ADJUDICATION SUMMARY

Decision pursuant to the *Building and Construction Industry Payments Act 2004*

Claimant	**Rob Carr Pty Ltd** **(ABN 38 007 198 843)**
Respondent	**Tenix Alliance Pty Ltd** **(ABN 65 075 194 857)**
Project	**Major Works Order No. TW-067909**
Adjudicator	**Warren Fischer** **Registration Number J1055362**
Nominating Authority	**Adjudicate Australia (a trading name of the Institute of Arbitrators & Mediators Australia)**
Adjudication Application	**26 October 2009 (dated)** **27 October 2009 (served on ANA)** **28 October 2009 (served on Respondent)**
Adjudicator Acceptance	**3 November 2009**
Adjudication Response	**5 November 2009**
Payment Claim	**30 September 2009**
Claimed Amount	**$237,355.40 (excluding GST)**
Payment Schedule	**14 October 2009**
Scheduled Amount	**Nil**
Set Off claimed	**$818,000.00 (excluding GST)**
Adjudicated Amount	**$237,355.40 (excluding GST)**
Due Date for Payment	**5 November 2009**
Rate of Interest	**10% p.a.**
ANA fees	**The Respondent is liable for the ANA fees**
Adjudicator's fees	**The Respondent is liable for the adjudicator's fees and expenses.**

In the matter of the

***Building and Construction Industry Payments Act* (QLD) 2004**

and

ROB CARR PTY LTD (the “Claimant”)

and

TENIX ALLIANCE PTY LTD (the “Respondent”)

ADJUDICATOR’S DECISION

I, Warren David FISCHER, as the Adjudicator for this Application made pursuant to *the Building and Construction Industry Payments Act 2004* (the "Act"), for the reasons set out in this decision, decide that:

a. **the adjudicated amount in respect of the adjudication application, dated 26 October 2009, is $237,355.40 (excluding GST);**

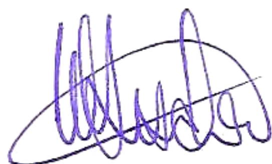
b. **the date on which the adjudicated amount became payable is 5 November 2009;**

c. **the applicable rate of interest payable on the adjudicated amount is 10% p.a.;**

d. **the Respondent is liable for the fees of the Authorised Nominating Authority; and**

e. **the Respondent is liable for the adjudicator’s fees and expenses.**

Signed



Warren Fischer
Registered Adjudicator J1055362
Date: 15 November 2009

BACKGROUND

1 This adjudication arises from an adjudication application (the "Application") made in respect of a disputed Payment Claim made by the Claimant, Rob Carr Pty Ltd ABN 38 007 198 843 (the "Subcontractor" and "Carr") on the Respondent, Tenix Alliance Pty Ltd ABN 65 075 194 857 (the "Contractor" and "Tenix").

2 Written agreements, dated 19 July 2005 and 14 December 2007, are in place between the Claimant and Respondent in respect of the work the subject of the Application.

3 The subject matter of the Payment Claim centres upon the Claimant's installation, by pipe jacking, of a 900 mm gravity main from manhole 28/1 to manhole 32/1, including construction of associated manholes, at Mattocks Rd, Burleigh Waters (Queensland).

4 By reference to correspondence between the parties of 24 August, 28 August and 2 September 2009, included in the Payment Claim, it is apparent that the work the subject of the agreements is complete and its final value agreed. The Payment Claim was, in essence, a claim for the final balance due in accordance with the agreements.

5 The Respondent seeks to invoke an indemnity provision in the subcontract agreement, between Tenix and the Carr, to set-off an alleged claim from a third party, EcoCivil Pty Ltd ("EcoCivil"), from the claimed amount which might otherwise be due to Carr.

6 Tenix alleges that EcoCivil has made a claim against it in the amount of $865,633.46 for loss and damage associated with delay and disruption suffered as a result of defective work carried out by Carr.

7 It is alleged that enveloper pipes installed by the Claimant at Clipper Boulevard and Bermuda Street, under other agreement(s) with the Respondent, are out of tolerance such that the subsequent installation of sewage carrier pipes inside the enveloper pipes could not be undertaken by EcoCivil.

8 The Claimant disputes that the enveloper pipes installed under the other agreements were installed out of tolerance and it asserts that, in any event, it installed the sewage carrier pipes (for EcoCivil) without difficulty. The Respondent acknowledges that the Claimant installed the sewage carrier pipes.

APPOINTMENT OF ADJUDICATOR

9 The Claimant lodged the Application, dated 26 October 2009, with the Institute of Arbitrators and Mediators Australia (referred to in this decision as "IAMA") on 27 October 2009. On 28 October 2009, the Claimant notified IAMA that a copy of the Application had been served on the Respondent on 28 October 2009.

10 By letter, dated 2 November 2009 but received on 3 November 2009, IAMA referred the Application to me. IAMA is an Authorised Nominating Authority ("ANA") under the Act, Registration Number N1057859.

11 By letter, dated 3 November 2009, forwarded by facsimile and email to the Claimant and the Respondent and also copied to IAMA, I accepted the Application. I thereby became the appointed Adjudicator. I am a Registered Adjudicator under the Act, Registration Number J1055362.

SCOPE OF THIS DECISION

12 The Act, at Section 26(1), requires that I am to decide:

a. the amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount);

b. the date on which any such amount became or becomes payable; and

c. the rate of interest payable on any such amount.

The Act, at Section 34(3)(b), gives me the discretion to decide:

d. the proportion of the contribution to be made by the Claimant and by the Respondent to the authorised nominating authorities fees.

The Act, at Section 35(3), gives me the discretion to decide:

e. the proportion of the contribution to be made by the Claimant and by the Respondent to the adjudicator’s fees and expenses.

MATTERS REGARDED IN MAKING THE DECISION

13 Section 26(2) restricts the matters which I may consider in deciding the Application. In making this decision I have had regard to the following:

(i) The provisions of the Act;

(ii) The Payment Claim, dated 30 September 2009, including the attached documentation to which the Application relates;

(iii) The Payment Schedule, dated 14 October 2009, to which the Application relates;

(iii) The Adjudication Application, dated 26 October 2009, and attached documentation including:

a| the Major Works Periodic Agreement for the Beenleigh - Merrimac - Pimpama Alliance, issued 19 July 2005, Agreement Number 00021ROB010 (the "subcontract agreement");

b| the Major Works Order Number TW - 067909, issued 14 December 2007, for the Gravity Main 900 Tunnel Mattocks Rd shaft 28/1 to 32/1 (the "works order");

(iv) The Adjudication Response, dated 5 November 2009, and attached documentation including:

a| statutory declaration of Colin David Bryce, dated 5 November 2009;

b| statutory declaration of Yuen Wong, dated 5 November 2009;

c| various correspondence included behind tab 4.

14 While within the adjudicator’s discretion, by Section 25(4) of the Act, no conference or inspection was requested or conducted.

15 The Claimant and the Respondent have not requested that I do not include reasons. Pursuant to s26(3) of the Act, I therefore now set out to decide the Application and to set out my findings on material questions of fact and identify the material on which those findings are based.

THRESHOLD ISSUE, INVALID PAYMENT CLAIM

16 In the Payment Schedule the Respondent asserts that, as the Payment Claim states that it is made in respect of work for the period ending 30 September 2009 and as it was served on 30 September 2009, the Payment Claim is invalid. The basis of the Respondent's assertion is that, it says, the relevant reference date under the terms of the agreements is the 15th day of each month.

17 The Respondent did not pursue this submission in its Adjudication Response, however neither did it expressly withdraw it. Accordingly, I must deal with it.

18 The Claimant asserts in the Application that clause 10.5.1 of the agreements provide that the reference date is the latter of the 15th day of each month, or, when the subcontractor complies with clause 10.5.2 of the subcontract agreement.

19 I have referred to clause 10.5.1 of the subcontract agreement and observe that it provides, inter alia, "***On the later of*** *(emphasis added) the day of the month specified in the Appendix and the day the Subcontractor complies with clauses 10.5.2 and 10.7 the Subcontractor must submit to Tenix a progress claim. ...*"

20 I have also referred to the Appendix in the works order which provides, for clause 10.5, that the day of the month for progress claims is the 15th.

21 Clause 10.7 of the subcontract agreement sets out the conditions precedent to payment rather than conditions precedent to making a progress claim. Neither party made any submissions as to the effect, if any, of this clause on the determination of the reference date.

22 Clause 10.5.2 of the subcontract agreement provides that, on or before the submission of a progress claim, the subcontractor is to provide a written statement confirming that various entitlements, amounts payable and the like have been paid.

23 I accept the Claimant's submission that the reference date is properly determined as the later of the 15th day of the month, or, when the Claimant has complied with clause 10.5.2.

24 With the Payment Claim submitted on 30 September 2009 the Claimant also submitted a letter, dated 30 September 2009 and addressed to Tenix "Re: Declaration for Payment Claim", which provided the statements necessary to satisfy clause 10.5.2 of the subcontract agreement.

25 There was no material placed before me to establish that clause 10.5.2 had been satisfied earlier in the relevant period, from 15 September 2009, than with the letter from the Claimant dated 30 September 2009.

26 Accordingly, I find that the reference date is 30 September 2009 being the later of the 15th day of the month and the day the Claimant complied with clause 10.5.2.

27 It follows that the Respondent's submission that the Payment Claim is invalid as it was issued for a reference date other than the 15th day of the month must fail.

REASON FOR NON-PAYMENT, SET OFF

28 In the Payment Schedule the Respondent claims a set-off in the amount of $818,000 (excluding GST). The Payment Schedule claims that the work undertaken by the Claimant at Clipper Boulevard and Bermuda Street was defective but provides no detail at all of any bases for that assertion. Nonetheless, the Payment Schedule asserts that the alleged defective work has resulted in another sub-contractor, Eco Civil, incurring significant delay costs which it has claimed against the Respondent.

29 The Payment Schedule goes on to assert that pursuant to clause 8.2 of the subcontract agreement the Claimant has indemnified the Respondent against all claims which the Respondent suffers as a result of an act or omission of the Claimant.

30 Clause 8.2 of the subcontract agreement provides:

"*Subcontractor's Liability*

The Subcontractor is liable for and indemnifies Tenix and the Client against all actions, claims, suits, damages, liabilities, costs, charges, expenses, penalties, fines, outgoings, payments, demands or losses which Tenix or the Client suffer, incur or are liable for which arise out of or are in any way connected with

(a) an act or omission of the Subcontractor, the Subcontractor's personnel or the personnel of any subcontractor, consultant or agent of the Subcontractor or any invitee of the Subcontractor to any Site including any breach of this Agreement, or of any Approval condition, or negligence, by any of them;

(b) the Client or the Contractor doing anything which the Subcontractor must do under this Agreement but it has not done or which the Client or the Contractor considers the Subcontractor has not done properly;

(c) death of or injury to any personnel of the Subcontractor or its subcontractors, consultants or agents or any invitee of the Subcontractor to any Site:

(d) any injury, loss or damage whatsoever to any property, real or personal, where that injury, loss or damage arises due to the negligence or default of the Subcontractor or its subcontractors, consultants or agents or of any invitee of the Subcontractor to any Site;

except to the extent that they are caused by a breach of the Subcontract by Tenix or the negligence of Tenix or the Client."

31 The Respondent then further asserts that, pursuant to clause 10.8.4 of the subcontract agreement, it is entitled to withhold from payment to the Claimant any money which the Claimant is required to pay, or in the Respondent's opinion is likely be required to pay, to the Respondent under or in connection with subcontract agreement.

32 Clause 10.8.4 of the subcontract agreement provides:

"Tenix may make a demand on any security provided by the Subcontractor and/or deduct from or set off against any progress payment, retention or any other amounts payable to the Subcontractor or draw down from any banker's undertaking whether provided or payable in respect of the Subcontract or any other agreement (whether in relation to this project or otherwise):

(1) the amount of losses to which the Subcontractor is made liable under a term of the Subcontract or which Tenix in its bona fide opinion believes it has suffered or is likely to suffer as a result of a breach of the Subcontract or negligent act or omission by the Subcontractor's personnel or their visitors; and

(2) other amounts which the Subcontractor is required to pay or in Tenix's bona fide opinion is likely to be required to pay to Tenix under or in connection with the Subcontract or any other agreement (whether in relation to this Project or otherwise).

the Subcontract Sum will be reduced by the aggregate of any such deduction, set off or draw down."

33 On that basis, the Respondent seeks to withhold the sum of $818,000 (excluding GST) from the Claimant. That sum, it alleges, is the sum of EcoCivil's delay claim arising from the Claimant's alleged defective work. A copy of EcoCivil's claim is not included with the Payment Schedule, neither is it included in the Adjudication Response. It is apparent from the attached documentation that the Claimant has not, at any time prior to the Application being made, been provided with a copy of EcoCivil's claim despite its requests. The Respondent's own submissions make it clear that the Respondent does not concede to EcoCivil's claim.

34 In its submissions the Respondent asserts that it does not affect the subcontract agreement indemnity that it "*has not admitted liability to EcoCivil in respect of its claim*" or that "*the EcoCivil claim has not been the subject of determinative proceedings*".

35 The Respondent further asserts that "*there is no requirement on the Respondent to establish actual liability or to inform the Claimant of the contents of the claim or demand. Neither the Subcontract nor the common law grant the Claimant any right whatsoever to enquire as to the content of claim. The Respondent is under no obligation to set out or justify that claim or demand to the Claimant.*" and that *"arguments about actual liability are intended to be avoided when the parties reach an agreement that one indemnifies the other"*.

36 The Respondent states that the underlying purpose of the Act is to provide an interim resolution to payment disputes under construction contracts. The Act has been widely accepted as "*pay now, argue later*" legislation, s7 of the Act expressly provides that the object of the Act is to ensure that <u>a person undertaking construction work</u> (the Claimant) is entitled to receive, and <u>is able to recover, progress payments</u>. Accordingly, I do not accept the Respondent's submission that to set off the full amount of an alleged claim from the Claimant's Payment Claim until such time as the actual amount of any liability of the Claimant is determined is consistent with the interim nature of the Act.

37 The EcoCivil claim was allegedly first notified in or around December 2008. The Respondent advises that shortly after 8 May 2009 it paid $214,810.01 to EcoCivil in respect of its claim. The statutory declaration of Yuen Wong, dated 5 November 2009, discloses that the payment made to EcoCivil by Tenix was made "*without any admission on the part of Tenix*". Given the date and subject matter of that statutory declaration, I infer that no further payments have been made to EcoCivil in respect of the alleged claim.

38 The statutory declaration of Colin Bryce, dated 5 November 2009, discloses that the Respondent signed some EcoCivil 'labour allocation records' which Mr Bryce asserts have created a strong prima facie inference that EcoCivil was delayed. Mr Bryce advises that these records are the basis of a significant part of EcoCivil's claim. In the Adjudication Response the proposition is put forward that "*these records lend significant weight to EcoCivil's claim*" (relying on *JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 58).

39 The difficulty here is that it is the Respondent, and not the Claimant, that has signed the 'labour allocation records'. If that action does give rise to a potential liability as the Respondent proposes then it is the Respondent's actions, and not the Claimant's, that have led, prima facie, to that position.

40 Returning to closer scrutiny of clause 8.2 of the subcontract agreement. It is not argued that the Respondent has yet incurred a liability for any loss in respect of the alleged claim. Neither does clause 8.2 include any provision in respect of the Respondent's "bona fide opinion". The best that might be said is that the Respondent has "suffered" (if suffered is read as "been subject to") the alleged claim (albeit that claim has not been produced in this adjudication).

41 The only indication as to any reason for non-payment pursuant to this clause in the Payment Schedule is an allegation of defective work at Clipper Boulevard and Bermuda Street and an indemnity from claims suffered "*as a result of any act or omission of RCPL*" (the Claimant). The only subclause which refers to an "*act or omission of the Subcontractor*" (RCPL, the Claimant) is subclause (a).

42 The "act or omission" referred to in subclause (a), by reference to the Payment Schedule, can only be the Respondent's allegation of defective work at Clipper Boulevard and Bermuda Street.

43 No copy of any agreement(s) has been provided in this adjudication in respect of the work Clipper Boulevard and Bermuda Street. The alleged defects (related to the line and level of the installed pipes) are keenly disputed.

44 The only material provided in this adjudication in respect of defects is a series of measurements which were provided in the Adjudication Response. I find that material inconclusive, particularly in circumstances where no specifications or agreements have been provided which might identify the permissible tolerances or the alleged breach of the relevant agreement(s). The Respondent does assert in the Adjudication Response that there is a tolerance of 25 mm, but no documents are provided to establish that. Neither the Payment Schedule nor the Adjudication Response identify the express provision(s) of the agreement(s) upon which the Respondent relies for its claim that the work done by the Claimant under the agreement(s) is defective.

45 There is simply insufficient material before me to enable a determination to be made as to whether the work undertaken by the Claimant at Clipper Boulevard and Bermuda Street is defective under the terms of the relevant agreement(s) or, if so, the extent of the Claimant's liability in respect of any such defective work.

46 In the Application the Claimant makes repeated assertions that the Respondent has not demonstrated:

- any breach of the subcontract(s) by the Claimant; or
- any terms of the subcontract(s) with which the Claimant has not complied; or
- any losses for which the Claimant is liable under the terms of any subcontracts; or
- that it has any liability to EcoCivil or is likely to have any liability to EcoCivil for anything done or omitted to be done by the Claimant,

the unsubstantiated assertions set out in the Adjudication Response by the Respondent do not answer those points or discharge the Respondent's onus to prove its claim.

47 I find the Respondent's failure to provide the relevant documents or otherwise demonstrate an answer to these points (with which I agree), in circumstances where the Claimant has raised them in its Application, significant. I am left to draw the inference that the Respondent is unable to provide any material that will help its case. Whilst Mr Bryce's statutory declaration refers to works at Clipper Boulevard and Bermuda Street, I have not been provided with any material which satisfies me as to the allegations made or indeed that if they were borne out they would result in any liability to the Claimant under the relevant agreements.

48 The Respondent carries the onus as it seeks to apply the liability provision. Based on the material provided, it is my decision that the Respondent has failed to discharge its onus. In such circumstances, I find the Respondent's reliance on clause 8.2 is misplaced and I decide that the Respondent has failed to establish an entitlement pursuant to clause 8.2 of the subcontract agreement..

49 Returning then to closer scrutiny of clause 10.8.4. In view of my decision in respect of clause 8.2, clause 10.8.4 (1) can have no application as: there is no liability under a term of the subcontract agreement; and, there is no breach of the subcontract agreement (as opposed to agreements for other projects) has been asserted by the Respondent.

50 Clause 10.8.4 (2), when properly construed provides for, inter alia, a deduction or set off from progress payments of amounts which the Claimant is required to pay, or in the Respondent's bona fide opinion is likely to be required to pay, to the Respondent under or in connection with any other agreement.

51 I have found earlier that the material provided to me in this adjudication is inconclusive in respect of determining an actual liability arising under or in connection with any other agreement and, accordingly, that a claim based on finding such a liability must fail in this adjudication as it cannot then be made out that the Claimant is required to pay anything. The only remaining test in clause 10.8.4 (2) is that of the Respondent's bona fide opinion as to the amounts which the Claimant is likely to be required to pay to the Respondent.

52 The Respondent seeks to set off $818K but has only paid, "*without any admission*", approx $215K and that, apparently, due to a concern as to liability arising from 'labour allocation sheets' it signed. The statutory declaration of Mr Bryce confirms that "*Tenix is currently disputing the claims issued* (sic) *brought by EcoCivil...*" The highest that the Respondent has put its "bona fide opinion" is that "*it is likely to have some liability to EcoCivil but the Respondent is not certain as to what the liability might be.*" I do not find that statement to satisfy the requirements of clause 10.8.4 (2) for set off as the Respondent clearly has not expressed any "bona fide opinion" as to the amount required to be paid, to the contrary it has expressly stated that it is not certain as to that amount.

53 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's claim for set off of $818,000.00 must fail.

PAY WHEN PAID PROVISION

54 In light of my finding that the Respondent has no entitlement to set off it becomes unnecessary for me to deal with the Claimant's submission that the set-off provision is "a pay when paid" provision void by s16 of the Act. I note in passing however that such a submission must fail as the definition at s16 of the Act of a pay when paid provision, in the present circumstances, would be contingent on a payment from Eco Civil ("the third party") to the Respondent ("the first party") that simply is not contemplated, the position is the reverse.

55 I would anticipate it more likely that the entitlement which the Respondent contends arises in its favour, from clause 8.2 and 10.8.4 of the subcontract agreement, might be found to offend s99 of the Act. I say that due to the potential delay in payment to the Claimant being not too dissimilar to that postulated by McDougall J in *Minister for Commerce v Contrax Plumbing & Ors* [2004] NSWSC 823 when his Honour found elements of the contract before him in that matter to be void under s34 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) [equiv s99 of the Act].

THE ADJUDICATED AMOUNT

56 Section 26(1)(a) of the Act requires that I am to decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount).

57 I have decided for reasons set out earlier that the Respondent's submissions in respect of the validity of the Payment Claim fail.

58 I have also decided for reasons set out earlier that the Respondent has not established, in this adjudication, an entitlement to set-off in respect of the alleged EcoCivil claim.

59 No further reasons have been provided by the Respondent for non-payment of the claimed amount, $237,355.40 (excluding GST). The Respondent has raised no issue with the quantum of the Claimant's claim. Indeed from the Respondent's email, dated 2 September 2009, included with the Payment Claim it is apparent that, but for the set off, the parties have agreed the claimed amount.

60 Accordingly, I decide that the adjudicated amount is $237,355.40 (excluding GST).

DUE DATE FOR PAYMENT

61 Section 26(1)(b) requires that I am to decide the date on which any amount became or becomes payable.

62 The Claimant submitted that the subcontract provides that the time for a progress payment will be *“the Thursday following 30 days from the end of the month in which the progress claim was submitted, if the 30th day is a Thursday and payment will be made on the following Thursday”.*

63 The Respondent made no submissions in regard to the due date for payment.

64 I have reviewed the subcontract agreement and works order and, following that review, I accept the Claimant's submission as to the provisions therein in respect of the due date for payment of the Payment Claim.

65 The Payment Claim was submitted on 30 September 2009. The Thursday following 30 days from the end of the month of September is 5 November 2009.

66 Therefore, I decide that the due date for payment is 5 November 2009.

RATE OF INTEREST

67 Section 26(1)(c) of the Act requires that I am to decide the rate of interest payable on any amount.

68 The Claimant submitted that the *Queensland Building Services Authority Act 1991* does not apply to the agreements and that the agreements make no provision for the payment of interest on overdue payments. The Respondent made no submission in respect of interest.

69 Section 15(2) and Section 15(3) of the Act provide:

"(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

(a) the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;

(b) the rate specified under the contract.

(3) For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section".

70 In light of the submissions made, I decide that the applicable rate of interest payable on any amount decided to be due in this adjudication is that arising under s15(2)(a) of the Act.

71 Section 48(1) of the *Supreme Court Act 1995* provides:

"48 Interest on debt under judgment or order

(1) Where judgment is given or an order is made by a court of record for the payment of money in a cause of action that arose after the commencement of the Common Law Practice Act Amendment Act 1972, interest shall, unless the court otherwise orders, be payable at the rate prescribed under a regulation from the date of the judgment or order on so much of the money as is from time to time unpaid.

72 Section 4 of the *Supreme Court Regulation 2008* (Reprint No 1) provides:

"4 Rate of interest on debt under judgment or order

For section 48(1) of the Act, the prescribed rate is 10% a year."

73 I therefore decide that the rate of interest payable on any amount decided to be due in this adjudication is 10% per annum.

AUTHORISED NOMINATING AUTHORITY'S FEES

74 Section 34(3)(b) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of any Authorised Nominating Authority fee in equal proportions or in the proportions the adjudicator to whom the Adjudication Application is referred may decide.

75 The Claimant made a short submission that the Respondent should be liable for 100% of the Authorised Nominating Authority fees. The Respondent made no submission in respect of these fees.

76 I have found fully in favour of the Claimant. In the circumstances of this adjudication I consider it appropriate that I exercise my discretion to decide that the Respondent is liable for the Authorised Nominating Authority fees and I do so.

ADJUDICATOR'S FEES

77 Section 35(3) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.

78 Each party has made a short submission that the opposing party should be found liable for 100% of the adjudicator's fees and expenses.

79 Each party's submissions were made on the basis that the submitting partly was fully successful in this adjudication. Neither party made any submissions in respect of fees if that party was unsuccessful in this adjudication.

80 I have found fully in favour of the Claimant. In the circumstances of this adjudication I consider it appropriate that I exercise my discretion to decide that the Respondent is liable for the adjudicator's fees and expenses and I do so.