

IN THE MATTER OF
THE CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2004
AND
IN THE MATTER OF AN ADJUDICATION

BETWEEN

AA PTE LTD
Claimant

and

AB PTE LTD
Respondent

ADJUDICATION DETERMINATION

Before
CHOW KOK FONG
Adjudicator

For the Claimant
Mr Michael Chia Peng Chuang and Karam S Parmar
M/s Tan Kok Quan Partnership

For the Respondent
Mr Christopher Chuah and Ms Lee Hwai Bin
M/s WongPartnership

9th December 2005

DETERMINATION

1. This is a determination made on *9TH DECEMBER 2005* under the Building and Construction Industry Security of Payment Act 2004.
2. The Claimant in this matter is M/s AA Pte Ltd (hereinafter "the Claimant") and the Respondent is M/s AB Pte Ltd (hereinafter "the Respondent").
3. For the reasons which are set out in the pages which follow, I determine that:
 - 3.1 The Respondent² shall pay to the Claimant the sum of \$520,428.00 (Dollars Five Hundred and Twenty Thousand, Four Hundred and Twenty Eight only) together with GST at the rate of 5 percent thereon. This is hereby recorded as the Adjudicated Amount of this determination.
 - 3.2 The Adjudicated Amount shall be paid on or before 22nd December 2005.
 - 3.3 Interest shall run from 22nd December 2005 at the rate of 5 percent per annum on any part of the adjudicated amount which remains unpaid until the same is paid.
 - 3.4 The costs of the adjudication shall be borne entirely by the Respondent.

RECORD

4. On 18th November 2005, the Claimant made an Adjudication Application to the Singapore Mediation Centre for the nomination of a person to act as adjudicator pursuant to the provisions of the Building and Construction Industry Security of Payment Act 2004.¹ On 22nd November 2005, the Singapore Mediation Centre nominated me, CHOW KOK FONG, to be the adjudicator. I accepted the nomination on the same day.

¹ Act 57 of 2004, hereinafter "the Act".

² The Respondent is referred to in several of the documents produced before the Tribunal by the initials "AB".

5. On 25th November 2005, the Respondent lodged an Adjudication Response with the Singapore Mediation Centre. Since an adjudication response was duly lodged in this case and there was no issue as to whether the Claimant had accepted any response amount³, the time for the making of the determination is 14 days as set out under section 17(1)(b) of the Act. I would have been required under this provision of the Act to determine the said adjudication application not later than 9th December 2005. However, both parties at a preliminary meeting held on 30th November 2005 agreed that, if I so require, the date for the making of the adjudication determination shall be extended to 23rd December 2005. As it turned out, I did not require the extension of time for making this determination.
6. The preliminary meeting on 30th November 2005 was attended by
 - (a) Mr Michael Chia Peng Chuang and Karam S Parmar of M/s Tan Kok Quan Partnership and Mr A for the Claimants and
 - (b) Mr Christopher Chuah and Ms Lee Hwai Bin of M/s WongPartnership and Mr B for the Respondents
7. At the preliminary meeting I directed, *inter alia*, as follows:
 - (a) The time for the filing of the Reply by the Claimant to the Adjudication Response is extended to 5.00 pm, 1st December 2005.
 - (b) The Respondent is entitled to file a Rejoinder to the Reply by 5.00 pm, 5th December 2005.
 - (c) The determination shall be made on the basis of written submissions and accompanying documents submitted therewith but this would not preclude the Tribunal from calling a conference if I deem this necessary.
8. The Claimant duly filed their Reply on 1st December 2005 and the Respondent filed their Rejoinder on 5th December 2005. As a result of the exceptional quality of the work of counsel for both parties, I was able to complete the making of the determination without the need to call for a conference.

³ This refers to the two situations envisaged under section 17(1)(a) to which the 7-day period applies.

REASONS

The Contract

9. Under a contract dated 27th April 2005, the Respondent was employed as the main contractor for the construction of a 6-storey extension with 2 basements to the existing C Shopping Centre at YYY Singapore. On 1st June 2005, they invited the Claimant to submit a tender for Bored Pile Work for the project.
10. On 6th July 2005, the Claimant submitted its quotation for the said works. The tender price, excluding GST, was \$499,670.00 together with a breakdown of the items as set out in the Bills of Quantities annexed therewith. Paragraph 4 of the quotation stipulates that "all quantities are only indicative" and that payment "shall be based on actual site measurement".
11. On 14th July 2005, the Claimant submitted a revised quotation. The tender price, excluding GST, was revised to \$495,000.00 and it was again expressed to be based on the Bill of Quantities annexed to the revised quotation.
12. By their letter of 19th July 2005 entitled "Letter of Award", the Respondent purported to confirm the award of the work to the Claimant. The letter also states that the award of the contract was to be "based on B's standard Terms of Subcontract annexed herein in Annexure 1".
13. Paragraph 1 of the letter then continues:

Scope of Works

This award authorizes you to commence work immediately and proceed in accordance with the requirements as stated in the invitation to bid dated 1st June 2005 which includes but shall not be limited to the following ("the Works"):

SUPPLY AND INSTALLATION OF BORED PILE INCLUDING
LOAD TEST

14. Paragraph 9 of the same letter contains the following:

Formal Contract

The formal Subcontract documents for the Works are currently being prepared for execution. However, until the execution of the formal Subcontract documents, the parties agree and acknowledge that this Letter of Award and your acceptance thereof shall constitute a binding agreement between the parties for the Works.

In the event that the parties do not execute such formal contract documents, AB may immediately terminate the Works commenced under this authorization. In such an instance AB's

liability shall be limited to reimbursement of all direct costs and expenses reasonable [sic] incurred by yourselves, but shall in no event exceed the Letter of Award Sum. In the interim please confirm your agreement to commence the Works on the basis outlined above by signing the duplicate copy of this letter where indicated and return the same to B.

SUPPLY AND INSTALLATION OF BORED PILE INCLUDING LOAD TEST

15. At the end of the Letter of Award, there was provision for the Claimant to affix their signature to a copy of the letter indicating their agreement "to commence works on the terms and conditions stated in the Letter of Award above". It was common ground that the Claimant did not sign the Letter of Award.
16. The *AB* Standard Terms of Subcontract (hereinafter "the Subcontract Terms") annexed to the Letter of Award is a formidable document of some 41 pages and this was supplemented by a series of schedules, identified as Schedules A to Q, several of which are very substantial documents. In particular, they included Schedule A, also entitled "Schedule of Programming Requirements", and Schedule M which was also identified as "the Specification".
17. The Subcontract Terms contained provisions requiring the Claimant to comply with instructions issued by the Respondent. Clause 5.1 reads:
 - 5.1 *B* may issue drawings, instructions or directions in relation to the Site, the Works or the Project. The Subcontractor shall comply with instructions or directions issued by *AB* within the time instructed by *AB*.
18. The payment provisions of the Subcontract Terms were clearly drafted with the expectation that it would be subject the Act. Clause 10.5 of the Subcontract Terms was cited by the Respondent extensively in their submissions, the relevant portions of which may be usefully noted:
 - 10.5.1 On the day of the month specified in the Appendix the Subcontractor may submit to *AB* a payment claim. For the purpose of "payment claim" made under this Clause, it shall have the same meaning ascribed in the SOP Act. A payment claim shall be made in compliance with the requirements of the SOP Act and shall show:
 - (1) the Subcontract value of the Works (excluding variations but allowing for variation omissions) completed to the last date of the monthly interval in question as stated in the claim, valued in accordance with Clause 10.3. Subject to Clause 10.6, the value of the Works may include the value of off-site or unfixed materials;
 - (2) the value of work completed on variations to the last date of the monthly interval in question as stated in the claim, valued in accordance with Clause 10.4;

- (3) the total amount determined under paragraphs (1) and (2) above less the amount previously paid to the Subcontractor in respect of the items referred to in those paragraphs and
- (4) other amounts to which the Subcontractor is entitled under the Subcontract.

10.5.2 After agreeing the payment claim amount and in any case within 21 days of receiving the payment claim duly submitted pursuant to Clause 10.5.1, *AB* shall issue a progress payment certificate to the Subcontractor showing the amounts, which may consist of deduction of any sums which have been or may become due and payable by the Subcontractor to *AB* under the Subcontract or otherwise, to which the Subcontractor is in *AB*'s opinion entitled in respect of the payment claim.

10.5.3 *A* shall substantiate its progress payment certificate if the amount stated therein is less than the amount claimed in the corresponding payment claim or if payments are withheld. Such progress payment certificate issued by *AB* shall comply fully with the requirements for progress payment response made in contemplation of the SOP Act and shall be deemed the payment response from *AB*, which meaning shall be the same ascribed in the SOP Act if *AB* does not provide any response within 21 days from the payment claim. Where *AB* provides a payment response in compliance with the SOP Act within 21 days from the payment claim, *AB*'s payment response shall take precedence over the progress payment certificate issued pursuant to Clause 10.5.2 and shall constitute the payment response defined in the SOP Act.

10.5.4 The receipt of *AB*'s progress payment certificate and / or payment response pursuant to Clauses 10.5.2 and / or 10.5.3, as the case may be, shall be conditions precedent to the Subcontractor's entitlement to submit the original tax invoice relating to the same. The Subcontractor must ensure that such tax invoice shall attach a copy of the relevant payment claim plus copies of the corresponding progress payment certificate and / or payment response, as the case may be, and be received by *AB* at its head office as addressed in this Subcontract and a copy received at its office on Site. Any failure by the Subcontractor to comply with this Clause 10.5.4 shall not entitle the Subcontractor to receiving [sic] payment under such a tax invoice.

19. The Subcontract Terms also contained provisions for the imposition of liquidated damages on account of culpable delay in the subcontract works:
Clause 10.12.1 reads:

10.12.1 If the Subcontractor fails to bring the Works or each stage of the Works (as the case may be) to Substantial Completion by the Date for Substantial Completion, the Subcontractor shall pay to the Client (through *B*) by way of liquidated damages the amount stated in the Appendix for every calendar day after the Date for Substantial Completion up to and including the Date of Substantial Completion.

Progress Claims No. 1 and 2

11. Despite the fact that the Letter of Award was not signed by the Claimant, works proceeded sometime in July 2005. The contract, as typical of piling contracts, was for a relatively short duration and the last bored pile was installed on 25th September 2005.⁴
12. The Claimant apparently made their first progress claim in July 2005. This led to the Respondent's letter of 3rd August 2005 in which the Respondent, pointed out that the claim should have been submitted by the 15th of the month and reminded the Claimant to submit the performance bond "as required by the contract conditions".
13. On 18th August 2005, the Respondent again wrote requiring the Claimant to submit the performance bond together with the other documents requested in the earlier. This letter reads:

We refer to the claim of progress works and application of man-year for C Project.

We would like to remind you that any delay of the above will not be our responsibility due to your failure in response [sic] to our letters. Despite numerous reminders had been sent out to ask for your immediate response, however, the following documents are still outstanding:

1. Schedule of rates for the contract.
2. Letter of Award
3. Undertaking Letter and Security Bond for Man-Year.
4. Performance Bond.

Thereby [sic] we are not able to process your claim and man-year application.

Attached are the letters previously sent to AA Pte Ltd for your kind record.

- a) Letter of response for July Claim.
- b) Revised claim for month August.
- c) Minute [sic] of minutes No. 08.

Thank you.

14. It would appear that the original progress claim for July was returned to the Claimant with revisions inserted by the Respondent together with instructions for the claim to be submitted in August.
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⁴ Paragraph 5.1, *Minutes of Construction Meeting* No. 13 held on 4th October 2005

15. On 15th August 2005, the Claimant submitted their Progress Claim No. 1A for a sum of \$165,391.30 (excluding GST). However, certain of the documents requested previously by the Respondent were still not furnished and on 3rd September 2005, they wrote to the Claimant as follows:

This is a second reminder to inform you that the following documents are still outstanding to B.

We would like to remind you that any delay in progress claim and man-year application will not be our responsibility due to your failure in response to our letters.

Please submit the said documents urgently for our process.

1. Schedule of rates for the contract.
2. Letter of Award
3. Undertaking Letter and Security Bond for Man-Year.
4. Performance Bond.

Thank You.

Nevertheless, on 10th September 2005, the Respondent issued a progress payment certificate for a sum of \$103,735.78 (including GST). As it transpired, notwithstanding the progress payment certificate, the Respondent did not pay any part of the sum which they had themselves certified.

16. On 15th September 2005, or about 10 days before the last bored pile was installed, the Claimant submitted their Progress Claim No. 2 for a sum of \$391,552.60 (excluding GST). The Respondent on 21st September 2005 wrote:

With reference to our record and the previous letters, we have yet to receive the following outstanding documents from AA Pte Ltd. You are reminded that incomplete documentation and contract will definitely delay the process of the progress payment.

You are advised to submit these documents urgently, in order to get the progress payment cleared immediately for you.

1. Schedule of rates for the contract.
2. Letter of Award
3. Performance Bond.

Your prompt action to the above submission will be appreciated.

No progress payment certificate was issued by the Respondent in respect of Progress Claim No. 2 nor was any payment made.

Progress Claim No. 3

17. I come now to the progress claim to which this adjudication specifically relates. On 12th October 2005, the Claimant submitted their Progress Claim No. 3 for a sum of \$520,428.00 (excluding GST). It is possible that the submission of this claim crossed with the Respondent's letter of the same date which states:

We refer to the contract of bored piling works for C Project. We still did not receive your complete documents of the following documents, despite numerous reminders had been sent out to ask for your immediate response. The outstanding documents are as follows:

1. Schedule of rates for the contract.
2. Letter of Award
3. Performance Bond.

We would like to remind you that any delay in paying of the progress claim will not be our responsibility due to your failure in response to our letters. Thereby we are not be [sic] able to process your claim.

We request you to issue the above documents as soon as possible.

Thank you.

18. On 20th October 2005, the Respondent sent another letter to the Claimant addition to Progress Claim No. 2. The contents of this letter were almost identical to the Respondent's earlier letter of 21st September 2005.
19. By section 11(1) of the Act, the respondent is obliged to provide a payment response to Progress Payment No. 3 by the date as provided in the contract or within 21 days from the service of the payment claim whichever was earlier. This is the same as the period allowed for the payment response under clause 10.5.2 of the Subcontract Terms. The effect is that assuming that the payment claim had been validly made, then the Respondent would be expected to make the payment response not later than 5th November 2005. In their adjudication response, the Respondent contended that their letter of 20th October 2005 constitutes a payment response. This issue falls to be determined in this adjudication.

The Issues

20. At the preliminary meeting on 30th November 2005, after discussing the case as framed by the adjudication application and adjudication response with the parties, counsel for the parties agreed with me that this determination turns on the following issues:
- (a) Whether for the purpose of the Act, there was in existence a "contract that is made in writing";

- (b) Whether the subject payment claim was premature;
 - (c) Whether the Respondent has made a payment response to the payment claim in accordance with the Act;
 - (d) The issue of the dispute settlement period.
21. I shall deal with each of these issues in turn.

Existence of a "Contract Made in Writing"

22. The Respondent argued in their Adjudication Response that because the Claimants did not execute the Letter of Award or the Sub-Contract, there was in substance no written contract between the parties. Furthermore, they alleged that they had not been given sight of the copy of the alleged Subcontract until they were served with the Adjudication Application on 18th November 2005.
23. The Respondent pointed out that under section 4(1) of the Act, the application of the security of payment regime is confined to a contract which is "made in writing" and that unless the instant contract falls within the definition of a contract "made in writing" as provided in section 4(3), this Tribunal has no jurisdiction to determine the subject dispute.
24. Section 4(3) of the Act provides:
- 4(3) For the purpose of this section, a contract shall be treated as being made in writing -
- (a) if the contract is made in writing whether or not it is signed by the parties thereto;
 - (b) if the contract is made by an exchange of communications in writing;
 - (c) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party with the authority of the parties thereto; or
 - (d) if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.
25. In their reply, the Claimant pointed out that the Letter of Award specifically stated the Respondent had awarded the Subcontract to the Claimant. They also argued that in setting out the terms of the letter the Respondent had (a) indicated that the date of the Subcontract was to be 15th July 2005; (b) deleted the 2nd and 3rd bullet points of clause B of the Articles of Subcontract; (c) required the works to start on 26th July 2005 and (d) required the Claimant to provide toilet accommodation and other washing facilities.

26. I am persuaded that, by their deliberate and careful amending of the terms of the subject contract, parties must have intended to be regulated by the provisions recorded in the Subcontract Terms and the other documents which were annexed to the Subcontract. Admittedly they may not have agreed to some of the terms of the subcontract but the conduct displayed suggests that the bulk of the terms are clearly intended to apply.
 27. In fact, this was how both parties subsequently proceeded with the contract notwithstanding their disagreement over some portions of the documentation. On 10th September 2005, the Respondent relied on clause 10.5.2 of the Subcontract Terms to issue a payment certificate for the sum of \$93,735.78. Although this sum was never paid, the Respondent could have only invoked the certification machinery if they thought that their relationship with the Claimant is to be regulated by the Subcontract Terms despite their protest that the Claimant did not sign the Letter of Award.
 28. This is also borne by the conduct of the parties at site meetings. At the site meeting held on 16th August 2005, the Respondent instructed the Claimant "to work and cast the pile everyday" (paragraph 5.3), "to do the screed brick wall kerb along YYY" (paragraph 5.4) and "to clear silt trap and washing bay".⁵ These instructions could only have been issued on the basis of Clause 5.1 of the Subcontract Terms (cited earlier) since it is only where the instructions are founded on this term that the Respondent can expect the Claimant to comply with the same.
 29. Similarly at the same site meeting, the Respondent - no doubt with the view to urge the Claimant to speed up their work - pointed out to the Claimant that "liquidated damages due to delay in completion of bored piling works will be \$8,000 per day".⁶ This is a specific reference to Clause 10.12.1 of the Subcontract Terms as cited earlier and, unless the Respondent considered the Subcontract provisions to be operative in regulating their dealings with the Claimant, such references to liquidated damages would have been meaningless.
 30. This attitude of the parties persisted in the other site meetings which followed. Thus instructions continued to be issued on various matters as recorded in the Minutes of Construction Meetings held on 23rd August 2005, 30th August 2005, 15th September 2005, 27th September 2005 and 4th October 2005. The attention of the Claimant was repeatedly drawn by the Respondent to the liquidated damages provisions in each of these meetings.
 31. In the overall scale of events, therefore, it seems to me that the parties dealt with each other on a set of written terms, the great majority of which they were in agreement. While there were a few terms which were not settled, I think their common frame of mind was that a sufficient number of
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⁵ Paragraphs 5.3, 5.4, *Minutes of Construction Meeting* No. 8 held on 16th August 2005.

⁶ Paragraphs 5.10, *Minutes of Construction Meeting* No. 8 held on 16th August 2005

the key terms were agreed to allow the Subcontract to proceed. This submission by the parties to be regulated by the terms of the Subcontract is sufficient in my view to bring the instant subcontract within the description of paragraph (d) of section 4(3) of the Act. There is no dispute that the contract was not signed but this is not required for a contract to be construed as having been made in writing under section 4(3)(a).

32. Accordingly, it is my determination that there was a contract made in writing for the purpose of the Act.

Premature Submission of Payment Claim

33. I move now to the second of the grounds canvassed by the Respondent to resist the adjudication application. In their adjudication response, the Respondent argued that the reference in Clause 10.5 of the Subcontract Terms to the date stipulated in the Appendix to the Subcontract effectively requires the Claimant to submit each progress claim on the 15th of each month. In this case, the Claimant submitted Progress Claim No. 3 on 12th October 2005. The Respondent advanced this to contend that the subject payment claim had been made prematurely and had not been submitted in accordance with terms of the contract as required by section 10(2) of the Act.

34. Clause 10.5.1 of the Subcontract Terms provides:

10.5.1 On the day of the month specified in the Appendix the Subcontractor may submit to AB a payment claim.

35. Section 10(2) of the Act reads:

10(2) A payment claim shall be served -

- (a) at such time as specified in or determined in accordance with the terms of the contract; or
- (b) where the contract does not contain such provision, at such time, as may be prescribed.

36. The Respondent cited the New South Wales decisions in *Beckhaus Civil Pty Ltd v. Brewarrina Shire Council* (2002)⁷ and *Walter Construction Group Ltd v. CPL (Surry Hills) Pty Ltd* (2003)⁸ for two propositions. The first is that, subject to the operation of the Act, the entitlement to progress payment remains founded on the terms of the underlying contract. The
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⁷ [2002] NSWSC 960.

⁸ [2003] NSWSC 266.

second proposition is that "the statutory claim must comply with the relevant section of the Act in order to attract the statutory protection and rights afforded to persons claiming for progress payment under the Act."

37. In their submission I do not read the Claimant as disputing these propositions. They emphasize, however, that in determining whether a payment claim had been submitted in accordance with the terms of the contract, the payment terms have to be construed purposively and that this appears to be the approach taken by Macready AJ and Young CJ in Beckhaus and by Davis AJA in Hawkins Construction (Aust) Pty Ltd v. Mac's Industrial Pipework Pty Ltd (2002).⁹
 38. The Claimant pointed out that the construction which seems to have been placed on this issue by the Respondent themselves, as demonstrated by the Respondent's fax of 3rd August 2005, was that the stipulation requires nothing more than that the claim should be submitted "by the 15th of the month" and not "on the 15th of he month" [emphasis added].
 39. I think this construction is more consistent with the objectives of these contractual stipulations. Reading the contract as a whole, a contractual stipulation such as this is intended to ensure that a payment claim is submitted on a date which allows the Respondent sufficient time to deal with the claim properly. If a payment claim is submitted earlier than the stipulated date, there is no obligation on the part of the Respondent to deal with it earlier unless they choose to do so. However, if a claim is submitted late it is conceivable that it may be effectively met with an objection by the Respondent that this will not be processed in time for payment to be made according to the timeline which would normally apply.
 40. At any rate, if the Respondent was troubled by the fact that the instant payment claim had been submitted three days earlier than expected, it would be reasonable to expect some protest or objection from them upon the receipt of the claim. Nothing along these lines was raised. They could have raised this issue, for example, in their fax of 20th October 2005 to the Claimant but that fax was silent on this point. As the Claimant rightly pointed out, had the Respondent raised this issue, all that the Claimant needed to do then was to re-submit the payment claim three days later.
 41. It seems to me, therefore, that the Respondent has placed too fine a point on the construction of this particular contractual provision. Furthermore it would not bear out on the approach urged by the New South Wales authorities cited before this Tribunal. For example, the Claimant in their submission noted that in Hawkins Construction (Aust) Pty Ltd v. Mac's Industrial Pipework Pty Ltd (2002),¹⁰ Davies AJA had suggested that such prescriptions should be construed "in a common sense practical manner".
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⁹ [2002] NSWCA 135.

¹⁰ [2002] NSWCA 135.

42. In my view, the contractual stipulation cited by the Respondent does not invalidate a payment claim merely by reason that it has been submitted before the date stated in the Appendix. Therefore I do not agree that the subject payment claim had been submitted contrary to the provisions of the underlying contract. Consequently, in my determination, the submission by the Claimant of the subject Progress Claim No. 3 three days earlier than that stipulated in the Appendix does not invalidate the payment claim for the purpose of the Act.

Payment Response pursuant to Section 11 of the Act

43. The next issue which falls to be considered is whether the Respondent serves a valid payment response following the receipt of the Claimant's payment claim on 12th October 2005. Section 11 of the Act reads:

11(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant -

- (a) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10 whichever is the earlier; or
- (b) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.

44. In the present case, the Subcontract provides expressly for the making of a payment response in accordance with the provisions of the Act. Clause 10.5.2 of the Subcontract Terms stipulates that "[after] agreeing the payment claim amount and in any case within 21 days from the receipt of the payment claim" the Respondent shall "issue a progress payment certificate to the Subcontractor showing the sum to which the Subcontractor is in *B*'s opinion entitled in respect of the payment claim"

45. Clause 10.5.3 of the Subcontract Terms, which have been cited earlier, requires the Respondent (identified as "*B*") to "substantiate with reasons in its progress payment certificate if the amount stated there is less than the amount claimed in the corresponding payment claim or if payments are withheld". This reproduces, in effect, the stipulations of section 11(3)(c) of the Act. It then provides that unless the Respondent furnishes a separate payment response, the progress payment certificate is to serve as a payment response for the purpose of the Act. These contractual stipulations therefore accord with the requirements of the Act and I take it that, since these terms are on the Respondent's standard form, the Respondent must be reasonably clear about their intent and operation.

46. The progress claim to which this adjudication relates - Progress Claim No. 3 - was submitted on 12th October 2005. Since the period provided under the Subcontract Terms for the Respondent had to furnish a payment response is the maximum of 21 days as permitted under section 11 of the Act, it was common ground that the Respondent had up till 5th November 2005 to furnish the requisite payment response.
47. What is now tendered as the payment response by the Respondent to the Claimant's payment claim of 12th October 2005 is the letter of 20th October 2005. This document was certainly issued within the requisite period of 21 days. However, to serve as a payment response for the purpose of the Act, the said document had to satisfy the requirements listed in section 11(3) of the Act and it is useful to reproduce this subsection here:
- 11(3) A payment response provided in relation to a construction contract-
- (a) shall identify the payment claim to which it relates;
 - (b) shall state the response amount (if any);
 - (c) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and
 - (d) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.
48. Paragraph (d) of section 11(3) extends the list of requirements of a payment response to include those set out under Regulation 6(1) of the Building and Construction Industry Security of Payment Regulations 2005. This provides as follows:
- 6(1) Every payment response provided in relation to a construction contract shall -
- (a) be in writing;
 - (b) be addressed to the claimant;
 - (c) state "nil" where the respondent does not propose to pay any part of the claimed amount and the reasons therefore;
 - (d) where the response amount is less than the claimed amount -
 - (i) contain the amount that the respondent proposes to pay for each item constituting the claimed amount, the reasons for the difference in any of the items

- (ii) and the calculations which show how the amount that the respondent proposes to pay is derived; and contain any amount that is being withheld, the reason for doing so and the calculations which show how the amount being withheld is derived.

49. The alleged payment response of 20th October 2005 issued by the Respondent is reproduced below:

With reference to our record and the previous letters, we have yet to receive the following outstanding documents from AA Pte Ltd. You are reminded that incomplete documentation and contract will withhold the payment of the claim.

You are advised to submit these documents urgently, in order to get the progress payment cleared immediately for you.

- 1 Schedule of rates for the contract
- 2 Letter of Award
- 3 Performance Bond

Your prompt action to the above submission will be appreciated.

50. Three observations may be shortly made. Firstly, as the Claimant pointed out, the payment response makes no mention of or attempt to identify the particular payment claim which it is supposed to relate. The opening paragraph makes reference only "to our record and the previous letters", not to Progress Claim No. 3 or, specifically, the date on which the particular payment claim was made. Given that the parties are dealing with the Respondent's standard terms and that the standard terms have been elaborately drafted to deal with the requirements of the Act, it is puzzling that this requirement could have been overlooked if, as argued, the subject letter is intended as a payment response. Reading the relevant provisions of the Act, it is evident that this requirement under paragraph (a) of section 11(3) must be absolutely vital because unless the payment response did so, it cannot be understood to be a payment response made under the Act. If it cannot be understood in these terms, the Claimant will not be able to deal with it.

51. Secondly, the subject payment response was also plainly deficient in respect of the other particulars which are expressly required under section 11(3) of the Act and Regulation 6(1):

- (a) It did not state the response amount, that is, the amount which Respondent considers to be due to the Claimant.
- (b) If the intention is to offer nothing at all in respect of any part of the claim, paragraph (c) of Regulation 6(1) requires that the word "nil" to be inserted against the relevant part. These insertions were not made.

- (c) The document furnished no reason for withholding of any payment as expressly required under Regulation 6(1)(c). Under Clause 10.5.3 of the Subcontract Terms, this requirement on the part of the Respondent is carefully reinforced.
 - (d) There were no calculations or computations either justifying the difference between the response amount and the claimed amount or supporting the withholding of any part of the payment sought as envisaged in section 11 (3)(c) of the Act.
52. Thirdly, if the Respondent intended to make a payment response to Progress Claim No. 3 that is capable of being understood to be a payment response under the Act, it is inexplicable why they had not chosen to make it in the manner of their response to Progress Claim No. 1A. It will be recalled that this relates to a progress claim which the Claimant reformulated after discussing with the Respondent and that, on 10th September 2005, the Respondent issued a formal progress payment certificate for a sum of \$93,735.78 (including GST). Since the Respondent had earlier issued a progress payment certificate, there is no question of the Respondent being unaware of the manner by which Progress Claim No. 3 should be dealt with or of the kind of payment response or certificate which is expected to follow from a payment claim. The certification machinery was available and had this been invoked, the chain of events prescribed in Clauses 10.5.3 and 10.5.4 of the Subcontract Terms would have followed and much of the present difficulties could have been avoided.
53. For these reasons, in my determination, the letter of the 20th October 2005 is not sufficient to constitute a payment response under the Act in relation to the payment claim identified as Progress Claim No. 3.
54. However, even if I am wrong on this point and the alleged payment response could somehow be construed to be a valid payment response, I do not think such a finding assists the Respondent's position in this adjudication. It does not state any response amount nor does it state that the Respondent is withholding the entire amount. The basic point made in the purported response appears to be only that the payment will be delayed for an unspecified length of time. No reasons were offered by the Respondent which relate specifically to the sums withheld against any of the components making up the claim. The sentence which reads "You are reminded that incomplete documentation and contract will withhold the payment of the claim" is ambiguous and does not, in my view, relate to the claimed amount. Indeed, nowhere in the purported response is the claimed amount mentioned.
55. Section 15(3) of the Act provides that in such a situation "the adjudicator shall not consider any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off". Accordingly, by virtue of section 15(3), I have no mandate to consider any reasons for withholding any amount advanced should these be raised now by the

Respondent at this stage of the proceedings.

Condition Precedent to Payment Claim

56. An alternative argument formulated by the Respondent relating to the validity of the subject payment claim derives from Clause 10.9.2 of the Subcontract Terms. Clause 10.9.2 provides that "[the] submission of a conforming performance bond shall be a condition precedent to the Subcontractor being entitled to receive any payment under the Subcontract". Since the Claimant failed to submit the performance bond, the Respondent's case is that the Claimant had not discharged the condition precedent on which the entitlement to make a payment claim is premised.
57. In their submissions, they directed me to the decision in *Brewarrina Shire Council v. Beckhaus Civil Pty Ltd (2003)*.¹¹ In that case, the subject contract contained a provision which required the contractor to deliver to the Superintendent "claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require". The majority of the New South Wales Court of Appeal apparently took the view that this provision operates as a condition precedent which had to be met before the Superintendent is obliged to issue a payment certificate.¹²
58. With respect I do not think that the New South Wales Court of Appeal in *Beckhaus* sought to lay down a general principle. The issue in each case must fall to be decided on the basis of the construction of the particular terms of contract and the facts. For this reason, Young CJ in a dissenting judgment took the view that such provisions should be construed purposively and that "a purposive construction tells against the inclusion of conditions precedent to performance."¹³
59. In their Reply, the Claimants argued that the validity of these contractual stipulations have to be considered against the anti-avoidance provisions of the Act, in particular clause 36(2) of the Act which reads:
- 36(2) The following provisions in any contract or agreement (whether in writing or not) shall be void –
- (a) a provision under which the operation of this Act or any part thereof is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of this Act or any part thereto; or
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¹¹ [2003] NSWCA 4.

¹² *Per Ipp JA* at [2003] NSWCA 4, para 45.

¹³ [2003] NSWCA 4, para 72.

- (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under this Act.

60. This provision of our Act resembles to a large extent section 34 of the New South Wales Building and Construction Industry Security of Payment Act 1999. The operation of this provision surfaced in the decision of the New South Wales Supreme Court in *Minister for Commerce v. Contrax Plumbing (2004)*.¹⁴ In that case a construction contract provided that the only payment entitlement of the builder was "the Contract Price" and this could only be adjusted by a process of submissions to the Superintendent's representative, the Superintendent, expert determination and (where the amount exceeded \$500,000) arbitration. The builder claimed for variations but this was not "worked through" the process just described which would have taken 200 days or more. Nevertheless, the adjudicator decided that the builder was entitled to be paid for the variations. The Government submitted that the adjudicator had no power to determine an entitlement unless the process described earlier had been followed. McDougall J in the New South Wales Supreme Court held that the process provided in the contractual regime in this case effectively sought to displace the entitlement of the claimant to be paid from a reference date for construction work carried out to some time in the future when the process had been worked through. Accordingly, he concluded that the effect of these contractual provisions offended section 34 of the New South Wales Act and were void by operation of that section.
61. On appeal, the decision was affirmed by the New South Wales Court of Appeal although only Hodgson JA felt it necessary to support the decision on the ground that the subject contractual stipulation offended the anti-avoidance section of the New South Wales Act.¹⁵ Both Bryson JA and Brownie AJA agreed with Hodgson JA that the appeal should be dismissed. However, Bryson JA considered that, although the decision does not turn on this point, the anti-avoidance provisions "should be applied according to their terms and no more widely".
62. Similarly I do not think the present decision turns on whether a condition precedent in the underlying contract had been satisfied and hence it is unnecessary for the present purpose to inquire into the operation of the provisions of section 36(2) of the Act in Singapore. The regime under the Act contemplates that if the Respondent considers that a valid claim had not been made, this should have been raised in the payment response as a ground to resist the payment claim. The Respondent had attempted to
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¹⁴ [2004] NSWSC 823.

¹⁵ [2005] NSWCA 142.

rely on their letter of 20th October 2005 as a payment response but, as I have decided earlier, this letter does not comply with the requirements prescribed in the Act and the Regulations to qualify as a payment response for the purpose of the Act. Of particular significance is the fact that it does not refer specifically to Progress Claim No. 3 nor does it state that the Respondent is refuting the sum claimed.

63. The Respondent could well be justified in withholding some part of the payment as a result of the Claimant's inexplicable refusal to hand over the documents sought by them, but for the purpose of the Act the merits of this recourse cannot be considered by an adjudicator until it has been asserted as a reason for withholding payment in a proper payment response. As an aside, it is interesting to note that the sum secured by performance bond is only \$20,750.00. This is a relatively small sum compared with the claimed amount of \$520,428.00 and the significance of this may be usefully considered against the contrast in the financial positions of the parties arising from this contract. Counsel confirmed that the Respondent had not paid the sum which they certified in the first progress payment certificate or any other sum notwithstanding that the last bored pile was installed on 25th September 2005. In the meantime, the works have been substantially completed when Progress Claim No. 3 was submitted on 12th October 2005. Consequently it seems to me that the Respondent could have, if they were so minded, deducted the equivalent of the amount representing the security afforded by the performance bond and processed the remainder of the payment claim rather than withhold the entire sum without any prejudice to their financial position.
64. The crux of this issue therefore is that the question of the condition precedent is moot because it had not been raised as part of a valid payment response. Accordingly, by virtue of section 15(3) of the Act, this issue should not have been raised in the adjudication response and this tribunal has no mandate at this stage of the proceedings to consider this ground as a reason to entitle the Respondent to withhold any part of the claimed amount.
65. My determination therefore is the Claimant's entitlement to be paid is not vitiated by the operation of the condition precedent raised by the Respondent in the adjudication response.

Issue of the Dispute Settlement Period

66. The dispute settlement period is unique to our Act. The purpose of this feature is, as noted by counsel for both parties, to address the element of surprise and, specifically, to reduce the risk that an unsuspecting respondent may be ambushed by a claimant. For this purpose, section 12(2) provides that the Claimant is only entitled to make the adjudication application if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response as the case may be. Section 12(4) then provides, inter alia, that during this

- period, either party may seek clarification from the other party on any matter relating to the payment claim.
67. The Respondent alleged that on "a purposive reading" of these provisions, the Claimant should be required to alert the Respondent to the fact that a dispute had arisen and should afford the Respondent an opportunity to clarify matters relating to the subject claim. There is thus no dispute that the adjudication application was made after the expiry of the dispute settlement period. The issue raised by the Respondent appears to be whether the Claimant had alerted the Respondent to consider a settlement of the subject dispute during the dispute settlement period as intended by the Act.
68. From the materials submitted to me, it does not seem to me that the Respondent in the present case could be said to be taken by surprise. They could have been more diligent to lodge a payment response which would at least comply substantially with the requirements of the Act, but it was certainly evident that they had chosen not to entertain the Claimant's payment claim on the ground that the performance bond and the other documents they sought from the Claimant had not been forthcoming. As I had determined earlier, if they are convinced that they have a contractual premise for withholding payment on this ground the right thing to do is to state this clearly in a payment response made under the Act.
69. Furthermore if, as they suggested, they had sent the 20th October 2005 letter as a response to Progress Claim No. 3 then they could not have been surprised by the fact that there was a huge difference in their position *vis a vis* that of the Claimant's - having paid nothing at all up to that date when Progress Claim No. 3 deals practically with the whole contract sum. In the circumstances, I do not think this argument assists the Respondent's case.

Quantum of the Payment Claim

70. In their adjudication response, the Respondent also suggested that, if the Tribunal decides that it should proceed to determine the payment claim, it should take into account the cost of rectifying the Claimant's work under the subcontract. They claimed that, by virtue of the failure of the test pile, additional piles will need to be installed and the Respondent is likely to incur a sum of \$395,896.20 (including GST).
71. This is no doubt a counterclaim which the Respondent would be expected to assert in their payment response under the current statutory regime. Given that I have determined that the document of 20th October 2005 does not stand up as a payment response for the purpose of the Act - and, in any case, this ground was never raised in that letter - this Tribunal is bound to address this argument in accordance with section 15(3) of the Act. This reads:
- 15(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim

and set-off, unless -

- (a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant...

72. The language is explicit. If the Respondent did not avail himself to state the counterclaim in a payment response furnished either within the time frame allowed in section 11(1) or within the extended time permitted by the provisions relating to the dispute settlement period as provided under section 12(4), I have no power under the Act to consider the counterclaim. I must therefore reject this counterclaim.

Adjudicated Amount

73. In the final analysis, it is my determination that the Claimant shall be entitled to their full claim of \$520,428.00 (Dollars Five Hundred and Twenty Thousand, Four Hundred and Twenty Eight only) together with GST at the rate of 5 percent thereon.

Date of Payment

74. I would order the Respondent to pay the Claimant the adjudicated amount on or before 22nd December 2005.

Interest

75. Interest shall run from 22nd December 2005 at the rate of 5 percent per annum on any part of the adjudicated amount which remains unpaid until the same is paid.

Costs of the Adjudication

76. The costs of the adjudication shall be borne entirely by the Respondent.

CHOW KOK FONG
Adjudicator

9th December 2005