IN THE DISPUTE BETWEEN

UNIVERSITY OF WITWATERSRAND
(the **"*EMPLOYER*")**

AND

ELEMENT CONSULTING ENGINEERS (PTY) LTD
(the **"*CONSULTANT*")**

In respect of

CONTRACT No: HETC116

FRAMEWORK CONTRACT FOR STRUCTURAL ENGINEERING SERVICES WITHIN THE SOL PLAATJE UNIVERSITY PRECINCT

DISPUTE

on

STRUCTURAL DISPUTE ON BUILDING C002
AT SOL PLAATJE UNIVERSITY

ADJUDICATOR'S DECISION

ADJUDICATOR : A L Griffiths
DATE OF DECISION : 13 February 2017

DISPUTE

on

STRUCTURAL DISPUTE ON BUILDING C002
AT SOL PLAATJE UNIVERSITY

ADJUDICATOR'S DECISION

1. INTRODUCTION

1.1. On or about 12 May 2014, the *Employer* and the *Contractor* (the Parties) entered into Contract No HETC116 – Framework Contract for Structural Engineering Services within the Sol Plaatje University Precincts, located in the Northern Cape.

1.2. The form of Contract was the NEC3 Professional Services Contract June 2005 (with amendments June 2006), Option G – Term Contract ("PSC3"), with the following secondary Options

- X1: Price adjustment for inflation
- X2: Changes in the law
- X7: Delay damages
- X9: Transfer of rights
- X10: Employer's Agent

As amended by the following Additional conditions of Contract ("Z Clauses")

- Z1: Tax invoices
- Z2: Selection and appointment of the *Adjudicator*
- Z3: Vendor registration
- Z4: Alternative basis for assessing compensation events relating to structural engineering services.

1.3. In terms of the Contract, the *Employer* instructed the *Consultant* to assist with the planning, conceptualising, design and construction preparation of new buildings and infrastructure on the new Sol Plaatje University in Kimberley. A Task Order was drawn up and accepted by the *Employer* on 4 September 2014.

1.4. The total of the Prices for the Task Order was R 3 454 709.31, including VAT.

1.5. Relevant contractual dates at the Task Order were:

Starting date:	25 April 2014
Task Completion date:	29 January 2016

1.6. The Contract provided for Dispute Resolution under PSC3 Option W1, which requires referral of disputes in the first instance to an adjudicator. The *Adjudicator* was specified in the Contract Data to be:

> "… the person selected by the Parties in terms of the relevant Z Clause from the panel of NEC Adjudicators set up by ICE-SA, a Joint Division of the Institution of Civil Engineers and the South African Institution of Civil Engineering …".

1.7. Clause Z2 [Selection and appointment of the *Adjudicator*] in turn provides that:

> "A Party may at any time notify the other Party of the names of two persons he has chosen from the Panel of NEC Adjudicators set up by ICE-SA, … whose availability to act as the *Adjudicator* the notifying Party has confirmed. The other Party selects on of the two persons chosen to be the *Adjudicator* within four days of receiving the notice, failing which the person chosen by the notifying Party will be the *Adjudicator*. The Parties appoint the selected *Adjudicator* under he NEC3 Adjudicator's Contract, June 2005."

1.8. I, AL Griffiths, a member of the aforesaid Panel of NEC Adjudicators set up by ICE-SA, was selected and duly appointed in terms of an NEC3 Adjudicator's Contract dated 7 December 2016.[1]

Adjudicator's Terms of Reference

1.9. In terms of the *Adjudicator's* Contract:

> "The *Adjudicator* decides the dispute referred to him under the contract between the Parties. He makes his decision and notifies the Parties of it in accordance with the contract between the Parties" [Clause 2.3].

1.10. In terms of the PSC3 Contract:

> "The *Adjudicator* acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator" [PSC3 Clause W1.2(2)],

and, in coming to his decision, the *Adjudicator* may:

- "review and revise any action or inaction of the *Employer* related to the dispute and alter a quotation which has been treated as having been accepted,
- take the initiative in ascertaining the facts and the law related to the dispute,
- instruct a Party to provide further information related to the dispute within a stated time and
- instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time" [PSC3 Clause W1.3(5)].

In addition:

- "If the *Adjudicator's* decision includes assessment of additional cost or delay caused to the *Contractor*, he makes his assessment in the same way as a compensation event is assessed" [PSC3 Clause W1.3(7)],

and

[1] Although signed by the Employer on 8 Dec 16, the Consultant on 12 Dec 16, and the Adjudicator on 14 Dec 17.

- "The *Adjudicator* decides the dispute and notifies the Parties of his decision and his reasons within four weeks of the end of the period for receiving information. The four week period may be extended if the Parties agree." [PSC3 Clause W1.3(8)].

1.11. The NEC3 Guidance Notes, in further explanation, state:

> "The *Adjudicator* has wide powers to manage the adjudication and ensure that he has all of the information he needs to reach a fair decision on the dispute within the time limits set out in the contract. The *Adjudicator* must ensure that he uses these powers fairly and reasonably."

1.12. The purpose of adjudication is to provide the Parties with a relatively quick and inexpensive independent decision on the matter in order to settle the dispute. The decision must be fair and in accordance with the contract. The *Adjudicator* acts neither as Arbitrator nor as an Expert in the context of an Expert Determination. The *Adjudicator's* Decision is binding upon the Parties as a matter of contractual agreement. Should either Party be dissatisfied with the *Adjudicator's* Decision he may, after giving notice to the other Party, refer the matter to the *tribunal*, which in this case is arbitration. Neither Party may refer a dispute to arbitration unless it has first been referred to the *Adjudicator*.

1.13. Given the purpose of adjudication and the fact that it is not the final decision on the dispute, it seems to me that the *Adjudicator* may take a robust approach, and is not strictly bound by any procedural rules or rules of evidence other than those stipulated in the contract and the rules of natural justice. Furthermore, the *Adjudicator* is not bound to adjudicate solely on the arguments put forward by the Parties in the manner that an arbitrator would be, but may take the initiative in ascertaining the facts and the law. He may also open up, review and revise any action or inaction of the *Employer*, which includes the power to decide what he believes the *Employer's* action or assessment of a quotation, should have been.

<u>The *Adjudicator's* Jurisdiction</u>

1.14. The *Consultant* contends that the *Employer* is time-barred from making this claim and/or referring the dispute to adjudication, and the *Adjudicator* also lacks the necessary jurisdiction for the purposes of determining the dispute as notified.

1.15. The jurisdictional challenge is noted and will be dealt later.

<u>The Adjudication Process and Timetable</u>

1.16. The *Employer* filed his Referral Information by e-mail on 22 December 2016. The Referral Information comprised:

- The *Employer's* Referral – A summary document, comprising 2 pages of text, in which the *Employer* sets out the relief sought. I shall refer to this document as "the "*Employer's* Referral Outline";

- The *Employer's* Referral Submission – A document, comprising 7 pages of text, in which the *Employer* sets out his case. I shall refer to this document as "the "*Employer's* Referral Submission":
- Annexures A – Z.[2]

1.17. The *Consultant* submitted his Response by e-mail on 19 January 2017,[3] which comprised:

- The "*Consultant's* Response", comprising 6 pages of text; and
- Annexures CS1 – CS4.

1.18. The *Employer* also submitted two further documents on 27 January 2017, described as being a copy of the complete Framework Contract and Associated Task Orders. However, these were submitted after the time period provided for in PSC3 Clause W1.3(3) for submission of any further information to be considered by the *Adjudicator* had expired. Accordingly, the *Adjudicator* advised by e-mail dated 27 January 2017 that he could not accept these documents unless the other party agreed. No such agreement was communicated to the *Adjudicator*.

1.19. Also on 27 January 2017, the *Adjudicator* sent "Questions / Requests for Further Information" to the Parties, and requested their responses on or before 3 February 2017. A copy of the *Adjudicator's* Questions / Requests for Further Information is attached as Annexure ADJ-01.

1.20. Both Parties duly responded on the due date. The responses comprised:

- *Employer*: A document comprising 4 pages of text, plus "Documents" 1 – 9;
- *Consultant*: A document comprising 5 pages of text, plus 1 Annexure.

I shall refer to these documents as "the *Employer's* Answers" and "the *Consultant's* Answers" respectively.

1.21. The above summarises the documentation / information to be considered by the *Adjudicator*.

1.22. As provided for in PSC3 Clause W1.3(8), the *Adjudicator's* Decision is to be notified within four weeks of the end of the period for receiving further information, which means that it is due on or before 16 February 2017.

[2] Annexures C – K were inadvertently omitted from the original submission; they were provided on 9 January 2017 upon the request of the Adjudicator

[3] Within the 4 week period provided for in PSC3 Clause W1.3(3)

2. THE DISPUTE

2.1. The Dispute concerns the *Employer's* claims that the *Consultant* breached PSC3 Clause 21 by failing to provide the Services with the skill and care ordinarily required in terms of the PSC.[4] As a result the *Employer* claims as follows:[5]

> "**RELIEF SOUGHT**
>
> 7. As a result of what is stated in the submission, the employer therefore claims an amount of R5 331 448.64 made up in the following respects:
>
> 7.1. R 1 142 149.80 in lieu of amounts paid to the construction contractor for the remedial works to the second and third floor;
>
> 7.2. R 3 995 945.91 for additional amounts paid to the construction contractor as a result of the additional 2.5 months required to complete the works caused by the consultant's omission;
>
> 7.3. Amounts paid to the University of the Witwatersrand core team professionals (New Universities Project Management Team) including the engagement of a structural engineering specialists (sic) to act as the Employer's advisor, totaling R 193 352.93; and
>
> 7.4. Interest a *tempora morae* on the amount of R 5 331 448.64, calculated at the prescribed rate of interest."

2.2. After setting out his response to the *Employer's* case, the *Consultant* concludes with the following request:[6]

> "**RELIEF SOUGHT:**
>
> 4. In the light of the Consultant's submissions above, the Consultant asks the Adjudicator to rule that:
>
> 4.1 The Employer is time-barred from making this claim and/or referring the dispute to Adjudication, and the Adjudicator consequently lacks jurisdiction to determine the dispute.
>
> 4.2 Alternatively to 4.1 above, the Employer is entitled to the monetary value of the claim referred to in 2.1 above, but is not entitled to claim delay damages from the Consultant.
>
> 4.3 Further alternatively to 4.2 above, should the Employer be entitled to delay damages, its entitlement does not exceed the contractual monetary value attributable to a 5 week delay, and that the 2.5 months delay claimed by the Employer in respect of the delay damages is incorrect / inflated."

2.3. The amounts referred to in paragraph 4.2 of the relief sought by the *Consultant* are the amounts set out in paragraphs 7.1 and 7.3 of the relief sought by the *Employer* quoted in my paragraph 2.1 above.

2.4. The *Consultant's* Response (and the relief sought) raises a fundamental issue to be considered at the outset, namely the question of the *Adjudicator's* jurisdiction. Since the

[4] *Employer's* Referral Outline, para 1
[5] *Employer's* Referral Outline, para 7
[6] *Consultant's* Response, para 4

jurisdiction question is intertwined with the time-bar argument, I shall deal with them together under the following "Head":

- The Time-Bar and the *Adjudicator's* Jurisdiction

2.5. If, after consideration of the jurisdiction question, I conclude that I am empowered to proceed further with this Adjudication, then:

2.5.1. I will not have to consider the merits or quantum of the *Employer's* claims for the relief sought under paragraphs 7.1 and 7.3 of the *Employer's* Referral Outline in the amounts of R1 142 149.80 + R193 352.93 = R1 335 502.73 including VAT since the *Consultant* has admitted them in these adjudication proceedings, albeit in the alternative.

2.5.2. It therefore follows that I will not have to consider the merits of the *Employer's* claim that the *Consultant* is in breach of PSC3 Clause 21 by failing to provide the Services with the skill and care ordinarily required in terms of the PSC. Otherwise the *Consultant* firstly would not have admitted the above claims, and secondly would, and should, have argued against the claim, but did not.

2.5.3. There is a Dispute regarding the *Employer's* claims for relief sought under paragraph 7.2 of the *Employer's* Referral Outline, and the *Consultant's* "Delay Damages" argument. The *Employer* also claims interest, which does not appear to have been addressed in the *Consultant's* Response. Since the interest claim is not expressly admitted, I must presume that it is denied and thus disputed. I shall therefore deal with these issues under the following "Heads":

- Entitlement to compensation for delay caused / Delay Damages;
- Quantum (if any) of compensation for delay caused, i.e. 2.5 months v 5 weeks and the associated monetary value; and
- Interest.

2.6. The issues underlying the Dispute, the contractual and/or legal basis of claim, the facts, evidence and reports upon which the *Employer* and the *Consultant* rely are set out in their submissions and their Answers to the *Adjudicator's* Questions / Requests for Further Information, all as described above. I have studied and considered the arguments presented and documents submitted. I do not intend to traverse each and every point that has been raised in detail, preferring to focus on the points I consider germane to the issue(s) to be decided. The fact that I do not expressly address any particular point or line of argument presented should not be taken as an oversight, nor that I agree or disagree with it.

3. THE TIME-BAR AND THE *ADJUDICATOR'S* JURISDICTION

3.1. The *Employer's* Case

Between the *Employer's* referral information and the *Employer's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Items 1 and 2, the *Employer's* case on the time-bar and the *Adjudicator's* jurisdiction may be summarised as follows:

3.1.1. The Dispute falls under "any other matter" in the Adjudication Table set out in PSC3 Clause W1.3(1).[7] There is therefore no time-barring provision applicable to this Dispute.[8]

3.1.2. Disputes need to be notified in accordance with PSC3 Clause 13.7, which provides that a notification is communicated separately from other communications. A letter of demand is not a notification of a dispute.

3.1.3. After the letters of demand, further discussions took place between the Parties to try and reach agreement. After all efforts failed, the *Employer* notified a dispute on 1 December 2016.

3.1.4. Clause Z2 sets out a procedure for the appointment of an adjudicator when the need arises, and was set up in such a manner that it is possible to appoint an adjudicator prior to the referral of a dispute to him. Clause Z2 does not amend any PSC3 clauses to allow the time for referral to run from the date of the appointment of the *Adjudicator*.

3.1.5. The Clause Z2 procedure was followed; the *Adjudicator* was appointed on 7 December 2016, and the referral submitted on 22 December 2016, all within the required times.

3.1.6. The Option W1 dispute resolution procedure and Clause Z2 form part of the Contract. There was no agreement to change any part of the Contract. The *Employer* sees no reason for the *Consultant's* averments on jurisdiction.

3.2. The *Consultant's* Case

Between the *Consultant's* Response and the *Consultant's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Items 1 and 2, the *Consultant's* case on the time-bar and the *Adjudicator's* jurisdiction may be summarised as follows:

3.2.1. The *Consultant* agrees that the Dispute falls under "any other matter" in the Adjudication Table set out in PSC3 Clause W1.3(1).[9]

[7] The *Consultant* agrees with this contention – refer *Consultant's* Response, para 1.3
[8] *Employer's* Referral Outline, para 6

3.2.2. However, in terms of the Adjudication Table a dispute may only be referred to the *Adjudicator* between two and four weeks after notification of the dispute to the other Party, and in terms of PSC3 Clause W1.3(2) if a disputed matter is not notified and referred within the times set out in this contract, neither Party may refer it to the *Adjudicator* or the *tribunal*.[10]

3.2.3. A dispute and notification of the dispute, as contemplated in the Agreement, necessarily arises once a claim is made, alternatively at the very latest, once a claim is made and the recipient has been given a reasonable opportunity to consider and respond to the claim. This follows from the ordinary meaning of "dispute", based on its plain South African English meaning.

3.2.4. The *Employer* made demands/claims as follows:

- On 2 October 2015, the *Employer* issued a letter of demand ("the first notice"), demanding compensation from the *Consultant* for remedial works and delay damages, to be paid by 30 November 2015; [11]
- On 26 November 2015, further to the first notice, the *Employer* made a further demand/claim ("the second notice") for R5 830 114.52 (including VAT), and demanded payment by 7 December 2015; and
- On 15 December 2015, the *Employer* sent a further letter that stated that if no payment were made by 5 January 2016, the matter would be handed over for litigation.

3.2.5. A claim was therefore clearly made by the *Employer* as early as 30 September 2015 / 2 October 2015, and the *Employer* notified the *Consultant* of the Dispute on this date. Accordingly, the *Consultant* denies that the dispute was notified on 1 December 2016.

3.2.6. It is trite law that a Party cannot determine / choose the commencement of the running of prescription / time-barring.

3.2.7. Since the *Employer* failed to refer the dispute to the *Adjudicator* between 2 and 4 weeks after notifying it, and waited more than a year to do so, the *Employer* is time-barred from making the claim and/or referring it to the *Adjudicator*, and the *Adjudicator* also lacks the necessary jurisdiction for the purposes of determining the dispute as notified.

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[9] *Consultant's* Response, para 1.3

[10] The times for notifying and referring a dispute may be extended by agreement between the Parties, but no such agreement was made in this case.

[11] The letter was signed on 30 September 2015

3.2.8. It is a peremptory requirement that a dispute is to be referred to the *Adjudicator* between two and four weeks after the notification of the dispute irrespective of whether or not an *Adjudicator* is named in the Contract or is not appointed prior to notification of the dispute, and does not permit any interpretation consideration.[12] For as long as the clause is workable, it must be applied in accordance with its strict wording, and there is no basis or need to widen the meaning of the words beyond the words themselves as the *Adjudicator* ought not to create a contract for the Parties.

3.2.9. Having notified the dispute, the *Employer* took no steps to appoint an *Adjudicator* or have an *Adjudicator* appointed in the two week period permitted by the Agreement and the *Employer* does not explain why it failed to comply with the timeframe in the Adjudication Table.

3.2.10. The *Adjudicator* lacks the necessary jurisdiction to determine the dispute as notified or the time-bar because no dispute as contemplated by the agreement has been referred to Adjudication; the dispute is time-barred.

3.2.11. The *Adjudicator* is not empowered to determine his own jurisdiction.

3.2.12. Jurisdiction is a matter of law. An incorrect determination does not create jurisdiction. Should the *Adjudicator* proceed to determine the dispute then, if the *Consultant* is correct in its argument that the claim is time-barred, the Adjudicator's Decision would fall to be set aside for lack of jurisdiction.

3.2.13. The *Consultant's* agreement to the appointment of the *Adjudicator* was made subject to the reservation of the *Consultant's* right to challenge the *Employer's* right to refer this dispute to Adjudication on the grounds that the *Employer* failed to refer the dispute as notified on 30 September 2015 within the contractual timeframe, in other words on the grounds of a lack of jurisdiction.

3.3. The *Adjudicator's* Assessment

3.3.1. As I understand the law, the fact that the *Consultant* has agreed to my appointment, notwithstanding his jurisdictional challenge, does not create jurisdiction. Further, absent a specific agreement, the *Adjudicator* does not have jurisdiction to decide his own jurisdiction. Since there is no such specific agreement in the Contract, I agree with the *Consultant* that I am not empowered to determine my own jurisdiction. However, that is not to say that because of the jurisdictional challenge I must immediately decline to act

[12] The Consultant adds that such consideration can only apply where it was not possible to comply with the time frame prescribed by the contract because the Parties failed to agree on the *Adjudicator* or because the nominating body was dilatory in the appointment of the *Adjudicator*.

or abandon this Adjudication.[13] Rather I believe that I must investigate the jurisdictional challenge and decide whether or not it is valid.[14]

3.3.2. As I intimated in the *Adjudicator's* Questions / Request for Further Information - Item 1, it seems to me that the *Consultant's* time-barring argument may be considered to be an "*in limine*" defence to the Dispute that has been referred by the *Employer*. If the argument is correct, it would be an absolute defence. However, the *Consultant* argues the referral is time-barred in the first instance, with the result that I have no jurisdiction to decide it. The *Employer* on the other hand contends that the referral is not time-barred. If that is correct, then I do have jurisdiction to decide the dispute referred to me.

3.3.3. Whichever way you look at it, there is clearly a dispute between the Parties over the question of whether or not the referral is time-barred, and this dispute has to be decided by someone. Since, the Parties have agreed to resolve their disputes through adjudication, and if that is unsuccessful, through arbitration, it leads me to believe that I ought to proceed to make an Adjudicator's Decision on the time-bar issue.

3.3.4. I agree that if the *Consultant* is correct in its argument that the referral is time-barred, then any Adjudicator's Decision I make could be set aside for lack of jurisdiction. But then if I find in the *Consultant's* favour on the time-barring issue, that will be the end of the Adjudication process; it would not be necessary nor would I have jurisdiction to consider the dispute further.

3.3.5. However, if the *Consultant* is not correct, then I do have jurisdiction for the dispute referred to me, in which case I am obliged to proceed to make an Adjudicator's Decision on the dispute that has been referred by the *Employer*.

3.3.6. Accordingly, I will proceed to investigate and decide the time-barring issue, whilst acknowledging that the *Consultant's* right to raise its jurisdictional challenge at a later date are reserved.

3.3.7. But before doing so, I do wish to comment on the *Consultant's* Answer that I should not have permitted the *Employer* to reply to the *Consultant's* time-barring argument and in particular the date upon which the *Employer* notified the Dispute, on the grounds that the argument had previously been put to the *Employer*.[15] The *Consultant's* Answer states: "*refer again to the attached e-mail*" and attaches an e-mail dated 15 December 2016 as evidence of that the time-barring argument had previously been put to the

[13] Because to do so would prejudice the rights of the other party
[14] Refer also to "Coulson on Construction Adjudication", by Sir Peter Coulson, 3rd edition 2015, Oxford University Press, paras 7.13 & 7.14
[15] Consultant's Answers 2.1 & 2.1(a)

Employer. However, I cannot find that e-mail in either the *Employer's* Referral Submission or *Consultant's* Response. I was therefore unaware of it at the time I issued the *Adjudicator's* Questions / Request for Further Information. In any case, I do not believe that any prejudice has been caused.

3.3.8. Compliance with the time provisions in PSC3 Clause W1.3(1) and the Adjudication Table is clearly a condition precedent for a referral to the *Adjudicator*. Given the potentially significant consequences of failure to comply, the time-barring provisions in PSC3 Clause W1.3(2) must, in my view, be construed strictly, and the failure to comply must be clear.

3.3.9. Both Parties agree that the Dispute is about "any other matter" in the fourth row of the Adjudication Table. Clearly therefore, the dispute must be referred to the Adjudicator "*Between two and four weeks after notification of the dispute to the other Party*".

3.3.10. Unlike disputes about matters that fall under the other three rows in the Adjudication Table, where the time period for notifying the dispute is stipulated, there is no such stipulation for disputes about "any other matter" which fall under the fourth row. Thus where PSC Clause W1.3(1) states that "*Disputes are notified and referred to the Adjudicator in accordance with the Adjudication Table*", the reference to "notified" can only apply to a dispute about matters that fall under the first three rows. It cannot apply to the fourth row since it is silent as to when the dispute is to be notified.

3.3.11. By the same reckoning, where PSC3 Clause W1.3(2) states that "*The time for notifying and referring a dispute may be extended if the Consultant and the Employer agree*" and goes on to state that "*If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal*", the references to "notifying" and "notified" can only apply to disputes about matters that fall under the first three rows. It cannot apply to the fourth row since there is no time period specified that could be extended or exceeded.

3.3.12. Consequently, the *Employer* (in this case) is not bound to notify the dispute within a specified time, with the result that the dispute can only be time-barred if the *Employer* fails to refer the Dispute to the *Adjudicator* between two and four weeks after notifying it.

3.3.13. Both the *Employer* and the *Contractor* agree that they were obliged to secure the appointment of an *Adjudicator* within the four week period between notifying the dispute

and referring it to the *Adjudicator*.[16] They both also reject the notion that the time for referring a dispute commences from the time the *Adjudicator* is appointed.[17]

3.3.14. Consequently, the core of the time-barring issue devolves to a question of when was the dispute "notified"? The *Employer* avers that it was notified on 1 December 2016, whereas the *Consultant* avers that it was notified as early as 30 September 2015 / 2 October 2015.

3.3.15. I agree that the word "dispute" bears no special technical meaning and should be given its ordinary plain meaning. However, notification of a claim does not automatically and immediately give rise to a dispute. A dispute does not arise unless and until it emerges that the claim is not admitted; that may be conveyed by a written rejection, or inferred by silence or prevarication on the part of the recipient over a period of time.[18]

3.3.16. Now it seems to me that the cases referred to by Coulson are mostly concerned with cases under the UK Statutory Adjudication Scheme where it was necessary to determine when a dispute came into existence in order to establish whether or not the dispute notice was premature. However, that is not an issue in this dispute, because there is no time period specified within which the *Employer* is obliged to notify the dispute after the dispute has arisen. Consequently, even if the dispute can be said to have come into existence long before the *Employer's* notification on 1 December 2016, it does not matter since the *Employer* was not obliged to notify it at that time.

3.3.17. I acknowledge that in terms of PSC3 Clause 13.7 a notification is to be communicated separately from other communications. However, it seems to me that priority should be given to substance rather than form. In other words, even though a communication may have dealt with a number of things, provided it makes it clear to the recipient that it is a notification then the fact that it was not communicated separately would not, in my view, entitle the sender to deny the notification.

3.3.18. On that basis I have reviewed the *Employer's* letters of 2 October 2015, 26 November 2015, and 15 December 2015.[19] However, I cannot find that any of them could be construed as a notification of a dispute. Whilst the last of those three letters makes reference to handing the matter over to the Wits legal office for litigation, it does not clearly notify the *Consultant* of a dispute or that the *Employer* has actually taken the

[16] The *Consultant* considers that the appointment is to be secured within the first two weeks after the dispute is notified
[17] Employer's Answers Item 2 last paragraph, Consultant's Answers Item 2.2 although the Consultant cites certain exceptions.
[18] Refer also to "Coulson on Construction Adjudication", by Sir Peter Coulson, 3rd edition 2015, Oxford University Press, paras 7.76 & 7.85
[19] Employer's Response Annexures U, W & X

decision to litigate or to notify him of the dispute. Rather it seems to me to be a warning of what may happen, with the inference that a dispute would come into existence if the *Consultant* does not pay on date specified. It is certainly no clear that a dispute is being notified and that the *Employer* has decided to refer it to the *Adjudicator*.

3.3.19. Finally, if the *Consultant* understood the *Employer's* letters to constitute a notification of a dispute, why did he not raise the time-bar issue at the time when the *Consultant* responded on 13 April 2016 with a "without prejudice" counter-offer?

3.3.20. Accordingly I do not accept the *Contractor's* contention that a dispute was notified on 30 September 2015 / 2 October 2015 when the *Employer* issued a letter of demand for compensation from the *Consultant*. Rather the letter notified the *Consultant* of the *Employer's* claim. Neither do I consider the *Employer's* letters of 26 November 2015 and/or 15 December 2015 to constitute a notification of the dispute.

3.3.21. I therefore reject the *Consultant's* argument that the *Employer* is time-barred from making this claim and/or referring the dispute to Adjudication, and as a result, I consider that I have jurisdiction to determine the dispute referred and make an Adjudicator's Decision.

4. ENTITLEMENT TO COMPENSATION FOR DELAY CAUSED / DELAY DAMAGES

4.1. The *Employer's* Case

Between the *Employer's* referral information and the *Employer's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Item 3, the *Employer's* case on this issue may be summarised as follows:

4.1.1. The claim is for damages, being the direct costs paid to the construction contractor as a result of the additional 2.5 months required to complete the works resulting from the *Consultant's* gross drawing and detailing error.

4.1.2. The claim is not for "delay damages" relating to late completion of the *Consultant's* services, which would fall under PSC3 Clause X7.

4.2. The *Contractor's* Case

Between the *Consultant's* Response and the *Consultant's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Item 3, the *Consultant's* case on this issue may be summarised as follows:

4.2.1. Clause X7: Delay Damages is the relevant applicable clause in respect of delay damages for a delay in achieving the completion of the services. Clause X7.3 provides that the *Consultant* will pay "*delay damages at the rate stated in the Task Order for each day from the Task Order Completion Date until Task Completion*". The Task Order provides that "*the delay damages are R0 per day"*.

4.2.2. At common law, a contracting party is entitled to claim contractual damages from another contracting party, in instances where the other contracting party has breached an agreement and caused damages. Contractual damages may be liquidated or unliquidated. The parties have elected, by including Clause X7 in the Agreement, to quantify contractual damages attributable to delay/s to a specific rate, which rate is identified in the Task Order, being R0 per day.

4.2.3. The terms of the agreement were put / proposed by the *Employer*. The *Employer* made this election and is bound by it. In selecting a rate of "*R0 per day*" in the Task Order, the *Employer* elected to waive its right to claim delay damages, either in the form of liquidated or unliquidated damages, as the Task Order refers to "*delay damages*" without qualification. This is the plain English meaning and the only meaning.

4.2.4. The *Employer* describes the amount claimed as additional amounts "*paid to the construction contractor as a result of the additional 2.5 months required to complete the works caused by the consultant's omission*". In correspondence the *Employer* has also described them as "*time delay and acceleration costs, distinct to the remedial works costs*". The *Employer* claims the costs as a delay cost, in other words, delay damages.

4.2.5. Whether the costs are of a P&G nature or not, and notwithstanding that P&G costs are added in the ordinary course to building work cost, the costs in question are direct costs, while they are direct costs, they are also delay costs. Delay costs / delay damages are payable at a rate of R0 per day.

4.2.6. The *Employer* is therefore not entitled to delay damages

4.3. <u>The *Adjudicator's* Assessment</u>

4.3.1. The PSC3 Option G Contract includes the following relevant provisions:

> "55.1 A Task Order includes … the amount of delay damages for late completion of the Task …"
>
> X7 **Delay damages**
>
> X7.3 The *Consultant* shall pay delay damages at the rate stated in the Task Order for each day from the Task Completion Date until Task Completion."

4.3.2. The Contract Data states: [20]

"X7 **Delay damages**
X7.1 Delay damages for late Completion of the whole of the services are as stated in the Task Order."

4.3.3. Task Order in turn states: [21]

"55.1 The starting date for the Task is 25 April 2014
55.1 The Task Completion Date is 29th January 2016
55.1 The delay damages are R 0 per day"

4.3.4. Reading the above together, the operable words are firstly "*delay damages for late completion of the Task*" in Clause 55.1, and secondly "*Delay damages for late Completion of the whole of the services*" in the Contract Data. Therefore, "delay damages" in the context of this Contract are liquidated damages payable in the event of the *Consultant's* failure to complete the *services* in the Task Order on time.

4.3.5. However, the *Employer's* claim is not about failure to complete the *services* on time, but the *Consultant's* breach of PSC3 Clause 21 by failing to provide the *services* with the skill and care ordinarily required.

4.3.6. That breach had occurred sometime before 6 August 2015, when the construction contractor notified the sagging of the second floor slab. The breach accordingly occurred well before the *services* in the Task Order were due to be completed, and well before PSC3 Clause X7 could come into effect.

4.3.7. It may well be that the breach caused delay to the construction contractor, but in my view that is a direct consequence of the breach, which was entirely foreseeable at the time the Parties entered into the Contract as well as at the time they concluded the Task Order.

4.3.8. I therefore reject the *Consultant's* argument that the *Employer's* claim is for Delay Damages as provided for by PSC3 Clause X7, and find that the *Employer* is entitled to its claim for general damages as a result of the *Consultant's* breach of PSC3 Clause 21.[22]

[20] Contract Data: Part 1 p7 – *Employer's* Answers Document 1
[21] *Consultant's* Response – Annexure CS3
[22] Refer para 2.5.2 above in respect of the Consultant's admission to the breach of PSC Clause 21

5. QUANTUM (IF ANY) OF COMPENSATION FOR DELAY CAUSED, i.e. 2.5 MONTHS v 5 WEEKS AND THE ASSOCIATED MONETARY VALUE

5.1. The *Employer's* Case

Between the *Employer's* referral information and the *Employer's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Items 4 & 5, the *Employer's* case on the disputed quantum may be summarised as follows:

5.1.1. The amount of R3 995 945.91 represents the direct costs paid to the construction contractor as a result of the additional 2.5 months required to complete the works and the required remedial work. Payment of this amount (plus the other costs admitted by the *Consultant*) puts the *Employer* back in the position that it would have been in had the *Consultant* not breached the Contract.

5.1.2. The 2.5 months' time due to the construction contractor were assessed in accordance with the compensation event provisions of the NEC3 Contract between the *Employer* and the construction contractor.

5.1.3. The *Consultant* contends that the remedial work drawings were issued around 17 August 2015 and the *Contractor* should have taken no more than 2 weeks to perform, hence the 5 week delay. In this regard:

5.1.3.1. The Drawing issued on 17 August 2015 was a drawing for the 2nd floor remedial measures. No details were provided for the hangers to address shortcomings in the 3rd floor slab, or the issues identified regarding the cracking in the vicinity of the stairwell landing. Furthermore, during his site inspection during August 2015, the *Employer's* structural engineer identified shortcomings in other elements of the works, which upon detailed analysis showed that remedial works were also required to strengthen them.

5.1.3.2. The *Consultant* only issued method statements for the repair during August 2015. The *Consultant's* independent structural engineer (KLS) only provided its reports and instructions for the remedial works during September 2015.

5.1.3.3. The *Consultant's* version of events is not supported by the communications at the time, as provided in the *Employer's* submission or Annexure CS4 to the Consultant's submission.

5.1.3.4. The *Consultant's* allegations of indecisive project management are unfounded; the Consultant's communications and response times were slow. The *Consultant*

was invited to collaborate in resolving the matters in order to reduce costs, and had every opportunity to do so.

5.1.3.5. The allegation that the *Employer's* review of the remedial measures caused further delays is refuted on the basis of the poor quality of the structural engineering work undertaken by the *Consultant*. The *Consultant* was not in a position to provide reasonable evidence that the design work had been undertaken in accordance with the provisions of the contract, and was therefore safe. The *Employer* had no confidence that the gross error, to which the *Consultant* admits, was an isolated event and had to treat it as a systematic issue until proven otherwise. The *Consultant* was only in a position to do so towards the end of September 2015 following a review of their own work and the production of the required evidence.

5.1.3.6. A major delay to the works was the 8-week lead-time to procure the hangers (Jakob's cables).

5.1.3.7. The *Consultant* also suggests that further delays were attributed to the hanger bolt failure. This failure was not dealt with as a compensation event as the contractor effected the change without consulting the *Consultant*. It has no bearing on the costs of the remedial works.

5.1.3.8. The *Consultant's* approach to the assessment of the cost of the remedial work ignores the impact (disruption, knock on effects, productivity loss, etc.) of change at a late stage in the works. The impact on the programme is not simply a two-week extension of time after the contractor is provided with information to proceed as suggested by the *Consultant*. This is a very simplistic view on the matter.

5.1.4. The total of the Prices in the construction contract was based on an activity schedule, not on a bill of quantities where time charges are applied to extensions of time. The costs associated with the 2.5 months' time were assessed on the basis of Defined Cost and the resulting Fee in accordance with the provisions of the NEC3 construction contract (clause 63.1).[23]

5.1.5. The costs claimed for the 2.5 months additional time, includes the following costs:

[23] The time and cost were assessed by the *Project Manager* (AECOM) for the NEC3 construction contract and a professional quantity surveyor. Detailed calculations are provided in the *Employer's* Referral Submission, Annexure W, and the *Consultant's* Response, Annexure CS2

- Salaries and wages of management (contracts director, quantity surveyor, senior planner, junior surveyor, health and safety representatives, site manager, junior site agent, foremen, etc.)
- Salaries and wages for site staff (site clerk, document control, wage clerk, storeman, office cleaners, watchmen, gang boss, etc.);
- Site costs (electrical, telephone, radio, office equipment, running expenses setting out and safety equipment, small tools, tower crane, dumpers, telehandlers, trucks, trailers, scaffolding, etc.).

5.1.6. The quantum for January 2016 could be apportioned between the three blocks under construction. However, the costs for February and March were solely attributed to Block C. The costs are what they have been assessed to be. The site had to be kept open to accommodate the late completion. The step-wise jump is representative of the fixed costs irrespective of the quantum of work executed.

5.1.7. The *Employer* accepts that in terms of Clause 82.1 in the Contract Data, the limit of the *Consultant's* liability is R5.0 million. VAT is an integral part of the loss suffered and forms part of the limit of liability.

5.2. The *Contractor's* Case

Between the *Consultant's* Response and the *Consultant's* Answers to the *Adjudicator's* Questions / Requests for Further Information, Items 4 & 5, the *Consultant's* case on the disputed quantum may be summarised as follows:

5.2.1. The amount claimed by the *Employer* is incorrect and/or inflated. No more than 5 weeks delay can reasonably be attributed to the *Consultant* for the following reasons:

5.2.1.1. The *Consultant* was informed of floor slab sagging on 6 August 2015. On 12 August 2015 the *Consultant* carried out investigations, and propping of the sagging floor slab was carried out to ensure that work could commence while remedial measures were established. The *Consultant* appointed an independent specialist (KLS) who evaluated and provided a suitable rectification solution on 17 August 2015. Drawings were also issued at this point.

5.2.1.2. No later than 1 week after receipt of the KLS remedial solution, the Employer ought reasonably to have given instructions to the construction contractor to carry out the rectification works.

5.2.1.3. The construction contractor should have taken no more than two weeks to carry out the rectification works.

5.2.2. The *Employer* is responsible for any delay incurred beyond 5 weeks because:

5.2.2.1. Upon receipt of the KLS remedial recommendation, the *Employer* sought to carry out its own review of the KLS remedial recommendation, which caused further delay. The *Consultant* cannot be held liable for delay caused by the *Employer* in reviewing the KLS remedial recommendation, particularly because he ultimately accepted it and carried it out.

5.2.2.2. The *Employer* elected to accelerate works by the contractor on other buildings that were in lag of time, rather than carry out the rectification works, which led to a diversion of resources from Block C, resulting in further delay.

5.2.2.3. Indecisive project management by the *Employer* (or his agents) and/or inadequate progress by the contractor in carrying out the remedial works caused further delay, which also cannot be attributed to the *Consultant*.

5.2.3. Accordingly, *Consultant* is liable for no more than 5 weeks delay (or the contractual monetary value thereof).

5.2.4. The *Employer's* claim is limited to R 5 million. The *Employer's* Referral Submission clearly concedes this. The *Adjudicator* is not permitted to find otherwise. The R5 million is necessarily inclusive of VAT.

5.3. The *Adjudicator's* Assessment

5.3.1. The Consultant admits a time of no more than 5 weeks; the Employer contends that it is 2.5 months – a difference of 5-6 weeks. Now it seems to me that I should start with an investigation of those averments that could substantially if not totally explain that difference.

5.3.2. The *Consultant's* 5 week delay appears to have been made up of the following:

- 2 weeks – Time from being notified of the defect on 6 August 2015 to provision of the drawings on 17 August 2015;
- 1 week – Time to instruct the construction contractor;
- 2 weeks – Time to construct the remedial works.

5.3.3. However, it seems to me that the *Consultant's* time-line must, as the *Employer* contend, be an over-simplification, for the following reasons at least:

5.3.3.1. After receipt of the remedial details on 17 August 2015, the Employer undertook his own peer review was conducted on the remedial details issued by the Consultant. Concurrently, KLS was requested to conduct an external peer review

on the areas of concern. The KLS review was issued in the first week of September.[24] The result of the peer review was that the proposed 2nd floor remedial details were approved for construction. Given the design error that had been discovered, I believe the *Employer* is entirely justified under the circumstances to demand an independent review of the remedial works. The fact that it took almost 3 weeks[25] until it was completed does not seem untoward or dilatory. Nor do I consider the fact that he ultimately accepted the remedial works proposed to change anything.

5.3.3.2. In addition, it was only on 28 August 2015, 11 days after issue of the drawing, that the *Consultant* confirmed the 2nd floor remedial work proposal and informed the *Employer* that the construction contractor should proceed.[26]

5.3.3.3. The Consultant's own time-line issued in an e-mail dated 31 August 2015 showed that a number of details were still to be issued, including details, method statements and detail drawings for the hangers, which would only be issued on 4 September 2016.[27] By the *Consultant's* own admission, the drawing showing the hangers was issued on 4 September 2015, and the method statement including the 2nd and 3rd floor hanger installation was issued on 21 September 2015.[28] So again the *Employer* would only be in a position to issue the balance of the remedial details from 4 September 2016 at the earliest.

5.3.3.4. According to the *Project Manager* for the construction contract, AECOM, the hangers (Jakob's cables) had an 8-week lead-time.[29] Thus even if the installation and subsequent work would only take 1 week, the overall time to complete the remedial works would be 9 weeks, and not the 2 weeks contended for by the *Consultant*.

5.3.4. On the basis of the foregoing, it seems to me that the *Consultant's* 5 week delay would become:

- 2 weeks – Time from being notified of the defect on 6 August 2015 to provision of the drawings on 17 August 2015;
- 1 week – Time from provision of the drawings to confirmation by the *Consultant* on 28 August 2015 that the construction contractor should proceed;

[24] On 2 and 6 September 2015 – refer *Employer's* Referral Submission, Annexures M & N
[25] 17 August 2016 to 6 September 2016
[26] *Employer's* Referral Submission, Annexure J
[27] *Employer's* Referral Submission, Annexure K
[28] *Consultant's* Response, Annexure CS4
[29] Refer also *Employer's* Answers, Document 8

- 1 week – Time from confirmation to proceed to completion of the independent design review on 2 / 6 September 2015;
- 1 week – Time to instruct the construction contractor;
- 9 weeks – Time to construct the remedial works after allowing for the 8-week lead-time for the hangers.

5.3.5. That is 14 weeks in total. Thus, even if I make allowance for activity overlaps, it seems to me that the *Employer's* claim for 2.5 months appears reasonable and justifiable.

5.3.6. Before moving on the cost calculations, I also wish to deal with the *Consultant's* Answers, Item 4.1(a) where he states that he "*requires an opportunity to respond to the Employer's comment"*.

5.3.6.1. In my *Adjudicator's* Questions / Request for Further Information, Item 4.1(a),[30] I invited the *Employer* to respond to the *Consultant's* 5-week delay argument on the basis that it did not appear from either Party's submissions in these Adjudication proceedings that the argument had previously been put to the *Employer*.

5.3.6.2. The *Consultant's* response that he "*requires an opportunity to respond to the Employer's comment*" is not what is provided for in the PSC3 Option W1 adjudication procedure. The time period for a party to submit further information to be considered by the *Adjudicator* had closed, and my Questions / Requests for Further Information were issued pursuant to PSC3 Clause W1.3(5). There is no automatic right of reply.

5.3.6.3. As it was, the *Employer* had made its argument for the 2.5 months time long before the dispute was referred to the *Adjudicator*. The *Consultant* thus had opportunity to respond and set out his argument before the matter was referred, but instead chose not do so until his Response to the *Employer's* Referral Submission.

5.3.6.4. Accordingly, I sent an e-mail on 6 February 2016, that said:

> "I acknowledge receipt of the Consultant's Response to my questions.
>
> We have thus far followed the dispute resolution procedure set out in Option W1 of the NEC PSC contract, in particular Clause W1.3(3) and (5). Unless I have further questions or require further information as a result of my review of the Party's replies to my questions I will proceed with my Decision on the dispute."

5.3.7. The *Consultant* takes no issue with the *Employer's* cost calculations (other than the delay damages and 5-week v 2.5 months arguments that I have already dealt with

[30] Refer Annexure ADJ-01

above). Nevertheless, I believe that I should review those calculations, as it remains incumbent upon the *Employer* to prove, on the balance of probabilities, that they were the costs validly incurred.

5.3.8. Accordingly, I have reviewed the calculations set out in the *Employer's* Referral Submission, Annexure W together with the adjustments made by the *Employer* in Annexure B. My review is set out in my Annexure ADJ-02. I comment as follows:

5.3.8.1. There appears to be an error in the *Employer's* calculations in the last table in Annexure B in that the allocation to Block C for January 2016 should be R 649 437.24 and not R 694 437.24. This transposition is then carried forward to the total. If the correction is made, the total reduces from R 3 505 215.71 to R3 460 213.71. Refer row 82 in my Annexure ADJ-02.

5.3.8.2. It may be that the contract pricing was based on an Activity Schedule and not a Bill of Quantities where time charges apply to extension of time, but the forecasts of Defined Cost certainly appear to have been based on time-related amounts.

5.3.8.3. I posed a question to the *Employer* in my *Adjudicator's* Questions / Request for Further Information, Item 4.2. My question was concerned with the acceleration of Blocks A & B so that they would be completed by the end of January 2016, and whether that acceleration would have the effect of exposing the *Consultant* to an increased cost since he would now be liable for the entire "P&G type" costs for February and March 2016. In this regard:

i) The *Employer's* Answer was that the quantum for January 2016 could be apportioned between the three blocks under construction. However, the costs for February and March were solely attributed to Block C. The costs are what they have been assessed to be. The site had to be kept open to accommodate the late completion. The step-wise jump is representative of the fixed costs irrespective of the quantum of work executed.[31]

ii) With respect, it seems to me that the last two sentences are exactly my point. Because of the acceleration of Blocks A & B, the fact that the site had to be kept open and the fixed costs incurred in February and March 2016 are now only attributable to Block C, whereas if there had been no acceleration, then and the fixed costs of keeping the site open would be shared by the 3 buildings.

[31] The *Consultant's* Answers, Item 4.2 also states that he "*requires an opportunity to respond to the Employer's comment*". I do not accept that for the same reasons given in relation to Item 4.1(a) – refer paragraph 5.3.6 above

iii) Put simply, and reduced to and individual cost item as an example, Salaries and/or wages of the quantity surveyor during in the period January – March 2016 would be shared between the three buildings if there was no acceleration. However, because of the acceleration his/her salary for February is now allocated 90% to Block C, and 100 % for March. The quantity surveyor's salary is R88 500 per month. Without acceleration, the cost attributable to Block C for the 3 months would be R 88 500 x 3 months x 33% = R 87 615. However, because of acceleration, the cost attributed to Block C is R 88 500 x 33% for January + R 88 500 x 90% for February + R 88 500 x 100% for March = R 197 355.

iv) The same would apply for the other cost categories that are in truth fixed monthly costs, independent of the quantity of work performed (or the value of the activities on the activity schedule) in a given month. These fixed monthly costs are in my costs by and large those listed in the *Employer's* Referral Submission, eg.

- Salaries and/or wages for management (contracts director, quantity surveyor, senior planner, junior surveyor, health and safety representatives, site manager, junior site agent, or foremen, etc.)
- Salaries and wages for site staff (site clerk, document control, wage clerk, storeman, office cleaners, watchmen, gang boss, etc.);
- Site costs (electrical, telephone, radio, office equipment, running expenses setting out and safety equipment, small tools, tower crane, dumpers, telehandlers, trucks, trailers, scaffolding, etc.).

v) Accordingly, I am not convinced that the *Employer's* allocation of costs to Block C in the months of February and March is correct. In my view, the allocation for January (multiplied by 2 as that was only half a month) should also apply to February and March. With that adjustment, the costs reduce to R 3 247 186.22 – Refer Annexure ADJ-02, Row 98.

vi) Alternatively, if I assume that the total costs without acceleration would be the same, then logically, the costs allocated to Block C should be 33% of the total costs ie. R 1 625 812.33 – Refer Annexure ADJ-02, Row 100.

5.3.8.4. However, I noted that each head of cost set out in the *Employer's* calculations,[32] is broken down into an "Extension of time portion" and an "Acceleration portion". Both portions are carried through to the totals. In this regard:

[32] *Employer's* Referral Submission, Annexure W

i) The *Employer* states that:[33]

> "A decision was made to pay for acceleration costs to ensure that Block A and B were completed by the end of January … A quotation for acceleration was received … for Block C. The cost benefits were carefully considered. … As a result, no acceleration in terms of the contract was required for Block C as it was not warranted."

ii) Consequently, I am not convinced that the "Acceleration portion" costs should be carried through to the totals attributable to Block C, and then to the *Consultant*.

iii) If only the costs attributable to the EoT portion (as per Annexure ADJ-02, Row 89) are carried through, and the same 33%:90%:100% apportionment to Black C is made, then the costs attributable to Block C are R 2 242 269.20 – Refer Annexure ADJ-02, Row 103.

iv) And if the allocation of costs to Block C in the months of February and March is limited to the allocation for January (multiplied by 2 as that was only half a month) for the same reasons already given above, the costs reduce to R 959 584.56 – Refer Annexure ADJ-02, Row 105.

5.3.9. In conclusion therefore, I am not convinced that the total costs claimed by the Employer are fully or appropriately justified. I am however satisfied that the costs attributable to Block C are at least R 959 584.56 (excluding VAT).

5.3.10. Thus, in my view, the *Employer* is entitled to the following costs:

	Rand
• Direct cost to construction contractor [34]	1 001 885.79
• Direct cost as a result of 2.5 months to complete the works	959 584.56
• Amounts paid to professional team [35]	169 607.83
Sub-Total	2 131 078.18
• VAT @ 14%	298 350.94
TOTAL	**2 429 429.12**

5.3.11. Both Parties agree that the limit of liability under the Contract is R 5.0 million including VAT. However, that is now irrelevant to my Adjudicator's Decision since the total amount I have determined is less than the limit of liability.

[33] *Employer's* Referral Submission, Annexure B
[34] As admitted by the *Consultant*
[35] As admitted by the *Consultant*

6. INTEREST

6.1. The *Employer* claims interest "*a temporae morae*", calculated at the prescribed rate.[36] Then, in the *Employer's* Answers, averred that he is due interest in terms of PSC3 Clauses 50.3 and 51.4, and submitted calculations thereof to 25 May 2016 in Document 7.

6.2. The *Consultant* has not responded on the matter of interest, either before or during these Adjudication proceedings.

6.3. Nevertheless, I believe that I should review the matter, as it remains incumbent upon the *Employer* to prove, on the balance of probabilities, that interest is due.

6.4. The relevant clauses of the contract are:

> "50.1 The *Consultant* assesses the amount due and submits an invoice at each assessment date …"
>
> "51.1 Each payment is made within three weeks of receiving the *Consultant's* invoice …"
>
> "50.3 The amount due is
> - the Price for Services Provided to Date
> - the amount of the expenses properly spent by the *Consultant* in Providing the Services and
> - other amounts to be paid to the *Consultant* less amounts to be paid by or retained from the *Consultant*.
>
> "51.3 If the *Employer* does not accept the *Consultant's* assessment of the amount due, he notifies the *Consultant* of his reasons and the amount which he assesses is due before the payment becomes due. He pays the amount of his assessment. …"
>
> "51.4 If a payment is late or has been delayed because of a disagreement, interest is paid. Interest is assessed from the date by which the payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made."
>
> "51.5 Interest is calculated on a daily basis at the *interest rate* and is compounded annually."

6.5. In this case, the net effect of the *Employer's* claim is that the *Consultant* is to pay the *Employer*. The payment is either late, or delayed because of a disagreement. Thus, in principle, the *Employer* is entitled to interest in terms of PSC Clause 51.4 at the interest rate specified, which in this case is the Prime Lending Rate of the Employer's Bank.[37]

6.6. Since entitlement to interest is already governed by the Contract, there is no basis for a general claim for "*interest a temporae morae, calculated at the prescribed rate*".

[36] *Employer's* Referral Outline, para 7.4
[37] Contract Data, Clause 51.5

6.7. I have reviewed the *Employer's* interest calculations,[38] and made certain adjustments as follows – Refer Annexure ADJ-03:

6.7.1. I do not accept that payment became due from the *Consultant* on the date of first demand, because at that time the *Employer* had not properly quantified his claim or been able to submit it the *Consultant* for review.

6.7.2. In any case, the *Employer* postponed the due date for payment by the *Consultant*, firstly to 7 December 2015, and then to 5 January 2016.[39] Thus the date from which interest can be said to run is 5 January 2016 - in other words, "*the date by which the payment should have been made*" in terms of PSC3 Clause 51.4.

6.7.3. I presume that all amounts set out in the *Employer's* calculation include VAT. I have therefore reduced them all to exclude VAT.

6.7.4. I am unable to verify any change in the Prime Lending rate after 18 March 2016.

6.7.5. I have assumed that the *Consultant* will pay the amount found due within 3 weeks of this Adjudicator's Decision, as that is the time for payment set out in the Contract Data. If payment is made earlier or later, then the interest calculation is to be adjusted accordingly.

6.8. In the result, I find that the *Employer* is due interest in the amount of R 223 543.33 excluding VAT.

[38] *Employer's* Answers, Document 7
[39] *Employer's* Referral, Annexures W & X

7. ADJUDICATOR'S DECISION

For the reasons explained above, the *Adjudicator's* Decision made pursuant to PSC3 Clause W1.3 (8) is:

7.1. The *Consultant's* claim that the *Employer* is time-barred from making this claim and/or referring the dispute to Adjudication, and that the *Adjudicator* consequently lacks jurisdiction to determine the dispute is rejected.

7.2. The *Employer* is to be paid by the *Consultant* the amount of R 2 684 268.52 (including VAT) made up as follows:

	Rand
• Direct cost to construction contractor	1 001 885.79
• Direct cost as a result of 2.5 months to complete the works	959 584.56
• Amounts paid to professional team	169 607.83
Sub-Total	**2 131 078.18**
• Interest	223 543.33
Sub-total	**2 354 621.51**
• VAT @ 14%	329 647.01
TOTAL	**2 684 268.52**

7.3. The relief sought in paragraphs 4.2 and 4.3 of the *Consultant's* Response is rejected.

7.4. The Interest is calculated on the assumption that the *Consultant* will pay the amount due within 3 weeks of this Adjudicator's Decision. If payment is made earlier or later, then the interest calculation is to be adjusted accordingly.

Signed

A L GRIFFITHS
Adjudicator

Bryanston
13 February 2017
(Signed electronically)