

*Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and  
Ford*

[2008] NTSC 42

PARTIES: TRANS AUSTRALIAN  
CONSTRUCTIONS PTY  
LTD (ACN 001 325 980)

v

NILSEN (SA) PTY LTD  
(ACN 007 873 387)

AND

FORD, CAMERON

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 134 of 2008 (20827418)

DELIVERED: 15 October 2008

HEARING DATES: 10 October 2008

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiff: J Kelly SC

Defendant: A Wyvill

*Solicitors:*

Plaintiff:

Minter Ellison

Defendant:

De Silva Hebron

Judgment category classification: B

Judgment ID Number: Sou0811

Number of pages: 41

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford*  
[2008] NTSC 42

No 134 of 2008

BETWEEN:

**TRANS AUSTRALIAN  
CONSTRUCTIONS (ACN 001 325 980)**  
Plaintiff

AND:

**NILSEN (SA) PTY LTD (ACN 007 873  
387)**  
First Defendant

AND:

**CAMERON FORD**  
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 October 2008)

**Introduction**

- [1] This proceeding was commenced by originating motion filed on 7 October 2008.
- [2] Trans Australian Constructions Pty Ltd(Transcon) seeks the following substantive relief:

- Declaration that the purported adjudication determination of Mr Cameron Ford, the second defendant, dated 26 September 2008, that Transcon is to immediately pay Nilsen (SA) Pty Ltd (Nilsen) \$1,874,036 (inclusive of GST) and interest at the rate of \$523.93 per day from 26 September 2008, is void.
- Further and alternatively, that the purported adjudication determination be quashed in that Mr Ford's determination was not made in respect of a payment dispute referred to adjudication pursuant to s 27 of the Construction Contracts (Security of Payments) Act (NT).
- The judgment of the Supreme Court of 6 October 2008 constituted upon the registration of Mr Ford's adjudication determination is set aside.

[3] The background to Transcon's claim is as follows. In 2007 Transcon and Alcan Gove Pty Ltd (Alcan) entered into a head contract under which Transcon was to perform certain construction work, including electrical and instrument installation works, for Alcan at Nhulunbuy in the Northern Territory. In October 2007 Transcon and Nilsen entered into a subcontract under which Transcon subcontracted to Nilsen the electrical and instrumentation works that Transcon was to perform for Alcan (the subcontract). Clause 28 of the subcontract General Conditions of Contract enabled Nilsen to make payment claims for the value of the work it performed as the subcontract works progressed towards completion. Nilsen performed construction work under the subcontract and from time to time rendered invoices for the work it had performed. Transcon has not paid Nilsen's last three invoices and on 22 August 2008 Nilsen made an

application for a determination by an adjudicator under the provisions of the Construction Contracts (Security of Payments) Act (NT) (the Act).

[4] Mr Ford was appointed the adjudicator under the Act and on 26 September 2008 he made the following determination:

- In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is \$1,874,036 inclusive of GST being the amount owing of \$1,821,265.72 plus interest until today of \$52,770.28. Interest accrues on the sum of \$1,821,265.72 at the rate of \$523.93 per day from today.
- The sum of \$1,874,036 inclusive of GST is payable immediately.

[5] Transcon has not paid to Nilsen the sum of \$1,874,036 plus interest and on 6 October 2008, Nilsen registered Mr Ford's determination as a judgment of the Supreme Court. Transcon seeks to prevent the judgment being enforced. If the judgment is enforced Transcon may be placed in serious financial difficulty.

### **The issues**

[6] The principal issue in the proceeding is, did the adjudication process fail to comply with the imperative requirements of the adjudication process described in the Act because firstly, Mr Ford failed to consider the matter that was before him; and, secondly, there was no payment dispute before Mr Ford because Nilsen had not made a valid payment claim under the subcontract?

- [7] The first matter mentioned in par [6] above involves consideration of whether the only matter before Mr Ford was a dispute about the claim made in a letter dated 21 July 2008 that Nilsen caused to be sent to Transcon. The second matter mentioned in par [6] primarily involves a consideration of whether Nilsen's three unpaid invoices were valid payment claims under the subcontract and within the meaning of the Act?

**The facts**

- [8] The facts are as follows. It was common ground between the parties that the subcontract is a construction contract within the meaning of the Act.
- [9] The subcontract includes written "General Conditions of Contract". Subclauses 28.1 and 28.2 of the General Conditions of Contract make the following provision for payment claims:

28.1 Payment Claims, Payment Certificates and Time for payment

At the time for payment claims stated in Annexure A, the Subcontractor shall deliver to the Contractor claims for payment supported by such evidence required by the Contractor or considered necessary by the Subcontractor to enable the Contractor to certify the amount due to the Subcontractor.

Within 14 days after receipt of the claim for payment, the Contractor shall issue to the Subcontractor a payment certificate stating the payment to be made by the Contractor to the Subcontractor. The Contractor shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Subcontractor, the reasons for the difference.

If the Subcontractor fails to make a claim for payment, the Contractor may nevertheless issue a payment certificate.

Within thirty (30) days after the end of the month in which the Contractor received the Subcontractor's claim for payment or, in any event, not more than thirty five (35) days after the payment is claimed, the Contractor shall pay to the Subcontractor the amount due to the Subcontractor.

Payment of moneys shall not be an admission of liability or that the work under the Contract has been executed satisfactorily but shall be payment on account only.

At any time and from time to time, the Contractor may, by any payment certificate, correct any error discovered in any previous payment certificate.

## 28.2 Calculation of payment

The amount due to the Subcontractor at any time for a claim for payment shall be the value of the work under the Contract carried out by the Subcontractor in performance of the Contract to that time, together with any moneys due to the Subcontractor under any other provision of the Contract less:

- a) amounts already paid under the contract;
- b) amounts which the Contractor is entitled to deduct or set off under the Contract;
- c) liquidated damages due to the Contractor;
- d) amounts paid directly by the Contractor to Secondary Contractors and suppliers under clause b); and
- e) all other adjustments which may be required to be made pursuant to the provisions of the Contract.

Where the Work under the contract is defective or omitted the estimated cost to rectify the defect or omission shall be taken into account.

[10] The relevant part of Annexure A of the General Conditions of Contract states that “Claims for payment shall be submitted on the last day of each Calendar month and only one claim shall be submitted each month”.

[11] Clause 32 of the General Conditions of Contract states:

## 32. Termination for Convenience

### 32.1 Termination

The Contractor may, at the Contractor’s absolute discretion, terminate the Contract for its convenience in whole or in part at any time by giving the Subcontractor seven (7) days written notice of its intention to terminate the Contract under this Clause 32.1, whether or not the Subcontractor is in default pursuant to Clause 31.

Upon receipt by the Subcontractor of such notice, the Subcontractor shall:

- a) immediately cease work under the Contract and comply forthwith with any directions given by the Contractor regarding the cessation of work under the Contract; and
- b) not place any further order, nor enter into any further agreements in relation to the work under the Contract, or part of the work under the Contract as the case may be.

### 32.2 Obligations upon Termination for Convenience

Upon termination under Clause 32.1, the Subcontractor shall as directed by the Contractor:

- a) protect the Site and the Works, including property in the possession of the Subcontractor in which the Contractor has or may acquire an interest;

- b) demobilise from the Site persons, the Subcontractor's Constructional Plant, vehicles, equipment and other things;
- c) cancel any order or agreement and do all things possible to reduce any expense or cost consequent upon termination and otherwise take all action relating to the termination;
- d) upon receipt of a direction by the Contractor to do so, novate or assign any contracts, or the rights and benefits under such contracts, between the Subcontractors and Secondary Subcontractors and suppliers. For this purpose, the Subcontractor shall execute all documents and do all things necessary to effect the assignment or novation and give all necessary notices to Secondary Subcontractors, suppliers or third parties;
- e) deliver to the Contractor:
  - i) the Work Product, and other documents, Information, materials and the like produced by the Subcontractor;
  - ii) Materials, equipment and other things intended for the Works; and
- f) Comply with any other direction of the Contractor regarding the work under the Contract.

### 32.3 Payment upon Termination for Convenience

Upon termination under Clause 32.1, the Subcontractor shall:

- a) waive any claims for damages, including loss of anticipated profits on account of the uncompleted portion of the work under the Contract or the expectation of entering into a further Contract for performance of the work under the Contract for the Project;
- b) not be entitled to any lost profit or any other compensation;

and as the sole right and remedy of the Subcontractor, the Subcontractor shall submit a claim for payment calculated in accordance with Clause 32.4

The Contractor shall not otherwise be liable to the Subcontractor for any cost, loss, expense or damage incurred by the Subcontractor under, or in connection with, the Contract or its termination.

The Contractor shall assess the Subcontractor's claim in accordance with the procedure in Clause 28 and issue a final payment certificate in accordance with Clause 28.5.

The Contractor may exercise its powers under this Clause 32.1 notwithstanding any default by the Contractor or any right which the Subcontractor may have generally at law or under the Contract.

The exercise by the Contractor of its rights under Clause 32.1 shall not relieve the Subcontractor of liability incurred, or breach of contract, prior to the date of termination or otherwise surviving termination under Clause 32.1.

#### 32.4 Calculation of Termination Payment

Where the Contractor terminates the Contract under Clause 32.1, the Subcontractor shall submit a claim according to the following:

- a) the amount due to the Subcontractor shown in any unpaid payment certificate;
- b) for work under the Contract executed prior to the notice of termination under Clause 32.1, the amount due to the Subcontractor as if the Subcontractor had submitted a payment claim on the date of the notice of termination less any payments previously made for that work under the Contract;
- c) the actual cost of Materials reasonably held or ordered by the Subcontractor for the work under the Contract, which the Subcontractor is legally liable to accept, plus the Subcontractor's actual costs of transportation to Site, but only if the Materials become the property of the Contractor upon payment;

- d) the actual cost of removal of Temporary Works and the Subcontractor's Constructional Plant; and
- e) the actual cost of return to their place of recruitment of the Subcontractor's employees engaged for the work under the Contract at the date of termination.

[12] On or about 26 November 2007, Nilsen started performing the subcontract works. During the course of performing the subcontract works Nilsen rendered the following invoices on the following dates which were paid in full by Transcon:

Claim:	Amount:	Date of Claim:	Date Paid:
Claim 1	\$ 98,900.56	02.11.2007	01.02.2008
Claim 2	\$ 548,655.69	30.11.2007	21.01.2008
Claim 3	\$ 276,988.72	20.12.2007	01.02.2008
Claim 4.1	\$ 771,963.98	30.01.2008	06.03.2008
Claim 4.2	\$ 17,160.00	23.01.2008	21.04.2008
Claim 5	\$ 334,669.42	25.02.2008	21.04.2008
Claim 6	\$ 338,397.25	27.03.2008	28.05.2008

[13] In its written response to Nilsen's application for adjudication, Transcon stated that Nilsen's invoices were paid after Alcan assessed the work which was the subject of each invoice as having been completed.

[14] Nilsen rendered the following invoices on the following dates which Transcon has not paid:

Claim:	Tax Invoice	Amount:	Date:
Claim 7.1	104183	\$ 338,730.15	22.04.2008
Claim 7.2	104301	\$ 531,692.43	09.05.2008
Claim 8	104436	\$ 950,843.14	29.05.2008

- [15] The invoices rendered by Nilsen state the total value of the work claimed to have been completed to the date of the invoice, the total value of all previous claims, and the total value of the claim made in the invoice. The invoices themselves do not identify the subcontract works performed by Nilsen that relate to the amount claimed in each invoice.
- [16] In addition to rendering invoices to Transcon, Nilsen also rendered documents that are described as progress claims which relate to each invoice. The progress claim documents itemise the work claimed to have been completed by Nilsen in accordance with a pricing schedule that was requested by Transcon and delivered by Nilsen on or about 26 October 2007. The progress claim documents identify the work performed by Nilsen that is the subject of the amount claimed in each invoice.
- [17] On 23 May 2008 Alcan terminated the head contract with Transcon and on 26 May 2008 Transcon sent an email to Nilsen which stated as follows:

We advise that our installation contract No C292 with Alcan at the Gove Alumina refinery Plant ('Site') has been terminated by Alcan. The termination is effective from 23 May 2008.

Please cancel all orders placed by Transcon for these works and where applicable demobilise any personnel and plant and equipment from the site immediately.

We apologise for any inconvenience caused and thank you for your assistance in this matter.

Could you please forward your final claim as soon as practical so we can process through Alcan?

[18] The email dated 26 May 2008 is a notice of termination that terminated the subcontract for Transcon's convenience. The notice was given under clause 32 of the General Conditions of Contract. The effect of subclause 32.1 of the General Conditions of Contract is that the subcontract was terminated 7 days after the email was sent to Nilsen.

[19] On 29 May 2008 Nilsen sent Transcon an invoice for \$950,843.14. The invoice is referred to in par [14] above as Claim 8.

[20] On or about 2 June 2008, Nilsen ceased to be entitled to make payment claims under clause 28 of the General Conditions of Contract but had a right to make a claim for final payment under clause 32.4 of the General Conditions of Contract. Nilsen has not yet exercised its right to make a claim for final payment under clause 32.4 of the General Conditions of Contract.

[21] On 3 June 2008 Nilsen sent Transcon a letter which, among other things, stated:

I have instructed our team to prepare a final claim which will be delivered to you shortly. Nilsen submits this claim on the express or implied undertaking from Alcan to pay all monies due and owing to Nilsen with respect to the Subcontract agreement.

[22] At 7.08 am on 18 June 2008 Nilsen's Commercial Manager sent Nilsen's General manager an email that stated as follows:

Please be advised that no bank guarantees were raised in the Alcan Gove Project with Trans Australian Constructions.

Currently outstanding are the following invoices however that are due or overdue for payment. Given pressure from Melbourne for financial year end debtors and cash, I am eager to seek clarification re intended payment dates for these invoices in keeping with your ongoing discussions with Transcon.

[The email then set out the three invoices referred to in par [13] above.]

[23] At 5.14 pm on 18 June 2008 Nilsen sent Transcon the following email:

Peter, followed up with my Commercial Manager this morning on the bank guarantee issue, yep looks like I am asking for something that doesn't exist, sorry to have wasted your time. Like a good money man he has asked me about the money that is outstanding, now I know that the last one does not probably exist due to the termination but after our discussions and subsequent one with Brian, is there any further offerings regarding the other money from your viewpoint. I know that we can insist on it through the legal avenues, NT legislation etc, but this is not really the way I would like to go, but I do not (sic) to get some cash for Nilsen and Suppliers etc.

Before I would entertain it I would speak to you, but need more commitment than we are currently seeing.

...

[24] On 16 July 2008 Transcon sent Nilsen an email which stated as follows:

Subject: Nilsen Reconciliation

Attachment: C292 Progress Assessment – as at 21.05.08

Harry,

Transcon need a full reconciliation of your claims to date. We have a couple of issues:-

- Alcan have provided us with a basic claim summary that represents the % complete for works. Have a good look at it. Alcan have devalued your works from the previous months claim. Craig Wood told us on the meeting on Thursday that Nilsen had accepted these values at the walk around. (I find this hard to believe.) *Transcon have not accepted this as a valid assessment of works complete* [emphasis added].
- Do Nilsen have their own assessment of the works complete on 21 May? Or have you accepted the values as shown on the attached Ed Tenaglia assessment?
- I also need further break down of your final claims.
- Another issue has been the variations claimed by Nilsen. Quite a few are a one line item on the variations register in your claims. We have no supporting documentation of any kind. These need further clarification. If Alcan have accepted these through your independent assessments and ongoing site works, we need to know that Alcan will pay us to pay you, or Nilsen will claim under their current works with Alcan.

Can you see what you can do to tie up the loose ends?

Much appreciated.

[25] On 21 July 2008 Nilsen sent Transcon a letter which stated as follows:

I note that we have still not received payment for our outstanding fees in relation to the above construction contract [the subcontract].

The outstanding tax invoices in question are:

[the letter then set out the three invoices referred to in par [13] above]

The total amount owed to Nilsen is \$1,821,265.72.

I enclose additional copies of the above invoices and supporting documents which have previously been provided to Transcon for your convenience.

The tax invoices were payable within 30 days of the date of the tax invoice. As you would appreciate, payment of those tax invoices is now well overdue.

Nilsen undertook the work for Transcon in good faith and there has been no complaint with respect to the services provided or the quality of Nilsen's workmanship.

This letter constitutes a payment claim under the Construction Contracts (Security of Payments) Act (NT) for the total outstanding money owed to Nilsen.

The \$1,821,265.72 may be paid by cheque within 10 days or transferred electronically into Nilsen's bank account. Nilsen's bank account details are:

[The letter set out the details of the bank account.]

We wish to preserve our good working relationship with Transcon and look forward to prompt resolution of this matter.

[26] Nilsen asserted that its letter dated 21 July 2008 "constitutes a payment claim under the Construction Contracts (Security of Payments) Act (NT) for the total outstanding money owed to Nilsen."

[27] On 30 July 2008 Transcon sent Nilsen a letter which stated as follows:

We refer to your letter of 21 July 2008 ('Payment Claim').

We dispute the Payment Claim on the following basis.

Invoice No. 104436 claims a sum of \$25,840.00 (exclusive of GST) on item 2.55 of Section A2: Site Works. Item 2.55 was claimed and

paid 100% in your January 2008 Progress Claim. Invoice No 104436 should be amended accordingly and resubmitted for payment.

The contractual terms of agreement between Transcon and Nilsen are set out in the Deed of Agreement between the parties and the documents referred to therein as forming the contract between the parties. The subcontract conditions of contract clause 28.1 (and Annexure A) provide for 1 progress claim to be made each month on the last day of the month with payment being made within 30 days after the end of the month in which Transcon receives Nilsen's claim for payment. Nilsen has purported to make two claims during the month of May 2008. The second payment claim made by Nilsen dated 29 May 2008 is considered by Transcon to be the June 2008 monthly progress claim. Invoice 104436 consequently became due and payable 30 days after 30 June 2008 and not on 30 June 2008 as stated in the Payment Claim.

Transcon disputes your claim that Invoice 104301 was due and payable on 10 June 2008. The May 2008 monthly payment was due to be paid on 30 June 2008.

Transcon disputes your claim that invoice 104436 was due and payable on 30 June 2008. The June 2008 monthly payment claim was due to be paid on 30 July 2008.

We will write to you separately regarding our payment proposal.

[28] On 22 August 2008, Nilsen submitted a written application for a determination by an adjudicator under the Act. In its written application Nilsen alleged that a payment dispute arose upon either Transcon's failure to pay the claim contained in its letter dated 21 July 2008 or upon Transcon's failure to pay Nilsen's three unpaid invoices. Among other things, Nilsen stated:

21. In or about June 2008 Nilsen ceased the Works and the Variation Works for Transcon. *Nilsen is still to provide Transcon with its final tax invoice* [emphasis added].

22. Nilsen has rendered ten (10) tax invoices to Transcon to date.  
...  
...
26. Transcon has failed to pay the following tax invoices pursuant to the Agreement within 30 days from the date of the tax invoice:  
  
[Nilsen then listed the invoices referred to in par [16] above.]
27. Transcon has not disputed the above three tax invoices rendered to it. The tax invoices are detailed and copies are enclosed with Document O.
28. On 21 July 2008 Nilsen issued a Payment Claim to Transcon ("the Payment Claim"): See Document O. The payment claim was transmitted to Transcon by email and facsimile. Transcon acknowledged receipt of the claim with a telephone call from its employee, Mr Eastick, to Nilsen's employee, Mr Grant Gentry on 21 July 2008.
29. On 30 July 2008 Transcon issued a Notice of Dispute to Nilsen ("the Notice of Dispute"): See Document P. The Notice of Dispute sets out Transcon's reasons for believing the Payment Claim was not made in accordance with the Agreement. Those reasons:  
  
[The application then set out the particulars contained in the letter dated 30 July 2008: see par [23] above.]
30. Nilsen responds to the Notice of Dispute as follows:
- 30.1 Item 2.55 has not been previously claimed by Nilsen and/or paid by Transcon: See schedules in Document Q;
- 30.2 Even on Transcon's interpretation of the Agreement, the three outstanding tax invoices and the Payment Claim are payable to Nilsen.

31. At the date of this application and in breach of the Agreement, Transcon has neglected to pay the three outstanding tax invoices and the Payment Claim, being the total sum of \$1,821,265.72 (inclusive of GST).
32. *A payment dispute pursuant to section 8 of the Act arose upon the wrongful refusal or failure by Transcon to pay the Payment Claim and/or Transcon's wrongful refusal or failure to pay the outstanding tax invoices [emphasis added] in accordance with the Agreement.*
33. If Transcon disputes any of the three outstanding invoices and/or the Payment Claim it must still comply with the Act and make full payment in accordance with the Act and/or Transcon's wrongful refusal or failure to pay the outstanding tax invoices in accordance with the Agreement.
34. Nilsen seeks a determination that it is entitled to payment of the sum of \$1,821,265.72 (inclusive of GST) being the balance of the three outstanding tax invoices and the amount claimed in the Payment Claim, which sum was due and payable on or before 1 July 2008 in accordance with Agreement and the Act.

[29] In its response to Nilsen's application, which is dated 5 September 2008, Transcon disputed that both Nilsen's three unpaid invoices and the letter dated 21 July 2008 were valid payment claims. Transcon disputed that any of the invoices rendered by Nilsen were payment claims under clause 28 of the General Conditions of Contract. Transcon stated that, except for invoice No 2, the invoices were not delivered on the last day of the month as required by the General Conditions of Contract. Invoices 7.1, 7.2 and 8 were submitted in breach of the General Conditions of Contract prescription that only one payment claim be made each month. Nilsen did not provide adequate evidence of the matters claimed. There were no records substantiating the 'percentage completed' of items of work claimed. The

variation claims were not valued in accordance with clause 26 and the claims included items for other, unsubstantiated claims clearly not variations to the scope of the subcontract works, such as alleged delay costs.

[30] While Transcon submitted to the adjudicator that there was no evidence before the adjudicator that the progress claim documents were provided to Transcon at the date the invoices were rendered; and that the invoices 7.1, 7.2 and 8 did not comply with the Act because they did not itemise and describe the work that Nilsen had performed and to which the invoices related, Transcon did not submit to the adjudicator that the progress claim documents did not adequately itemise and describe the obligations that Nilsen had performed. Nor did Transcon assert that it could not identify the work to which the invoices related. Nor did Transcon argue in its written response that Mr Ford could not consider any dispute based on Nilsen's three unpaid invoices unless Transcon consented to all three claims being heard together: see s 34 (3) of the Act. Nor did Transcon argue that the three invoices were not payment claims under the General Conditions of Contract because they were not serial claims that each contained a claim for the total amount payable at the date of each invoice.

[31] Among other things, in its written response, Transcon stated:

17. Transcon admits receiving the invoices set out in paragraph 24 of the Application. Transcon disputes that any of these invoices were payment claims under section 28 of the Subcontract Conditions of Contract.

18. Excepting invoice No 2, the invoices were not delivered on the last day of the month, as required by the Subcontract. Invoices 7.1, 7.2 and 8 were further submitted in breach of the Subcontractor's prescription that only one payment claim be made in a month. Nilsen submitted three invoices in the month of April 2008. Nilsen submitted two invoices for the month of May 2008.
19. The invoices that were submitted by Nilsen did not provide adequate evidence of the matters claimed. Particularly, there were no records substantiating the 'percentage completed' of items of work claimed executed, the variation claims were not valued in accordance with clause 26, and the claims include items for other, unsubstantiated claims clearly not variations to the scope of the Subcontract Works, such as alleged delay costs.
20. ... There is no evidence before the Adjudicator that the supporting progress claim documents attached to the Application in the 'Document O' bundle were provided to Transcon with the earlier provided invoices.
21. Transcon generally declined to issue payment certificates for these invoices, as they were not payment claims under section (sic) 28 of the Subcontract Conditions of Contract. ...
22. Although not required by the Subcontract, Transcon did coordinate assessment of Nilsen's Subcontract Work's with Alcan's review of the Head Contract works and Transcon's claims and progressively paid the assessed value of the Subcontract Works as varied upon execution by Nilsen. Transcon, Nilsen and Alcan representatives met on site regularly and reviewed the claimed value of the Subcontract Works as part of the assessment processes for Transcon's claims under the Head Contract. Transcon has paid Nilsen the sum of \$1,838,079.93 (excl GST) on the basis of the Alcan assessments of the extent and value of the Subcontract works (as varied) executed by Nilsen and has also paid the invoice 2 sum of \$548,655.69 (excl GST) as this invoice was at least given on the correct day (last day of November 2007).
23. ... Upon termination of the Subcontract, Nilsen is entitled to make a claim in accordance with clause 32.3 of the Subcontract

Conditions of Contract, calculated in accordance with clause 32.4 of the Subcontract Conditions of Contract.

24. Nilsen has not made its final claim for payment upon termination for Subcontract under clause 32.3 of the Subcontract Conditions of Contract. Nilsen has and continues to reserve its position on making its final payment claim available under the Subcontract, see paragraph 21 of the Application.
25. ...
26. Nilsen has asserted a letter to Transcon dated 21 July 2008 is a payment claim, ...
27. ..., the Nilsen letter of 21 July 2008 is not a valid payment claim in accordance with the express terms of the Subcontract. The payment claim mechanism under clause 28 of the Subcontract Conditions of Contract was no longer operable on termination of the Subcontract, and the letter is not a claim referencing clause 32.3 of the Subcontract Conditions of Contract or disclosing a claim calculated in accordance with clause 32.4 of the Subcontract Conditions of Contract. Transcon has accordingly not issued a payment certificate in response to this letter.
- ...
30. ..., as at termination, 21 May 2008, Alcan certified to Transcon under the Head Contract, and Nilsen had attended meetings with Alcan and Transcon and was notified that the value of Nilsen's Subcontract Works was \$2,025,368.00 (excl GST). Transcon had progressively paid Nilsen, prior to the termination for convenience of its Head Contract and consequent termination for convenience of the Subcontract, the sum of \$1,969,842.00 (excl GST) in respect of the Subcontract Works executed by Nilsen.

31. Upon a valid payment claim being made by Nilsen to Transcon under clause 32.3 of the Subcontract Conditions of Contract in accordance with the calculation methodology provided in clause 32.4 of the Subcontract Conditions of Contract, which payment claim will need to have adequate supporting information which must include a reconciliation of what (if any) of Alcan's assessment of Nilsen's Subcontract Works Nilsen disputes and what part of the value of Nilsen's Subcontract Works is being paid for directly by Alcan under the New Contract. Transcon will therein be able to address and determine the amount due to Nilsen upon the termination of the Subcontract. Transcon presently anticipates that the assessment will include \$55,526.00 (excl GST) as the value of the Subcontract Works and the sum of \$79,734.00 (excl GST) for variation works, as both amounts are determinable from Alcan's value for the Subcontract Works (as varied), subject to it being clearly established these amounts are unpaid by Transcon and have not been included in Alcan's payments directly to Nilsen under the New Contract.

...

38. ..., Transcon submits that ... Invoices 7.1, 7.2 and 8 do not comply with the Act in that they do not itemise and describe the obligations Nilsen has performed and to which the purported claims relate in sufficient detail for Transcon to assess the claim of particular relevance.

[32] On 26 September 2008, Mr Ford sent both Transcon and Nilsen an email which stated:

I am inviting written submissions from the parties on one point.

At par 17 et seq, the respondent argues that the three subject invoices were not payment claims under the contract because they were not delivered on the last day of the month and that more than one claim was made per month.

I note, however, that the respondent has accepted and paid previous invoices which were delivered contrary to those requirements. In particular, I note that claims 1 and 2 were both issued in November

2007 and claims 4.1 and 4.2 were both issued in January 2008. Further, none of the claims 1, 3, 4.2, 5 and 6 were issued on the last day of the month.

In those circumstances it seems to me that an argument of waiver, estoppel or similar is at least raised. As this may be an important issue and as neither party has addressed it, I should allow the parties an opportunity to comment.

I invite written submissions on whether the apparent acceptance and payment of claims 1 – 6 in the circumstances described above in some way precludes the respondent from now arguing that claims 7.1, 7.2 and 8 (invoices 104183, 104301, 104436) are not payment claims under the contract because they were not delivered on the last day of the month and because in some cases more than one claim was made per month.

I want to make it clear I am not seeking any further factual material and I will have to ignore any further such material. I am only seeking submissions whether the conduct as described can in some way preclude the respondent from asserting as it now does.

[33] Following receipt of Mr Ford's email, Nilsen filed written submissions stating that Transcon had either waived or was estopped from relying on clause 28 of the General Conditions of Contract. Transcon filed written submissions stating that no question of estoppel or waiver arose because the payment dispute before the adjudicator was not in respect of invoices 104183, 104301 and 104436; if the adjudicator considered and addressed the three unpaid invoices he would fall outside the scope of his reference; following the termination of the subcontract, a claim under clause 32 of the General Conditions of Contract was the only basis for Nilsen to make a payment claim; no claim had been made under clause 32 of the General Conditions of Contract; and the circumstances of the parties had changed as

it was no longer possible to assess Nilsen's claim at a site meeting with Alcan. Transcon again raised no argument based on s 34(3) of the Act. Transcon did not argue that if the adjudicator was to treat the three unpaid invoices as payment claims then the three unpaid invoices gave rise to three separate payment disputes and Transcon's consent was necessary for the three payment disputes to be heard together by the adjudicator. In the circumstances Transcon waived any entitlement that it had under s 34(3) of the Act.

[34] On 26 September 2008, Mr Ford made the determination referred to in par [4] above. Relevantly, he held as follows:

As stated in par 10(c) above, the respondent says the applicant's letter of 21 July 2008 cannot be a payment claim under cl 28 of the contract because the contract was terminated on 21 (sic) May 2008. On termination, it says, the cl 28 payment claim mechanism ceased to operate and was replaced by the cl 32.2 final claim mechanism.

I do not have to decide this issue as I have found that the three invoices were payment claims under the contract, triggering a payment dispute under s 8 of the Act when they were due for payment but unpaid. That date was thirty days from the date they were issued, the respondent having, as I have found, waived by its conduct strict compliance with the requirement to issue invoices only on the last day of each month.

Payment disputes in respect of the three invoices therefore arose on 23 May, 10 and 30 June as set out in par 5 above.

### **Transcon's argument**

[35] Senior Counsel for the Plaintiff, Ms Kelly SC, made the following arguments.

[36] Mr Ford's determination was void for two reasons. First, because the adjudicator stepped outside the function conferred on him by the Act by determining a question which had not been referred to him for determination. Secondly, because a basic and essential requirement for a valid determination was absent, the existence of a payment dispute between the Transcon and Nilsen.

[37] Mr Ford made the first error when he declined to determine whether the letter of 21 July 2008 was a valid payment claim within the meaning of the Construction Contracts (Security of Payments) Act (NT). Mr Ford wrongly based his determination on his finding that Nilsen's three unpaid invoices were the relevant payment claims. The only payment dispute before Mr Ford was a payment dispute based on Nilsen's letter to Transcon dated 21 July 2008. Had he turned his mind to the issue Mr Ford would have realised that the letter of 21 July 2008 was not a valid payment claim under the Act and he would have dismissed Nilsen's application. The subcontract was terminated on 26 May 2008. All payment claims after that date had to be in accordance with clause 32 of the General Conditions of Contract. The letter dated 21 July 2008 did not comply with clause 32 of the General Conditions of Contract. If there was no payment claim, there was no payment dispute and Mr Ford had no jurisdiction to make a determination.

[38] Mr Ford also erred in finding that Nilsen's three unpaid invoices, being invoices 104183, 104301 and 104436, were payment claims under the Act. In order for the three invoices to be payment claims within the meaning of

the Act it was an imperative requirement of the Act that they must objectively comply with the provisions of clause 28 of the General Conditions of Contract. The three unpaid invoices did not comply with the provisions of clause 28 because they were not rendered at the end of the month, more than two invoices were issued in May 2008, the invoices were not truly serial invoices and the amount claimed in each invoice was not a progressive amount that related to the total value of the subcontract works claimed to have been completed by Nilsen at the date of the invoice. The unpaid invoices were payment claims different in kind to the payment claims contemplated by clause 28 and therefore they were not valid payment claims under the Act.

[39] In any event, Nilsen's contractual right to pursue the unpaid invoices was lost when the subcontract was terminated for Transcon's convenience. Upon termination of the subcontract Nilsen's only remedy was to make a payment claim in accordance with clause 32 of the General Conditions of Contract.

[40] Transcon's primary contention is that the existence of an objectively valid payment claim was an essential requirement of the adjudication process described in the Act. An objectively valid payment claim was a payment claim that in fact complied with the payment claim provisions of the General Conditions of Contract. Apart from certain prohibited contractual terms, the aim of the Act was to respect the parties' privity of contract and leave the parties free to determine their own contractual terms. Without the objective

existence of a valid payment claim there could be no payment dispute and without a payment dispute an adjudicator had no jurisdiction under the Act.

[41] The Act establishes a summary dispute resolution process which provides for payment on account. The Act is primarily concerned with maintaining a contractor's or subcontractor's cash flow and does not affect the ultimate recovery of final amounts due between the parties based upon their legal rights. However, pending the final resolution of the parties' contractual rights, the party ordered by an adjudicator to pay an amount under a determination must pay – even if the adjudicator made an error in the facts or the law; even in short if the determination was plainly wrong. An adjudicator's determination may be registered and enforced as a judgment of the Court.

[42] A corollary of the summary dispute resolution process established by the Act and the easy enforceability of an adjudicator's determination is that for an adjudicator's determination to be valid all essential requirements of the adjudication process described in the Act must be fulfilled. If all of the essential requirements of the adjudication process are not fulfilled then the purported determination will in truth not be an adjudicator's determination: *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 per Hodgson JA at par [52]. Such a determination is void: *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521 per Hodgson JA at par [29].

[43] While the legislature intended that the determinations of adjudicators should have strong legal effect within their intended area of operation; it is equally important that the courts ensure that where an adjudicator strayed outside the intended area of operation of the Act appropriate declaratory relief is available. Determinations of adjudicators might otherwise have potentially catastrophic effects. A purported determination will be void if the basic requirements of the Act are not complied with, or if a purported adjudication is not made bona fide, or if there is a substantial denial of natural justice.

[44] The central importance of a valid payment claim is established by the scheme of the Act. The scheme of the Act is as follows. If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated: s 27 of the Act. A payment dispute arises 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: s 8 of the Act. A payment claim means a claim made under a construction contract 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: s 4 of the Act. Once an application for adjudication is made an adjudicator must either dismiss the application or determine the application: s 33 of the Act. An adjudicator's determination is binding on the parties to the construction contract under which the payment dispute arose even if other proceedings relating to the payment dispute have been started before an arbitrator or other person or a court or other body: s

40 of the Act. A determination may be registered and enforced as a judgment of the Court: s 45 of the Act.

[45] There is nothing non-specific about the definition of “payment claim” in the Act. It is always possible to determine whether a particular claim is a “payment claim”. If a construction contract contains a written provision about payment claims the Act defines “payment claim” by reference to the terms of the construction contract actually made by the parties: s 4 of the Act. It is to that contract that the adjudicator must go to determine whether there is a “payment claim” and hence a “payment dispute” for him to adjudicate. If the construction contract does not contain such a written provision the Act implies into the contract the relevant contractual provisions in the Schedule of the Act.

[46] That does not mean that an adjudicator is free to get the question about whether a payment claim exists wrong. Whether there is a payment claim is a threshold question which an adjudicator has the jurisdiction to determine, but if he makes an erroneous decision in relation to that threshold question, then he steps outside his jurisdiction and any subsequent purported determination is a nullity and is void.

#### **Transcon’s argument about the progress claim documents**

[47] Transcon also asserted that the details contained in the progress claim documents were insufficient for Transcon to identify what Nilsen was claiming to be the work performed for which payment was being claimed. In

particular the progress claim documents did not identify the work said to have been carried out for which payment was claimed in respect of variations. By way of example the items such as “EWP spotter” and “Wet Weather delays” were unintelligible, as were the items, “60171 Disconnect and remove emerg light .. etc” and “60173 Assemble fan units to VSD 316 subL”.

[48] Transcon further asserted that there was no evidence before the Court in relation to when the progress claim documents were provided to Transcon other than they were included, along with the invoices, with the letter from Nilsen to Transcon dated 21 July 2008. In its application to the adjudicator, Nilsen stated that the invoices were sent to Transcon on the day that they were rendered by Nilsen. However, Nilsen does not state that the progress claim documents accompanied the invoices nor does Nilsen state the date when the progress claim documents were given to Transcon.

[49] In my opinion Transcon’s submissions as to the lack of evidence about when it received the progress claim documents cannot be sustained. The progress claim documents are itemised in accordance with a pricing schedule that Nilsen sent to Transcon on 26 October 2007. The progress claim document that relates to invoice No 104183 (which is dated 22 April 2008) is dated 25 April 2008. The progress claim document in relation to invoice No 104301 (which is dated 9 May 2008) is dated 25 April 2008. The progress claim document in relation to invoice No 104436 is dated 25 May 2008. In its letter dated 21 July 2008 Nilsen stated, “I enclose additional copies of the

above tax invoices and supporting documents which have previously been provided to Transcon for your convenience.” The copies of the supporting documents included copies of the progress claim documents. In its letter to Nilsen dated 30 July 2008, Transcon did not deny that it had previously been given the progress claim documents. Further, in the letter dated 30 July 2008, Transcon asserts, as to invoice No 104436, that the sum of \$25,840.00 in respect of item ‘2.55 of Section A2: Site Works’ had been previously claimed by Nilsen. Transcon could not make such an assertion if it did not have the progress claim document that related to invoice No 104436. In its email dated 16 July 2008 Transcon makes statements about matters that it could only make statements about if it had already received Nilsen’s progress claim documents: see par [24] above.

[50] An inference can be reasonably drawn from the above matters that Transcon received Nilsen’s progress claim documents at a time that was reasonably contemporaneous with the date that it received Nilsen’s invoices. The inference can be more confidently drawn as a result of the following matters. Transcon did not inform the adjudicator that it only received the progress claims when it received Nilsen’s letter dated 21 July 2008. When I raised this specific issue with the parties on 14 October 2008, Ms Kelly SC asked for time to respond to my enquiry on the basis that Transcon may wish to file an affidavit about when it received the progress claim documents. Transcon was granted time to do so. However, no affidavit was filed.

[51] If I am wrong about the above finding of fact, I accept Mr Wyvill's submission that as it is Transcon who seeks to establish the invalidity of Nilsen's three unpaid invoices, it for Transcon to establish that it did not receive the progress claim documents at a time reasonably contemporaneous with the time that it received the invoices and Transcon has not done so: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364 per Hodgson JA at par [28].

[52] I also find that the progress claim documents do sufficiently identify the work claimed to have been performed in relation to each of Nilsen's three unpaid invoices.

**Nilsen's argument about the validity of payment claims**

[53] Counsel for Nilsen, Mr Wyvill, argued that Nilsen's three unpaid invoices complied with the requirements of subclause 28.1 of the General Conditions of Contract. Mr Wyvill stated that subclause 28.2 of the General Conditions of Contract cast no burden on Nilsen. Subclause 28.2 was a provision which stipulated how Transcon was to calculate the amount due and payable to Transcon.

[54] I understand Mr Wyvill's reference to Nilsen's three unpaid invoices to be a reference to the three unpaid invoices plus the related progress claim documents. In my opinion the three unpaid invoices alone do not comply with the requirements of subclause 28.1 because they do not identify the

work undertaken by Nilsen which is said to relate to the amount claimed in the invoice.

[55] Mr Wyvill also argued that s 8 of the Act did not impose an objective requirement; rather s 8 of the Act merely imposed a requirement that an adjudicator had power to determine. Mr Wyvill argued that this contention was supported by the object of the Act, which was to maintain the cash flow of subcontractors; the principal aims of the Act which were the rapid resolution of payment disputes arising under construction contracts and the rapid recovery of payments under construction contracts; the informal nature of the adjudication process; the lack of an appeal mechanism for appeals against an adjudicator's determination; the ease and speed at which an adjudicator's determination may be registered as a judgment of the court; and the fact that monies paid in accordance with an adjudicator's determination were only paid on account.

[56] In support of his argument Mr Wyvill relied on the following statement of Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (supra) at pars [43] to [48]:

[43] The next question is whether the existence of a valid payment claim, which complies with s 13(2) is an essential precondition to a valid determination. A related question is whether, even if there is a valid claim, a determination which appears to go beyond the parameters of the claim is itself a valid determination: see [24] and [26] above.

[44] For reasons explained in *Hargreaves* at [72]-[77], it is not possible to construe s 13(2) as doing otherwise than imposing

mandatory requirements with respect to the making of payment claims. However, it does not follow that the Court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements, or the determination goes beyond the parameters of the claim, properly understood. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 72 (Spigelman CJ).

[45] In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.

[46] In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in Brodyn, should be understood as giving effect to these principles.

[47] It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for*

*Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], was to the following effect:

If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.

Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that it must be undertaken in good faith, but that is not a sufficient condition of validity.

[48] The approach set out above does not import into the operation of the provisions discussed some overriding principle of procedural fairness, as may, on one view, be inferred from the approach adopted in *John Holland v Cardno MBK*. Such an approach would be attended with difficulties for two reasons. The first is that it is at risk of introducing into the adjudication process some ill-defined notion of “fairness”, the counterpart of which is impermissible unfairness. The danger is that the Court may be led into reassessing the merits of the decision in a manner which fails to draw a firm distinction between procedural and substantive unfairness: see generally, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [28] (Gleeson CJ), [80] (McHugh and Gummow JJ) and [148] (Callinan J). The second reason is that the relevant content of procedural fairness must be ascertained by reference to the specific statutory scheme. Where that scheme is inconsistent with some element which might otherwise have been implied under the general law, it is the general law which must give way.

[57] In my opinion for the reasons given in par [63] to [73] below, Mr Wyvill’s argument cannot be sustained. The provisions of the Act are different to the statutory provisions that were being considered by Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (supra). Although the adjudication process established by the Act is an informal process aimed

at facilitating the rapid recovery of payments under construction contracts, the jurisdiction granted to adjudicators is nonetheless a specific and limited jurisdiction and principals and head contractors are entitled to be given a fair opportunity to consider whether to pay or dispute a payment claim and adequate notice of the ambit of any potential application for a determination by an adjudicator.

**Did Mr Ford fail to determine the payment dispute that had been submitted for his determination?**

- [58] In my opinion Mr Ford did not fail to determine the payment dispute that was submitted for his determination. Nor did he fail to consider if a payment claim or payment claims existed. Transcon's first contention cannot be sustained.
- [59] Nilsen made its application in the alternative: see paragraphs 32 and 34 of the application in par [28]. Nilsen asserted that either its letter dated 21 July 2008 was a payment claim or, alternatively, Nilsen's three unpaid invoices were payment claims. Transcon elected not to rely on s 34(3) of the Act and in its written response Transcon responded to both assertions of Nilsen about the alleged payment claims.
- [60] Mr Ford stated in his reasons for determination that, as he found that Nilsen's three unpaid invoices were payment claims under the subcontract, he did not have to consider Transcon's argument that Nilsen's letter of 21

July 2008 was not a payment claim. As Nilsen's application was made in the alternative, he was entitled to do so.

[61] Each of Nilsen's three unpaid invoices were rendered prior to Transcon's termination of the subcontract. Clause 32 of the General Conditions of Contract only takes effect once a contract is terminated. It is a general principle of the law of contract, that rights which accrue to a party under a contract before its termination remain enforceable: *Ettridge v Vermin Board of the District of Murat Bay* [1928] SASR 124; *Striker Resources NL v Australian Goldfields NL (in liquidation)* [2006] WASC 153 at [171]. I do not accept Transcon's submissions that Nilsen's rights to claim payment on account for invoices rendered prior to the termination of the subcontract ceased upon termination of the subcontract. Clause 32.3 of the General Conditions of Contract does not expressly state that the subcontractor waives any such rights or ceases to be entitled to any such rights upon termination.

[62] Clause 32 of the General Conditions of Contract must also be construed in such away that the clause does not modify a party's rights, which have already arisen, under the Act: see s 10 of the Act.

**Is the existence of an objectively valid payment claim an essential requirement of the adjudication process described in Construction Contracts (Security of Payments) Act (NT)?**

[63] It is common ground between the parties that in order to determine if an objectively valid payment claim is an essential requirement of the

adjudication process described in the Act it necessary to determine whether the legislature intended that an adjudicator's determination should be void if a payment claim which was the subject of a payment dispute was not made in accordance with the provisions of the relevant construction contract:

*Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 to 391; *Brodyn Pty Ltd v Davenport* (supra) at par [55].

[64] In my opinion it was not the intention of the legislature that any failure to comply with the requirements of a construction contract about the making of payment claims should result in the invalidity of an adjudicator's determination under the Act. Such a construction would defeat the object of the Act. The object of the Act is to promote 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. It also is to be noted that a payment made in accordance with an adjudicator's determination is a payment on account. It is a payment made without prejudice to the parties' ultimate contractual rights.

[65] In *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 at pars [16] to [18] I stated that:

[16] The Construction Contracts (Security of Payments) Act establishes a summary dispute resolution process that facilitates the

rapid resolution of payment disputes arising under a construction contract and a mechanism for the rapid recovery of payments under a construction contract: s 3(2). Relevantly a payment dispute arises, inter alia, when the amount claimed in a progress claim is due to be paid under the contract and the amount has not been paid: s 8. The adjudicator's determination is final in the sense that the adjudicator cannot subsequently amend or cancel the dispute and a party to the dispute cannot later apply for adjudication of the dispute: s 43. The adjudicator's determination is binding on the parties to the construction contract under which the payment dispute arose even if other proceedings relating to the payment dispute have been started before an arbitrator or another person or a court: s 40; a party that is liable to pay an amount under a determination must do so on or before the date stated in the determination: s 41(1); and the determination may be enforced as a judgment for a debt in a court of competent jurisdiction: s 45.

[17] However, payments made by a principal in accordance with the determination of an adjudicator are payments on account: s 42. Payment of the amount of the determination is taken to be an advance towards the total amount payable under the construction contract by the principal to the contractor: s 42(2). The provisions of the Construction Contracts (Security of Payments) Act do not prevent a party to a construction contract from starting proceedings before an arbitrator, another person or a court in relation to a dispute or other matter arising under the construction contract. An arbitrator or other person or a court dealing with a matter arising under a construction contract may make an order for the restitution of the amount paid or any other appropriate order relating to the determination: s 47(1) and (4). Except for a review a determination to dismiss an application without making a determination of its merits, a decision or determination of an adjudicator arguably cannot be appealed or reviewed: s 48(3).

[18] The Construction Contracts (Security of Payments) Act is primarily concerned with maintaining a contractor's cash flow, not with determining its ultimate rights: *Demir Pty Ltd v Graf Plumbing Pty Ltd* (above) at par [19]. The Act does not affect the ultimate recovery of final amounts due between the parties based on their legal rights: *CCD Group Pty Ltd v Premier Drywall Pty Ltd* (above) at par [48].

[66] It was the intention of the legislature that a valid payment claim must be of adequate particularity to enable a principal or head contractor to know the ambit of any potential application for a determination by an adjudicator under the Act if the claim is unpaid or disputed. To do so, a payment claim, must contain sufficient detail to put the principal or head contractor on notice of the precise amount claimed and it must sufficiently identify the obligations said to have been performed under the contract to which the amount claimed relates. If a payment claim does not contain such detail the principal or head contractor cannot determine if the progress claim should be paid, part paid or disputed. It was the intention of the legislature that a principal or head contractor must be given a fair opportunity to determine whether to pay, part pay or dispute a payment claim.

[67] In my opinion the essential requirements of a valid payment claim are as follows:

1. The payment claim must be made pursuant to a construction contract and not some other contract;
2. The payment claim must be in writing;
3. The payment claim must be a bona fide claim and not a fraudulent claim;
4. The payment claim must state the amount claimed;

5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.

[68] The above requirements of a valid payment claim are consistent with the definition of payment claim in the Act. They are also consistent with the basic requirements of procedural fairness. Section 28(2) of the Act and r 6 of the Construction Contracts (Security of Payments) Regulations contain little particularity about the necessary details of an application for adjudication. However, s 28(2)(b)(ii) does require the relevant payment claim to be attached to the application for adjudication.

[69] Section 4 of the Act defines payment claim, so far as is relevant, as follows:

*payment claim* means a claim made under a construction contract 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; or

[70] The two key elements of the definition of “payment claim” are that a payment claim is a claim made under a construction contract and not some other kind of contract; and a payment claim is a claim made 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.

[71] The rendering of a payment claim that contains the requirements specified in par [67] above is an essential requirement of the adjudication process

described in the Act. It is not merely a matter for the adjudicator's determination. However, an adjudicator is bound to consider if there is a valid payment claim before the adjudicator that contains the requirements referred to in par [67] above.

[72] Issues about the intervals at which payment claims may be made under the relevant construction contract, the number of payment claims that can be made in any interval, and the manner in which the amount claimed in payment claim is calculated are all in truth matters going to whether the amount claimed in a payment claim is due and payable. Whether a payment claim is due and payable is a matter for an adjudicator to determine. He or she may get their conclusion wrong.

[73] Each of Nilsen's three unpaid invoices together with the related progress claim documents contained sufficient detail to identify the amounts claimed by Nilsen and to identify and describe the obligations that Nilsen claimed to have performed under the subcontract to which the amounts claimed related. In the circumstances there were three valid payment claims before the adjudicator, the essential requirements of the adjudication process were complied with and the determination of the adjudicator is not void.

### **Orders**

[74] In the circumstances Transcon's claims are dismissed. There shall be judgment for Nilsen.

[75] I will hear the parties further as to costs.