DETERMINATION NO. 16.07.01

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act (NT)

AA

Applicant

and

BB

Respondent

I, Cameron Ford, determine on 20 July 2007 that the amount to be paid by the respondent to the applicant is $61,774.58. That amount is payable immediately. Interest accrues at the rate of $17.52 per day from 20 July 2007. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

Applicant: Respondent:

Appointment as adjudicator

1. On 5 July 2007 I was appointed adjudicator by the Institute of Arbitrators and Mediators to determine this application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act). That Institute is a prescribed appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

2. On 10 July 2007 I held a teleconference with the lawyers for the parties. At that conference the parties stated that there was no objection to my acting as adjudicator, and I accordingly accepted the appointment.

Documents received by adjudicator

3. I received and have considered the following documents from the applicant forming the application:

   (a) application for adjudication undated;

   (b) payment claim dated 21 May 2007;

   (c) applicant's submissions;

   (d) index to documents relied on;

   (e) tax invoice 4141 dated 30.11.05;

   (f) applicant's debtor invoice 2944 dated 30.11.05;

   (g) tax invoice 4239 dated 31.12.05

   (h) applicant's debtor invoice 4440 dated 31.12.05;

   (i) tax invoice 4423 dated 28.2.06;

   (j) applicant's debtor invoice 2948 dated 28.2.06;

   (k) tax invoice 4503 dated 28.3.06;

   (l) applicant's debtor invoice 6336 dated 28.3.06;

(m) respondent's purchase order 14863 dated 28.3.06;

(n) tax invoice 4547 dated 31.3.06;

(o) applicant's debtor invoice 5518 dated 31.3.06;

(p) respondent's purchase order 14797 dated 17.3.06;

(q) tax invoice 4616 dated 27.4.06;

(r) applicant's debtor invoice 6642 dated 27.4.06;

(s) applicant's ext/int invoice 4080 dated 27.4.06;

(t) tax invoice 4617 dated 27.4.06;

(u) respondent's purchase order 15002 dated 27.4.06;

(v) applicant's debtor invoice 6643 dated 28.4.06;

(w) tax invoice 4618 dated 2.5.06;

(x) applicant's debtor invoice 6648 dated 2.5.06;

(y) respondent's purchase order 15006 dated 2.5.06;

(z) tax invoice 4643 dated 16.5.06;

(aa) applicant's debtor invoice 5529 dated 30.4.06;

(bb) tax invoice 4671 dated 24.5.06;

(cc) applicant's debtor invoice 6560 dated 18.5.06;

(dd) respondent's purchase order 150112 undated;

(ee) tax invoice 4672 dated 24.5.06;

(ff) applicant's debtor invoice 6561 dated 18.5.06;

(gg) respondent's purchase order 15014 dated 8.5.06;

(hh) tax invoice 4696 dated 30.5.06;

(ii) applicant's debtor invoice 6651 dated 5.4.06;

(jj) respondent's purchase order 14880 dated 5.4.06;

(kk) tax invoice 4727 dated 31.5.06;

(ll) applicant's debtor invoice 6136 dated May 06;

(mm) respondent's purchase order 15029 dated 23.5.06;

(nn) tax invoice 5047 dated 31.5.06;

(oo) applicant's debtor invoice 6509 dated 31.5.06;

(pp) tax invoice 5048 dated 31.5.06;

(qq) applicant's debtor invoice 5543 dated 31.5.06;

(rr) email dated 29.11.05 from [CC] of NT government to [DD] of the applicant;

(ss) letter from Department of Planning and Infrastructure to applicant dated 28.3.07;

(tt) contractor's performance report dated 7.7.06 regarding applicant;

(uu) emails dated 27.10.05 and 21.10.05 from [EE] of respondent to [FF] of applicant;

4. In the teleconference, the parties agreed that the response was due under the Act no later than 13 July 2007. I received the respondent's response on that day comprising:

(a) index of documents;

(b) notice of dispute dated 1 June 2007;

(c) applicant's tax invoices 5048, 4503, 4547, 4616, 4617, 4618, 4643, 4671, 4672, 4696, 4727 & 5047;

(d) response to application for adjudication;

(e) respondent’s submissions;

(f) statutory declaration of [GG] made 13 July 2007, the principal of the respondent;

(g) plans CD2, CD3 and CD4 of drawing B05-4149;

(h) special conditions to contract;

(i) [HH] tax invoice 1 dated 23.8.06;

(j) emails dated 27.10.05 and 21.10.05 from [EE] of respondent to [FF]of applicant;

(k) email dated 27.10.05 from [II] NT government to [JJ] of the respondent;

(l) contractor’s performance report dated 7.7.06 regarding applicant;

(m) letter from Department of Planning and Infrastructure to applicant dated 28.3.07;

(n) letter from Department of Planning and Infrastructure to respondent dated 1 August 2006 with attached contractor’s performance report dated 7.7.06 regarding respondent;

(o) two photographs of earthworks;

(p) schedule – summary of proposed contract price undated;

(q) applicant’s tax invoices 4423, 4239 & 4141;

(r) [KK] tax invoice 4367 dated 4.11.05;

(s) [KK] tax invoice 4584 dated 12.5.06;

(t) [KK] tax invoice 4567 dated 12.5.06;

(u) respondent’s purchase order 14893 dated 15.4.06;

(v) annexure to the general conditions of contract items 12-21;

(w) clauses 35.5, 36 and part 37.1 of a contract;

(x) letter irwinconsult to respondent dated 10.7.07;

(y) email [respondent's lawyer] to [applicant's lawyer] and email from [applicant's lawyer] to [respondent's lawyer] both dated 4.6.07;

(z) National direct payments report AXW25853 dated 4.6.07;

(aa) two handwritten pages, p 1 commencing "TYPICAL UNIT" and p 2 commencing "[location] – CONCRETE TAKE OFFS";

(bb) one page from Yahoo! 7 Answers "Why is salted water in the sea?";

(cc) one page from Salt Institute "What is salt?";

(dd) pp 708-709 of "Marine Structures" by Ben C Gerwick Jr;

(ee) Australian standard AS 3600-2001 Concrete structures, p 3.12 ;

(ff) AS 2758.1-1998 ss 14 and 15.1-15.2;

(gg) two handwritten pages, p 1 commencing "6 GEH [location]" and p 2 commencing "Concrete Slab & Footings";

(hh) extract from diary 17 April 2006;

(ii) respondent's tax invoice 2611 dated 4.6.07

5. On 17 July, after receipt of the response, I received a further letter from the applicant. For reasons I will give, I have not taken that letter into account in making this determination. On that day I also received an email from the respondents solicitors saying that the respondent's principal would like to be involved in any future conferences. I have not called a further conference.

JURISDICTION

6. In the teleconference I referred to, the parties agreed that I had jurisdiction to make a determination. In particular, the respondent agreed that:

   (a) there was a construction contract – s 27;

   (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;

   (c) a payment dispute had arisen – s 8;

   (d) the application had been served within 28 days after the payment dispute arose – s 28(1);

   (e) the dispute was not the subject of an order, judgment or other finding.

7. I find therefore that I have jurisdiction to entertain the application and make a determination.

8. Since the response was due and provided on 13 July, my determination is due 10 working days thereafter, namely 27 July 2007.

Further material

9. In its application the applicant requested 10 working days after receipt of the response for it to respond to the response.

10. In the response, the respondent said "There is no provision in the Act for the Applicant to have an opportunity to respond to the Respondent's submissions in the adjudication process. Accordingly, the Respondent does not agree to the 'claimant's' requirements as noted in the Application for Adjudication".

11. I agree with the respondent. The procedure in the Act is a summary, statutory procedure of application, response and determination. Section 34 clearly sets out the procedure:

34. Adjudication procedure

(1) For making a determination, an appointed adjudicator –

(a) must act informally and if possible make the determination on the basis of –

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 29, the response and its attachments; and

(b) is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

12. Under s 34(2) the adjudicator may relevantly request further submissions, information or documents from a party or request the parties attend a conference.

13. There is no provision for an applicant's response to a response. While the statutory procedure has some similarities with court procedure, those similarities do not mean that all other incidents of the court process are available under the Act.

14. Natural justice has a part to play under the Act, but only to the extent required by the Act: *Brodyn Pty. Ltd. t/as Time Cost and Quality v. Davenport* (2004) 61 NSLWR 421 at [55]-[57]. Although the NSW statutory scheme is different from the NT Act, that principle is equally applicable to both.

15. In my view, the omission by the Legislature of a right of reply in the applicant must be taken to have been deliberate, and therefore an intentional curtailment of the requirements of natural justice.

16. The view that the Act does not entitle an applicant to deliver a response as of right is supported by s 28(2)(c) which states:

28. Applying for adjudication

-

(2) The application must –

-

(c) state or have attached to it **all** the information, documents and submissions on which the party making it relies in the **adjudication**. (emphasis added)

17. The emphasised words highlight that the applicant is to include everything in the application which it relies on, not only for the application itself, but for the adjudication as a whole.

18. A reason for parliament not providing a right of reply to an applicant can be seen in this case, where the respondent stated that if the applicant was to have 10 working days to respond to the response, the respondent sought a similar time to respond to the response to the response. The process would be never ending if there was not some limitation on the requirements of natural justice.

19. In my view the Legislature has deliberately ended the right to comment at the delivery of the response, and left it thereafter to the discretion of the adjudicator to request further information if needed. This is not to say there would never be a case where an adjudicator should call for a response from an applicant to material raised by the respondent for the first time in its response. However, for reasons which will appear, this is not one of those cases.

20. I have therefore not even read the letter attached to the email of 17 July 2007 from the applicant's solicitors.

MERITS

Overview

21. From the statutory declaration of [GG], the principal of the respondent, I understand that the respondent had a contract with the NT government to build houses at [location], a remote community.

22. The contract required the respondent to purchase concrete from the applicant at a specified rate.

23. In addition to purchasing concrete from the applicant, the respondent obtained sand, blue metal, cement, loader and crane hire, labour, paint and other incidental items.

24. The respondent rendered invoices to the applicant, 13 of which remain unpaid and for which the applicant seeks payment in this application of $89,231.45.

25. The amount sought in the application is less than that sought in the payment claim of $97,918.05. The difference is $8,686.60, made up of $2,141.60 which the applicant acknowledges it overcharged for GST, and $6,545 which it acknowledges to overcharged for concrete on invoices 4643 and 5047. Concrete was charged on those invoices at $650/m^3 plus GST rather than $660/m^3 inclusive of GST.

26. That reduction in the amount sought in the payment claim deals with two of the respondent's issues in the notice of dispute.

27. On 4 June 2007, after the notice of dispute of 1 June, the respondent paid the applicant $25,032.16 for that amount of the payment claim not in dispute. The applicant does not appear to have reduced the amount claimed in the application by that amount and I think I must.

Respondent's contentions

28. The most convenient method of resolving the matter is to consider each of the respondent's contentions as they appear in its submissions, attachment B to the response, beginning from par 5 (pars 1-3 are general and I have dealt with the GST issue referred to in par 4).

Duplication of invoices 4643 and 5047

29. The respondent says that the 10 m^3 of concrete in invoice 4643 of 16 May 2006 is included in invoice 5047 of 31 May 2006. That latter invoice states that 10 m^3 of concrete was delivered on 1, 3, 5 and 8 May 2006, while invoice 4643 gives no date of supply. Tax invoice 5047 appears to have been drawn on the basis of debtor invoice 6509 of 31 May 2006.

30. In par 2 of its submissions on the notice of dispute, the applicant says that invoice 4643 relates to its debtor invoice 5529 dated 30 April 2006. This means that the 10 m^3 of concrete in that invoice must have been supplied before 1 May 2006 and is therefore different from the concrete in invoice 5047.

31. The respondent says generally at par 3 of its submissions that it did not receive the "External Debtor Invoices" from which the tax invoices appear to have been prepared. I do not think this is conclusive or even indicative of anything. I think it is understandable that an organisation such as the applicant would have a procedure such as the debtor invoices to record material supplied and from which to prepare a formal tax invoice. This is supported by the debtor invoices being handwritten whereas the tax invoices are typed

32. I note that many different quantities of concrete were invoiced by the application to the respondent over the course of the contract, and that similar quantities were delivered on different days. For example, of the nine deliveries listed in invoice 5047, four are for 10 m^3 and two are for 15 m^3. To my mind, the fact that the same quantity of concrete appears in more than once invoice is not an indication that that particular delivery is being duplicated.

33. The principal of the respondent does not address the alleged 10 m^3 duplication in his statutory declaration. There is simply an assertion in the notice of dispute and in the respondent submissions. I am left then to balance that assertion against the two documents of the applicant. Putting the tax invoices to one side which are in contention, that leaves the debtor invoice as the substantive, objective evidence. It persuades me on the balance of probabilities that the 10 m^3 of concrete in invoice 4643 is not duplicated in invoice 5047. It appears to be a contemporaneous business record upon which it is safe to rely.

34. I therefore allow the applicant the sum of $6,600 inclusive of GST, being 10 m^3 of concrete at $660 per m^3.

35. The respondent says that the 5 m^3 of concrete in tax invoice 4643 dated 16 May 2006 was ordered for delivery on 15 April but was cancelled by him on 14 April. The effect is that he is being charged for concrete he did not receive.

36. Tax invoice 4643 is based on debtor invoice 5529 dated 30 April 2006. No date is given in either invoice for the alleged supply of the concrete. Tax invoice 4643 was the first tax invoice after 15 April, on the material before me.

37. Unlike the 10 m^3 issue, the respondent's principal has gone into evidence in his statutory declaration as to cancelling the 5 m^3 on 14 April. And unlike the tax invoice and debtor invoice relating to the 10 m^3, neither tax invoice 4643 nor debtor invoice 5529 includes dates of supply.

38. In my view the respondent is on much stronger ground challenging the 5 m^3 than the 10 m^3. For one, he has given sworn evidence that he cancelled the order, and secondly the relevant tax and debtor invoices do not provide the support for the alleged supply of 5 m^3 that the other invoices do for the 10 m^3 allegation.

39. I am not persuaded on the balance of probabilities that the applicant provided the 5 m^3 of concrete referred to in tax invoice 4643 and debtor invoice 5529. The applicant has not provided the source documents from which debtor invoice 5529 was created to show on which date the 5 m^3 was alleged to have been supplied.

40. I therefore do not allow the applicant the sum of $3,300 being 5 m^3 of concrete at $660 per m^3.

41. The respondent lists the price of sand and the price of concrete next in its response, at pars 5 and 6. I do not have to deal with them as the respondent does not now wish to argue the price of sand, and the applicant has made the reductions the respondent seeks in par 6.

Quantity of concrete supplied

42. The respondent questions the amount of concrete allegedly supplied and invoiced by the applicant. The respondent says it has calculated that the maximum amount of concrete necessary for the project was 158 m^3 plus 10 m^3 of repoured concrete. In contrast, the applicant has invoiced the respondent for 193 m^3, a difference of 25 m^3. I have disallowed 5 m^3, making the difference 20 m^3.

43. The respondent points to the applicant's admission of transcription errors in the price of concrete and says that this evidences poor record keeping which in turn supports the contention that the record of quantities may be incorrect.

44. As a result of these concerns, the respondent "questions the amount of concrete allegedly supplied in Tax Invoice 5047, and seeks an adjudication as to the proper amount of concrete that should have been invoiced."

45. To my mind, the respondent's attack on tax invoice 5047 and the amount of concrete alleged to have been delivered is vague and is done in a strange way. It seems odd to me that the best that could be said was that the respondent calculated the job would require a certain amount of concrete but in fact the applicant says it has delivered more.

46. I would have thought that a far better approach would have been for the respondent to keep a record of the concrete actually delivered and to compare that with every invoice rendered by the applicant. I do not think that is unrealistic or a counsel of perfection, since all that would be required would be for the respondent to keep a small notebook in which to record the quantities delivered. I accept at face value the respondent's claim to be one of the [adjective] builders in the NT, with over [No.] years of experience. I find it somewhat surprising that a builder of that standing and experience would not keep a proper record of such an important and expensive delivery as concrete.

47. In the absence of that record, I have simply the respondent's assertion that the job should not have required that much concrete. I find this very unpersuasive, especially in the face of debtor invoices and tax invoices from the applicant, most with dates of supply.

48. The respondent says that the applicant has not produced any material supporting the claim in tax invoice 5047 to have delivered 104 m^3 of concrete. But to my mind, the applicant has done all that it need do on an application such as this. It is for the respondent now to produce evidence that rebuts the persuasive evidence of the applicant. It may well be that in court proceedings where the discovery process is available the respondent may be able to show

that the quantities invoiced were not in fact delivered. But in an application such as this, in the absence of anything (dare I say) concrete, I must accept the documents of the applicant. I am simply not in a position to make "an adjudication as to the proper amount of concrete that should have been invoiced."

49. I therefore do not further reduce the amount the applicant seeks for the quantity of concrete supplied.

Set off for inferior concrete – beach sand

50. The respondent seeks to reduce the amount claimed by the applicant by $53,762.50, being the total of amounts it says it incurred as a result of the respondent using beach sand in the concrete rather than local (non-beach) or other sand.

51. The respondent discovered beach sand was being used in the concrete when one batch started going off much quicker than earlier deliveries and was much more difficult to work.

52. In response to the discovery that beach sand was being used, the respondent contacted another concrete supplier and asked what could be done to counteract the effects of beach sand. Additives were prescribed which the respondent purchased and added to the concrete. Another more experienced team of concretors were flown into the site who were better able to deal with the concrete which remained difficult to work even with the additives.

53. Behind the respondent's concern over the use of beach sand is the possibility that the salt content of the sand will erode the metal reinforcing in the concrete. I have been provided with the material set out in sub-pars 4(aa), (bb), (cc), (dd), (ee) and (ff), and the letter from irwinconsult dated 10 July 2007 attesting to this possibility.

54. For present purposes I am prepared to accept that there is a real possibility, even a probability, of the beach sand in the concrete on this project having the feared effects. My concern is not with that aspect of the respondent's

complaint, but rather with the respondent's response to the discovery that beach sand was being used.

55. Instead of raising the issue of beach sand with the applicant, the respondent consulted another concrete supplier and obtained additives to combat the problem. I would not even criticise the respondent for consulting another concrete supplier, but I think the respondent erred in not giving the applicant an opportunity to comment on the use of beach sand, an opportunity to comment on the suggested remedies of the other supplier, and an opportunity to provide remedies of its own.

56. Had the respondent told the applicant of its concerns with the use of beach sand, the applicant would have had an opportunity to tell the respondent that it had used beach sand in all the batches of concrete thus far without apparent difficulty (par 5.2(ii) applicant's submissions), it could have taken the respondent to other sites where beach sand had allegedly been used in the past (par 5.2(i) applicant's submissions), it could have offered or suggested testing of the sand and concrete to allay the respondent's concerns (par 5.2(ii) applicant's submissions), and it could have discussed the other supplier's additives with the respondent and offered additives of its own.

57. In answer, the respondent says in par 9(b) of its submissions:

> "The respondent in the circumstances made a valid decision that there was no purpose raising the beach sand mixing in the concrete issue with the Applicant due to firstly the Applicant's unprofessional behaviour in mixing the beach sand in the concrete, secondly in the Applicant not advising the Respondent of mixing beach sand in the concrete, and thirdly from past experience in respect of the project (ie the earthworks not being completed on time etc) validly concluding that raising the matter with the Applicant would not be productive and was not going to solve the issue within the critical construction frames."

58. None of this I find convincing. It is simply illogical that someone would not raise a concern with another merely because they had that concern. Similarly, it is no answer to say the respondent did not raise it because the applicant did not tell it they were using sand. (I make no finding as to whether the applicant told the respondent about the use of sand prior, as the applicant alleges in par

5.2(i) of its submissions). And the so-called past experience was no reason not to raise this issue with the applicant. It was a different issue and, in any case, builders and contractors on building sites have to be in constant contact resolving all manner of difficulties which arise in the course of a project. Not to do so makes a project unworkable and is totally unrealistic.

59. This is supported by the letter from irwinconsult "engineering certification project management", which the respondent provided in its response. That letter says:

> "If you are intending to use local sand we would recommend you prepare a trial mix and have it analysed to check the acid-soluble chloride-ion content."
>
> and
>
> "You should prepare a mix design based on the actual aggregate being used and have the overall aggregates checked for compliance to AS 1141."
>
> and
>
> "We recommend you should prepare a trial mix when using local aggregate so that the mix design can be refined to meet the Specification. The local aggregates should be tested as described above to show compliance to the relevant Code."

60. Significantly, irwinconsult does not say that under no circumstances should local or beach sand be used or that in every or most circumstances additives will be needed. It recommends testing to determine whether or not the specifications, standards and code are met.

61. I appreciate that the respondent was working in a remote community under time pressures, and that conducting trial mixes might have been difficult (I do not know, but I am prepared to assume this for the benefit of the respondent). However, my point again is that all those factors indicate that the appropriate response to the discovery of the use of beach sand was communication with the applicant. If the applicant had prevaricated or provided unworkable solutions, the respondent would then have been in a much better position to recover these costs.

62. One way of looking at the matter is that an injured party has an obligation to mitigate its loss. The clearly appropriate way for the respondent to mitigate its loss in this instance was for it to talk immediately to the respondent and give the respondent the opportunity of allaying concerns or offering solutions.

63. I find that the respondent's reaction to the discovery of the use of beach sand in the concrete was wholly unreasonable, that it did not act as a reasonable builder in its situation would act, that it did not act to mitigate its loss, and that it is not entitled to any amount for the alleged inferior concrete.

Set-off for delay

64. The respondent says $19,320 should be set off against the amount claimed because it had to do extra work as a result of the applicant's delay in completing the ground works/first stage.

65. As an initial answer, the applicant says that because this amount was not included in the notice of dispute I cannot consider it. I do not need to decide this issue as I am of the view that the claim to a set-off is not substantiated.

66. In his statutory declaration, which I found very helpful in understanding the overall project, the respondent's principal says at par 13 that when he arrived to take over the site it was not yet ready for handover and commencement of construction. He does not say when he arrived on site, when the site should have been ready for handover and commencement of construction, when it was in fact ready and what he did to get it ready.

67. He says at par 14 that "I concluded that it would be cost effective for [the respondent] to undertake the balance of the work and I did it at the additional cost of $19,320 that was noted in the Notice of Dispute …". Without more, that conclusion suffers from the same problems as the decision not to consult the applicant about the beach sand.

68. There is simply insufficient material upon which an adjudicator could make a determination on the balance of probabilities as to the respondent's entitlement to this set-off. True, there are particulars given in the Notice of Dispute, but

they are not supported by any evidence – no documents, no testimony, no invoices. I find the photographs practically meaningless supported only by the statement in par 13 of the statutory declaration that they show "that the earthworks were not ready for construction to commence by the agreed date". There is no evidence as to when they were taken, what they show or what the agreed date was.

69. This is not to say that the respondent may not have a claim for the work it says it did finalising the site. That claim could be the subject of an application for adjudication by the respondent, provided the relevant time limits have not expired. The reason I am rejecting the claim to a set-off is that I cannot be satisfied of any of the material facts on the balance of probabilities.

70. Finally the respondent seeks the return of the $25,032.16 it paid to the applicant in response to the payment claim. I understand that this is only claimed if the respondent is successful in reducing the applicant's claim. It has not been so there is no basis for a refund of that amount.

Conclusion

71. The applicant is entitled to the entirety of the amount claimed in the application less the sum of $25,032.16 paid by the respondent on 4 June 2007 and $3,300 on account of 5 m^3 of concrete. The calculations are therefore $89,231.45 less $25,032.16 less $3,300, making a total of $60,899.29.

Interest

72. The applicant seeks interest under s 35 of the Act. Interest is allowed at the prescribed rate, being at present 10.5%, from the date the payment dispute arose.

73. For present purposes I will take the date from which interest is due as the date of the notice of dispute, since that is the date under s 8 when, in this case, a payment dispute arose. The notice of dispute was dated 1 June 2007.

74. Interest on $60,899.29 from 1 June 2007 to 20 July 2007 (50 days) at 10.5% is $875.95.

Costs

75. The applicant also seeks costs under s 36. That section says:

> **36. Costs of parties to payment disputes**
>
> (1) The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.
>
> (2) However, if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.

76. In my view, the test under subsection (2) is similar to the test for payment of indemnity or solicitor-client costs in a civil action. I do not regard the conduct or submissions of the respondent to nearly approximate that required to warrant displacement of the usual rule that each party bear its own costs. I should state clearly that I do not regard the conduct of the respondent to have been frivolous or vexatious or its submissions unfounded, quite apart from the test for indemnity costs in civil proceedings.

77. I decline to decide that the respondent pay the applicant's costs.

Determination

78. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $61,774.58 being the amount owing of $60,899.29 plus interest to 20 July 2007 of $875.95. Interest accrues on the sum of $60,899.29 at the rate of $17.52 per day from 20 July 2007.

79. The sum of $61,774.58 is payable immediately.

Dated: 20 July 2007

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CAMERON FORD
Registered Adjudicator