that that on or about 28 January 2014 BB asked the applicant to provide him with a quote or estimate for the contract works to be performed by the applicant. I find that it was likely that that happened, rather than his son, DD, having done so, because I consider it to be more likely that DD was not introduced to the applicant until some uncertain time in the first half of February 2014.

b. I find that, due to the family relationship between BB and DD, BB made that request to the applicant as the agent of the second respondent, because there was no need for BB to ask the applicant to provide a quote or estimate to the first respondent in circumstances where the second respondent had already entered into a contract to be the principal AC contractor.

c. I find that, the first respondent's AA did not also make that request, because I accept his evidence that he cannot recall having done so, and I also consider that there would have been no reason for him to ask a party, who he understood to be a subcontractor to the principal AC contractor, to provide a quote or estimate.

d. I find that on balance that on 29 January 2014 the applicant provided the costing per room document to BB in BB's office in the presence of CC and that when the

applicant did so:

i. the applicant said to BB that it is only an estimate as every room is different; and

ii. however, as long as the air conditioners are, “slide out slide in” the costing could be used as a guide.

e. However, I also find on balance that on 29 or 30 January 2014 (rather than on 17 February 2014), BB first told the applicant that the second respondent was the principal AC contractor and that the applicant would from then on be its subcontractor, because:

i. of the contradiction in the application regarding the date when this occurred in the applicant’s statutory declaration (where it was stated in paragraph 38 that that happened on 17 February 2014) and in the payment claim (where it was stated that that happened on about 30 January 2014 - see payment claim page 2 paragraph 4);

ii. that it is also stated in the payment claim that “Approximately a week thereafter a person introduced himself as “DD [i.e. DD] from [the second respondent]”” to the applicant (see payment claim page 2 paragraph 5); and

iii. in a recorded telephone conversation between the applicant and the contractor who completed the contract works, which occurred some time after the applicant stopped performing the contract works, it is stated by the applicant at 10 minutes and 45 seconds of such recording “…I didn’t know I was working for him [i.e. the second respondent] until about a week and a half …I think it was two and a half weeks into the job then I found out I was working for a third party otherwise I thought I was working for [the first respondent]”. I note that I make findings concerning whether it was legally permissible for me to consider those recordings in the next section of this determination.

f. I consider that it is more credible that BB first told the applicant that he was working for the second respondent on about 29 or 30 January 2014 than on 17

February 2014, because, when the applicant was preparing his statutory declaration, he may have considered that it better suited his legal position for him to state that he was first told about the second respondent by BB half way through February 2014 than at the end of January 2014.

g. I find that the first respondent's further submissions, concerning whether the second respondent's email attaching its order to the applicant was received by the applicant, should be preferred over the applicant's submissions in that regard, but do not consider that that matters contractually, because I also find that the statements by the applicant to BB when providing the costing per room document to the effect that it was only an estimate bound the applicant that it should be treated as an estimate rather than a quote per room, because BB was acting as the agent of the second respondent at that time.

h. I agree with the first respondent's submissions to the effect that once BB informed the applicant by no later than 30 January 2014 that the second applicant was contracting him to perform the contract works:

   i. any contractual relationship between the first respondent and the applicant ended (noting that I have already found that up to that date the applicant was performing the contract works for the first respondent on a 'do and charge' basis with no defined scope);

   ii. any further contract works performed by the applicant after being advised that he was being contracted by the second respondent was pursuant to a contract between those parties; and

   iii. by continuing to perform the contract works after 30 January 2014, after being told that he was contracted to the second respondent, meant that the applicant was estopped from denying that that was the case.

i. I also find that on or about 4 February 2014 the contract between the applicant and the first respondent came to an end due to the delivery of the second respondent's order to the applicant and thereafter a contract between the applicant and the second respondent was substituted for the earlier contract whereby the applicant contracted to perform the balance of the works for the

estimated costing per room, unless the applicant advised the second respondent that the estimate per room needed to be revised due to the occurrence of unforeseen contingencies, which would make it take the applicant longer to perform the contract works and he could then vary the costing per room accordingly.

104. Due to my above findings that there were two contracts at different times to perform different parts of the contract works, the first contract being between the applicant and the first respondent and the second contract being between the applicant and the second respondent and the payment claim related to charges rendered in both of those contracts I have determined, as stated above in the section of this determination headed "Jurisdiction", that I must dismiss the application without making any findings as to its merits.

FINDINGS AS TO FURTHER SUBMISSIONS ABOUT APPLICANT'S RECORDINGS OF TELEPHONE CALLS AND MEETINGS

105. In my email sent to the parties' legal representatives on 8 July at 11:48 am I stated:

> *"I am presently uncertain whether I should consider any of the recorded information on the memory stick or the transcription and related submissions pertaining to any part of that recording in some of the submissions. The only party who has made submissions about the legality of using this evidence is the Applicant, who has referred to ss. 11(1)((a), 15(1) and 15(2)(b) of the Surveiillance Devices Act, NT ("SDA") and s 34(1)(b) of the Act. Whilst it does appear to me that, in the circumstances, there may not have been any breach by the applicant of s. 11(1)(a) of the SDA because the applicant was a party to the recorded conversations, I am not as yet convinced that the exception in s. 15(2)(b)(ii) of the SDA should be taken to apply in this case, because I have not been referred to any commentary about the operation of s. 15(2)(b). I therefore request that the applicant provide further more detailed submissions (which include any commentary on the operation of the exception in s. 15(2)(b)(ii) of the SDA in texts, cases or first and/or second reading parliamentary speeches or otherwise) by 5pm on Wednesday 9 July next.*
>
> *I then request that the respondents make any submissions in reply to the applicant's submissions in that regard by 5pm on Thursday 10 July next."*

106. The applicant made the following further submissions in this regard in the time allowed by me:

> *"22. Publication of a recorded private conversation is permitted under the Surveillance Devices Act if it is "protecting the lawful interests of the person making it" [section 15(2)(b)(ii)] or "in respect of a publication in the course of a legal…. proceeding" [section 15(2)(c)]. VV submits both those exceptions are satisfied.*

23. *The adjudication under the Act is clearly a legal proceeding. The evidence in VV's statutory declaration makes it clear that he commenced making the recordings for the protection of his lawful interests when he became concerned about receiving payment of his contract.*

24. *The Western Australian Surveillance Devices Act is similar, although not identical to the NT Act. The exemption in Western Australia is actually more difficult to satisfy in that there must first be a legal proceeding and then it must be shown that the publication is necessary for the protection of the lawful interests of the person making the publication. So, in Western Australia there is a 2 step process, but in the Northern Territory there are alternative exemptions.*

25. *VV relies on the Federal Court decision out of Western Australia Metz Holdings Pty Ltd (as trustee for the Zulu Trust) v Simmac Pty Ltd (No1) BC 2011 01 418 (copy attached), and in particular the findings of Barker J:*

a. At [19] that the expression "legal proceedings" should have a broad interpretation given to it; and

b. At [24] that in similar circumstances to the present, that the applicant was protecting his lawful interests."

107. The first respondent's further submissions in this regard were as follows:

"28 Other than stating that the adjudication is not a legal proceeding within the definition of section 15(2)(c), and questioning the relevance of the decision in Metz Holdings Pty Ltd v Simmic Pty Ltd (No. 1) [2011] FCA 263, the First Respondent makes no further submissions in response to this request."

108. I agree with the applicant's submissions to the effect that the term 'legal proceedings' should be given a broad interpretation so as to include an adjudication of a construction contract under the Act and that, in any event, due to the cumulative terms of the exceptions in the relevant section in the NT Surveillance Devices Act, it does not matter whether that is so, if I find that the making of the recordings was done by the applicant to 'protect his legal interests'.

109. I find that the circumstances pursuant to which the applicant made such recordings can be construed as being an attempt by the applicant to 'protect his legal interests' and, therefore, the publication of such recordings does not breach that Act and I can consider them.

110. After listening to those recordings I found that a large part of their contents were irrelevant to the matters which I needed to determine.

111. However, I find that the recording I refer to in paragraph 103(e)(iii) above were relevant

to contractual matters.

112. The only other parts of those recordings, which I consider could have been of relevance, relate to the veracity of the second respondent's set-off claim.

113. However, there is no need for me to make reference to those recordings, because I have found I lack jurisdiction to deal with the application on its merits.

DEFECTS SET-OFF

114. As I consider I must dismiss the application because I lack jurisdiction under s. 33(1)(a) of the Act I consider also lack jurisdiction to make a determination of the merits of this set-off claim.

COSTS

115. S. 36 (2) of the Act provides that *"if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs."*

116. I do not consider that the applicant at any time throughout the course of the adjudication acted in a frivolous or vexatious manner, or that its submissions were unfounded.

117. Therefore, in relation to my fees and the other fees incurred by the parties, I adopt the standard position in s 36(1) of the Act that the parties to a payment dispute bear their own costs in relation to an adjudication (including the costs the parties are liable to pay under s 46 – i.e the adjudicator's fees).

DETERMINATION

I, David Baldry, determine on 29 July 2014 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act* that:

A. the application for adjudication be dismissed under s. 33(1)(a) of the Act;

B. the amount to be paid by the respondents to the applicant is NIL;

C. I make no orders as to the costs of the adjudication pursuant to s. 36(2) of the Act.

Dated: 29 July 2014

David Baldry
Registered Adjudicator