THE CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT (NT)

DETERMINATION NO. 22.10.01

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act (NT) ("the Act")

between

Applicant

and

Respondent

Pursuant to s.33(1)(b) of the Act, I, Alistair Wyvill SC, the appointed adjudicator, determine, on the balance of probabilities, that the Respondent to the payment dispute is liable to make a payment to the Applicant of $253.52. I determine that this sum is to be paid on 18 May 2010.

I am satisfied in accordance with s.36(2) of the Act that the Respondent has incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, the Applicant. I decide that those costs are in the sum of $500.00 and that they are to be paid on 18 May 2010.

Dated this 18th day of May 2010

Alistair Wyvill SC

Particulars of Adjudication[1]

Name of Adjudicator	Alistair Wyvill SC
Adjudicator Registration Number	22
Date of Certificate of Registration	20 May 2009
Applicant's name	
Applicant's contact details	
Respondent's name	
Respondent's contact details	
Details of contract	Comprehensive Maintenance Services NT/K, at [three sites within the NT] dated 1 July 2008
Date of Payment Claim	26 February 2010
Date of service of Payment Claim	26 February 2010
Date Payment Dispute arose	14 March 2010
Date of Application for Adjudication	16 April 2010
Prescribed appointer	The Institute of Arbitrators & Mediators of Australia
Date prescribed appointer served	16 April 2010
Date Respondent served	20 April 2010
Date Adjudicator served	19 April 2010
Date of Respondent's written response served on the Applicant and the Adjudicator	6 May 2010
Date of Adjudicator's Determination	18 May 2010
Identification number of adjudicator's determination	22.10.01
Amount to be paid - s.38(1)(c)(i)	$253.52
Date on or before which this sum must be paid - s.38(1)(c)(i)	18 May 2010
Security to be returned (if any) – s.38(1)(c)(ii)	None
Date on or before which any security must be returned (if any) – s.38(1)(c)(ii)	Not applicable
Decision under s.36(2)	The Applicant is to pay the Respondent $500.00 on 18 May 2010.
Information determined as being not suitable for publication (if any) - s.38(1)(e)	None

[1] In the event of any inconsistency between this schedule and the reasons below, the reasons should prevail.

Reasons for Adjudicator's Determination

Background

1. It is common ground that the Applicant and the Respondent are party to a contract entitled "Comprehensive Maintenance Services NT/K Services Level Agreement" and dated 1 July 2008 ("the Contract") and that the Contract applies to the work the subject of the adjudication application ("the Application"). That work, in the respects relevant to this adjudication, was carried out in the Northern Territory and, in my view, falls within the definition of "construction work" in s.6(1)(e) of the Act. The contrary was not suggested by the Respondent.

2. The subject payment claim ("the Payment Claim") is dated 26 February 2010. It was served by email on that day and, it appears, by facsimile at 5.21pm on the previous day. Given the date of the letter and cl. 23.2 of the Contract, I find that service was effected on 26 February 2010. The Payment Claim meets the requirements of cl.18.3 as to form, if they are applicable. It also satisfies the requirements set out in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42 at [67].

3. Time for payment is 14 days after the end of the month in which the claim is received: see clause 19.1 and item 9 of schedule 1 (the words in brackets in item 9 must be read subject to the express words in cl.19.1). There was no response to the payment claim from the Respondent. Accordingly, I find that the payment dispute arose on 14 March 2010.

4. The Application was served on the appointing authority, the Institute of Arbitrators & Mediators of Australia, on 16 April 2010. It is the nominating authority agreed by the parties under clause 20(e) of the Contract.

5. By letter from the Institute of Arbitrators & Mediators of Australia dated 19 April 2010, received by me along with the Application on that date, I was appointed as adjudicator under the Act. I confirmed at that time that I was not aware of any fact or matter which would or might disqualify me from adjudicating the dispute or prevent me from determining the matter within the time limits required by the Act. That remains the position.

6. By facsimile letter of 21 April 2010, I was advised by the solicitors for the Respondent that a full copy of the Application including all supporting material was not received by the Respondent until 20 April 2010. This was accepted by the Applicant.

7. Assuming that the Payment Claim is not a repeat of an earlier payment claim, the Application was served well within 90 days of the payment dispute arising.

8. On 22 April 2010 I directed the Applicant to provide written submissions to establish that the payment claim did not contain any repeat claims such as to attract the principle established by the decision in *AJ Lucas Operations Pty Ltd v Mac-attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14; [2009] NTCA 4. I receive those submissions by facsimile on 29 April 2010.

9. On 6 May 2010, I received the Respondent's response. My determination was required therefore by 20 May 2010.

10. I consider that all parties have complied with the procedural requirements of the Act and with my directions in relation to the provision of submissions and materials to me. If I am wrong in this respect, in any event I would have elected to receive these submissions and materials under s.34(1)(b) of the Act.

11. I note that there is nothing before me which suggests that there is an arbitrator or other person or a court or other body dealing with a matter arising under the Contract who has made an order, judgment or other finding about the dispute that is the subject of this application.

Jurisdiction

12. The Respondent puts a threshold argument which amounts to a submission, it seems to me, that I have no jurisdiction to adjudicate the payment dispute in essence as it does not exist. The Respondent submits that the termination of the Contract on 28 February 2010 under clause 26.8 occurred prior to the time by which the Respondent was required to assess the Payment Claim under the Contract. The obligation to assess did not survive termination. Similarly, no obligation on the part of the Respondent to pay the Payment Claim could arise thereafter.

13. I reject this submission. It seems to me clear that, on a true construction of the Contract, the mechanics of determining the value of, and then paying for, items of work completed prior to the date of notice of termination survive termination. Clause 26.8(b) states that:

> *"[The Respondent's] Representative must assess, and [the Respondent] must pay, the amount payable to the Subcontractor under the Agreement for the performance of the Services up until the date on which the notice of termination was given to the Subcontractor."* (emphasis added)

14. That notice was given by letter dated 15 February 2010 on or shortly after 15 February 2010. I note that the letter itself in the fourth paragraph contemplates

the Respondent paying for work undertaken after the date of the notice up to the end of February 2010.

15. As the Applicant's claims all relate to work undertaken prior to 15 February 2010, it is clear, in my view, that the termination under clause 26.8 pursuant to the letter of 15 February 2010 could not and did not, of itself, defeat the Applicant's claims under the Payment Claim.

16. In any event, this is a point which goes to the merits of the payment dispute. For an adjudicator to have jurisdiction, it is not necessary for an applicant to establish that the amounts claimed in the payment claim are in fact due. It is sufficient to show that they are claims which have been validly raised under the relevant contract: *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [52].

17. The Respondent also submits that, to the extent that the Applicant seeks to have its claim for additional work valued on a basis different to, and significantly greater than, that as set out in the Payment Claim ($2,334,879.94 as opposed to $1,235,696.98), it is beyond my power. I agree with this submission. Payment dispute is defined in s.8 of the Act by reference to "the amount claimed in the payment claim". Whilst an adjudicator may arguably have some latitude to award a greater sum than that set out in the payment claim to take account, for example, of an obvious and comparatively insignificant error, in my opinion, he or she has no power to award a substantially greater sum calculated on a significantly different basis to that set out in the payment claim. I therefore hold that I have no jurisdiction to assess the Applicant's claim for additional work on a basis other than, and in an amount in excess of the sum, as set out in the Payment Claim.

18. No other points were taken by the Respondent as to my jurisdiction. I should note the Applicant's submissions have satisfied me that none of the claims have been the subject of a prior, valid payment claim. The Respondent has not suggested otherwise. I hold that the Applicant's letter of 5 February 2010, to the extent it makes a claim in relation to the late payment claim and the wrongful deduction claim is not a payment claim; although I note that, even if it was, the Application would still have been made within 90 days of the payment dispute arising.

19. Accordingly, for the purposes of s.31 of the Act, I am satisfied that:

    19.1. the Contract concerned is a construction contract within the meaning of the Act;

    19.2. the Application has been prepared and served in accordance with section 28, including that the Application was served within 90 days of the payment dispute arising;

19.3. there is no arbitrator or other person or a court or other body dealing with a matter arising under the Contract who has made an order, judgment or other finding about the dispute that is the subject of this application;

19.4. this is not a matter where its complexity and/or the shortness of time prevents me from fairly making a determination under the Act.

20. Accordingly, I am obliged by s.31 to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security to the other.

Determination of Payment Dispute - generally

21. The Applicant takes a threshold point that, by failing to dispute the Payment Claim after its receipt, the Respondent is now bound to pay it in its entirety. It relies on cl.6(2) of division 5 of the schedule to the Act which it claims is to be implied into the Contract by s.20 of the Act and, alternatively, relies on cl.19.1 of the Contract.

22. I reject both of these submissions. Given cl.19 of the Contract, there is no room in my opinion for implying terms from division 5 of the schedule to the Act because the Act has "a written provision about the matter": s.20. Further, whilst it places an obligation on the Respondent to "assess any Claim for payment, and to the extent the assessment is less than the amount claimed, give reasons for the assessment within 3 days of receipt of the Claim", cl.19.1 does not in terms say that the Respondent is precluded from disputing a payment claim if it does not do so. The words used in the clause tend to suggest the opposite, obliging the Respondent to pay "any amount <u>payable</u> to (the Applicant) in respect of the Claim for payment" (emphasis added). Had the Contract intended to require the Respondent to pay a claim which was not formally disputed in accordance with cl.19.1 words like "or any amount <u>claimed</u> in the Claim if not disputed within 3 days of receipt of the Claim" would have been used or would have to be implied.

23. In these circumstances, in my opinion it would not be appropriate to imply into the clause an obligation of this kind on the Respondent to pay the entire amount of any claim by the Applicant which it fails dispute with reasons within 3 days of receipt regardless of whether the Respondent considered that the claim was well founded or not. It is not necessary to do so. The Contract functions quite satisfactorily without it.

24. In any event, if contrary to my view cl.19.1 does require the Respondent to pay a "Claim for payment" it has not disputed within the time specified, in my view, the Claim itself would have to satisfy the timing requirements in cl.18.2 or cl.29 as applicable. These are expressed clearly in mandatory terms. As explained below, the Applicant has not complied with these clauses (one or the other is applicable

to every claim) in relation to the claims in the Payment Claim. The Applicant cannot breach the timing requirements under the Contract for claims and then insist on strict compliance by the Respondent with its timing obligations under the Contract for the same claims, the latter in my view being an obligation dependent upon the former.

Determination of Payment Dispute – variation/additional work claim – amount claimed $1,235,696.98 (inc GST)

25. This is item No.3 in the tax invoice in the Payment Claim.

26. This is a claim for additional work which the Applicant says it was instructed to do by the Respondent through the various job dockets issued by the Respondent over the course of the Contract. It is said that this work was done between 1 July 2008 and 31 December 2009, which is almost the entire period of the Contract. The essence of the claim is that under the Contract, the Applicant agreed to undertake "Planned Services" (also known as preventative maintenance) on the equipment listed in schedule C for a fixed annual price of $689,386.60. At the request of the Respondent, the Applicant in fact undertook such work on a large number of other items of equipment not listed in schedule C. The scale of the additional work claimed is reflected by the fact that:

    26.1. On the Applicant's case, the number of assets listed in schedule C is 582 whereas the number of additional assets it worked on which are not listed in that schedule is 1302, which suggests at least a trebling of the scope of works;

    26.2. The Applicant now assesses the value of this additional work at $1,235,696.98 (at least), which also suggests a trebling of the scope of works and, of course, the contract price in this respect.

27. I have reviewed the job dockets issued by the Respondent and note that they purport to be instructions to undertake Planned Services within the scope of the Contract. They are not, or at least do not purport to be, directions for a variation under cl.9.1 or 9.3. I also note that the "work done" section in each job docket appears to have been completed and signed by employees of the Applicant to evidence that the work requested has been finished. As far as I can see, there is nothing in any of the job dockets completed by the Applicant to warn the Respondent that some or all of the work was undertaken outside scope, undertaken as additional work and as a result subject to charge as a variation. In fact I note that the section headed "Additional Work" in each job docket appears to be empty, which suggests the exact opposite.

28. It appears that the first time that the Applicant suggested that it may be undertaking Planned Services work outside that which it had contracted to undertake was in an e-mail of 23 April 2009, more than 9 months after the start of

work under the Contract. It was left by the Applicant on the basis that the question was “being reviewed and we will advise the Respondent accordingly.”

29. By letter of 29 April 2009, the Applicant advised that it considered that it was being asked to undertake Planned Services on items outside of schedule C and that “until now we may have inadvertently been doing so.” It then said, “[The Applicant] will not be seeking to recover this oversight.” This statement was not in the form of an offer, but a statement of intention and explains why the Applicant made no attempt certainly at that stage to make a formal claim under the Contract, which remained uncontradicted until the Payment Claim.

30. This letter went on to say that the Applicant required a direction to undertake this work as a variation, presumably under cl.14(c).

31. There is no evidence before me that any such direction was ever given. Rather, the Respondent continued to deliver job dockets for Planned Services on the basis that the subject equipment fell within scope and the Applicant continued to complete the works the subject of those dockets.

32. Further, although required by cl.8.4 of the Contract “to complete a full equipment survey, verifying existing data and recording details of new equipment” within 3 months of “contract award date” (i.e., by 1 October 2008 at the latest), it appears that this was never done by the Applicant, a fact which the Applicant acknowledged in its letter of 15 December 2009.

33. As late as 15 December 2009, the Applicant was seeking – but still not receiving - specific “repair dockets” for this claimed additional work from the Respondent. It continued doing this alleged additional work until 31 December 2009.

34. As noted above, the Respondent elected to exercise its right to terminate the Contract on notice under cl.26.8 by letter of 15 February 2010, with effect from 28 February 2010. Eleven days later, the Applicant delivered the Payment Claim. This was the first time, as far as I can see, that any attempt was made by the Applicant to identify with particularity all of the additional work done and to price that work. This is in spite of the fact that, on the Applicant’s case, it had been undertaking such additional work since July 2008, more than 19 months earlier.

35. The Respondent relies, amongst other matters, on cl.18 and cl.29 of the Contract as barring the Applicant’s claim in this respect in its entirety. Given that cl.29 applies “except for Claims for payment pursuant to clause 18”, one or other of these clauses must apply as the Applicant’s claim is plainly a “Claim” under the Contract and hence falls prima facie within cl.29.

36. It seems to me that the correct analysis of the Applicant’s claim to be paid in this respect is that the subject additional work could only be undertaken under the

Contract as a variation to Planned Services under cl.14(c). In order to be obliged to undertake this work, the Applicant was entitled to insist upon a direction to this effect under cl.14(c), which would have then have triggered entitlements to valuation and payment as a variation under cl.9 and cl.18.

37. The Respondent never provided this direction, at least not in those terms, but purported to issue job dockets on the basis that the work fell within schedule 3. This is the source of the dispute – whether or not a direction under cl.14(c) was required. The dispute as set out in the Payment Claim in this respect in my view does not fall within "Claims for payment pursuant to clause 18" as the Applicant could have no arguable right to payment as claimed except if the work was outside scope and hence required directions for variations under cl.14(c).

38. For these reasons, in my opinion, the Payment Claim is not a "Claim for payment pursuant to clause 18" and accordingly cl.29 applies to this claim.

39. The first document which could possibly satisfy the requirements of cl.29 in relation to this claim was the Payment Claim. As noted, it appears that the Applicant ceased doing this disputed work from 1 January 2010. Accordingly, the Payment Claim was outside the 30 day requirement in cl.29 even for any such work undertaken in December 2009, let alone for work completed prior to December 2009. This assumes, in the Applicant's favour, that the dispute in relation to the disputed equipment worked on in December 2009 did not arise at a much earlier date, i.e., when the Applicant first did work on the same equipment in the knowledge that it was outside, on its view, schedule C.

40. Accordingly, I find that the Applicant's claim in this respect is barred by cl.29 in its entirety.

41. If I am wrong and the Applicant's claim falls to be considered as a "Claim for payment pursuant to clause 18", it appears to me that equivalent, and indeed more difficult, problems arise for the Applicant in relation to time which have not been met.

42. This claim for additional work is "in respect of Planned Services" – the Applicant's claim being covered by cl.14(c). Clause 18.2(b) requires the Applicant to issue an invoice for the work "at the end of the month the service was completed in". It was bound by cl.18.3(c)(ii) to include in those invoices "the value of any Variations". I am unable to locate copies of those invoices in the materials provided to me. Given the Applicant's assurance that none of the claims it now makes have been the subject of earlier invoices, I infer that none of them included any claim of the kind now made. Clause 18.1 makes it clear that the submission of "Claims for payment" is a pre-condition to the right to payment.

43. In my opinion therefore, the Applicant has failed to satisfy the pre-condition for payment in cl.18.2 by including the amount claimed for the variation in each month's invoice by reason of which it has lost the right to make a claim.

44. There is no basis for reading down or otherwise not applying cl.18 or cl.29 in accordance with their terms and, further, consistently such as to provide a regime for early notice upon which a contractor in the position of the Respondent could rely in order to control the budget for the works by setting conditions precedent for valid claims for payment. Clauses 18.2 and 29 are expressed in mandatory terms. If they were to be construed otherwise, then the plain intention of the parties as revealed in the Contract to ensure that any matters which may cause additional costs are brought promptly to the attention of the Respondent (see cls.4.2, 4.4(b), 8.4, 9.2, 9.3, 9.4 and 13) would be defeated.

45. Provisions of this kind have been included in construction contracts for many years and have been enforced by the Courts. They play an important role in managing cost by ensuring that events which are likely to affect the cost of a contract are brought promptly to the attention of the paying party and dealt with shortly after they occur. This is obviously important when the paying party is itself looking to recoup its payment from its principal. Whilst strictly speaking it is correct as the Applicant noted in its letter of 15 December 2008 that the requirements of the Respondent's contract with [the principal] were not its concern, it can have no basis for complaint if it suffers the consequences of failing to comply with the terms of its own contract with the Respondent inserted to protect the Respondent' interests under its contract with [the principal]. Whilst it is possible the Respondent may have made omissions in preparing schedule C and omitted equipment which ought to have been included, in addition to its obligation under clause 8.4 to complete a survey to identify any such equipment (which would have identified any issue in this respect), the Applicant had an obligation under the Contract to make a formal claim within the time specified if it wished to be paid for work it had undertaken on this equipment. It failed to do either.

46. The point taken now by the Applicant was available to be taken at any time after 1 July 2008. The task which it has done now – to compare the dockets with schedule C – could and should have been done on receipt of the first docket requesting work (assuming that schedule C should be treated as the Applicant now suggests). When the Applicant did bring the issue to the Respondent's attention, it was content to give up any rights in relation to past work. It did not press the matter in any contractual sense until its letter of 15 December 2009, when it stated that it would cease doing what it considered to be additional work on 1 January 2010. It also stated it would be seeking reimbursement for this "over servicing". This appears to be the first occasion on which the Applicant stated expressly that it would make a claim for payment for this claimed additional work.

This claim was not received until the Payment Claim of 26 February 2010, more than 19 months after the matter should have first come to the attention of the Applicant and 10 months after it did. Now, the Applicant seeks in effect to treble the contract price for the Planned Services work undertaken since 1 July 2008. It is hardly surprising in these circumstances that the terms of the Contract might operate to prevent the Applicant doing this.

47. As stated by Smart J in the well known case of *Jennings Constructions Ltd v Q H & M Birt Pty Ltd* (1986) 8 NSWLR 18 at p.24:

> *I appreciate the strength of the arbitrator's view that if there is an express or implied term that Birt will perform the work, the contract authorises the doing of the work, requires Birt to do it and Birt is entitled to be paid. Clause 47 does not diminish the requirement that Birt should do the work. It requires notice to be given where work is authorised under the contract if it should be necessary and events or circumstances occur making it necessary.* ***The requirement of giving notice must be met if payment is to be obtained for the extra work done as a result of the occurrence of the events or circumstances.*** *The clause does not focus upon whether the work is covered by the express or implied terms of the contract but upon the occurrence of events or circumstances necessitating the work.*
>
> *Unless notice is given the contractor may not be alerted to the proposed claim and given the opportunity to investigate and check. The requirement of written notice, which is so common in construction contracts, puts the matter on a formal and readily identifiable basis.* (emphasis added)

48. I note that there appear to be other serious difficulties with the Applicant's claim in this respect. For example, as the Respondent' points out, schedule 3 makes it clear that the Applicant's scope extended to "the entire installation" in relation to each item listed in schedule C, which I note is headed ""equipment description for information only". On this basis alone, a large proportion of the Applicant's claims appear to be erroneous. However, given my finding that this claim is precluded in its entirety by the terms of the Contract, it is unnecessary for me to consider whether the Applicant has satisfied the onus on it to establish that it has undertaken work outside the agreed scope of the Contract works and, if so, how much it would have been entitled to be paid had it otherwise satisfied the requirements of the Contract.

49. I therefore reject this claim in its entirety.

50. For completeness, I note that the Applicant has not made – or sought to make - any submission to the effect that the Respondent is precluded from relying upon clause 18.2 or 29 as pre-conditions for payment under the Contract. In the

absence of any evidence from the Applicant placing the responsibility for the delay on acts or omissions of the Respondent, no such argument is revealed by the material in any event.

Determination of Payment Dispute – repayment of wrongful early payment deductions claim – amount claimed $32,847.74 (inc GST)

51. This is item No.1 in the invoice in the Payment Claim.

52. These are in substance claims for damages for late payment in breach of cl.19.2 of the Contract. Whilst the contract price may have been negotiated on a particular basis, there are no provisions in the Contract which, in terms, permit the Applicant to recover the discount it was persuaded to give in the negotiations if the promised prompt payment is not made for Planned Services.

53. I do not exclude the Applicant's claim in this respect on the basis that they have not been characterized as such by the Applicant. They are clearly claims for late payment of sums due under the Contract, contrary to its terms, and the obvious remedy is damages for breach. Further, as such, there is no basis for limiting the claim to Planned Services.

54. However, all of these claims save one, appear to fall foul of cl.29. Being in substance claims for the payment of damages for late payment, they are clearly "Claims" to which cl.29 applies. On the Applicant's own case, the earliest event of late payment was 17 October 2008. This claim in general terms was raised at a meeting on 24 June 2009. The Respondent's representative stated that "Give me a list to show when we have paid late and I will address it." When this was raised again, three months later, at a meeting on 21 September 2009, the Applicant was asked again for documentation.

55. Particulars satisfying cl.29 were not provided until, at the earliest, the Applicant's letter of 5 February 2010, which was the claim foreshadowed in the Applicant's letter of 15 December 2009.

56. Once proper account is taken of the actual date of receipt by the Respondent of the relevant invoice and cl.19.2 of the Contract (as I find the Respondent has done in the schedule at tab 3 to its response), the late payment of invoice 012824 of 30 November 2009 in the sum of $5,070.40, received by the Respondent on 14 December 2009 but not paid until 26 February 2010, is the only claim under this item which satisfies cl.29. I note that, prior to that invoice, the most recent event of late payment was on 27 August 2009 in respect of an invoice due on 14 August 2009 (no.11562) and prior that on 18 June 2009 in respect of an invoice due on 14 June 2009 (no.11087).

57. I consider that 5% of invoice value is an appropriate measure of damages for this late payment and therefore award $253.52. Given my decision under s.36(2), I determine that no interest should be paid on this amount.

58. Otherwise, cl.29 applies and these claims are precluded entirely. I so find.

Determination of Payment Dispute – claim for wrongful deductions in June 2009 – amount claimed $58,866.19 (inc GST)

59. This is item No.2 in the invoice in the Payment Claim.

60. There does not appear to be any dispute that the Applicant undertook the work which was the subject of the penalty levied by [the principal] on the Respondent and that the Applicant was at fault. The Applicant's only answer appears to be that, although it did undertake the work, it was not obliged to as it was outside its scope, relying it seems on the scope of work argument in item No.3 in the tax invoice in the Payment Claim, discussed above.

61. However, this does not mean that this work was not done "under the Agreement" and hence, in doing it, the Applicant was obliged to do it competently and otherwise in compliance with the Contract. On the contrary, it is the Applicant's case that it did this extra work in accordance with the Contract and is entitled to be paid as a variation under the Contract. The Applicant's assertion that the work was outside schedule C does not undermine the validity of the deduction.

62. In any event, the indemnity in cl.25.2 is broad enough in my view to apply to the Respondent's negligence in this respect even if this answer was valid contractually.

63. Further, I note that full details of the Respondent's claim for a deduction in this respect was given to the Applicant by letter dated 29 June 2009. By e-mail 14 July 2009, the Respondent raised with the Applicant the question of the period over which the deduction should be made. The Applicant responded by e-mail of 21 July 2009 asking the Respondent to apply the deduction over a 3 month period. There was no hint in that e-mail that the Applicant disputed the deduction, which was then made.

64. It appears that this deduction was challenged (with particulars complying with cl.29) for the first time in the Applicant's letter of 5 February 2010.

65. I reject this claim both for failure to comply with cl.29 and on the underlying merits.

Determination of Payment Dispute – costs and damages on termination – amounts claimed $74,231.30 and $114,400

66. These are items No.4 and 5 in the invoice in the Payment Claim.

67. The Applicant claims for demobilisation costs and loss of profit caused by the termination of the Contract by the Applicant prior to the end of the Contract term.

68. The termination of the Contract under cl.26.8 was “at will”. There is no suggestion by the Applicant that the procedure followed by the Respondent did not comply with cl.26.8.

69. There is no provision in the contract which permits the Applicant to recover any of these costs or losses on termination under cl.26.8. The only basis that I can see upon which these claims could be made is if the termination was in breach of contract.

70. This is not suggested by the Applicant nor is there any basis that I can see for it.

71. I reject these claims in their entirety.

Request by the Respondent that the Applicant pay 100% of Adjudicator’s Fees

72. The Respondent has sought, I assume under s.36(2) of the Act, that I direct that the Applicant pay 100% of my fees.

73. The submissions made in support of claims 2, 4 and 5 in the invoice to the Payment Claim were in my view “unfounded”. They obviously had no merit and should not have been included in the Application. Whilst the amount of time that I have spent on these claims in comparison with claims 1 and 3 and the adjudication generally is minimal, in all the circumstances I consider it appropriate to direct under s.36(2) of the Act that the Applicant pay the Respondent $500.00 of the Respondent’s share of my fees. My fees being $8,000.00 plus GST, ultimate liability should therefore be borne as to $4,500.00 plus GST by the Applicant and as to $3,500.00 plus GST by the Respondent.

74. Section 36(2) the Act does give clear power to adjudicators to direct the payment of adjudicator’s fees and, in my view, legal fees incurred in dealing with claims of the type referred to in s.36(2). Any applicant must bear this firmly in mind when considering whether to make an adjudication application and if so what to include in it.

Dated this 18th day of May 2010

Alistair Wyvill SC