

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act 2004 ("**The Act**")

BETWEEN:

(**"Applicant"**)

and

(**"Respondent"**)

REASONS FOR DECISION

1. On 21 December 2018 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Resolution Institute, formerly the Institute of Arbitrators and Mediators Australia (**the Resolution Institute**) as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations* (**the Regulations**). The Application dated 20 December 2018 was delivered to me on 21 December 2018 and a copy of the Letter of Appointment dated 21 December 2018 was sent to me by email on 24 December 2018.
2. On 29 December 2018 I wrote to the parties advising of my appointment and declared no conflict of interest in the matter. I sought submissions until 2:00pm CST on Thursday, 3 January 2019 should either party object to the appointment. There were no objections to my appointment.
3. In my letter of 29 December 2018, I requested that the parties confirm the date and method of service of the Application on the Respondent for jurisdictional clarity and consistency. I confirmed that on the basis of service of the Application on 20 December 2018, by my calculation the Response would be due on or before 8 January 2019. I requested that the parties let me know

immediately if that was not the case. I also pointed out that the Applicant had indicated in the Application that the Response was due on 3 January 2019 and that it was unclear whether that date was accurate given the holiday period. I requested the parties confirm the date the Response was due.

4. In my letter of 29 December 2018, I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act*. I requested that the parties confirm in writing their acceptance or otherwise of the electronic service process by 2:00pm CST on Thursday, 3 January 2019.
5. I also requested an Applicant's Declaration in relation to Progress Payment Claim 12 in this adjudication as follows:

"Declaration of Claim

There have been several adjudications between the parties in relation to the various payment claims made by the Applicant. In Schedule 1 to the Applicant's Statutory Declaration by Mr [G], five (5) progress claims are listed as outstanding and it is entirely unclear as to whether or not these payment claims, whether in whole or part, have been the subject of an earlier adjudication.

The Applicant at paragraph 49 of the Application confirms that "...no court or arbitrator has made any decision about the Payment Dispute that is the subject of this application...", however it stops short of declaring that Progress Payment Claim 12 is not the subject of an earlier adjudication.

*Accordingly, I require the Applicant's Declaration that Progress Payment Claim 12 in whole or part has not been the subject of an earlier adjudication or application for adjudication. I request this declaration under s.27 of the Act on or before **2:00pm CST on Thursday, 3 January 2019**.*

Thank you for your assistance".

6. On 31 December 2018 the Respondent confirmed the following:
 - (a) there were no objections to my appointment as adjudicator;
 - (b) the Application was served on the Respondent on 20 December 2018;
 - (c) the Response was due on 8 January 2019, not 3 January 2019; and

(d) the Respondent agreed to service by electronic means.

7. On 3 January 2019 the Applicant confirmed the following:

- (a) there were no objections to my appointment as adjudicator;
- (b) the Application was served on 20 December 2018;
- (c) the Response was due on 8 January 2019;
- (d) the Applicant does not agree to electronic service and will require service of a hard copy of the Response; and
- (e) that Progress Payment Claim 12, in whole or part, has not been the subject of a prior adjudication.

8. On 7 January 2019 I wrote to the parties as follows:

“Thank you for your response to my correspondence of 29 December 2018 in relation to the administrative and service aspects of the Adjudication.

I confirm that the Applicant does not consent to service of the Response by electronic means.

As such, service of the documents of the Adjudication become a specific matter for jurisdictional completeness.

Both parties are Companies as defined in s.9 of the Corporations Act 2001 and both parties are interstate.

As I see it, service of the documents of the Adjudication would fall under the Service and Execution of Process Act 1992.

If that is not the case, I will accept submissions from the parties under s.34(2) of the Construction Contracts (Security of Payments) Act (the Act) to be provided on or before 5:00pm CST on 10 January 2019.

I otherwise direct the parties to provide detailed information of compliance and proof of service of the documents of the Adjudication on or before 5:00pm CST on 10 January 2019.

I confirm that I will accept service of the Response electronically under s.29(1)(b) of the Act.

I thank you for your continued assistance in this matter”.

9. On 8 January 2019 and within time the Respondent served the Response and a download link to the Response including the attachments and list of

authorities. The Respondent also confirmed service of the Response on the Applicant's address for service.

10. On 9 January 2019 I wrote to the parties confirming electronic receipt of the Response on 8 January 2019 at 1:43pm CST.
11. On 10 January 2019 The Applicant raised two issues with the Response, first an alleged set-off claim that the Applicant had not previously been provided and the use and details of prior adjudication decisions and details of settlements which were agreed on a 'without prejudice basis'. The Applicant requested I call for further submissions under s.34(2) of the Act.
12. Later that same day 10 January 2019 I received the further submissions from both the Respondent and the Applicant in relation to the service of the documents of the Adjudication as to:
 - (a) whether the *Service and Execution of Process Act 1992 (Cth)* applies to adjudications under the *Construction Contracts (Security of Payments) Act*; and
 - (b) the provision of detailed proof of service of the documents of the Adjudication.
13. On 16 January 2019 I received further unsolicited submissions from both parties in relation to an adjudication determination of a payment dispute over progress payment claim 11 in the same contract. The Respondent attached a copy of the adjudicator's determination to which the Applicant objected on the basis that the material was "*....not relevant to the determination of the matter before you...*" and that the Adjudication related to an "*.....entirely separate payment dispute....*". I will deal with this further in the jurisdiction of this determination.
14. Later that same day 16 January 2019 I wrote to the parties requesting further submissions under s.34(2) of the Act on some questions that I had in relation to the Application and Response as follows:

"I have now read all the documents of the Adjudication.

The Respondent has made a counterclaim of set-off in the Response for alleged overpayment of the contract to the Applicant. This was based on a contract reconciliation conducted by the Respondent on or about 2 January 2019.

In the Adjudication the Applicant has not had the opportunity to respond to these allegations. To ensure natural justice for both parties, I invite the Applicant to make further submissions on the set-off claims put forward by the Respondent and for the Respondent to make further submissions on any new matters raised by the Applicant.

I invite the parties to make further submissions under s.34(2) of the Construction Contracts (Security of Payments) Act.

When making these submissions, I request the Applicant strictly limits its submissions to the set-off claims made by the Respondent and that the Respondent strictly limits its submissions to new matters only, if any, raised by the Applicant.

*I request that the Applicant provide any further submissions to the counterclaims raised by the Respondent in its Response by **5.00pm CST on Monday 21 January 2019** and that the Respondent provide any submissions in response to new matters raised by the Applicant by **5.00pm CST on Thursday 24 January 2019**.*

In calling for further submissions I follow the reasoning of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42 and, in particular, His Honour's conclusions at 42.

I will seek a short extension from the Construction Registrar to consider this new material and will advise the new date by which my determination will be handed down.

I thank you for your continued assistance in this matter”.

15. On 9 November 2018 I wrote to the Construction Registrar seeking an extension of time within which to make my determination as follows:

“Dear Registrar,

I refer to the above matter which relates to Payment Claim No. 12 in the contract.

The Respondent has raised a counterclaim of set-off in the Response for overpayment in the contract on which the Applicant has not had an opportunity to consider and respond.

Accordingly, I have sought further submissions under s.34(2) from the parties in relation to the counterclaim and have given them each a deadline within which to provide me their submissions.

The date for the Respondent's submissions and the Applicant's submissions on any new matters raised is beyond the current date for the determination of 22 January 2019.

I therefore respectfully request an extension of time under s.34(3)(a) up to and inclusive of 1 February 2019 within which to make my determination.

Thank you for your consideration of this request and I look forward to your earliest response”.

16. On 17 January 2019, the Construction Registrar granted the additional time for the determination to 1 February 2019.
17. On 21 January 2019 and within time the Applicant provided further submissions with a document download link containing voluminous material in relation to the Respondent's counterclaim.
18. On 24 January 2019 and within time I received the Respondent's further submissions on any new matters raised by the Applicant in their further submissions.
19. On 30 January 2019 I wrote to the parties confirming the following:

“I confirm receipt of both the Applicant's and the Respondent's further submissions and within time. I have now considered the lengthy further submissions and require no further information or submissions from the parties and the shutters are now closed.

On 16 January 2019 I wrote to the Construction Registrar and sought an extension of time under s.34(3)(a) of the Act up to and inclusive of 1 February 2019 within which to make my determination.

The Construction Registrar has granted the request with the extended date for my determination now 1 February 2019.

On 16 January 2019 the Respondent and the Applicant wrote to me regarding a determination of an earlier payment dispute.

The Act does not exclude earlier determinations as evidence and s.34(1)(b) provides that an adjudicator is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate.

This adjudication is in relation to Progress Payment Claim 12 only and an earlier determination regarding another payment claim under the same construction contract would be given the appropriate probative weight. I will deal with this issue further in my determination.

I thank you for your continued assistance in this matter.”

20. I received no further correspondence from the parties in relation to the Adjudication.

Introduction

21. This Adjudication arises out of a building contract pursuant to which the Applicant agreed with the Respondent to undertake the site building activities for the installation of modular buildings to be installed into the [redacted] Project in [site details redacted] in the Northern Territory of Australia (**the Contract**).
22. The Applicant claims that it is entitled to be paid its Progress Payment Claim 12 (**PC12**) issued on 20 September 2018 in the sum **\$162,430.00 (excluding GST)**. The Applicant's claim is for work carried out on the [redacted] Project in [site details redacted] (**the Project**) that had been directed as Site Instruction (**SI**) variational work to the Contract between the period of 21 August 2018 and 20 September 2018.
23. The Applicant does not seek interest on any amount due to be paid, however the Applicant does seek that any amount awarded in the Adjudication be paid to the Applicant not more than seven days from the date of determination.
24. The Applicant seeks costs of the adjudication to be paid by the Respondent in full and the Applicant's legal costs of preparing the Application fixed in the sum of **\$7,000.00**.
25. The Respondent submits that the Applicant is not entitled to any payment for PC12 on the basis that the Respondent has an offsetting claim in the amount of **\$307,945.55 (excluding GST)** for overpayment in the Contract. In the alternative, the Respondent submits that the Applicant is only entitled to a payment of **\$160,025.00 (excluding GST)** for PC12.
26. The Respondent makes no submission in relation to interest.
27. The Respondent does not seek costs of the Adjudication.

Procedural Background

The Application

28. The Application is dated 20 December 2018 and comprises a general submission, a statutory declaration with 17 attachments with numerous exhibits in each attachment. The attachments include:
- (a) a copy of the Contract;
 - (b) a copy of the Applicant's PC12; and
 - (c) supporting evidence, including spreadsheet reports of each claim, day work sheets and site instructions, drawings, and letter and email correspondence between the parties relied on in the general submission.
29. The Applicant's PC12 was submitted to the Respondent on 20 September 2018.
30. The Application was served on 20 December 2018 pursuant to s.28 of the Act.

The Response

31. The Response is dated 8 January 2019 and comprises a general submission, a statutory declaration with 10 attachments and with exhibits in each attachment. The attachments include:
- (a) copies of payment claims from the Applicant, some annotated with hand written comments in the margins;
 - (b) claim assessment spreadsheets;
 - (c) Bankers Guarantees and EFT payment receipt;
 - (d) A copy of Determination 26.18.04; and
 - (e) additional supporting evidence, including day work sheets, change request forms relating to site instructions and email correspondence between the parties relied upon in the general submission.
32. The Response was served on 8 January 2019 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

33. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
34. Section 4 of the Act – **Site in the Territory** – the site is [*site details redacted*] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.
35. Section 5 of the Act - **Construction Contract** - the Contract is an amended 'Australian Standard' AS 4906-2002, Incorporating amendment No.1, an 'Amended Minor Works Contract' which is 'Principal' administered for use in undertaking 'construct-only' projects. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the Contract. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.
36. Section 6 of the Act – **Construction Work** – the work is for the site building activities for the installation of modular buildings into the [*project and site details redacted*]. That work falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.
37. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:
- “(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or*
- (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.”*
38. In its submissions the Applicant says that it made a valid payment claim in that

30.1 is in writing;

30.2 includes details of the value of WUC done;

30.3 *may include details of other moneys due to the Applicant pursuant to the Contract.....”.*

39. The Applicant submits that PC12 made on 20 September 2018 fulfils those requirements for the making of a payment claim under the Contract and is therefore a valid payment claim as defined in s.4(a) of the Act.
40. The Respondent submits that PC12 is not an invalid progress claim in accordance with the Contract or the Act and says that the Contract specifically includes written provisions for making a claim and that clause 23.2 provides for responding and paying a claim.
41. The Respondent has acknowledged that the Applicant has made a progress claim for payment for work done up to and including 20 September 2018 and does not deny that the progress claim was received on 20 September 2018. The Respondent has identified that progress claim as ‘Progress Claim 12’ which is subject to the Respondent’s offsetting claim for overpayment in the Contract.
42. I am satisfied that the Applicant’s PC12 made on 20 September 2018 in the sum of \$162,430.00 (excluding GST) complies with the stipulations of the Contract for the making of a claim for payment for work done and is therefore a valid payment claim for the purposes of s.4 of the Act.
43. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
- “(a) *a payment claim has been made under a contract and either:*
- (i) *the claim has been rejected or wholly or partly disputed; or*
- (ii) *when the amount claimed is due to be paid, the amount has not been paid in full; or*
- (b) *when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
- (c) *when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”*
44. The Applicant made a valid payment claim on 20 September 2018 under clause 23 of the Contract for the provision of SI variational works in the Contract.

45. The Contract at clause 23.2 provides for payment of a valid payment claim “....*Within 21 days after receipt by the Principal of such a progress claim.....*”.
46. The Respondent was to have certified by way of a ‘progress certificate’ any amount due to be paid to the Applicant for the work done in PC12 within “... *14 Days...*”. The Respondent did not issue a progress certificate and did not make any payment to the Applicant for its claim.
47. There is no definition of “Days” found in the Contract and as such a day would be calculated as a calendar day.
48. The PC12 was sent to the Respondent on 20 September 2018 and, by calculation, payment was due on or before 11 October 2018. The Respondent did not issue a progress certificate and did not make any payment to the Applicant under the Contract within this period.
49. I am of the view that PC12 was not paid by the Respondent on or before 11 October 2018 and that a payment dispute commenced the next day on 12 October 2018.
50. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 12 October 2018 under section 8(a)(ii) of the Act.
51. Section 28 and 29 of the Act - **Service of the Application and the Response of the Adjudication** – The Respondent did not consent to service of the Response by electronic means under s.8(1)(b) of the *Electronic Transactions (Northern Territory) Act* and requested “....*service of a hard copy of the response....*”. Absent consent by both parties to the electronic service process, service of the documents of the Adjudication must be by other means. Service of documents in the Northern Territory falls under s.25 of the *Interpretation Act*, however given that both the Applicant and the Respondent are registered entities under the *Corporations Act 2001* each with their registered address interstate, I raised the question with the parties and sought further submissions under s.34(2) of the Act as follows:

- (a) whether the *Service and Execution of Process Act 1992 (Cth)* (**SEPA**) applies to adjudications under the *Construction Contracts (Security of Payments) Act*; and
- (b) the provision of detailed proof of service of the documents of the Adjudication.

52. The Respondent submits that the provisions for service of documents under the SEPA do not apply to adjudications, despite s.3(1) defining the adjudicative function as:

*“**adjudicative function**, in relation to a tribunal, means the function of determining the rights or liabilities of a person in a proceeding in which there are 2 or more parties, including the function of making a determination:*

(a) altering those rights or liabilities; or

(b) relating to any matters of a kind mentioned in section 48.....”

53. The “adjudicative function” relates to a “tribunal” which is also defined in s.3(1) and is:

*“**tribunal means:***

(a) a person appointed by the Governor of a State, or by or under a law of a State; or

(b) a body established by or under a law of a State;

and authorised by or under a law of the State to take evidence on oath or affirmation, but does not include:

(c) a court; or

(d) a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court.”

54. Under s.52(1) of the Act, adjudicators are suitably qualified and experienced persons eligible to be registered to perform the function of an adjudicator. In the performance of that function adjudicators are:

(a) not bound by the rules of evidence, s34(1)(b); and

(b) must act informally, s34(1)(a), when making their determination.

55. As stated by Barr J in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 at [14] when referring to the adjudication process:

“.....The second reading speech referred to the importance of the building and construction industry to the economy of the Northern Territory and went on to say: “The failure to pay at any stage in the contracting chain can have disastrous effects for those further down the chain awaiting payment.” The second reading speech described the process established by the Act as a “rapid adjudication process” and a “process for speedy adjudication outside the court system.....”.

56. The Respondent also submits that in the decision of *Musico v Davenport* [2003] NSWSC 977 at [51], also cited in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* (2004) 61 NSWLR 421 at [47], the Court considered that an adjudicator is not analogous to a tribunal but more akin to an expert by whose determination the parties have agreed to be bound.
57. The Applicant agrees with the Respondent’s submission and is of the view that the relevant provisions of the State or Territory *Interpretation Act* govern service of the documents of an adjudication.
58. I agree with the parties in this regard and have in mind the dictum of Hodgson JA in *Falgat Constructions Pty. Limited v. Equity Australia Corporation Pty. Limited* [2006] NSWCA 259 at [58]:
- “.....In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty. Limited v. Leslie* [1996] NSWSC 314; (1996) 41 NSWLR 542; *Mohamed v. Farah* [2004] NSWSC 482 at [42]- [44]. In such a case, there has been service, provision and receipt.”
59. Both parties have provided evidence of proper service of the documents of the Adjudication and I am satisfied that service of the Application and the Response has been performed in accordance with ss.28 and 29 of the Act.
60. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 20 December 2018, served on the Respondent and the Prescribed Appointer the Resolution Institute on 20 December 2018. I am satisfied that the Application is a valid Application for

Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and r.6 of the Regulations.

61. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 8 January 2019, served on the Applicant and the Adjudicator on 8 January 2019. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and r.7 of the Regulations.
62. Having now considered the relevant sections of the Act and the Regulations and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claim

63. The Applicant's PC12 made on 20 September 2018 contains the components set out in Table 1 below for SI work directed by the Respondent between the period of 21 August 2018 and 20 September 2018.
64. Included in Table 1 is the amount assessed by the Respondent in the Response and those components the Respondent has placed in dispute. As can be seen in Table 1, of the seven (7) components there are only two (2) components in dispute.

Item	Description	Site Instruction	PC12	Respondent Assessment	Disputed Components
1	Labour and Supervision to construct seven (7) walkways	32	\$12,065.00	\$12,065.00	\$0.00
2	Supervision and direction of works on site	39	\$26,030.00	\$24,130.00	(\$1,900.00)
3	Factory Defects rectification	43	\$83,250.00	\$82,745.00	(\$505.00)
4	Installing replacement ceiling panels damaged by others and installing acoustic insulation	55	\$13,300.00	\$13,300.00	\$0.00

5	Installing fixing for door closers behind plasterboard wall and install conduit for mode switches that were not installed in factory	56	\$18,050.00	\$18,050.00	\$0.00
6	Re-building shower floors in PWD rooms in 11.04, 11.05 and 11.06 - reinstall new to AS standard in re-vinyl	57	\$8,120.00	\$8,120.00	\$0.00
7	Rectification to walls damaged by [redacted] to ROC 11.01	58	\$1,615.00	\$1,615.00	\$0.00
TOTAL			\$162,430.00	\$160,025.00	(\$2,405.00)

Table1.

65. A total claim of **\$162,430.00 (excluding GST)**.

66. I deal with each component of the Applicant's PC12 below.

Items 1,4,5,6 and 7 for SI 32,55,56,57 and 58 works directed by the Respondent in the Contract – Not in Dispute and in the total sum of \$53,150.00 (excluding GST)

67. In its assessment in the Response at paragraph 87 the Respondent has confirmed that the Applicant has provided sufficient substantiation for each component of the claim and agrees that these components are not in dispute.

68. The PC12 components 1, 4, 5, 6 and 7 of Table 1 above for work carried out on SI's 32, 55, 56, 57 and 58 respectively stand in the sum of **\$53,150.00 (excluding GST)**.

Item 2 – SI 39 – Supervision and direction of Works on site in the sum of - \$26,030.00 (excluding GST)

69. The Applicant has provided dayworks sheets showing 284 'Supervision' hours for the SI 39 variational work in the Contract.

70. The Respondent does not dispute 254 hours and submits that there are three (3) dayworks sheets submitted by the Applicant that have been previously submitted for payment with progress payment claim 10 under the Contract.

71. After going through the numerous dayworks sheets, and given the lack of evidence from the Respondent clearly showing the prior submission of these dayworks sheets for payment, I am not with the Respondent on this issue.
72. The dayworks sheets 710, 714 and 717 are for work as follows:
- (a) Sheet 710 – supervision work carried out on 23 August 2018 and during the period applicable to PC12 – 10 hours;
 - (b) Sheet 714 – supervision work carried out on 24 August 2018 and during the period applicable to PC12 – 10 hours; and
 - (c) Sheet 717 – supervision work carried out on 25 August 2018 and during the period applicable to PC12 – 10 hours.
73. These dayworks sheets were submitted by the Applicant for payment as part of PC12, however I have no evidence before me that would show these dayworks sheets have been previously submitted for payment. I do, however, note that in his Statutory Declaration for the Respondent Mr [S] at paragraph 45(b) indicates that progress payment claim 10 was settled by agreement between the parties. From the Respondent's reconciliation spreadsheet progress payment claim 10 was for work done for the period prior to 20 July 2018 and was submitted to the Respondent for payment on 25 July 2018, well before the date the supervisory work was performed on the dayworks sheets 710, 714 and 717. It is therefore likely that the supervisory work the subject of these dayworks sheets had not yet been done at the time of submission of progress payment claim 10 on 25 July 2018.
74. The SI 39 claim component for Supervision and direction of Works on site stands in the sum of **\$26,030.00 (excluding GST)**.

Item 3 – SI 43 – Factory defect rectification in the sum of - \$83,250.00 (excluding GST)

75. The Applicant has provided dayworks sheets showing only 831 hours of labour expended in completing the SI 43 variational work in the Contract but has claimed for 876.31 hours of labour in PC12.

76. The Respondent says that Applicant provided dayworks sheets showing 871 hours of labour expended on SI 43 variation work in the Contract.
77. The PC12 claim as submitted in Mr [G]'s Statutory Declaration for the Applicant contains dayworks sheets showing only 831 hours expended on SI 43 variational works in the Contract.
78. I am therefore not with either the Applicant or the Respondent in the assessment of this component of the claim.
79. The dayworks sheets are signed by the site representatives of both parties as the work was done between the period of 23 August 2018 to 15 September 2018. By calculation the claim for 831 hours at the agreed labour rate on \$95.00 per hour is the sum of \$78,945.00 (excluding GST).
80. The SI 43 claim component for labour expended in completing factory defects rectification stands in the sum of **\$78,945.00 (excluding GST)**
81. Pulling the threads together for each component of the Applicant's PC12, it can be seen in Table 2 below the value of the Applicant's claim is \$109,092.47 (excluding GST).

Item	Description	Site Instruction	PC12	Respondent Assessment	Determination
1	Labour and Supervision to construct seven (7) walkways	32	\$12,065.00	\$12,065.00	\$12,065.00
2	Supervision and direction of works on site	39	\$26,030.00	\$24,130.00	\$26,030.00
3	Factory Defects rectification	43	\$83,250.00	\$82,745.00	\$78,945.00
4	Installing replacement ceiling panels damaged by others and installing acoustic insulation	55	\$13,300.00	\$13,300.00	\$13,300.00
5	Installing fixing for door closers behind plasterboard wall and install conduit for mode switches that were not installed in factory	56	\$18,050.00	\$18,050.00	\$18,050.00

6	Re-building shower floors in PWD rooms in 11.04, 11.05 and 11.06 - reinstall new to AS standard in re-vinyl	57	\$8,120.00	\$8,120.00	\$8,120.00
7	Rectification to walls damaged by [redacted] to ROC 11.01	58	\$1,615.00	\$1,615.00	\$1,615.00
TOTAL			\$162,430.00	\$160,025.00	\$158,125.00

Table 2.

82. The Respondent submits that it is not obliged to make any payment to the Applicant in relation to PC12 as it has reconciled the Contract to date and found the Contract to be overpaid in the sum of **\$307,945.55 (excluding GST)**. The Respondent has claimed that sum as a counterclaim in the Contract.
83. The basis of the Respondent's argument is that all payments made in the Contract are on account, clause 23.2, which also includes amounts awarded in an adjudication, s.42 of the Act. I agree. The Contract sum at clause 3 of the Formal Instrument of Agreement (FIA) is \$961,565.00 (excluding GST) and the Applicant has claimed the sum of \$1,280,355.00 (excluding GST).
84. The Respondent has provided the Applicant a Purchase Order (**PO**) for the Contract sum of \$1,280,355 (excluding GST) but says that the increased PO value was to cover the Contract sum in the FIA of \$961,565.00 (excluding GST) and to allow for any further variations that may need to be undertaken during the course of the Project. An earlier PO in the sum of \$961,565.00 (excluding GST) was subsequently cancelled by the Respondent.
85. The Respondent also says that I am bound to follow an earlier adjudication determination of progress payment claim 11 in the Contract by Mr Floreani "*....who determined that the contract sum was \$961,565.00 and not \$1,280,355.00....*". The Respondent submits that following the appellant decision of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 the common law principles of "*issue estoppel*" and "*res judicata*" operate to place limitations on subsequent adjudications.
86. The Applicant submits that Contract sum was revised to \$1,280,355.00 (excluding GST) prior to signing the Contract and that the parties failed to update the sum set out in clause 3 of the FIA at the time of signing the Contract.

87. The Applicant also says that at the time of signing the Contract the signing page of the Contract was executed without all pages of the Contract being printed. The Contract document was later printed and collated by the Respondent.
88. The Applicant says that the earlier PO in the sum of \$961,565.00 (excluding GST) was cancelled and replaced with an updated PO in the sum of \$1,280,355.00 (excluding GST) for the revised contract sum agreed between the parties.
89. There are numerous other secondary arguments advanced by both parties in the further submissions which add little to the nub of the issues to be considered in this determination. There are three (3) key issues to be considered:
- (i) The earlier determination of Mr Floreani and its relevance on this determination;
 - (ii) The two purchase orders and their relevance to the performance of the Contract by the parties; and
 - (iii) The reconciliation of the Contract and conduct of the parties when dealing with payment claims under the Contract.

The earlier determination of Progress Payment Claim 11 by Mr Floreani

90. The Respondent provided the determination of Mr Floreani on 16 January 2019 (**PC11 Determination**) as an unsolicited submission.
91. The Applicant objected that same day on the basis that the PC11 Determination was for an entirely separate payment dispute and not relevant to the PC12 Adjudication.
92. While there are no provisions in the Act that preclude an adjudicator considering an earlier decision of a payment dispute under the same contract, the adjudicator would be compelled to apply an appropriate probative weight to the findings of the other adjudicator. The issue for the adjudicator in considering an earlier decision, as is the case with the PC11 Determination, is

that the current adjudicator does not have the benefit of the evidence of the documents submitted in the earlier adjudication that was carried out under the same contract.

93. The result of strict application of the doctrines of *issue estopple* and *res judicata* may result in a decision inconsistent with the evidence of the current adjudication. Both the Act and the current decisions of the Northern Territory Courts require adjudicators to exercise caution when dealing with multiple payment disputes in the absence of agreement between the parties to an adjudication, see s.34(3) and s.34(4) and *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7; and *Northern Territory of Australia v Woodhill and Sons Pty Ltd* [2018] NTSC 30.
94. Attendance to the PC11 Determination, and specifically paragraph 12 which deals with the contract value, however, states:

“.....To the extent that the issue of the contract sum is relevant to the matters arising in this adjudication, which I agree with [the Resppondent] it is not, I am not satisfied the contract sum was varied to \$1,280,355.00 (ex GST).....”.

95. It is unclear as to the entirety of the evidence put before Mr Floreani in relation to this issue, however he has found that the issue with the contract sum is not relevant to the matters arising in his PC11 Determination and he has not considered the issue further other than to make a finding that the contract sum was \$961,565.00 (excluding GST).
96. That is not the case in this adjudication as I am required to carefully consider the relevance of the representations of and conduct between the parties to the Contract in relation to the contract sum and reconciliation of the Contract carried by the Respondent in order to claim the overpayment in the Contract.

The relevance of the two (2) purchase orders to the Contract

97. The Contract, a modified AS4906-2002 contract document, is a “*lump sum*” contract with the terms of clause 3 of the FIA stating:

“....3 *Contract Sum*

- 3.1 *Unless otherwise agreed in writing the Principal and the Contractor agree that the Contract will be performed for the contract sum (excluding GST), which is a lump sum.*
- 3.2 *The contract sum is \$961,565.00, excluding GST and any additions or deductions which may be required to be made under the Contract....”.*

98. The term “*contract sum*” is a defined term of the Contract at clause 1 of the contract conditions and states:

*“**contract sum** means the total price provided for in the Formal Instrument of Agreement but excluding any additions or deductions which may be required to be made under the Contract.....”.*

99. The only method of adding or deducting from the contract sum is by variation to the Contract made under clause 22 of the Contract which states:

*“.....**22 Variations***

22.1 Directing variations

The Contractor shall not vary WUC except as directed in writing.

The Principal, before the date of practical completion, may direct the Contractor to vary WUC or execute additional work but such variation shall be of a character and extent contemplated, by and capable of being carried out under, the provisions of the Contract.

22.2 Pricing

The Principal shall, as soon as possible, price each variation using the following order of precedence:

- (a) prior agreement;*
- (b) applicable rates or prices in the Contract;*
- (c) rates or prices in a schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and*
- (d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads;*

and any deductions shall include a reasonable amount for profit but

That price shall be added to or deducted from the contract sum....”.

100. The PO number 5024225 for the Contract sum of \$961,565.00 (excluding GST) was cancelled and the notice from the Respondent to the Applicant of 1 November 2018 was “...I have removed po 5024225 from our system...”.

101. Attendance to the PO number 5024693 which was raised on 1 November 2018, and after the execution of the Contract on 16 October 2018, shows the annotation in the “*Description*” section of the document of “*MACS – Delamere Contract sum*”. The value of that PO is \$1,280,355.00 (excluding GST).
102. Attached to the PO is a document titled “*Installation and Complexing Breakdown – Delamere*” which is a detailed breakdown of the lump sum titled into specific line items with a lump sum value against each scope of work component such that the total of the line items arrives at the lump sum value of \$1,280,355.00 (excluding GST) for the Contract sum.
103. I am of the view that this is the fixed scope of work for the Contract agreed between the parties on 1 November 2018 and that the price for that fixed scope of work is \$1,280,355.00 (excluding GST). I do not support the Respondent’s argument that the value of the PO was increased to provide flexibility under the Contract to manage their project variations as each variation thereafter was detailed in a site instruction directed by the Respondent into the Contract.

The reconciliation of the Contract sum and payment claim assessment

104. The Respondent’s summary reconciliation of the Contract, provided electronically with the Statutory Declaration of Mr [S] in the Response at tab PS10, together with the hard copy assessments made in progress payment claims 1 to 5 were carried out on the Contract sum of \$1,280,355.00 (excluding GST) and any variations to the Contract were added as additional line entries at the bottom of the detailed lump sum breakdown.
105. In the early undisputed claim and assessment process, being claims 1 to 5, the parties conduct was based on the revised lump sum Contract value of \$1,280,355.00 (excluding GST) with claims made as a percentage complete of each respective line item in the breakdown and those claims paid accordingly. The breakdown used by the parties was that breakdown that was attached to PO number 5024693 which was raised on 1 November 2018. It appears that when the Contract went into dispute the issue of the Contract sum and overpayment arose.

Conclusion

106. When pulling the three issues together, and in light of the specific contractual terms forming the Contract as a lump sum contract, the agreement between the parties of 1 November 2018 and the objective claim and assessment process of the earlier undisputed progress payment claims 1 through to 5, the conclusion I have reached is that the Contract is a lump sum contract for a fixed scope of work and the Contract sum is \$1,280,355.00 (excluding GST) which was amended by "*prior agreement*" between the parties under clause 22 of the Contract on 1 November 2018.
107. I am not with the Respondent in its counterclaim and I value that counterclaim at "**Nil**" in this adjudication.
108. I award the sum of **\$158,125.00 (excluding GST)** for the Applicant's PC12 in the Contract.

Interest on the claim

109. The amount the Respondent is to pay the Applicant is \$158,125.00 (excluding GST).
110. The Contract at clause 23.4 provides for interest on late payments as follows:
"....Interest in Item 15 shall be due and payable after the date of default in payment...."
111. The Contract Annexure Part A , Item Schedule at Item 15 states:
*"...15 Interest rate on overdue paymentsNil... % per annum
(subclause 23.4) If nothing stated 18% per annum...."*
112. The parties have agreed that there will be no interest payable under the Contract on late payments.
113. The Act at s.35 provides a discretion to an adjudicator to make an award of interest, however that award is limited under s.35(1)(a) to "*...the payment in accordance with the contract...*".
114. As the parties have agreed at Item 15 that there will be "*Nil*" interest on late payments, I make no award of interest.

Summary

115. In summary of the material findings, I determine:

- (a) The contract to be a construction contract under the Act;
- (b) The work to be construction work under the Act;
- (c) The site to be a site in the Northern Territory under the Act;
- (d) The Progress Payment Claim 12 to be the valid payment claim for adjudication under the Act;
- (e) The dispute to be a payment dispute under the Act;
- (f) The Application to be a valid application under the Act;
- (g) The Response to be a valid response under the Act;
- (h) The Applicant's claim to stand as set out in Table 2 in the sum of \$158,125.00 (excluding GST); and
- (i) There is no interest payable on late payments under the Contract.

116. I determine that the amount to be paid by the Respondent to the Applicant in relation to Progress Payment Claim 12 under the Contract, is **\$173,937.50 (including GST)**.

117. This sum is to be paid to the Applicant by the Respondent on or before **15 February 2019**.

Costs

118. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.

119. The Act at section 36(2) gives Adjudicators discretion to award costs:

"...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...”.

120. I have not found either the Application or the Response without merit and I do not consider the Applicant’s conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

121. The test for determining whether a proceeding is vexatious is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

“1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.

3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.”

122. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.

123. I make no decision under s.36(2) of the Act.

124. I determine that the parties bear their own legal costs under s.36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under s.46(4) of the Act.

Confidential Information

125. The following information is confidential:

- (a) the identity of the parties;
- (b) the identity of the principal; and

(c) the location of the works.

Closing Remarks

126. This is already a lengthy set of reasons, necessarily in light of the fact that the claim, several arguments and further voluminous submissions I have had to consider each involved factual consideration unique to that item. I have focused on what have seemed to me to be those submissions that are most central to the issues in dispute, but I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked it.

DATED: 1 February 2019

Rod Perkins
Adjudicator No. 26