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Pursuant to the

Construction Contracts (Security of Payments) CCA 2004

Adjudication Number	35.18.01
Prescribed Appointor	RICS Dispute Resolution Service
Adjudicator	John Tuhtan¹
Applicant:	[Redacted]
Respondent:	[Redacted]
Project:	[Redacted]
Amount to be paid by Respondent	\$1,516,310.40 including GST
Due date for payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	15 May 2018
Payment Claim	Claimed Amount: \$2,129,234.80 including GST Dated: 22 December 2017
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount: \$ Nil
Adjudication Application	Dated: 28 March 2018
Adjudicator Acceptance	Dated: 4 April 2018
Adjudication Response	Dated: 24 April 2018

¹ Registered Adjudicator Number 35

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DETERMINATION

- 1) I, John Tuhtan², the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) (the **CCA**), for the reasons set out below, determine that:
 - a) The amount to be paid by the respondent to the applicant is \$1,516,310.40 including GST.
 - b) Interest is due on the adjudicated amount at a rate of 10% per annum commencing on 19 January 2018 and up until the date of payment of the adjudicated amount.
 - c) The respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the notice advising that the determination has been released.

BACKGROUND

- 2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the CCA for construction work carried out under a construction contract at [redacted] NT (the **Site**).

APPOINTMENT OF ADJUDICATOR

- 3) Pursuant to section 28(1)(c)(iii) of the CCA, the applicant served its adjudication application on the RICS Dispute Resolution Service, which is a prescribed appointor under the CCA, on 28 March 2018.
- 4) The adjudication application was referred to me as adjudicator on 4 April 2018 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the CCA.
- 5) The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the applicant and the respondent on 4 April 2018.

DOCUMENTS

- 6) The following documents were provided to me:
 - a) The Adjudication application signed by the applicant and submissions dated 28 March 2018 (contained in 2 A4 lever arch folders) on 4 April 2018;
 - b) Adjudication response dated 18 April 2018 (contained in 3 A4 lever arch folders) on 20 April 2018;

² Registered Adjudicator Number 35

JURISDICTION

- 7) On or about 25 July 2014, the parties entered into a Contract (the **Contract**) for the detailed design, off-site fabrication, transport to the Site and installation on the Site of a number of modular buildings to contain [equipment redacted] to be installed by the respondent (the **Works**). The Contract was entered into after the commencement of section 9 of the CCA.
- 8) The work performed under the Contract is '*construction work*' as defined in section 6(1) of the CCA.
- 9) Accordingly, the Contract is a construction Contract as defined in section 5(1) of the CCA and the CCA applies to disputes arising under the Contract.
- 10) Pursuant to section 27 of the CCA, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.
- 11) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or court dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the CCA.
- 12) I am, therefore, satisfied that I have jurisdiction to determine the application for adjudication under the CCA.

BACKGROUND & CONTRACT

- 13) In November 2013, the respondent invited the applicant submitted a tender to carry out the Works.
- 14) On or about 26 February 2014, the respondent issued to the applicant updated drawings referenced "Revision C".
- 15) On or about 19 March 2014, the respondent issued to the applicant updated drawings referenced "Revision F".
- 16) On or about 21 March 2014, the respondent issued a technical specification referenced "13Q2088819 Rev 3".
- 17) On 13 May 2014, the respondent issued as scope of work document and requested the claimant to provide a new price to carry out the Works.
- 18) On 30 May 2014, the applicant submitted a price of \$9,423,000 +GST to carry out the Works described in the above mentioned drawings and specifications and a list of additional prices to carry out "Optional" work.
- 19) On 31 May 2014, the respondent issued a "letter of award" indicating that the respondent proposed to enter into a contract with the applicant to carry out certain work articulated in the letter of award for the lump sum price of \$13,807,000 + GST (\$375,000 was included as a provisional sum referenced "Options").

- 20) On 27 June 2014, the respondent provided a “final offer” to carry out the Works. I note that as at this time, the respondent had not issued a form of contract and there is no evidence that any terms and conditions (save for the price) had been offered by either party.
- 21) On 4 October 2014, the respondent issued a purchase order referenced 3161184371 (**Purchase Order 2.10.2014**) that identified each of the items to be supplied and indicated that there were certain changes to the prices for various items and that the new lump sum price was \$14,268,039+GST. Purchase Order 2.10.2014 also indicated that the terms of payment were “Payable after 7 days Due Net” and that the place for delivery was “FCA Darwin NT”.
- 22) On 26 February 2015, the respondent provided a draft contract, which the claimant executed and returned to the respondent on 27 February 2015. The draft contract set out terms and conditions, drawings and specifications for items to be designed, fabricated, delivered to site and installed on site for a lump sum price of \$13,807,000 + GST.
- 23) On 25 July 2015, the claimant executed an amended draft contract that contained hand written terms drafted by the respondent, which included a contract price break down and an amended scope of work. It was at this point in time that there appears to have been a meeting of the minds and the parties entered into the Contract.
- 24) On 8 August 2016, the respondent issued a purchase order referenced 3161235552 (**Purchase Order 8.08.2016**) that identified a number of [redacted] items to be supplied and installed and the lump sum price was \$49,687.99 + GST. Purchase Order 8.08.2016 also indicated that the terms of payment were “Payable after 42 days Due Net” and that the place for delivery was “EXW [redacted]”.
- 25) On 7 December 2017, the respondent issued its 4th amendment to Purchase Order 2.10.2014, which indicated that the revised price for that purchase order was \$15,475,483.96 + GST.

PAYMENT CLAIM

- 26) On 22 December 2017, the applicant served the respondent a payment claim in the amount of \$2,129,234.80 incl. GST (the **Payment Claim**).
- 27) Section 4 of the CCA defines a “payment claim” as:

“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 under the contract; 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.”*

- 28) The Payment Claim was sent to the respondent and was for work carried out on or in relation to the [site] and described therein as being for “variations undertaken by [the applicant] at the request of [the respondent] together with costs incurred by [the applicant] arising out of the variations”. The Payment Claim particularised 15 variations as follows:

Item	Description	Claimed
Main [redacted] Revised building layouts (items 1.0 to 7.0)		
<i>Design change to increase width and/or length</i>		
1.10	Main [redacted] Module 1 (increased width and/or length)	\$61,150.00
1.20	Main [redacted] Module 2 (increased width and/or length)	\$48,055.00
1.30	Main [redacted] Module 3 (increased width and/or length)	\$49,596.00
1.40	Main [redacted] Module 4 (increased width and/or length)	\$30,642.00
1.50	Main [redacted] Module 1 (increased width and/or length)	\$9,114.00
1.60	Main [redacted] Module 3 (increased width and/or length)	\$23,786.00
1.70	Main [redacted] Module 4 (increased width and/or length)	\$93,763.00
SUBTOTAL		\$316,106.00
<i>Additional air handling/conditioning due to design change to split rooms, 15 m extra duct, 10 off extra grilles)</i>		
2.00	[redacted] (split rooms, 15 m extra duct, 10 off extra grilles)	\$74,600.00
<i>Additional transport costs due to design change to increase width and or length</i>		
3.10	Main [redacted] Module 1 - [redacted] Room	\$32,000.00
3.20	Main [redacted] Module 2	\$55,330.00
3.30	Main [redacted] Module 3	\$32,000.00
3.40	Main [redacted] Module 4	\$32,000.00
3.50	Main [redacted] Module 1	\$13,800.00
3.60	Main [redacted] Module 3	\$13,800.00
3.70	Main [redacted] Module 4	\$43,200.00
SUBTOTAL		\$222,130.00

<i>Additional structure due to design change for 2 hr fire rated internal walls and increased width</i>		
4.00	Updated structure	\$226,945.00
<i>Additional supply & installation of electrical items due design change to split rooms</i>		
5.00	Electrical	\$46,000.00
<i>Increase size of landings due to design change</i>		
6.00	Landings	\$55,470.00
<i>Design change of floor material</i>		
7.00	Floor material	\$112,560.00
SUBTOTAL ITEMS 1.0 TO 7.0		\$1,053,811.00
<i>Design Change [redacted] Revised building layouts (Items 8.0 to 10.0)</i>		
8.00	Landings	\$52,530.00
9.00	Transport	\$45,000.00
10.00	[Redacted]/Other rooms zone/Fittings	\$253,510.00
SUBTOTAL ITEMS 8.0 TO 10.0		\$351,040.00
<i>Acceleration directed by [the respondent]B</i>		
11.00	Acceleration Proposal	\$189,000.00
<i>Design change electrical items</i>		
12.00	Equipment installation / [redacted]	\$114,121.00
<i>Design change [redacted] / [redacted] All buildings (Item 13.0)</i>		
13.10	[Redacted] supply of [redacted] all buildings. As email of 27/11/14 as accepted	\$7,790.00
13.20	[Redacted] supply for [redacted] all buildings	\$8,932.00
13.30	[Redacted] System [redacted]	\$5,625.00
13.40	[Redacted] System installation	\$52,030.00
SUBTOTAL ITEM 13.0		\$74,377.00
<i>Design change electrical items</i>		
14.00	Revised [redacted] spec for light & power	\$56,700.00
<i>[Respondent] Instructions - Sundry extras / [redacted] (Item 15.0)</i>		

15.10	[Redacted] 822 - [redacted] schedule adjustments required for the [redacted] schedule issued for construction on 26th August 2015 by [redacted]. Extra over costs of installation of [redacted].	\$51,155.00
15.20	[Redacted] 821 - [redacted] schedule adjustments for [redacted] of July 2015.	\$8,755.00
15.30	[Redacted] 823 - [redacted] schedule adjustments for [redacted] schedule of July 2015	\$7,785.00
<i>Sundry variations Ex [respondent] - all works done</i>		
15.40	VAR22 SEI - Sort cut and load [redacted] for delivery to Darwin. [Redacted] site as directed by [the respondent].	\$6,185.00
15.50	VAR23 SEI - Additional floor cut-outs and [redacted] in Building [redacted] as quoted.	\$1,650.00
15.60	VAR24 SEI - Replace [redacted] numbers to [redacted] 823	\$2,389.00
15.70	[redacted] Room - Additional [redacted] to [redacted] 822 as quoted 11 September 2015, [redacted] modifications as instructed by [the respondent] 31 August 2015, additional [redacted] as instructed by [the respondent]	\$18,700.00
SUBTOTAL ITEM 15.0		\$96,619.00
TOTAL CLAIMED EXCLUDING GST		\$1,935,668.00
TOTAL CLAIMED INCLUDING GST		\$2,129,234.80

- 29) The Payment Claim was comprised of 19 pages including:
- a) A tax invoice referenced 2101/27 dated 19 December 2017 in the amount of \$2,129,234.80 incl. GST; and
 - b) A 18 page detailed breakdown of the amount claimed under the 15 claimed variations, which the applicant asserts were due to the respondent's design changes or additional work instructed by the respondent;
- 30) Clause 12.1(a) of the Contract states:
- "Vendor Contractor [the applicant] must submit a payment claim to [redacted] [the respondent] within 30 business days after completing a payment milestone."*
- 31) Section 2 of Schedule 3 to the Contract states:
- "Note: Payments may be made progressively up to the value of the milestone, as approved by the [respondent]. The Vendor Contractor must submit a payment claim for approval."*

32) Section 1 of Schedule 3 to the Contract states:

“The price offered includes options that may be varied (as per the terms and conditions of this contract) based on final quantities sizes.”

33) The respondent asserts that the Payment Claim is invalid because it was submitted outside of the time frame permitted by the Contract.

34) I have determined below at paragraphs 61) to 0 that the Payment Claim was submitted within the time frame permitted by the Contract.

35) Section 12.1(b) of the Contract further required:

“Each payment claim must:

(1) be in writing;

(2) set out the total amount claimed by the Vendor Contractor an itemised breakdown of that amount;

(3) include details and supporting information reasonably required to determine whether the amounts claimed are payable under the Contract; and

(4) ...”.

36) The Payment Claim is in writing, sets out an itemised account of the amounts claimed and provides details explaining why it is entitled to payment. The details that must be provided under clause 12.1(b)(3) of the Contract must be sufficient to explain to the respondent what is being claimed.

37) In *Multiplex Constructions Pty Ltd v Luikens & Anor* [\[2003\] NSWSC 1140](#) at [76], Palmer J set out the following test for sufficiency of detail:

“A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.”

38) In the context of the abovementioned judicial definition of sufficiency of detail and on the basis that I understood the applicant’s claimed basis of entitlement articulated in the Payment Claim, I have determined that the Payment Claim satisfied the requirements of clause 12.1(b) of the Contract.

39) The Payment Claim was made in accordance with clause 12 of the Contract and was, therefore, a payment claim for the purposes of the CCA.

PAYMENT SCHEDULE

- 40) On 11 January 2018, the respondent served a payment schedule under clause 12.2 of the Contract, which was the notice of dispute for the purposes of the CCA.
- 41) Specifically, the payment schedule indicated:
- a) That the respondent proposed to pay \$Nil.
 - b) The respondent indicated (at Table A) that:
 - i) the final contract sum was \$15,525,171.95 + GST (which was comprised of \$15,475,483.96 + GST for Purchase Order 2.10.2014 and \$49,687.99 + GST for Purchase Order 8.08.2016;
 - ii) the respondent had paid \$15,455,502.96 + GST;
 - iii) that \$65,669.00 + GST (being the difference between the contract sum and the amount paid by the respondent) was retained and was for “[respondent] agreed backcharges”.
 - c) The reasons for withholding payment were:
 - i) The applicant has no contractual entitlement to make the Payment Claim; and
 - ii) The contract sum and the variations identified in the payment claim have been previously claimed and previously assessed and paid by the respondent and nothing further is owed to the applicant.
 - d) Attachment A to the payment schedule stated:

“...Note that the final contract sum, within Table A, does not include the Liquidated Damages debt due and payable by [the applicant] to [the respondent] (refer to the attachments).”
 - e) Attachment A had appended to it a copy of a letter addressed to the applicant and dated 4 August 2017 claiming payment of liquidated damages in the amount of \$1,746,160 + GST.

DATE FOR PAYMENT

- 42) The applicant asserts that the payment terms set out in the Contract are void by the operation of the CCA.
- 43) Clause 12 of the Contract provides that the respondent must pay an approved payment claim within 45 business days after it receives a tax invoice that is made pursuant to a payment schedule given 15 business days after receipt of a payment claim made pursuant to clause 12.1.
- 44) Section 13 of the CCA states:
- “A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed must be read as being amended to require the payment to be made within 28 days after it is claimed.”*

- 45) Accordingly, the due date for payment is 28 days after the Payment Claim was made.
- 46) The Payment Claim was served on the respondent on 22 December 2017, accordingly the due date for payment is 19 January 2018.

DATE OF PAYMENT DISPUTE

- 47) On 11 January 2018, the respondent made it clear to the applicant that it would not be paying any of the amount claimed in the Payment Claim by the service of its payment schedule.
- 48) Pursuant to section 8(a) of the CCA, the payment dispute occurred on the day the amount claimed in the Payment Claim was due to be paid but was not paid in full or the claim was rejected or wholly or partly disputed.
- 49) In this case, the payment dispute arose on 11 January 2018, which is the day that the respondent notified the applicant by way of the payment schedule that the payment claim was wholly rejected³.

APPLICATION FOR ADJUDICATION

- 50) Section 28(1) of the CCA entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.
- 51) I am satisfied that the payment dispute occurred on 11 January 2018, which is the date the respondent notified the applicant (by way of the payment schedule) that it wholly disputed the payment claim and would not be making any payment in response to the payment claim.
- 52) The applicant applied for adjudication of the payment dispute on 28 March 2018, which is within the time permitted by and in accordance with section 28(1) of the CCA. Specifically:
 - a) The application is in writing as required by section 28(1)(a) and 28(2) of the CCA.
 - b) The application was served on the respondent on 28 March 2018, pursuant to section 28(1)(b) of the CCA.
 - c) The application was served on RICS Dispute Resolution Service on 28 March 2018, pursuant to section 28(1)(c)(iii) of the CCA.
- 53) On 20 April 2018, the adjudicator requested an equal deposit or security for the costs of the adjudication from the applicant and the respondent. Both parties duly provided the deposit as requested.
- 54) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the CCA.

³ *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1*
Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd [2012] NTSC 22 at 20.

ADJUDICATION RESPONSE

- 55) Pursuant to section 29(1) of the CCA, the respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the applicant.
- 56) The respondent served its adjudication response on the appointer (acting as agent for the adjudicator) and the applicant on 18 April 2018.
- 57) I am satisfied, therefore, that the respondent served its response within the timeframes prescribed in the CCA.

FURTHER SUBMISSIONS

- 58) On 20 April 2018, I informed the applicant that the respondent had raised a jurisdictional challenge and gave it up to 24 April 2018 at 4:30pm to provide its submission on the point. The applicant provided me its submissions on the jurisdictional challenge on 24 April 2018.
- 59) On 20 April 2018, the applicant informed me that the respondent had raised numerous factual issues and reasons for withholding payment (the **New Issues**) and requested additional time to provide a reply to the reasons raised for the first time in the response. It was clear to me that the respondent raised numerous reasons for withholding payment that were not given in the payment schedule. Accordingly, I granted the applicant until 8 May 2018 to provide me its submissions. The applicant provided me its submissions on the New Issues on 8 May 2018.
- 60) I invited the respondent and granted it a further day to review the applicant's submissions to identify any parts of the applicant's submission that are not in direct response to the New Issues raised by the applicant. The respondent provided me its submissions on the applicant's reply to the New Issues on 9 May 2018.

DETERMINATION OF JURISDICTIONAL ISSUES RAISED BY THE RESPONDENT IN THE RESPONSE & FURTHER SUBMISSIONS

- 61) The respondent has raised a jurisdictional issue for the first time in the response and asserts that the adjudication application is invalid because it relates to a payment claim that was not made in accordance with the Contract and, therefore, I must dismiss the application.
- 62) Specifically, the respondent asserts that:

"The application for adjudication is invalid because, the payment claim to which it relates was made long after [the applicant's] right to make payment claims under the contract had ceased. Accordingly, the payment claim was invalid and incapable of giving rise to a payment dispute under the CCA."
[Emphasis added]

- 63) The respondent asserts that pursuant to clause 12 of the Contract, the applicant was only entitled to submit a payment claim *'within 30 business days after completing a payment milestone'*. The payment milestones are set out in Schedule 3 to the Contract. Specifically, section 2 of Schedule 3 to the Contract defined 3 payment milestones as certain work that had to be completed prior to accruing an entitlement to claim payment.
- 64) The respondent has also pointed out that Schedule 3 contains the following additional term identified as follows:
- "Note: Payments may be made progressively up to the value of the milestone, as approved by [redacted] [the respondent]. The Vendor Contractor [the applicant] must submit a payment claim for approval." [Emphasis added]*
- 65) In relation to the above mentioned "Note", the respondent asserts:
- a) that the "Note" is inconsistent with clause 12 of the Contract and, therefore, pursuant to item 5 of Schedule 1 to the Contract (which sets out the order of precedence of contract documents) clause 12 of the Contract has precedence; or, in the alternative;
 - b) The "Note" only permits the applicant to claim a progress payment up to the time it achieved each payment milestone.
- 66) The respondent further asserts that the Contract:
- a) contained an *"obligation in clause 12 of the General Conditions for [the applicant] to submit a final payment claim within 30 business days after completing a milestone"*; and
 - b) prescribed a period of time (30 business days) after the date of completion of each payment milestone after which the applicant was no longer entitled to claim or was barred from making any further claims including payment claims.
- 67) Accordingly, on 20 April 2018 pursuant to section 34(2)(a) of the CCA, in order to ensure that the applicant was afforded natural justice, I requested the applicant to provide me its submissions in response to the jurisdictional issue raised by the respondent.
- 68) The applicant asserts that:
- a) the Payment Claim is a claim for work that is a variation to the Contract but which the respondent does not accept, and clause 12 and Schedule 3 of the Contract do not apply to that type of claim;
 - b) clause 12 and Schedule 3 only set out how the applicant can make a claim for a part of Contract Price, which is set out in section 1 of Schedule 3 or an adjusted Contract Price determined by the respondent; and
 - c) there is nothing in the Contract that permits the applicant to claim for variations that have not been accepted by the respondent.

- 69) The applicant argues that because there is nothing in the Contract that permits the applicant to claim for variations that have not been accepted by the respondent, by the operation of section 18 of the CCA, the terms set out in Division 3 of the Schedule to the CCA are implied into the Contract.
- 70) The applicant further argues that there is nothing in Division 3 of the Schedule to the CCA that prescribes any time limits within which the applicant may submit a payment claim for work relating to variations performed under a construction contract.
- 71) My determination of the jurisdictional issue is set out below.
- 72) Clause 12 and the terms set out in Schedule 3 regulate how the applicant may submit a payment claim under the Contract.
- 73) Clause 12.1(a) of the Contract states:

“Vendor Contractor [the applicant] must submit a payment claim to [redacted] Subcontractor [the respondent] within 30 business days after completing a payment milestone.”

Clause 12.1(a) requires the applicant to submit one payment claim for the work particularised in the milestones table in Schedule 3 within 30 business days of completing each milestone. This clause, however, does not say that the applicant is barred from submitting any other claims after the 30 business days from the date of completion of each milestone has elapsed.

- 74) Section 1 of Schedule 3 to the Contract states:

“IMPORTANT NOTE:

The price offered includes options that may be varied (as per the terms and conditions of this contract) based on final quantities / sizes.” [Emphasis added]

This term states that the Contract Price may be changed and implies that the Contract Price will be adjusted accordingly.

- 75) Section 2 of Schedule 3 to the Contract states:

“Note: Payments may be made progressively up to the value of the milestone, as approved by the [respondent]. The Vendor Contractor must submit a payment claim for approval. [Emphasis added]

No.	Milestone	Percentage
1	Upon successful completion of building fabrication and painting per module or [redacted]	50%
2	Upon issue of Certificate of Acceptance for buildings	35%
3	Upon Delivery of buildings and receipt of final documentation and “Final” as built drawings	15%
	<i>TOTAL</i>	100%

”

Section 2 of Schedule 3 to the Contract contains a term referenced as “Note:...” that implies that applicant may make progress claims in relation to work under each milestone. Under this term, however, the respondent is not required to make a payment for work completed in accordance with the Contract but it has a discretion as to whether to make a progress payment.

- 76) The phrase “*payment claim*” is not defined under the Contract, however, the word “*claim*” is defined in clause 1 as:

“any claim, demand, action or proceedings of any nature whatsoever, whether actual or threatened, including a claim by Vendor Contractor for an EOT.”

- 77) Clause 18.1(a) of the Contract requires the applicant to provide to the respondent notice that it may claim including claim for work that it asserts is a variation as follows:

“If Vendor Contractor wishes to make a claim against [redacted] Subcontractor arising out of or in connection with the Contract (however arising, including for negligence), Vendor Contractor must give [redacted] Subcontractor written notice of the claim within 15 days after Vendor Contractor that becomes aware, or ought reasonably to have become aware, of the event all circumstances on which the claim is based.”

- 78) When clause 12, Schedule 3, clause 1 and clause 3 are read together, there is no doubt that the applicant was permitted to make a payment claim to the Contract Price and for other amounts approved by the respondent. Accordingly, I do not accept the applicant’s argument for the implication of implied terms by operation of the CCA.
- 79) When clause 12 and Schedule 3 are read together there is no time frame within which a payment claim must be made. Accordingly, I do not accept the respondent’s assertion as to the operation of the Contract on this point.
- 80) The Contract provides that if the applicant gave the respondent notice of claim pursuant to clause 18.1, the applicant has accrued a right to make a claim at any future time.
- 81) I note from the sworn statement of [BS] of the applicant that the applicant sent notices of claim on 25 June 2014, 1 October 2014, 25 March 2015, 4 June 2015, 9 July 2015 and 27 August 2015 in relation to design changes and “*building sizes are growing significantly*”.
- 82) I also note that the respondent has not provided any responses or rejections to the above mentioned 6 notices of claim with the exception of the following:
- a) On 26 February 2015, [SP] of the respondent sent an email to the applicant requesting the applicant to execute an attached draft form of contract and further stated:

“Variations to the contract will be processed when the Purchase Order is released after the Contract is signed off.”

- b) On 6 May 2015, [redacted] from the respondent sent an email to the applicant stating:

"In following yesterday's Variation review.

Please receive the spreadsheet [the respondent was] utilising as attached.

With [the respondent's] notes from said review included."

That email attached a spreadsheet that included most of the variations claimed in the Payment Claim.

- 83) Clause 18.1(b) of the Contract set out the form requirements for a notice given under clause 18.1(a) that stated:

"A notice under clause 18.1(a) must include reasonable details of the following;

(1) the Claim which the Vendor Contractor intends to make, the details of the relief, including any amount claimed and how that amount was calculated;

(2) the factual and legal basis for the claim, including the provisions of the contract relied on; and

(3) any details which are not available at the time of submission of the claim but which Vendor Contractor intends to submit in support of the Claim."

- 84) The abovementioned notices of claim indicated that the design had been changed from the design upon which the Contract was originally based and that the applicant would be submitting a claim for payment due to size increases of buildings, materials changes, electrical fittings changes, landings changes, [redacted] changes etc... The applicant also provided an estimate of the value of the claimed variations but noted that price was subject to change as the design was being changed by the respondent.

- 85) Section 4 of the CCA states:

payment claim means a claim made under a construction contract: [Emphasis added]

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

(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.

- 86) Pursuant to section 4 of the CCA a "payment claim" is a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.

- 87) At [236]-[238] in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*, Olsson A-J stated:

“[236]Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for moneys in accordance with or subject to the conditions of a construction contract.

[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction Contract is plainly not what is in contemplation by the legislation.

[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction Contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract, that is, in the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of cl 12.2 of the sub-contract.”

- 88) A claim for payment of a variation is in relation to the performance by the applicant of its obligations under the Contract.
- 89) In order for there to be a payment claim under a construction contract, the payment claim must be made in accordance with the terms of the construction Contract relating to how a party must make a claim to another party for payment. The word “under” does not mean “in relation to” or “associated with”, it means “in accordance with”.
- 90) The payment claim was made in accordance with clauses 18.1 and 12.1 of the Contract. I have, therefore, decided that the applicant gave the requisite complying notice of claim within a time permitted by the Contract and, therefore, the Payment Claim was a valid payment claim.
- 91) Accordingly, for the above stated reasons, I have determined that the applicant submitted a valid payment claim under the Contract and for the purposes of the CCA.
- 92) The respondent also asserts that the adjudication application is invalid. For the avoidance of doubt, set out below are my reasons for determining that the application for adjudication is valid.
- 93) Section 8 of the CCA states:

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 [Emphasis added]*
- (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.*

94) Section 28 of the CCA states:

Applying for adjudication

- (1) *To apply to have a payment dispute adjudicated, a party to the Contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b): [Emphasis added]*

95) Section 33(1) of the CCA states:

Adjudicator's functions

- (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):*
 - (a) *dismiss the application without making a determination of its merits if:*
 - (i) *the Contract concerned is not a construction contract; or*
 - (ii) *the application has not been prepared and served in accordance with section 28; or*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction Contract makes an order, judgment or other finding about the dispute that is the subject of the application; or [Emphasis added]*
 - (iv) *satisfied it is not possible to fairly make a determination:*
 - (A) *because of the complexity of the matter; or*
 - (B) *because the prescribed time or any extension of it is not sufficient for another reason; or*

96) Section 4 and section 8 and section 33 when read together, only authorise an adjudicator to determine an application for adjudication if the payment claim is validly made and the application for adjudication made within 90 days of the occurrence of the payment dispute.

97) These passages confirm that I must look to the Contract to assess whether the payment claim is a valid payment claim which complies with the Contract and as such as impose an obligation on the respondent under the Contract to make payment by a particular date. If the payment claim does not satisfy the requirements of the Contract to trigger the obligation under the Contract on the respondent to pay, then no payment dispute can have arisen.

- 98) Accordingly, I have determined that since the payment claim was a valid payment claim under the Contract and for the purposes of the CCA, and the payment dispute arose on the date that the payment claim was rejected, which was 11 January 2018, and the applicant made the adjudication application within 90 days of the dispute arising, the adjudication application is valid and I have jurisdiction to determine the payment dispute.

REASONS FOR THE DETERMINATION

- 99) Pursuant to section 34 of the CCA, I have considered the following matters in making this determination:
- a) the application for adjudication and its attachments;
 - b) the response and its attachments; and
 - c) the further written submissions validly made by the parties.

DETERMINATION OF THE PAYMENT DISPUTE

- 100) I have considered the claims for variations and the respondent's claim for liquidated damages separately.

ITEM 1.0 OF THE PAYMENT CLAIM

- 101) The applicant has claimed \$316,106.00 excl. GST to increase the length and/or change the width and install dividing walls in 7 prefabricated buildings included in the work under the Contract.
- 102) In relation to item 1.0, the respondent has scheduled \$Nil and has provided the following reasons in the payment schedule for withholding payment:
- a) *"Nothing further is owed to [the applicant] under this Contract..."* (an extract from the payment schedule)
 - b) *"[The applicant] has claimed amounts that [it has] previously claimed and were subject to previous [respondent] assessments and payment schedules."* (an extract from the payment schedule);
 - c) *"[The applicant has] previously submitted [its] last Invoice (Tax Invoice No. 2101/26, dated 31 March 2017....demonstrating the agreed final Contract Sum..."* (an extract from the payment schedule);
 - d) *"[The applicant is] claiming amounts many years after the contractual works have been agreed upon and completed..."* (an extract from the payment schedule); and
 - e) *"[the applicant] are ignoring their contractual obligation to pay Liquidated Damages in accordance with the Contract..."* (an extract from the payment schedule).

- 103) In relation to item 1.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) The applicant increased the width and or changed the length and installed dividing walls in 7 prefabricated buildings for its own convenience. Specifically:
 - i) The applicant elected to widen the buildings rather than increasing their height.
 - ii) The respondent did not set any height restriction⁴ for the prefabricated buildings.
 - iii) A 4.3 metre height restriction was set by the applicant for its own convenience that related to being able to pass under certain bridges en route to the site;
 - iv) The applicant installed 2 dividing walls (one down the middle of [redacted] Module 1 and one down the middle of [redacted] Module 2) for its own convenience in order to achieve certain fire safety requirements⁵. Specifically, the applicant could have relocated equipment and avoided the need to install the dividing walls.
 - b) Additionally, in relation to sub-items 1.5 to 1.7, the applicant is not entitled to payment because⁶:
 - i) The respondent never issued the applicant a change order for any of these 3 items;
 - ii) The applicant has failed to comply with the requirements (including time requirements) for making a claim set out in the Contract and is now barred; and
 - iii) The applicant never “*substantiated the nature underlying these claims*”⁷.
- 104) In summary, the applicant asserts that:
- a) the Contract was based on certain drawings;
 - b) its design obligations were limited to detailed design (including certification of the detailed design);
 - c) the drawings were changed by the respondent;
 - d) the applicant duly notified the respondent of its intention to claim in accordance with the Contract; and
 - e) the applicant has now made a claim for payment of Item 1.0 in the Payment Claim in accordance with the Contract.

⁴ Paragraph 35 of the sworn statement of [SP], Paragraph 39 of the sworn statement of [AT];

⁵ Paragraph 34 of the sworn statement of [SP], Paragraph 43 of the sworn statement of [AT];

⁶ Paragraph 40 of the sworn statement of [SP];

⁷ Paragraph 41 of the sworn statement of [SP], Paragraph 48 of the sworn statement of [AT];

- 105) In summary, the respondent asserts that:
- a) the applicant was responsible for all design and construction under the Contract;
 - b) the drawings referred to by the applicant upon which it has based its claim, were indicative only;
 - c) the changes in length, width and installation of dividing walls were necessary design changes to meet the specification and the applicant is responsible for the cost of such changes because of its obligation to design in accordance with the Contract; and
 - d) the applicant has not followed the Contract and is now barred from making this Payment Claim.

The applicant's design obligations under the Contract

- 106) [AT] of the respondent has provided a complete copy of the executed Contract, which is said to be the relevant Contract for the purposes of this application for adjudication.
- 107) I note that the Contract provided by [AT] was executed by the applicant on 27 February 2015, contains a part identified as "Attachment B" (that was not included in previous drafts of the Contract) that includes a hand annotation drafted by [SP] the respondent (clause 11.0) on or about 27 February 2015 and another hand annotation clause 11.4 drafted by the applicant and initialled by [BS] of the applicant on 25 July 2015.
- 108) I have decided that the version of the Contract referred to above represents the final agreement between the parties, which I shall use to construe the parties' rights and obligations for the purposes of this application for adjudication.
- 109) Item 5 of Schedule 1 sets out the order of precedence of contract documents as follows:
- “. an amendment to the Contract;*
 - . the Special Conditions;*
 - . the annexures to the Special Conditions;*
 - . the General Terms and Conditions;*
 - . the Schedules to the General Terms and Conditions.”*
- 110) The Contract was executed by the applicant on 27 February 2014. Attachment B modified on 25 July 2014, and was an amendment to the Contract. Attachment B, therefore, has the highest precedence.
- 111) The Contract, in descending order of precedence, is comprised of the following documents:
- a) Attachment B (including the documents referenced therein), which was an amendment to the Contract made on 25 July 2014;

- b) Special Conditions of Contract;
 - c) Annexures A and B to the Special Conditions of Contract;
 - d) General Conditions of Contract; and
 - e) Schedules 1 to 4 to the General Conditions of Contract (including Attachment A to Schedule 3).
- 112) The obligations of the applicant under the Contract are set out in the Contract as follows:
- a) The Recitals at page 2 of the Contract state:

“1 [the respondent] wishes to engage Vendor Contractor to manufacture, transport, deliver and supply the Equipment in accordance with the Contract.”
[Emphasis added]
 - b) Clause 2.1(a) states:

“Vendor Contractor must ensure that the Equipment achieves Delivery Acceptance by the Date for Delivery.”
 - c) The word “Equipment” is defined in clause 1 of the Contract as follows:

“the equipment, parts software, manuals, documentation and other things which Vendor Contractor is required to supply to [redacted] Subcontractor under the Contract”
 - d) The phrase “Delivery Acceptance” is defined in clause 1 of the Contract as follows:

“the stage in Vendor Contractor’s performance of its obligations under the Contract where

...

2 the Equipment is in accordance with the requirements of the Contract, excluding...”
 - e) The phrase “Technical Specification” is defined in clause 1 of the Contract as follows:

“the specifications, drawings and other requirements set out in Schedule 2”

Schedule 2 incorporates the technical specification referenced: “V-31SOS7801380-1126 Rev 0”.
- 113) Clause 4.1(b) of the Special conditions sets out the applicant’s design obligations as follows:
- “Vendor Contractor must design the Equipment to ensure that:*
- (i) *the Equipment can be operated and performs in a safe manner;*

- (ii) the Equipment achieves the conditions of operability, efficiency and maintenance stated or specified in the Contract; and
- (iii) where applicable, the Equipment complies with any performance requirements in the Contract.

114) Clause 4.2(a) refers to the production of Deliverables as follows:

- “(vii) In the preparation of any Deliverables, Vendor Contractor must not deviate from the Contract or other documents supplied by [redacted] Subcontractor without prior approval.
- (vii) Vendor Contractor must develop the Deliverables as it progresses the detailed engineering of the equipment and it must incorporate all relevant information and data received from its subcontractors or vendors with respect to the Equipment in order to ensure that the works and the Equipment comply with the requirements of the Contract.”

115) Clause 1 defines “Deliverables” as follows:

“means all the documents listed in the Technical Specification that are required to be prepared and issued by Vendor Contractor in accordance with the Contract and which are necessary for the proper and complete performance of the Works. Deliverables include calculations, notes, data sheets, Computer data, specifications, drawings, plans, sketches, procedures and the like as specified in the Contract.”

116) Technical specification referenced: “V-31SOS7801380-1126 Rev 0” sets out the following requirements in relation to design;

a) Clause 1.1 states:

“this document provides the scope of work and technical requirements for the [redacted] erected modular buildings for the [project]. This scope is generally to design, furnish, fabricate, manufacture, and deliver nine (9) buildings in accordance with the requirements stated herein and within the referenced documents.

...

The bid for the main [redacted] ... buildings will include designing, assembling, Equipment Installation, Inter-panel wiring, testing, and packaging module of buildings to how’s electrical and instrumentation equipment that shall be provided and installed on the [redacted] site by the [redacted] Subcontractor. The equipment layout, including location of door, size of a building, shipping split(s) and work and safety clearance as shown in the Layout drawings (refer to section 1.4 “Documents Included in Scope of Work”) are for reference. The [respondent] shall propose layout meeting all applicable specifications.”

117) Clause 1.5 states:

“All design testing, materials, and devices shall meet or permit requirements and applicable Australian codes and standards.

118) Clause 2.2.1 states:

“Work to be provided by [respondent]

(1) complete functional buildings including design, fabrication, and at delivery to sub contract tours site, structural systems, building enclosure, interior walls, doors, ceilings, finishes, [redacted], and exterior / interior [redacted] and lighting systems.”

119) Clauses 2.2.1(4)(a) to (e) required the design and supply of support structure of all buildings, external platforms, external handrails, external walkways and external stairs.

120) Clause 2.2.1(5) states:

“documentation shall be provided by [the respondent] to include, but not necessarily limited to the following:

a) equipment fabrication drawings

...

d) all necessary [redacted] construction documentation, plans showing unit layout, ductwork, fire dampers, unit and component schedules, accessories, Controls and electrical.

...

h) equipment installation drawings...”.

121) Technical specification referenced: “V-31SOS7801380-1126 Rev 0” refers to numerous items and work that is not included in the applicant’s scope of work. The items that the applicant was required to design, fabricate, deliver and install were identified in Attachment A to Schedule 3 of the Contract and included the following:

a) Buildings including:

i) 3mm steel walls / roof;

ii) 6mm steel floor;

iii) 2 hr fire rated walls;

iv) [Redacted] Room fittings;

v) Emergency fittings;

b) [Redacted] including;

i) Stainless steel [redacted] cladding and external ductwork;

c) The installation of equipment (supplied by others);

d) Transport to site of all items referred to above.

- 122) Clause 11.4 of Attachment B states:
- “The extent of the scope of work included in the contract price is this Attachment B which is the basis for any contract sum adjustments arising from any conflicts.”*
- 123) It appears to me that Clause 11.4 of Attachment B was intended to finally define the scope of work which the applicant was obliged to carry out by reference to the following documents:
- a) Document referenced 13Q2088819 Rev.0 dated 20/11/2013;
 - b) Document referenced 13Q2088819 Rev.2 dated 4/03/2014;
 - c) Document referenced 13Q2088819 Rev.3 dated 21/03/2014; and
 - d) [Respondent] Issued Rev F drawings 19/03/2014;
- 124) Document 13Q2088819 Rev.0 dated 20/11/2013 includes the following specification:
- “1.3 Inclusions*
- . Design, Engineering & Documentation as per typical [redacted] list, attached.”*
- 125) Document 13Q2088819 Rev.0 dated 20/11/2013 includes the following specification:
- “1.4 Exclusions*
- Work excluded by [the respondent] shall not be limited to the following;*
- . Site plans and layouts”*
- 126) Document 13Q2088819 Rev.0 dated 20/11/2013 incorporates by reference a document entitled; *“[Redacted] Technical details-redacted”*.
- 127) The document entitled *“[Redacted Technical details-[redacted]]”* set out *“Building Parameters”* for the modular buildings that included *“Module Length”* and *“Module Width”* for each modular building to be designed and constructed. Under the abovementioned headings, the document stated *“Refer to [respondent] Layouts”* for the *“Module Length”* and *“Module Width”* for each modular building. Accordingly, that document indicates that the [the respondent’s] Layouts (the **Rev F drawings**) were to be used to define the *“Module Length”* and *“Module Width”*.
- 128) In above paragraphs 116) to 120), I have identified clauses in the Technical specification referenced: *“V-31SOS7801380-1126 Rev 0”* that clearly require the respondent to provide (amongst other things) a complete design of the buildings and [redacted] and that drawings setting out module length and module width are indicative only.
- 129) The respondent asserts that the applicant was required to perform all of the respondent’s obligations as articulated in the Technical specification referenced: *“V-31SOS7801380-1126 Rev 0”*.

- 130) There is, however, nothing in the Contract that expressly states that for the purposes of Technical specification referenced: "V-31SOS7801380-1126 Rev 0" [redacted] (being the respondent) means the applicant.
- 131) The applicant asserts that its design obligations were detailed design obligations and that it was only required to perform some of the respondent's obligations as articulated in the Technical specification referenced: "V-31SOS7801380-1126 Rev 0".
- 132) I prefer the applicant's argument, being that it was required to develop a detailed design based on the Rev F drawings for the following reasons:
- a) There is nothing in the General Terms and Conditions that defines any design obligation. In fact, the General Terms and Conditions explain the applicant's obligations as "to manufacture, transport, deliver and supply the Equipment" in accordance with the Technical Specification, which includes the document referenced "V-31SOS7801380-1126 Rev 0".
 - b) Clause 4.1(b) of the Special Conditions sets out certain design obligations for the applicant, however, clause 4.2(a) makes it clear that the applicant "must not deviate from the Contract or other documents supplied by [redacted] Subcontractor". Technical specification referenced: "V-31SOS7801380-1126. This condition takes precedence over the design requirements set out in Rev 0".
 - c) Attachment B, which takes precedence over the Technical Specification, makes it clear that the basis of the contract price are the Rev F drawings and the document entitled "[redacted] Technical details-[redacted]" set out "Building Parameters" for the modular buildings that included "Module Length" and "Module Width" for each modular building to be designed and constructed. In particular, Attachment B included Rev F drawing entitled; "CCPP-L-300-LER-811 [redacted]" Rev F issued 19 March 2014 that stated widths and lengths for the building modules and for landings and showed internal dividing walls.
 - d) Attachment B further makes it clear that any change to the design set out in the Rev F drawings will entitle the applicant to make a claim for a contract price adjustment as follows:

"The extent of the scope of work included in the contract price is this Attachment B which is the basis for any contract sum adjustments arising from any conflicts."
 - e) Accordingly, I have interpreted the Contract to require the applicant to have provided a detailed design sufficient for the construction of 9 modular buildings that satisfied the specification set out in Technical specification referenced: "V-31SOS7801380-1126 Rev 0" and the other documents referred to in Schedule 2 and Attachment B including all statutory permits and the BCA and relevant Australian Standards in accordance with the respondent's Rev F drawings (that defined overall sizes) and subject to the respondent's approval.
- 133) The respondent asserts that the applicant elected to maintain a 4.3 metre maximum height restriction for its own convenience that related to being able to pass under certain bridges en-route to the site.

- 134) The applicant has drawn my attention to note 4 on the respondent issued Rev F drawing entitled; “[redacted]” Rev F issued 19 March 2014 (and also Rev G issued 21 March 2014 (the **Rev G Drawings**), that the applicant agrees contains the same information regarding height limits), which states:

“Maximum building overall height for road transport is 4200 mm”

- 135) For the above stated reasons, it was a term of the Contract that the applicant must comply with the requirements of the Rev F drawing.
- 136) Accordingly, I do not accept the respondent’s assertion that the applicant self-imposed the height restriction of 4.3 metres.
- 137) If anything, the applicant has built the modules to a height that is in excess of the specified height, however, that point is not in issue in this application for adjudication and does not affect my decision.
- 138) The respondent further asserts that the applicant installed 2 dividing walls (one down the middle of [redacted] Module 1 and one down the middle of [redacted] Module 2) for its own convenience in order to achieve certain fire safety requirements.
- 139) Under the Contract, the applicant was required to install certain equipment that was provided by the respondent or otherwise provided by the higher level contractor with whom the respondent contracted. There is nothing in the Contract that requires the applicant to design of any part of the equipment layout, save for the [redacted] system and building lighting and power systems.
- 140) On or about 19 June 2014, the respondent issued to the applicant a drawing entitled; “[redacted]” Rev A (the **Rev A Drawing**). On or about 30 June 2014, the respondent issued to the applicant a drawing entitled; “[redacted]” Rev B (the **Rev B Drawing**).
- 141) “[Redacted]” Rev B changed the width, length of buildings the subject of claims for variation in the Payment Claim. This drawing also changed the width of stair landings and required an internal wall in modules 1 and 2.
- 142) The Contract defines “Change” as:

“an increase, decrease, substitution, omission or variation of or to the Equipment”.

- 143) Accordingly, the drawing “[redacted]” Rev B set out a Change(s), which the applicant was required to perform.
- 144) Clause 8.2 of the Contract sets out the process by which the respondent may instruct a Change as follows:

“(a) [redacted] Subcontractor may, at any time before Final Acceptance, give Vendor Contractor a Change Order to perform a Change. [Redacted] Subcontractor need not request a Change proposal before giving a Change Order.

(b) where [redacted] Subcontractor gives Vendor Contractor a Change Order Vendor Contractor must perform its obligations under the Contract as varied by the Change Order. However, Vendor Contractor is not required to perform a Change that is beyond the general scope of the Contract.

Vendor Contractor must not perform a Change, except in accordance with a Change Order. Vendor Contractor is not entitled to make any claim against [redacted] Subcontractor in relation to a Change performed without a Change Order."

145) It is clear that the respondent issued on or about 19 June 2014, a drawing entitled; "[Redacted] GA for arrangement freeze CCPP-L-300-LER-811" Rev A and on or about 30 June 2014, a drawing entitled; "[Redacted] GA for arrangement freeze CCPP-L-300-LER-811" Rev B, which it required the applicant to construct.

146) There is no provision in the Contract that entitles the respondent to issue drawings that require the applicant to carry out a Change unless it issues the drawings by way of a Change Order.

147) Notwithstanding that the respondent did not follow the requisite process set out in the Contract, the applicant notified the respondent on 25 June 2014 in the terms set out below that it intended to claim payment for the changes to be performed pursuant to the drawing "[Redacted] GA for arrangement freeze CCPP-L-300-LER-811" Rev A issued on 19 June 2014 as follows:

"Further to our discussions of 24 June 2014 and the evolving design it is apparent that the building sizes are growing significantly.

The changes and the variation amounts now estimated are listed below:

[the applicant set out in detail the individual additional costs due to changes in the building sizes, internal partitions, [redacted], electrical design and building finishes]"

148) The applicant sent further notices updating its estimate of the impacts and cost of the changes on 1 October 2014, 25 March 2015, 4 June 2015, 9 July 2015.

149) Clause 18.1(a) of the Contract requires the applicant to provide to the respondent notice that it may claim including claim for work that it asserts is a variation as follows:

"If Vendor Contractor wishes to make a claim against [redacted] Subcontractor arising out of or in connection with the Contract (however arising, including for negligence), Vendor Contractor must give [redacted] Subcontractor written notice of the claim within 15 days after Vendor Contractor that becomes aware, or ought reasonably to have become aware, of the event all circumstances on which the claim is based."

150) At above paragraph 90) I decided that the applicant gave the requisite complying notice of claim within a time permitted by the Contract.

- 151) I acknowledge that the respondent never issued the applicant a Change Order for Item 1.0 of the Payment Claim. However, for the reasons stated above, the respondent knew (or ought to have known) that the Rev A (and Rev B) drawings it provided required the applicant to make changes for which the respondent was liable. It should similarly have known that the applicant was entitled to payment for the changes and that without a Change Order, the applicant was not entitled to claim payment. Accordingly, the respondent should have issued a Change Order either with the issue of the drawings that required the Changes or after receipt of the applicant's notice under clause 18;
- 152) For the above stated reasons, I do not accept that the applicant failed to comply with the requirements for making a claim set out in the Contract and is now barred because the applicant gave its notice of intention to claim pursuant to clause 18 of the Contract within the 15 days required by clause 18.
- 153) The applicant provided sufficient detailed description of the changes resulting from the Rev A and Rev B drawings and cost estimates for each change. Accordingly, I do not accept the respondent's assertion that the applicant never "*substantiated the nature underlying these claims*".
- 154) In relation to the respondent's reasons set out in the payment schedule for withholding payment, I have decided as set out below.
- 155) The respondent asserted; "*Nothing further is owed to [the applicant] under this Contract...*" (an extract from the payment schedule). I do not accept that assertion for the reasons set out in this determination.
- 156) "*[The applicant] has claimed amounts that [it has] previously claimed and were subject to previous [respondent] assessments and payment schedules.*" (an extract from the payment schedule).
- 157) There is nothing in the Contract that prevents the applicant from claiming an amount that was previously claimed and rejected.
- 158) HH Kelly J in *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and Ors [2017] NTSC 1* and the judgments of Olsson JA and Kelly in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Ors [2011] NTCA 1* of this issue concluded that rolling or repeat claims are permissible under the CCA and a payment dispute may arise in relation to each validly made payment claim under a contract for the following reasons.
- 159) Section 4 of the CCA states:
- payment claim means a claim made under a construction contract: [Emphasis added]*
- (a) *by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or*
- (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.*

- 160) Pursuant to section 4 of the CCA a “*payment claim*” is a claim made under a construction Contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.
- 161) In order for there to be a payment claim under a construction contract, the payment claim must be made in accordance with the terms of the construction Contract relating to how a party must make a claim to another party for payment. The word “*under*” does not mean “*in relation to*” or “*associated with*”, it means “*in accordance with*”.
- 162) Section 8 of the CCA states:

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
[Emphasis added]
- (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.*

- 163) Section 33(1) of the CCA states:

Adjudicator's functions

- (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):*
- (a) *dismiss the application without making a determination of its merits if:*
- (i) *the Contract concerned is not a construction contract; or*
- (ii) *the application has not been prepared and served in accordance with section 28*; or
- (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction Contract makes an order, judgment or other finding about the dispute that is the subject of the application*; or [Emphasis added]
- (iv) *satisfied it is not possible to fairly make a determination:*
- (A) *because of the complexity of the matter; or*

(B) *because the prescribed time or any extension of it is not sufficient for another reason; or*

- 164) Section 4 and section 8 and section 33 when read together, only authorise an adjudicator to determine an application for adjudication if the payment claim is validly made and the application for adjudication made within 90 days of the occurrence of the payment dispute.
- 165) At paragraphs [118]-[124] of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*, Kelly J stated:

[118] *The second matter I want to comment upon is the question of “repeat claims”.*

[119] *In AJ Lucas, Southwood J made the following remarks:*

Clause 13 of the appellant’s standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat claim in respect of the performance of the same obligations under a construction contract.

[120] *The underlined words in this passage were used as the basis for a submission that, as a matter of law, the Act does not allow for (indeed prohibits) what have been referred to as “repeat claims”. It was said that s 8 defines when a payment dispute arises, and once a dispute has arisen about a particular amount, it cannot arise again. Read in the context of the whole passage, the underlined words are not authority for such a proposition.*

[121] *As Southwood J made clear, the Contract in question in AJ Lucas provided for monthly invoices and made no provision for “repeat claims”.*

[122] *In this case, the Contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a “rolling claim”. That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim. It is readily apparent that if any payment claim is not paid in full:*

- (a) *a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and*
- (b) *despite that, each subsequent payment claim must include a “repeat claim” for that unpaid part.*

[123] *There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon. What the adjudicator is obliged to do when faced with a payment claim under a Contract of this kind is the same as he does for any other contract: he should look at the Contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the Contract (if payable), and whether the application has been lodged within 90 days of that date.*

[124] *I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a Contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. In each case one must look to the Contract to determine when a payment was due and hence when the payment dispute arose. One imagines that in most contracts, a “repeat invoice” claiming no new work and simply served in an attempt to “re-set the clock” for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the Contract to determine when the payment dispute arose according to the express and/or implied terms of the contract.”*

166) Further, at [236]-[238] in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*, Olsson A-J stated:

“[236] Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for moneys in accordance with or subject to the conditions of a construction contract.

[237] In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction Contract is plainly not what is in contemplation by the legislation.

[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction Contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract, that is, in the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of cl 12.2 of the sub-contract.”

167) At paragraphs [257]-[261] of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*, Olsson A-J stated:

[257] *In view of that conclusion, it becomes unnecessary to dilate at length on the question of whether the statute contemplates or permits, for its purposes, the lodgement of repeat payment claims, so as to re-trigger the relevant 90 day limit.*

[258] *It was argued on behalf of GRD that the issue as to whether the subject contract, as opposed to the statute, provides for or permits the resubmission of former payment claims is not to the point. Counsel contended that the critical issue is whether the statute permits the re-triggering of the 90 day limit in that manner, by giving rise to a valid payment dispute in relation to earlier payment claims. Reliance was placed on what fell from Southwood J in Mac-Attack117.*

[259] *In the last mentioned case all of the members of the Court were of the opinion that the statute made no provision for and thus did not directly authorise, the resubmission or re-formulation of payment claims.*

[260] *Whilst I respectfully accept that the manner in which s 8 sets out to define what constitutes a payment dispute does not make any provision for the re-triggering, by a repeat payment claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which the 90 day limit has expired, nevertheless, it does not prohibit such a practical situation arising if such a situation is expressly stipulated for by the relevant construction contract.*

[261] *I see no reason why such a Contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. Such a situation did not arise in Mac-Attack.*

168) These passages confirm that the applicant was entitled to re-submit a payment claim that included items that may have been previously claimed and rejected by the respondent.

169) The respondent asserted; “[The applicant has] previously submitted [its] last Invoice (Tax Invoice No. 2101/26, dated 31 March 2017....demonstrating the agreed final Contract Sum...” (an extract from the payment schedule). I do not accept that conclusion because there is nothing in the Contract that states that a payment claim made pursuant to clause 12.1(a) of the Contract is the final claim and that the applicant is not entitled to make any further payment claims.

170) Furthermore, I have not been provided any evidence that the parties agreed a final Contract Sum and the fact that the applicant made the Payment Claim and this application for adjudication is evidence of a contrary intention. Accordingly, I do not accept the implication that the applicant is now estopped from making this claim because it agreed a final Contract Sum because there is no evidence of such an agreement.

- 171) The respondent asserted; “[The applicant is claiming amounts many years after the contractual works have been agreed upon and completed...” (an extract from the payment schedule). There is nothing in the Contract that provides a deadline as to when the applicant may submit a payment claim provided it has given due notice of its intention to claim payment under clause 18 of the Contract.
- 172) The respondent asserted; “[The applicant is] ignoring [its] contractual obligation to pay Liquidated Damages in accordance with the Contract...” (an extract from the payment schedule). I will deal with this point further below. I note however, that the payment schedule discloses that the respondent has not sought to exercise its rights under clause 10.2 because there is no account of the claimed liquidated damages. In the context that a dispute arises either from the position taken by the respondent in the payment schedule or by failing to pay the amount claimed by the date for payment under the Contract, since the respondent remained silent as to liquidated damages in the payment schedule, there can be no dispute relating to liquidated damages for the purposes of this application for adjudication.
- 173) The respondent has not challenged the quantum of Item 1.0.
- 174) Accordingly, I have decided that the applicant is entitled to payment of \$316,106.00 plus GST.

ITEM 2.0 OF THE PAYMENT CLAIM

- 175) The applicant has claimed \$74,600.00 excl. GST for additional air handling / conditioning due to the design change to split rooms including 15 metres of extra duct, 10 additional grilles) included in the work under the Contract.
- 176) In relation to item 2.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 177) I have considered the respondent’s reasons for withholding payment stated in the payment schedule and the applicant’s reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 2.0.
- 178) In relation to item 2.0, the respondent has scheduled \$Nil and has provided the reasons in the adjudication response stated above at paragraphs 103) to 104)e) for withholding payment.
- 179) I have considered the respondent’s reasons for withholding payment stated in the adjudication response and the applicant’s reply to the reasons raised for the first time in the response and have determined above at paragraphs 106) to 153) that none of those reasons entitle the respondent to withhold money in relation to Item 2.0.
- 180) I have decided that the applicant is entitled to payment of \$74,600.00 plus GST for Item 2.0.

ITEM 3.0 OF THE PAYMENT CLAIM

- 181) The applicant has claimed \$222,130.00 excl. GST for additional transport costs due to design change to increase width and or length of the building modules under the Contract.
- 182) In relation to item 3.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 183) In relation to item 3.0, the respondent has scheduled \$Nil and has provided the reasons in the adjudication response stated above at paragraphs 0 to 104)e) for withholding payment.
- 184) I have considered the respondent's reasons for withholding payment stated in the payment schedule and the applicant's reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 3.0.
- 185) I have considered the respondent's reasons for withholding payment stated in the adjudication response and the applicant's reply to the reasons raised for the first time in the response and have determined above at paragraphs 106) to 153) that none of those reasons entitle the respondent to withhold money in relation to Item 3.0.
- 186) I have decided that the applicant is entitled to payment of \$222,130.00 plus GST for Item 3.0.

ITEM 4.0 OF THE PAYMENT CLAIM

- 187) The applicant has claimed \$226,945.00 excl. GST for additional structural changes due to design change to increase width and or length of the building modules under the Contract.
- 188) In relation to item 4.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 189) I have considered the respondent's reasons for withholding payment stated in the payment schedule and the applicant's reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 4.0.
- 190) In relation to item 4.0, the respondent has scheduled \$Nil and has provided the reasons in the adjudication response stated above at paragraphs 0 to 104)e) for withholding payment.
- 191) I have considered the respondent's reasons for withholding payment stated in the adjudication response and the applicant's reply to the reasons raised for the first time in the response and have determined above at paragraphs 106) to 153) that none of those reasons entitle the respondent to withhold money in relation to Item 4.0.

- 192) I have decided that the applicant is entitled to payment of \$226,945.00 plus GST for Item 4.0.

ITEM 5.0 OF THE PAYMENT CLAIM

- 193) The applicant has claimed \$46,000.00 excl. GST for additional supply & installation of electrical items due design change to split rooms of the building modules under the Contract.
- 194) In relation to item 5.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 195) I have considered the respondent's reasons for withholding payment stated in the payment schedule and the applicant's reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 5.0.
- 196) In relation to item 5.0, the respondent has scheduled \$Nil and has provided the reasons in the adjudication response stated above at paragraphs 10 to 104)e) for withholding payment.
- 197) I have considered the respondent's reasons for withholding payment stated in the adjudication response and the applicant's reply to the reasons raised for the first time in the response and have determined above at paragraphs 106) to 153) that none of those reasons entitle the respondent to withhold money in relation to Item 5.0.
- 198) I have decided that the applicant is entitled to payment of \$46,000.00 plus GST for Item 5.0.

ITEM 6.0 OF THE PAYMENT CLAIM

- 199) The applicant has claimed \$55,470.00 excl. GST to increase the size (length and width) of the landings for the modular buildings following the issue of the Rev A and Rev B drawings.
- 200) In relation to item 6.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 201) In relation to item 6.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) The Rev A and Rev B drawings; *"are concept drawings only. It is from these that [the applicant] is required to prepare its detailed design so that it satisfies the relevant specifications in the Contract."*;
 - b) The applicant increased the width and or changed the length in 7 prefabricated buildings for its own convenience. *"By redesigning the modules to make them wider and or longer, this meant that the overall footprint of the entire [redacted] building increased and this influenced the dimensions of the landings and landings and stairs and their locations"*;

- c) “[the applicant] failed to provide the detail required under the Contract for Item 6.0” and the respondent refers me to the email of [SP] dated 9 December 2014.
- d) This issue arose in October 2014 and the applicant failed to provide notice as required by clause 18 of the Contract;
- e) Additionally, in relation to sub-items 1.5 to 1.7, the applicant is not entitled to payment because⁸:
 - i) The respondent never issued the applicant a change order for any of these 3 items;
 - ii) The applicant has failed to comply with the requirements (including time requirements) for making a claim set out in the Contract and is now barred;
 - iii) The applicant never “substantiated the nature underlying these claims”⁹;
- f) The applicant’s rates (\$2,200/m² for landings and \$445/lm for handrails are excessive. The respondent asserts that reasonable market rates for landings are \$1,250/m².

202) In summary, the applicant asserts that:

- a) the Contract was based on certain drawings;
- b) its design obligations were limited to detailed design (including certification of the detailed design);
- c) the drawings were changed by the respondent;
- d) the applicant duly notified the respondent of its intention to claim in accordance with the Contract; and
- e) the applicant has now made a claim for payment of Item 1.0 in the Payment Claim in accordance with the Contract.

203) In summary, the respondent asserts that:

- a) the applicant was responsible for all design and construction under the Contract;
- b) the drawings referred to by the applicant upon which it has based its claim, were indicative only;
- c) the changes in length, width and installation of dividing walls were necessary design changes to meet the specification and the applicant is responsible for the cost of such changes because of its obligation to design in accordance with the Contract; and

⁸ Paragraph 40 of the sworn statement of [SP];

⁹ Paragraph 41 of the sworn statement of [SP], Paragraph 48 of the sworn statement of [AT];

- d) the applicant has not followed the Contract and is now barred from making this Payment Claim.
- 204) I have considered the respondent's reasons for withholding payment stated in the payment schedule and the applicant's reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 6.0.
- 205) I have decided above that the applicant was required to produce detailed or fabrication drawings from the documents, drawings and specifications provided by the respondent in relation to the Main [redacted] modules under the Contract. In particular, the applicant was required to incorporate the widths, lengths heights set out in the Rev F (and Rev G) drawings and produce drawings from which the modular buildings could be constructed that satisfied the Contract, the BCA and relevant Australian Standards.
- 206) I decided above that Attachment B contained an amendment to the Contract that made it clear that the contract price was based on the Rev F drawings and that any change would entitle the applicant to measure the change against the Rev F drawings for the purposes of claiming a variation.
- 207) On or about 19 June 2014, the respondent issued to the applicant a drawing entitled; "[redacted]" Rev A (the **Rev A Drawing**).
- 208) On or about 30 June 2014, the respondent issued to the applicant a drawing entitled; "[redacted]" Rev B (the **Rev B Drawing**).
- 209) The Rev A Drawing and the Rev B Drawing indicated landings that were wider and or longer than those indicated on the Rev F drawings.
- 210) the applicant notified the respondent on 25 June 2014 in the terms set out below that it intended to claim payment for the landings changes to be performed pursuant to the drawing "[redacted]" Rev A issued on 19 June 2014 as follows:

"2.3 Total Building Landing Widths Changes

-Part from 2.5m to 3.5m

-Part from 2.0 to 3.1m

EO Costs \$72,000

Note: any landings not part of a Building Section will incur transport costs due to extra width / non divisible loads etc.

EO Costs \$21,000

\$93,000 + GST

..."

- 211) I do not accept the respondent's assertion that the Rev A and Rev B drawings; *"are concept drawings only"*. For the above stated reasons, those drawings were drawings that the applicant was required to use to produce fabrication drawings and the applicant had no discretion to change the length of widths of the buildings or landings.
- 212) In relation to the respondent's assertion that; *"It is from these that [the applicant] is required to prepare its detailed design so that it satisfies the relevant specifications in the Contract."* that is correct. The detailed design was required to incorporate the overall length, width and layout specified by the respondent in its Rev F and Rev G drawings and the subsequently issued Rev A and Rev B drawings;
- 213) I do not accept that the respondent's assertion that; *"By redesigning the modules to make them wider and or longer, this meant that the overall footprint of the entire Main [redacted] building increased and this influenced the dimensions of the landings and landings and stairs and their locations"*. The width and length and location of landings and stairs is a function of the respondent (and its client's) and site requirements and is subject to constraints imposed by the BCA and relevant Australian Standards but has nothing to do with increasing the size of the buildings.
- 214) In relation to the respondent's assertion that *"[The applicant] failed to provide the detail required under the Contract for Item 6.0"* and the respondent refers me to the email of [SP] dated 9 December 2014. That email states:

"Hello [redacted]/[redacted]

Further to our meeting of 3 Dec 14 at [redacted], there were some urgent actions requiring [respondent] responses, as a memory jogger, these items are summarised below:

...

. Variation for [redacted] changes Main [redacted]– [redacted], re-routing of stairs / landings.

. Variations – historical (refer [Respondent's] email), estimates and update.

...".

- 215) The email appears to accept that re-routing as the stairs / landings is a variation but it is not clear what further information is being requested by the applicant. In the context that the applicant gave an estimate of \$72,000 for the landings and stairs that were changed by the Rev A and Rev B Drawings and that the amount included in the Payment Claim is \$55,470, I do not consider that the applicant's notice of intention to claim was invalidated because of that reduction in the amount claimed.
- 216) I do not accept that This issue arose in October 2014 and the applicant failed to provide notice as required by clause 18 of the Contract because the applicant gave notice of 25 June 2018 of design changes that would give rise to a claim for changes to the landings and stairs, which the applicant estimated would cost \$72,000.
- 217) At above paragraph 90) I decided that the applicant gave the requisite complying notice of claim within a time permitted by the Contract.

- 218) I acknowledge that the respondent never issued the applicant a Change Order for Item 1.0 of the Payment Claim. However, for the reasons stated above, the respondent knew (or ought to have known) that the Rev A (and Rev B) drawings it provided required the applicant to make changes for which the respondent was liable. It should similarly have known that the applicant was entitled to payment for the changes and that without a Change Order, the applicant was not entitled to claim payment. Accordingly, the respondent should have issued a Change Order either with the issue of the drawings that required the Changes or after receipt of the applicant's notice under clause 18;
- 219) For the above stated reasons, I do not accept that the applicant failed to comply with the requirements for making a claim set out in the Contract and is now barred because the applicant gave its notice of intention to claim pursuant to clause 18 of the Contract within the 15 days required by clause 18.
- 220) The applicant provided sufficient detailed description of the changes resulting from the Rev A and Rev B drawings and cost estimates for each change. Accordingly, I do not accept the respondent's assertion that the applicant never "*substantiated the nature underlying these claims*".
- 221) The respondent asserts that the applicant's rates (\$2,200/m² for landings and \$445/lm for handrails) are excessive. The respondent asserts that reasonable market rates for landings are \$1,250/m².
- 222) Neither the applicant nor the respondent have provided me any evidence to demonstrate that the claimed rates are excessive or reasonable. Similarly, neither has submitted an elemental build-up of those rates to support the claim.
- 223) In the context that the applicant first indicated its rates by way of the 25 June 2014 email, the respondent has had more than enough time to either negotiate acceptable rates or provide some quotation to demonstrate reasonable market rates and I am not persuaded that the respondent's 9 December 2014 email required the applicant to substantiate its rates for construction of additional landings and or stairs and handrails.
- 224) Furthermore, there is nothing in the Contract that requires the applicant to provide that information.
- 225) Accordingly, I have decided that the applicant is entitled to payment of \$55,470.00 plus GST.

ITEM 7.0 OF THE PAYMENT CLAIM

- 226) The applicant has claimed \$112,560.00 excl. GST to provide a 6mm steel floor for [redacted] rooms ([redacted] Room 1 and [redacted] Room 2). The applicant asserts that these rooms were specifically excluded from the Contract.
- 227) In the Payment Claim the applicant states:
- "Price quoted for steel plate floors. Originally quoted 28/11/14 (Applicant's Submission). Refer email of 20/5/14 to [redacted] (specifically excluded [redacted] floor areas.*
- The [redacted] Rooms are not included in the Contract Price."*

- 228) In relation to item 7.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 229) I have considered the respondent’s reasons for withholding payment stated in the payment schedule and the applicant’s reply to those reasons set out in the application for adjudication and have determined above at paragraphs 155) to 172) that none of those reasons entitle the respondent to withhold money in relation to Item 7.0.
- 230) In relation to item 7.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) The Contract requires that the [redacted] room floors be constructed with 6mm steel plate floors.
 - b) *“The Contract does not include any reference to the exclusion of 6mm steel plate floors for the [redacted] rooms, nor does it state that the 6mm steel plate floors for the [redacted] Rooms are to be treated as extra works or provisional sum works”.*
- 231) Attachment B, which contains an amendment to the Contract and was initialled by [BS] of the applicant on 25 July 2015 and Attachment A to Schedule 3 of the Contract, sets out the contract price as follows:

CONTRACT PRICE	
Item	\$ Amount
Building	\$ 6,503,000.00
[Redacted]	\$ 1,720,000.00
Equipment installation	\$ 1,200,000.00
Sub-total	\$ 9,423,000.00
3mm steel walls/roof (as per email 08.04.14)	\$ 1,210,000.00
6mm steel floor	\$ 527,000.00
2 hr fire rated walls	\$ 117,000.00
transport to site	\$ 1,205,000.00
S/Steel [redacted] cladding & ext. ductwork	\$ 950,000.00
sub-total	\$ 4,009,000.00
Contract Price (Base Price)	\$ 13,432,000.00
OPTIONS	
[Redacted]	\$ 40,000.00
[Redacted] room fittings	\$ 90,000.00
Emergency fittings	\$ 245,000.00
Sub-total	\$ 375,000.00

- 232) On 1 October 2014, the applicant sent to the respondent a notice of claim identifying variations. In particular that email states:

“...
 2.0 Steel floors in 6 mm steel plate painted
 ...”

- 233) There is nothing in the Contract or the contract documents that says that the 6mm steel floors were not to be used in [redacted] Rooms 1 and 2.
- 234) The phrase “6mm steel floor” is an all-inclusive term that in the absence of any other specification or limiting statement, means the material to be used for all floors to be constructed.
- 235) Furthermore, clause 21.4 states: *“The Contract supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties in respect of the subject matter.”*
- 236) The Contract sets out all the parties’ rights and obligations and the last offer was made by the applicant and accepted by the respondent on 25 July 2015. There is no evidence that the parties did not intend for the [redacted] floors to be constructed of 6mm steel plate. I have, therefore, decided that the Contract required all floors to be constructed using 6mm steel plate. Accordingly, the applicant is not entitled to any payment for Item 7.0 of the Payment Claim.
- 237) I note that the applicant first provided notice of its intention to claim for the [redacted] room floors on 25 March 2015 but it claims that the parties agreed at the time of entering into the Contract that the [redacted] floors would be constructed using 18mm CFC floor.
- 238) The applicant has not provided any evidence that shows that the [redacted] room floors were changed from an 18mm CFC to a 6mm steel floor. The applicant has only referred to changes of the buildings made under the Rev A and Rev B drawings. In that context, regardless of the conclusion that I made in the above paragraph, the applicant would have been barred from making a claim for payment because it failed to provide the requisite notice under clause 18 of the Contract.

ITEM 8.0 OF THE PAYMENT CLAIM

- 239) The applicant has claimed \$52,300.00 excl. GST for changes to landings on the [redacted] Room. Specifically, to increase the size (length and width resulting in an increase of 15m²) of the landings, provide an additional base frame to support the landings, provide additional handrails, provide columns / capitals, lift points and a joint for the modular [redacted] Room building following the issue of the Rev A and Rev B drawings.
- 240) In relation to item 8.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 241) In relation to item 8.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:

- a) The applicant *"never provided [the respondent] any options or prior notice as to how [the applicant] intended[s] to build or transport a landing of the kind claimed for Item 8.0"*.
 - b) Additionally, the applicant is not entitled to payment because:
 - i) The respondent never issued the applicant a Change Order for this item;
 - ii) The applicant has failed to comply with the requirements (clause 8.2 and clause 18.1) for making a claim set out in the Contract and is now barred;
 - iii) The applicant never provided substantiation for the *"lump sum prices"* for *"columns/capital extra over costs"*, *"lift point"* and the *"joint to [redacted] Room"*;
 - c) The applicant's rates (\$2,200/m² for landings and \$445/lm for handrails are excessive. The respondent asserts that reasonable market rates for landings are \$1,250/m².
- 242) In summary, the applicant asserts that:
- a) the Contract was based on certain drawings;
 - b) its design obligations were limited to detailed design (including certification of the detailed design);
 - c) the drawings were changed by the respondent;
 - d) the applicant duly notified the respondent of its intention to claim in accordance with the Contract; and
 - e) the applicant has now made a claim for payment of Item 8.0 in the Payment Claim in accordance with the Contract.
- 243) In summary, the respondent asserts that the applicant has not followed the Contract and is now barred from making this Payment Claim.
- 244) The applicant has provided no evidence of when the change claimed under Item 8 was made nor has it provided any evidence that it provided a notice of intention to claim payment for the claimed changes. Specifically:
- a) the notice it sent on 25 June 2015 makes no mention of the *[redacted] 821 and 823 [redacted] Room*.
 - b) The attachment to the notice the applicant sent to the respondent on 1 October 2014 makes mention of variations to *[redacted] 821 / 823* as follows:

"1.3 Revised doors/landings locations/size".
- 245) The 1 October 2014 email does not satisfy the requirements of clause 18.1(b) because it failed to indicate *"the Claim which Vendor Contractor intends to make, the details of the relief, including any amount claimed"*.
- 246) Accordingly, I have decided that the applicant is not entitled to payment of Item 8.0.

ITEM 9.0 OF THE PAYMENT CLAIM

- 247) The applicant has claimed \$45,000.00 excl. GST for transport of the re-designed landings on the [redacted] Room claimed under Item 9.0 following the issue of the Rev A and Rev B drawings.
- 248) In relation to item 9.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 249) In relation to item 9.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) The applicant *“never provided [the respondent] any options or prior notice as to how [the applicant] intended[s] to build or transport a landing of the kind claimed for Item 8.0”*.
 - b) Additionally, the applicant is not entitled to payment because:
 - iv) The respondent never issued the applicant a Change Order for this item;
 - v) The applicant has failed to comply with the requirements (clause 8.2 and clause 18.1) for making a claim set out in the Contract and is now barred;
 - vi) The applicant never provided substantiation for the *“lump sum prices”* for *“columns/capital extra over costs”*, *“lift point”* and the *“joint to [redacted] Room”*;
- 250) In summary, the applicant asserts that:
- a) the Contract was based on certain drawings;
 - b) its design obligations were limited to detailed design (including certification of the detailed design);
 - c) the drawings were changed by the respondent;
 - d) the applicant duly notified the respondent of its intention to claim in accordance with the Contract; and
 - e) the applicant has now made a claim for payment of Item 8.0 in the Payment Claim in accordance with the Contract.
- 251) In summary, the respondent asserts that the applicant has not followed the Contract and is now barred from making this Payment Claim.
- 252) I determined above at paragraph 246) that the applicant is not entitled to any payment for claimed changes to landings on the [redacted] Room.
- 253) I have determined for the same reasons that the applicant is not entitled to any payment for Item 9.0.

ITEM 10.0 OF THE PAYMENT CLAIM

- 254) The applicant has claimed \$253,510.00 excl. GST for installation of [redacted] Room and other rooms Emergency Light fittings claimed under Item 10.0 (as part of a provisional sum of \$335,000 referred to in the Contract as Options).
- 255) In relation to item 10.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 256) In relation to item 10.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) The Option amount of \$335,000 set out in the Contract was a provisional sum that was *“based upon every light fitting being a Zone 1 type...it was included as a provisional sum item in the event that Zone 1 type light fittings were required in areas not specified by the General Specifications for the [redacted]¹⁰”*.
 - b) The applicant is not entitled to payment for light fittings that it supplied and installed that *“were not required by the Scope of Work document or the General Specifications for the [redacted] and [redacted]¹¹”*.
 - c) The applicant is not entitled to payment for *“type Zone 1 light fittings that always formed part of its scope of Work (ie those required for the [redacted] rooms) as per the Scope of Work Document and the General Specifications for the [redacted] and [redacted]¹²”*.
 - d) *“[The respondent] never issued a direction in respect of this provisional sum / Option Price.”*
 - e) *“[The applicant’s] scope of work included the design of the lighting systems for each of the buildings, and the supply and installation of the light fittings for the same.”*
 - f) Additionally, the applicant is not entitled to payment because:
 - i) The respondent never issued the applicant a Change Order for this item;
 - ii) The applicant has failed to comply with the requirements (clause 8.2 and clause 18.1) for making a claim set out in the Contract and is now barred;
 - iii) The applicant never provided substantiation for the “lump sum prices” for “columns/capital extra over costs”, “lift point” and the “joint to [redacted] Room”;

¹⁰ clause 16.4(a) of the response

¹¹ clause 16.4(e) of the response

¹² clause 16.4(f) of the response

257) The Contract describes the provisional work as follows:

“Option prices as discussed 29th May 2014:

...

. [Redacted] room fittings \$90,000

.Emergency fittings \$245,000

...Optional qty to be confirmed based on specification...

Base Price \$13,432,000 + GST” [which excludes the Option prices]

258) There is nothing in the Contract that states that the [redacted] Room fittings are included in Base Price as asserted by the respondent 16.19 of the response.

259) Furthermore, if the respondent’s assertion that the Option Price was *based upon every light fitting being a Zone 1 type*, then there would have been another provision for the same thing in the Base Price.

260) On the basis that the [redacted] Room fittings are identified in Attachment B as an Option Price in the Contract, I do not accept the respondent’s argument on that point.

261) The respondent also argues that it never instructed the applicant to do any of the provisional work. I also do not accept that assertion for the following reasons:

a) On 1 October 2014, the applicant sent to the respondent an email that stated;

“The Option Prices provided and confirmed as proceeding for the following additional scope of work items;

...

4.0 E.O. Cost of [redacted] Rooms light fittings to Zone 1 type

5.0 E.O. Cost of emergency light fittings in all locations to Zone 1 type

...”

b) During the period November 2014 to February 2015, the respondent and the applicant discussed and exchanged extensive documentation as to the numbers of emergency light that would be provided and whether the lighting intensity of 0.2lux would be achieved. I note the respondent asserted the applicant was providing too many emergency light fittings and the respondent asserted that it had to review the lighting intensity calculations to ensure the Technical Specifications and statutory requirements were satisfied.

262) In the above context, I have decided that the respondent expressly or implicitly instructed the applicant to proceed with the design, supply and installation of the Emergency [light] fittings and the [redacted] room fittings.

- 263) In relation to the respondent's assertion that the applicant provided too many light fittings, the respondent has not provided me a copy any instruction given to the applicant prescribing the number of emergency fittings that the applicant was to provide. Furthermore, the respondent has not provided any assessment of the number and value of Emergency fittings that it considered were required to satisfy the Contract.
- 264) There is nothing in the Contract that deals with how provisional sums are to be instructed and managed generally.
- 265) In the context that this claim relates to a provisional sum that was specifically identified in Attachment B and Schedule 3 of the Contract and that I decided above that the respondent instructed the applicant to proceed with the design, supply and installation of the Emergency [light] fittings and the [redacted] room fittings, I do not accept the respondent's arguments that the applicant was required to notify the respondent of its intention to claim payment under clause 18.1.
- 266) At the time of instructing that the provisional work proceed, the applicant was required to design, supply and installation of the Emergency [light] fittings and the [redacted] room fittings in accordance with the Technical Specification and the respondent was required to pay the applicant the provisional sum amount regardless of the number of Emergency fittings and [redacted] room fittings that were supplied and installed.
- 267) The respondent has made no submission as to the quantum of Item 10.0.
- 268) Accordingly, I have determined that the applicant is entitled to payment of \$253,510.00 excl. GST for Item 10.

ITEM 11.0 OF THE PAYMENT CLAIM

- 269) The applicant has claimed \$189,000.00 excl. GST for acceleration of the works pursuant to an offer it made to the respondent on 9 January 2015.
- 270) In relation to item 12.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 271) In relation to item 11.0, the respondent has scheduled \$Nil and asserts that the applicant failed to satisfy the conditions of the acceleration agreement referenced 'Option 1' and accordingly is not entitled to any payment.
- 272) Specifically, [A7] has provided a sworn statement including a schedule referenced: 'AT-18' that sets out that every one of 4 critical dates was not achieved by the applicant.
- 273) The applicant has made not rebutted or made any reply to that assertion.
- 274) Accordingly, I have determined that the applicant is not entitled to any payment for Item 11.0.

ITEM 12.0 OF THE PAYMENT CLAIM

- 275) The applicant has claimed \$114,121.00 excl. GST for equipment installation/
[redacted].
- 276) In relation to item 12.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 277) In relation to item 12.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) In relation to sub-item 12.2:
 - i) The applicant has provided an email dated 14 January 2015 sent by the respondent that instructed the applicant to purchase certain [redacted].
 - ii) In about January 2015, the respondent instructed the deduction of the supply of certain [redacted] from the applicant's scope of work.
 - iii) In an email dated 21 January 2015, the applicant valued the [redacted] as \$60,000. The applicant has provided no updated statement as to the quantity [redacted] that it provided.
 - iv) On 27 January 2015, the applicant advised it had purchased some of the [redacted] and promised to advise of the amount and the value.
 - v) The applicant did not offer any deduction for the [redacted] that was deleted from the applicant's scope of work in 2015.
 - vi) In the Payment Claim, the applicant did not offered any deduction for the [redacted].
 - vii) The respondent rejected the applicant's deduction asserts that the deduction of \$279,250 (based on the applicant's prior advice) and not \$219,250 as offered by the applicant is appropriate.
 - viii) The respondent has relied on its site representative's email dated 28 January 2015 that states that no [redacted] had been installed. That email is not evidence that the applicant did not supply any [redacted].
 - ix) The applicant has not replied to the respondent's assertion nor provided any evidence of the [redacted] that it supplied.
 - x) I note that the respondent never issued a Change Order for this Change.
 - xi) In any event, I will accept the respondent's valuation.
 - b) In relation to sub-item 12.3.1.3:
 - i) The documents provided to me by the parties show that on 19 January 2015, the respondent instructed the applicant to carry out this work but did not request a price to carry out this work. The parties were unable to agree a price.

- ii) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to claim payment for this work.
- iii) The applicant has not provided any rebuttal or response to the respondent's assertion.
- iv) Based on the correspondence exchanged by the parties in relation to this sub-item and its response, the applicant says it carried out the work, which was a variation. The respondent does not deny that this work was a variation, nor does it deny that the work was done.
- v) The respondent simply asserts that there was no agreement as to the value of the variation and it never issued a Change Order. The respondent also asserts that the applicant never issued a notice of intention to claim and, therefore, the applicant has accrued no contractual entitlement to make a claim.
- vi) Clause 8.3(b)(2) relevantly states:

"To the extent that the parties cannot agree any of the matters listed in clauses 8.1(b)(1) to 8.1(b)(4) (inclusive), they will be determined as follows:

(2) any adjustment to the Contract Price will be determined by [redacted] Subcontractor, acting reasonably; and..."
- vii) Clause 12.2(a) relevantly state:

"Within 15 business days after receipt of a payment claim in compliance with clause 12.1, [redacted] Subcontractor must assess the payment claim and give Vendor Contractor written approval"
- viii) Clause 12.3(a) states:

"Vendor Contractor must, within 5 business days after receipt of a payment approval, give [redacted] Subcontractor the tax invoice required by clause 19(d)."
- ix) When read together, I interpret those clauses to mean that the respondent must assess the payment claim and issue to the applicant a document (referred to in the Contract as "payment approval") setting out which part of the work claimed is approved.
- x) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment and issued a payment approval as required by the Contract.

- xi) The respondent has not offered its assessment of the quantum of the claim.
 - xii) Accordingly, I have decided that the applicant is entitled to the amount claimed.
- c) In relation to sub-item 12.3.1.4:
- i) On 10 February 2015, the respondent instructed the applicant to order materials the subject of this claim.
 - ii) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - iii) The applicant has not provided any rebuttal or response to the respondent's assertion.
 - iv) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.
 - v) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - vi) The respondent has not offered its assessment of the quantum of the claim.
 - vii) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- d) In relation to sub-item 12.3.2:
- i) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - ii) The applicant has not provided any rebuttal or response to the respondent's assertion.
 - iii) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.

- iv) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - v) The respondent has not offered its assessment of the quantum of the claim.
 - vi) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- e) In relation to sub-item 12.3.4:
- i) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - ii) The applicant has not provided any rebuttal or response to the respondent's assertion, accordingly I accept that the applicant is not entitled to payment for sub-item 12.3.4.
 - iii) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.
 - iv) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - v) The respondent has not offered its assessment of the quantum of the claim.
 - vi) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- f) In relation to sub-item 12.3.5:
- i) On 15 May 2015, the applicant confirmed to the respondent "*All [redacted] (4 No.) will be handed over to [the respondent] ...at our factory at [redacted].*"
 - ii) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.

- iii) The applicant has not provided any rebuttal or response to the respondent's assertion, accordingly I accept that the applicant is not entitled to payment for sub-item 12.3.5.
 - iv) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.
 - v) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - vi) The respondent has not offered its assessment of the quantum of the claim.
 - vii) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- g) In relation to sub-item 12.3.6:
- i) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - ii) The applicant has not provided any rebuttal or response to the respondent's assertion, accordingly I accept that the applicant is not entitled to payment for sub-item 12.3.6.
 - iii) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.
 - iv) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - v) The respondent has not offered its assessment of the quantum of the claim.
 - vi) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.

- h) In relation to sub-item 12.3.7:
 - i) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - ii) The applicant has not provided any rebuttal or response to the respondent's assertion, accordingly I accept that the applicant is not entitled to payment for sub-item 12.3.6.
 - iii) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.
 - iv) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
 - v) The respondent has not offered its assessment of the quantum of the claim.
 - vi) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- i) In relation to sub-item 12.6:
 - i) On 26 June 2014, the respondent instructed the applicant to carry out this work.
 - ii) The respondent asserts that it issued no Change Order for this work nor did the applicant provide notice of its intention to claim under clause 18.1, therefore, the applicant is not entitled to payment for this work.
 - iii) The applicant has not provided any rebuttal or response to the respondent's assertion, accordingly I accept that the applicant is not entitled to payment for sub-item 12.6.
 - iv) Based on the correspondence exchanged by the parties in relation to this sub-item, the respondent does not deny that this work was a variation, nor does it deny that the work was done. The respondent asserts that there was no agreement as to the value of the variation and it never issued a Change Order nor did the applicant issue a notice of intention to claim and, therefore, the applicant has no entitlement to make a claim.

- v) The respondent has merely stated that the applicant has not shown that it has any contractual entitlement to the amount claimed, which is correct. That however, does not mean that the applicant is not entitled to any payment. The respondent should have assessed and determined a reasonable payment as required by the Contract.
- vi) The respondent has not offered its assessment of the quantum of the claim.
- vii) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.
- j) Accordingly, I have determined that the applicant is entitled to payment of \$54,121.00 excl. GST for Item 12.0.

ITEM 13.0 OF THE PAYMENT CLAIM

- 278) The applicant has claimed \$74,277.00 excl. GST for [redacted] and [redacted] supply and installation.
- 279) In relation to item 13.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 280) In relation to item 13.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
 - a) In relation to sub-item 13.1:
 - i) The respondent asserts:
 - (1) applicant has no contractual entitlement because the respondent did not issue a Change Order;
 - (2) The applicant did not issue a notice of intention to claim under clause 18.1 and, therefore, has accrued no entitlement to make a claim for payment; and
 - ii) On 26 November 2014, the respondent requested the applicant to provide a price for the [redacted] and on 27 November 2014, the applicant offered its prices accordingly.
 - iii) On 1 December 2014, [redacted] of the respondent sent an email instructing the applicant to procure the [redacted] for the amount of \$7,790.00 plus GST.
 - iv) The respondent asserts that on or about 2 December 2014, [redacted] sent another email instructing the applicant not to proceed with the purchase of the subject [redacted]. The respondent advises he cannot find a copy of that email.
 - v) On 19 January 2015, [redacted] of the respondent confirmed to the applicant that [the respondent] intended to free issue the [redacted].

- vi) The applicant claims it supplied the subject [redacted] in accordance with the respondent's instruction of 1 December 2014.
 - vii) I prefer the applicant's submission on this point and have decided that the applicant is entitled to payment of the claimed amount.
- b) In relation to sub-item 13.2:
- i) The respondent asserts;
 - (1) applicant has no contractual entitlement because the respondent did not issue a Change Order;
 - (2) The applicant did not issue a notice of intention to claim under clause 18.1 and, therefore, has accrued no entitlement to make a claim for payment; and
 - ii) On 1 December 2014, the respondent requested the applicant to provide a price for the [redacted] and on 27 November 2014, the applicant offered its prices accordingly.
 - iii) On 1 December 2014, [redacted] of the respondent sent an email instructing the applicant to procure the [redacted] for the amount of \$7,437.00 plus GST.
 - iv) The applicant claims it supplied the subject [redacted] and has claimed \$8,932.00 plus GST without any explanation of the extra amount claimed.
 - v) I prefer the respondent's submission as to quantum and have decided that the applicant is entitled to payment of \$7,437.00 plus GST.
- c) In relation to sub-item 13.3:
- i) The respondent asserts that the applicant has not provided any direct evidence that it carried out the work.
 - ii) On or about 15 May 2015, the respondent requested the applicant to provide a price for the [redacted] and on 15 May 2015, the applicant offered its price of \$5,625.00 plus GST.
 - iii) The respondent admits that it does not know whether or not the work claimed was carried out.
 - iv) As mentioned above, the clause 8 of the Contract requires the respondent to make an assessment of the payment claim. That is not limited to considering the documents provided by the applicant, it requires the respondent to take reasonable steps to ascertain what part of the claimed work (if any) has been carried out in accordance with the Contract.
 - v) I prefer the applicant's submission on this point and have decided that the applicant is entitled to payment of the claimed amount.

- d) In relation to sub-item 13.4:
- i) The respondent asserts:
- (1) “the [redacted] were not installed as quoted by [the applicant] and, as such, [the applicant] is not entitled to payment for works it did not perform.
 - (2) On 8 July 2015, [the applicant] confirmed the variations it was claiming but there was no mention of item 13.4 “installation of the [redacted] system.”
- ii) The applicant rejects that assertion and has:
- (1) advised that on 14 August 2015, the respondent sent the applicant an email stating; “...the test sheets for equipment (including [redacted]) are on the chair in the [respondent’s] office”. That email states that the respondent had prepared test sheets for tests and inspections scheduled to be carried out on or about 24 August 2014 and 20 August 2014.
 - (2) Provided photographs of installed [redacted] junction boxes.
- iii) I prefer the applicant’s submission on this point and have decided that the applicant is entitled to payment of the claimed amount.

ITEM 14.0 OF THE PAYMENT CLAIM

- 281) The applicant has claimed \$56,700.00 excl. GST for a “Revised [redacted] for Light & Power”.
- 282) In relation to item 13.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.
- 283) In relation to item 14.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:
- a) There was never a change to the scope of work for light and power circuits;
 - b) The applicant has no contractual entitlement because it failed to comply with the requirements of clause 8 and 18.1 of the Contract;
- 284) On 22 October 2014, the applicant provided the respondent its price to supply a certain type of [redacted] for \$56,700.00 plus GST.
- 285) On 31 October 2014, the respondent instructed to provide that [redacted] for the [redacted] and HRSG 4 & 5 and the applicant confirmed that it had ordered the [redacted] in accordance with that instruction on 3 November 2014.

286) The respondent asserts that the [redacted] supplied was only a part of the [redacted] that was quoted and adds:

"Given that [the applicant] has not provided any breakdown or substantiation for its claim for Item 14.0 (for instance, how much [redacted] is being claimed for), it is impossible for [the respondent] to say with any precision how much the claim should be reduced by."

287) As mentioned above, the clause 8 of the Contract requires the respondent to make an assessment of the payment claim. That is not limited to considering the documents provided by the applicant, it requires the respondent to take reasonable steps to ascertain what part of the claimed work (if any) has been carried out in accordance with the Contract.

288) Clearly, there was a change in the scope of work and clearly a price was offered and accepted. The respondent should have issued a Change Order.

289) The respondent has not offered its assessment of the quantum of the claim.

290) For the reasons set out above at paragraphs 273(b)(vi) to 273(b)(x), I have decided that the applicant is entitled to the amount claimed.

ITEM 15.0 OF THE PAYMENT CLAIM

291) The applicant has claimed \$96,619.00 excl. GST for sundry extras / [redacted] updates.

292) In relation to item 15.0, the respondent has scheduled \$Nil and has provided the reasons in the payment schedule stated above at paragraph 102) for withholding payment.

293) In relation to item 15.0, the respondent has scheduled \$Nil and has provided the following reasons in the response for withholding payment:

a) In relation to sub-items 15.1 to 15.6:

i) The respondent asserts that:

(1) it did not request nor direct variation work to be carried out;

(2) If the applicant considered this work to be a variation, then it should have submitted a notice of intention to claim under clause 18.1;

(3) The applicant has not provided any break-down of the amount claimed;

ii) The applicant has provided an email from the respondent that states: *"Attached is the revised [redacted]..."*. There is nothing in that email that indicates that the respondent considered any of that work to be a variation.

- iii) In the applicant's reply, [redacted] states: *"These works were instructed on hourly rates by [redacted] from [the respondent]. ...overseen by [the respondent's] representative [redacted] and they were the subject of signed timesheets (by [redacted])..."*.
 - iv) The applicant has not provided me any timesheet or any instruction to carry out the works on dayworks nor has it rebutted the assertion that the installation of the [redacted] formed a part of its scope of work.
 - v) Furthermore, the applicant has not provide me any notice of intention to claim that was made within the requisite time.
 - vi) The applicant has not explained why the revised [redacted] gave rise to work that was a variation.
 - vii) Accordingly, I have determined that the applicant is not entitled to payment for sub-items 15.1 to 15.6.
- b) In relation to sub-item 15.7:
- i) The respondent asserts that:
 - (1) it did not request nor direct variation work to be carried out;
 - (2) If the applicant considered this work to be a variation, then it should have submitted a notice of intention to claim under clause 18.1;
 - ii) The applicant has provided an email it sent to the respondent that states: *"Please find attached variations for [redacted] modifications made in AC 821, 822 & 823 as requested and instructed by [the respondent]. Total variation costs: \$8,832.00 + GST. All works have already been completed as per [the respondent's] site instructions."*
 - iii) The applicant has not provided any details of the instruction that it claims was given by the respondent.
 - iv) Furthermore, the applicant has not provide me any notice of intention to claim that was made within the requisite time.
 - v) The applicant has not explained what [redacted] modifications were made or what gave rise to the need to carry out such modifications.
 - vi) Accordingly, I have determined that the applicant is not entitled to payment for sub-item 15.7.

RESPONDENT'S LIQUIDATED DAMAGES

- 294) The respondent has made submissions regarding liquidated damages it considers it is entitled to set-off against money otherwise payable to the applicant (if any).
- 295) The applicant submitted the Payment Claim on 22 December 2017 for \$2,129,234.80 incl. GST.
- 296) The respondent issued a payment schedule on 11 January 2018 that indicated the respondent proposed to pay \$0.00 (nil).
- 297) The payment schedule indicated that the adjusted Contract Price was \$15,525,171.95 + GST. The payment further indicated that "*[The respondent] agreed back charges were \$69,668.99 + GST*".
- 298) There is no mention of liquidated damages in the amount of \$1,746,160.00 being applied in the payment schedule.
- 299) The respondent attached a letter of demand dated 4 August 2017 that it sent to the applicant demanding payment of liquidated damages in the amount of \$1,746,160.00 and that letter concluded by stating:

"...7. [The respondent] further confirms that any other back charges and/or offset amount, due to [the applicant's] acts or omissions, (including any [applicant] punch list items rectification and/or previously detailed Quality Issues) are not considered for the purposes of calculating liquidated Damages.

...

[The respondent] reserves its rights under the Contract and at law in relation to any failure by [the applicant] to pay the liquidated damages by the 4th September 2017."

- 300) The respondent never set-off the liquidated damages in relation to which on 4 August 2017 it had notified the applicant were owing and accordingly, there can be no liquidated damages in dispute for the purposes of this application for adjudication.
- 301) In order for a dispute relating to liquidated damages to be adjudicated, the respondent was required make its claim for liquidated damages by way of the payment schedule and then, if the applicant rejected the respondent's claim for liquidated damages, either party was entitled to make an application for adjudication in relation to the payment dispute.
- 302) Section 4 of the CCA states:
- "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 under the contract; 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.”*

- 303) For the avoidance of doubt, a payment claim includes a claim made by the respondent on the applicant.
- 304) Section 8 of the CCA states :
- 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.*
- 305) In this case if the respondent had applied liquidated damages, then that would be a payment claim for the purposes of the CCA and the respondent would have accrued a right to have the payment disputed adjudicated when the applicant rejected the respondent’s claim.
- 306) If the respondent did not accept the applicant’s rejection of its claim for liquidated damages, under section 28 of the CCA, the respondent had 90 days from the date that the dispute had arisen to make an adjudication application.
- 307) Alternatively, the respondent could have applied the liquidated damages by way of the payment schedule and if the applicant had considered that to give rise to a payment dispute, then the applicant was entitled to make an application for adjudication in relation to the liquidated damages.
- 308) For the above stated reasons, there is no claim for liquidated damages in relation to this application for adjudication and, therefore, there can be no payment dispute in relation liquidated damages for me to determine.

CLAIM FOR INTEREST

- 309) The applicant has asked me to award interest from September 2015.
- 310) Section 41 of the CCA provides :
- “(1) *A party that is liable to pay an amount under a determination must do so on or before the date stated in the determination.*
- (2) *Unless the determination provides otherwise, interest at the rate prescribed by the Regulations must be paid on the part of the amount that is unpaid after the date stated in the determination.*

(3) *The interest forms part of the determination.*

(4) *If, under section 45(1), a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue."*

311) The applicant made its payment claim on 22 December 2017. The date for payment was 19 January 2018.

312) Accordingly, interest will accrue on the adjudicated amount from 19 January 2018 up until the date of payment.

THE DETAILS OF THE DETERMINATION

313) Pursuant to s 34(1)(a) of the CCA, I have made this determination on the basis of the application and its attachments and the response and its attachments and the parties' submissions.

314) Specifically, I have determined each claim as follows:

Item	Description	Claimed	Scheduled	Determined
Main LER/LIR Revised building layouts (items 1.0 to 7.0)				
Design change to increase width and/or length				
1.1	Main [redacted] Module 1 (increased width and/or length)	\$61,150.00	\$0.00	\$61,150.00
1.2	Main [redacted] Module 2 (increased width and/or length)	\$48,055.00	\$0.00	\$48,055.00
1.3	Main [redacted] Module 3 (increased width and/or length)	\$49,596.00	\$0.00	\$49,596.00
1.4	Main [redacted] Module 4 (increased width and/or length)	\$30,642.00	\$0.00	\$30,642.00
1.5	Main [redacted] Module 1 (increased width and/or length)	\$9,114.00	\$0.00	\$9,114.00
1.6	Main [redacted] Module 3 (increased width and/or length)	\$23,786.00	\$0.00	\$23,786.00
1.7	Main [redacted] Module 4 (increased width and/or length)	\$93,763.00	\$0.00	\$93,763.00
SUBTOTAL		\$316,106.00	\$0.00	\$316,106.00
Additional airhandling/conditioning due to design change to split rooms, 15 m extra duct, 10 off extra grilles)				
2.0	[Redacted] (split rooms, 15 m extra duct, 10 off extra grilles)	\$74,600.00	\$0.00	\$74,600.00

Additional transport costs due to design change to increase width and or length				
3.1	Main [redacted] Module 1 - VSD Room	\$32,000.00	\$0.00	\$32,000.00
3.2	Main [redacted] Module 2	\$55,330.00	\$0.00	\$55,330.00
3.3	Main [redacted] Module 3	\$32,000.00	\$0.00	\$32,000.00
3.4	Main [redacted] Module 4	\$32,000.00	\$0.00	\$32,000.00
3.5	Main [redacted] Module 1	\$13,800.00	\$0.00	\$13,800.00
3.6	Main [redacted] Module 3	\$13,800.00	\$0.00	\$13,800.00
3.7	Main [redacted] Module 41	\$43,200.00	\$0.00	\$43,200.00
SUBTOTAL		\$222,130.00	\$0.00	\$222,130.00
Additional structure due to design change for 2 hr fire rated internal walls and i ncreased width				
4.0	Updated structure	\$226,945.00	\$0.00	\$226,945.00
Additional supply & installation of electrical items due design change to split rooms				
5.0	Electrical	\$46,000.00	\$0.00	\$46,000.00
Increase size of landings due to design change				
6.0	Landings	\$55,470.00	\$0.00	\$55,470.00
Design change of floor material to [redacted] room floor				
7.0	Floor material	\$112,560.00	\$0.00	\$0.00
SUBTOTAL ITEMS 1.0 TO 7.0		\$1,053,811.00	\$0.00	\$941,251.00
<i>Design Change [Redacted] Revised building layouts (Items 8.0 to 10.0)</i>				
8.0	Landings	\$52,530.00	\$0.00	\$0.00
9.0	Transport	\$45,000.00	\$0.00	\$0.00
10.0	[Redacted] /Other rooms zone/Fittings	\$253,510.00	\$0.00	\$253,510.00
SUBTOTAL ITEMS 8.0 TO 10.0		\$351,040.00	\$0.00	\$253,510.00
<i>Acceleration directed by [the respondent]</i>				
11.0	Acceleration Proposal	\$189,000.00	\$0.00	\$0.00
<i>Design change electrical items</i>				
12.0	Equipment installation / [redacted]	\$114,121.00	\$0.00	\$54,121.00

<i>Design change [redacted] All buildings (Item 13.0)</i>				
13.1	[Redacted] all buildings. As email of 27/11/14 as accepted	\$7,790.00	\$0.00	\$7,790.00
13.2	[Redacted] all buildings	\$8,932.00	\$0.00	\$7,437.00
13.3	[Redacted] System [redacted]	\$5,625.00	\$0.00	\$5,625.00
13.4	[Redacted] System installation	\$52,030.00	\$0.00	\$52,030.00
SUBTOTAL ITEM 13.0		\$74,377.00	\$0.00	\$72,882.00

<i>Design change electrical items</i>				
14.0	Revised [redacted] spec for light & power	\$56,700.00	\$0.00	\$56,700.00

<i>[Redacted] Instructions - Sundry extras/[redacted] schedule updates (Item 15.0)</i>				
15.1	[Redacted] 822 - [redacted] adjustments required for the [redacted] schedule issued for construction on 26th August 2015 by [the respondent] ([redacted]). Extra over costs of installation of free issue [redacted].	\$51,155.00	\$0.00	\$0.00
15.2	[Redacted] 821 - [redacted] adjustments for [redacted] schedule of July 2015.	\$8,755.00	\$0.00	\$0.00
15.3	[Redacted] 823 - [redacted] adjustments for [redacted] schedule of July 2015	\$7,785.00	\$0.00	\$0.00
<i>Sundry variations Ex [redacted] - all works done</i>				
15.4	VAR22 SEI - Sort [redacted] for delivery to Darwin [redacted] site as directed by [the respondent].	\$6,185.00	\$0.00	\$0.00
15.5	VAR23 SEI - Additional floor cut-outs and [redacted] in Building [redacted] as quoted.	\$1,650.00	\$0.00	\$0.00
15.6	VAR24 SEI - Replace [redacted] to [redacted] 823	\$2,389.00	\$0.00	\$0.00
15.7	[Redacted] Room - Additional [redacted] [redacted] 22 as quoted 11 September 2015, [redacted] modifications as instructed by [the respondent] 31 August 2015, additional [redacted] frames and [redacted] as instructed by [the respondent]	\$18,700.00	\$0.00	\$0.00
SUBTOTAL ITEM 15.0		\$96,619.00	\$0.00	\$0.00

TOTAL CLAIMED EXCLUDING GST	\$1,935,668.00	\$0.00	\$1,378,464.00
TOTAL CLAIMED INCLUDING GST	\$2,129,234.80	\$0.00	\$1,516,310.40

- 315) Pursuant to s 33(1)(b), I have determined that:
- a) the respondent must pay to the applicant the sum of \$ 1,378,464.00 excl. GST (which is \$1,516,310.40 incl. GST) within 7 days after the issue of the determination;
 - b) in accordance with clause 35(1)(b) of the CCA, I determine that interest is payable on the amount the respondent must pay to the applicant is the rate agreed by the parties and stated in the Contract, which is 10% per annum from 19 January 2018.
- 316) Neither party properly followed the administrative procedures required under the Contract during the course of the works. Accordingly, I determine that:
- a) pursuant to section 36(1) of the CCA, each party shall bear their costs in relation to this adjudication.
 - c) pursuant to section 46(5) of the CCA, the costs of the adjudication shall be shared equally by both parties.
- 317) The costs of the adjudication amount to 190.30 hours @ \$305.00 plus GST, which is \$58,041.50 incl. GST.
- 318) I acknowledge that each party paid me a deposit of \$10,000.00 incl. GST.
- 319) I will issue one Tax Invoice in the amount of \$58,041.50 incl. GST (which is \$58,041.50 less deposits paid $2 \times \$10,000.00 = \$38,041.50$) to the applicant and the respondent must pay the applicant one half of the invoiced amount, which is \$19,020.75 within 7 days after the issue of the determination.

CONFIDENTIAL INFORMATION

- 320) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.
- 321) If either party considers any part of their submissions confidential or any part of this determination as confidential, I request that they notify me accordingly within 2 working days of receipt of this determination.



John Tuhtan
NT Adjudicator #35