Determination 26.17.03

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

BETWEEN:

("**Applicant**")

and

("**Respondent**")

REASONS FOR DECISION

1. On 25 September 2017 I was appointed Adjudicator to determine a payment dispute between the Applicant (Subcontractor) and the Respondent (Contractor) by the Institute of Arbitrators and Mediators Australia, now the Resolution Institute, as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations* ("the Regulations"). A copy of the Letter of Appointment and the Application documents were delivered to me on 25 September 2017.

2. On 28 September 2017 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions until 2:00pm CST on Tuesday, 5 September 2017 should either party object to the appointment. There were no objections to my appointment.

3. In my letter of 28 September 2017 I confirmed that the Letter of Appointment had advised that the Application was served on the Prescribed Appointer on 25 September 2017. I requested that the parties confirm the date and method of service of the Application on the Respondent by 2:00pm CST of Tuesday, 3 October 2017.

4. In my letter of 28 September 2017 I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication. A complete hard copy of the Response documents was to follow in due course. I also confirmed that service by electronic means complies with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act* and that, by my calculation based on service of the Application on the Appointer on 25 September 2017, the Response was due on or before 9 October 2017.

5. On 27 September 2017 and before I wrote to the parties, the Applicant made further and unsolicited submissions in support of its Application to the Respondent and myself as follows:

> *"Dear Mr Perkins and [redacted],*
>
> *We refer to the Application for Adjudication under the Construction Contracts (Security of Payments) Act 2004 (NT) served on the respondent, [name redacted], and the prescribed appointer, the Institute of Arbitrators & Mediators Australia (Resolution Institute) (IAMA) on Monday 25 September 2017. We also note Mr Perkins' nomination as adjudicator of that adjudication by the attached letter from IAMA.*
>
> *The Applicant attaches, by way of service to [the Respondent] and Mr Perkins, further submissions in support of its Application."*

6. Contained within the Applicant's further submissions was a copy of the Letter of Appointment from the Resolution Institute and the Applicant's further submissions in support of its application.

7. On 28 September 2017 I responded to the parties by email as follows:

> *"Dear [*names redacted*]*
>
> *On 27 September 2017 the Applicant provided further submissions that were unsolicited and made, presumably, under s.34(2) of the Construction Contracts (Security of Payments) Act ("the Act").*
>
> *As the parties would be aware, calling for submissions under s.34(2) of the Act is at the discretion of the adjudicator so that the adjudicator may properly inform him or herself on particular aspects of the adjudication.*

It would appear, prima facie, that the Applicant's unsolicited submissions are aimed at curing a defect in the Application and I have not yet decided whether I will accept those submissions. I would prefer to wait until the Respondent has served its Response and I have read down the matter properly before making that decision.

Thank you for your assistance in this matter."

8. The Applicant responded by email to me and copied the Respondent as follows"

"Dear Mr Perkins

The applicant's submissions served on 27 August 2017 were not provided to cure any defect in the application served on 25 September 2017 and were not provided pursuant to s.34(2) of the Act. Rather, and as explained in the submissions, they form part of the application and were served within the time prescribed by the Act. Consequently, they fall to be considered as part of your determination."

9. On 3 October 2017 I received correspondence from both parties confirming that the Application was served by hand at the Respondent's registered offices on 25 September 2017. There were no objections to the electronic method of service of the Response with a hard copy to follow by mail and there were no objections to my appointment as Adjudicator.

10. On 4 October 2017 I wrote to the parties as follows:

"Dear [names redacted]

I refer to your correspondence confirming service of the application on the Respondent.

As no objections to my appointment have been raised, I will proceed to adjudicate the matter and I look forward to receiving the Response on or before 9 October 2017.

Thank you for your assistance."

11. On 9 October 2017 and within time I received the Respondent's Response electronically and a hard copy by mail.

12. On 15 October 2017 I wrote to the parties seeking further submissions in relation to the Applicant's submissions of 27 September 2017 as follows:

"Dear [names redacted],

I have had the opportunity of reading the Application and the Response, including the additional material sent by [Mr M] on 27 September 2017.

Given the content of the material sent by [Mr M] on 27 September 2017, I am not convinced that those submissions form part of the Application but are more relevantly unsolicited further submissions made under s.34(2) of the Constructions Contracts (Security of Payments) Act ("the Act").

To ensure this issue is fully considered by the parties and to ensure natural justice is afforded to the parties, I request further submissions on the following questions:

1. If the submissions made by the Applicant are to form part of the Application what provision of the Act provides for service of the Application in multiple parts and on what day was the Application served on the parties to the adjudication process.

2. If submission of an application can be made in multiple parts when then is the Response due to be served, and in turn, when is the Adjudicator's determination due.

In seeking these further submissions I have considered the issues that arose in Gwelo Developments Pty Ltd v Brierty Limited (2014) 36 NTLR 1; [2014] NTSC 44 at 48 (and affirmed by the Court of Appeal in Brierty Limited v Gwelo Developments Pty Ltd (2014) 35 NTLR 13; [2014] NTCA 7).

I request the parties provide their submissions on or before 5:00pm CST Thursday, 19 October 2017.

In the meantime, I will seek a short extension of time from the Construction Registrar within which to make my determination.

Thank you for your continued assistance."

13. On that same day 15 October 2017 I wrote to the Construction Registrar advising that the Applicant had made further unsolicited submissions on 27 September 2017 as part of their Application and that I would require the parties to make further submissions on the issue. I requested additional time under s.34(3)(a) of the Act up to and inclusive of 31 October 2017 to make a determination of the payment dispute.

14. On 16 October 2017 the Construction Registrar approved an extension for my determination up to and inclusive of 31 October 2017. There were no objections from the parties.

15. On 17 October 2017 I received the Respondent's further submissions on the two questions I had asked the parties on 15 October 2017.

16. On 18 October 2017 I received the Applicant's further submissions on the two questions I had asked the parties on 15 October 2017.

17. Following those submissions I required no further information from the parties to determine the payment dispute.

Introduction

18. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent for the 'wet hire' of a Surface Miner 2500SM ("Surface Miner"), all maintenance and an operator for surface mining operations to prepare open cut drains and preliminary grounds work as directed by the Respondent ("the Contract"). The work was to be carried out on [*site details redacted*] in the Northern Territory as part of the [*project details redacted*].

19. The Applicant claims that it is entitled to be paid its Tax Invoice 1337 dated 31 May 2017 ("the May Claim"), in the sum of **$179,422.55 (including GST)**.

20. The Applicant seeks interest on its claim at 7.5%, as the applicable rate of prescribed by the Regulations from 29 June 2017 until the amount is paid.

21. The Applicant also seeks all of its costs of the adjudication, which would also include any appointer's fee, to be paid in full by the Respondent due to the frivolous and vexatious conduct by the Respondent.

22. The Respondent submits that it has incurred significant additional costs under the contract due to the Applicant's poor production, and claims for additional counterclaim costs in respect of the Applicant's May Claim first in the Respondent's letter of 2 August 2017 and then later revised in its letter of 11 September 2017 in the sum of **$298,870.47 (including GST)** made up of the following components of claim:

(i) Invoice overcharges from the Applicant due to the shortfall in daily production from represented to actual calculated in the sum of **$115,313.97 (including GST)**;

(ii) Additional accommodation costs incurred due to poor production and the Applicant's extended time on site calculated in the sum of **$6,090.00 (including GST)**;

(iii) Replacement staff provided by the Respondent to the Applicant's operations on site calculated in the sum of **$13,110.00 (including GST)**;

(iv) Additional plant provided by the Respondent to re-grade the material excavated by the Surface Miner calculated in the sum of **$71,956.50 (including GST)**; and

(v) Delays caused by the Applicant to the Respondent's schedule of works ("the Programme") calculated in the sum of **$92,400.00 (including GST)**.

A total counterclaim in the sum of **$298,870.47 (including GST)**.

23. The Respondent says that it seeks a substantial reduction to the Applicant's charges to mitigate the costs the Respondent has incurred as a result of the Applicant failing to achieve the production rates offered to the Respondent.

24. The Respondent does not seek interest or costs of the adjudication.

25. This determination is in relation to the May Claim.

Procedural Background

<u>The Application</u>

26. The Application is dated 25 September 2017 and comprises 3 lever-arch files with files two and three containing a list and copy of 27 authorities and file one containing the Application submissions and 12 attachments with exhibits in each attachment. The attachments include:

(a) A copy of the Plant Hire Agreement;

(b) A Letter of Demand for payment of the May Claim;

(c) Three Statutory Declarations by the Applicant's project staff;

(d) A copy of the May Claim and the transmittal email;

(e) Letters from the Respondent;

(f) Supporting evidence including, spreadsheet reports, daily shift reports, photographs, timesheets, and letter and email correspondence between the parties relied on in the general submissions; and

(g) A copy of cases relied on in the Application.

27. The Application was served on the Appointer and the Respondent on 25 September 2017 pursuant to s.28 of the Act.

The Response

28. The Response is dated 9 October 2017 and comprises a submission referencing each paragraph of the Application and several attachments. The attachments are identified Annexure A to D inclusive and includes:

(a) A Statutory Declaration from the Operations Manager;

(b) Copies of email correspondence between the parties;

(c) A copy of a Particle Distribution Report for the excavated material; and

(d) A copy of Daily Shift Report for the works.

29. The Response was served on 9 October 2017 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

30. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

31. Section 4 of the Act – **Site in the Territory** – the site is [*redacted*] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

32. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the work to be carried out under the Contract and the Statutory Declarations of the project staff for the project. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the document "*Plant Hire Agreement (NT) R8000;[redacted], Preliminary Civil Works, Plant Hire – Surface Miner*", relevantly the Contract. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s. 5(1)(a) of the Act.

33. Section 6 of the Act – **Construction Work** – the work is for the 'wet hire' of a Surface Miner, including all maintenance and an operator for surface mining operations to prepare open cut drains and preliminary grounds work as directed by the Respondent for the [*project details redacted*]. That work falls within the provisions of s.6(1)(c) of the Act and I am satisfied that the work is construction work for the purposes of the Act.

34. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

> *"(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or*
>
> *(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract."*

35. The Applicant submits that it made a valid payment claim to the Respondent in the form of a Tax Invoice Number 1337 dated 31 May 2017 and supporting documents under the terms of the Contract on 1 June 2017, relevantly the May Claim, and that the May Claim is a compliant claim under the Contract and fulfills the Payment Claim requirements of s.4 of the Act.

36. The Applicant also argues that the terms of the Contract that relate to payment of a payment claim, specifically Special Condition 12, is caught by the prohibited provision of s.13 of the Act.

37. Section 13 of the Act provides:

> "***13 Provisions requiring payment to be made after 50 days***
>
> *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..."* [SEP]

38. The Special Condition 12 of the Contract states:

> *"12. Payment terms are 30 days from End of Month in which a progress claim/invoice is submitted to and approved by [the Respondent]...".*

39. The Applicant advances two examples where Special Condition 12 of the Contract would offend s.13 of the Act, relevantly:

(i) Where the payment claim is made on the first of the month – payment under Special Condition 12 would then not fall due for between 59 and 60 days, depending on the number of days in the month; and

(ii) Where the Respondent does not attend to and approve the payment claim until the end of the month – payment under Special Condition 12 would then not fall due for another 30 days which would give the Contract a payment provision in excess of 50 days.

40. The Applicant says in relation to the May Claim that the Respondent failed to respond within 50 days of the claim having been made and therefore the prohibited provisions in s.13 of the Act would amend Special Condition 12 to read:

> *"12. Payment terms are 28 days from when a progress claim/invoice is submitted to [the Respondent]..."*

41. The Respondent did not comment on this point other than to say "Noted" but submitted a letter sent to the Applicant on 2 August 2017 in response to the Applicant's letter of demand for payment dated 28 July 2017. This letter was later revised with updated counterclaims on 11 September 2017. The Respondent argues that the rates in the Contract were based on a particular daily production rate and that the Applicant has over-claimed in its payment claim. This is a matter for the merits of the payment dispute and not an argument of whether or not the terms of the Contract are amended by the provisions of the Act.

42. The Applicant's payment claim was submitted for payment on 1 June 2017 and under the terms of the Contract, specifically Special Condition 12, payment of the claim was not due until 30 July 2017 some 60 days later. The prohibited provisions of s.13 of the Act are precise in relation to the terms of a construction contract that provide for payment of a payment claim more than 50 days after the payment is claimed.

43. The Act would operate on Special Condition 12 to the extent that the Contract terms offend s.13 of the Act. Special Condition 12 would therefore be amended to provide for payment of a payment claim within 28 days after it is claimed.

44. Section 15 of the Act would also operate on the terms of the Contract that may be modified by s.13 of the Act and would not prejudice or affect the operation of other provisions of the Contract.

45. The Applicant has also argued that there are no terms in the Contract regarding responding to a payment claim and therefore s.20 of the implied provisions would be implied into the Contract. The Applicant says that this would be consistent with the amendment of Special Condition 12 by s.13 of the Act requiring payment of a claim to be made within 28 days.

46. In support of this argument the Applicant cites Southwood J in *M & P Builders Pty Ltd* v *Norblast Industrial Solutions Pty Ltd* [2014] NTSC 25 at paragraph 38 where His Honour has determined that:

> *".....The Act does not provide that, regardless of the payment terms of the relevant construction contract, a party is entitled to have a dispute that it has raised resolved. The object of the Act is to facilitate timely payments between the parties to construction contracts and provide for the rapid resolution of payment disputes arising under construction contracts. To that end, s 20 of the Act implies certain conditions into a construction contract that does not have written provisions about: (a) when and how a party must respond to a payment claim made by another party; and (b) by when a payment must be made. Those contractual terms are critical to the achievement of the object of the Act and, subject to any question of waiver or estoppel, a party to a construction contract is liable to make payments in accordance with them....."*[1]

47. The Respondent did not comment on this point in the Response other than to state "Noted".

48. When reading the terms of the Contract, particularly the Special Conditions, it becomes clear that there are no terms that oblige the Respondent to respond to a payment claim or terms that define a timeframe for any such response. The Special Condition 12 merely states that:

> *"12. Payment terms are 30 days from End of Month in which a progress claim/invoice is submitted to and approved by [the Respondent]..."*

In the event that the Respondent simply ignores the payment claim, technically it may never fall due for payment because a pre-condition for payment is the Respondent's approval. By ignoring the claim or not approving the claim, the Respondent may avoid triggering any timely payment under the Contract. In other words, the Respondent can control precisely how and when it makes any payment to the Applicant for the work done.

49. Section 20 of the Act states:

> *"**20. Responding to payment claims and time for payment***
>
> *The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:*
>
> *(a) when and how a party must respond to a payment claim made by another party;*
>
> *(b) by when a payment must be made...."*

The Schedule at Division 5, s.6 implies terms into a construction contract for responding to a payment claim as follows:

> ***6. Responding to payment claim by notice of dispute or payment***
>
> *(1) This clause applies if:*
>
> *(a) a party receives a payment claim under this contract; and*
>
> *(b) the party:*
>
> *(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or*
>
> *(ii) disputes the whole or part of the claim.*
>
> *(2) The party must:*
>
> *(a) within 14 days after receiving the payment claim:*
>
> *(i) give the claimant a notice of dispute; and*
>
> *(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*
>
> *(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.*
>
> *(3) The notice of dispute must:*
>
> *(a) be in writing; and*
>
> *(b) be addressed to the claimant; and*
>
> *(c) state the name of the party giving the notice; and*

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and

(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

50. The Applicant's payment claim was submitted for payment on 1 June 2017 and under the terms of the Contract, specifically Special Condition 12. Special Condition 12 would be amended by s.13 of the Act to provide for payment of a payment claim within 28 days after it is claimed. Payment of the Applicant's payment claim was due on or before 29 June 2017.

51. There are no terms in the Contract that oblige the Respondent to either respond to the payment claim within a specific timeframe or to approve the payment claim within a specific timeframe. Absent those terms, the implied provisions of the Act would enter the Contract and operate to impose on the Respondent response requirements consistent with s.6 of the Schedule of the Act.

52. Those terms would operate to the extent of any inconsistency in the Contract terms and would impose a 14 day response timeframe on the Respondent in the event that the Respondent disputes the payment in whole or in part or, if there is no disputed portion of the claim, pay the claim within 28 days after it was submitted for payment.

53. Under both the prohibited provisions and the implied provisions of the Act operating on Special Condition 12 of the Contract, the Respondent was to have either disputed the payment claim by notice on or before 15 June 2017 or, if there was no notified dispute from the Respondent, pay the payment claim in full on or before 29 June 2017.

54. I am satisfied that the May Claim made on 1 June 2017 complies with the terms of the Contract, specifically Special Condition 12 that is amended by s.13 and s.20 of the Act. I am satisfied that the payment claim complies with the stipulations of Special Condition 12 as amended by the Act for the making of and responding to a claim for payment for work done and is therefore a valid Payment Claim for the purposes of s.4 of the Act.

55. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

> ***"8. Payment dispute***
>
> *A payment dispute arises if:*
>
> *(a) a payment claim has been made under a contract and either:*
>
> *(i) the claim has been rejected or wholly or partly disputed; or*
>
> *(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*
>
> *(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
>
> *(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned…".*

56. The Applicant made a valid payment claim on 1 June 2017 in the form of the May Claim for the provision of work performed under the Contract.

57. The Contract terms Special Condition 12 that is amended by s.13 and s.20 of the Act provides for dispute notification of the payment claim in whole or in part by 15 June 2017 or, if there was no dispute notification or dispute of the payment claim by the Respondent, payment of the payment claim on or before 29 June 2017.

58. The Respondent did not dispute the payment claim and did not pay the payment but submitted a letter to the Applicant on 2 August 2017 in response to the Applicant's letter of demand for payment dated 28 July 2017. That letter was later updated on 11 September 2017. The Respondent argues that the rates in the Contract were based on a particular daily production rate and that the Applicant has over-claimed in its payment claim. As I have stated previously at paragraph [41.] above, this is a matter for the merits and would not affect the date on which a payment dispute commenced.

59. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that the payment dispute commenced on 30 June 2017 under section 8(a)(ii) of the Act when the Applicant's May Claim was not paid in full by the Respondent.

60. Section 28 of the Act – **Applying for Adjudication** – The documents of the Application dated 25 September 2017 were served on the Respondent and the Prescribed Appointer, the Institute of Arbitrators and Mediators Australia, now the Resolution Institute, on 25 September 2017.

61. On 27 September 2017 the Applicant served additional documents dated 26 September 2017 that the Applicant says formed part of the Application but were titled "Application for Adjudication – Further Submissions".

62. I called for further submissions on this issue on 15 October 2017 and received submissions from the parties on 17 October 2017 and 18 October 2017 respectively.

63. The Applicant says that its Application can be served within 90 days from when the payment dispute arose and as such the Applicant can be served up to and inclusive of 27 September 2017. The Applicant has treated the further submissions as supplementary submissions made within time under s.28 of the Act.

64. The Respondent says the Applicant is not permitted to make further submissions unless they are called for by the Adjudicator under s.34(2) of the Act and that the Applicant's supplementary submissions are unsolicited submissions and should be disregarded as part of the Adjudication.

65. The parties made no submissions in relation to the key question of whether the Application can be made in multiple parts and when the Response would be due.

66. Section 29(1) of the Act is quite clear on this issue in that:

> *"Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it....."*

67. Time for the Respondent starts marching as soon as the Application is served. This does not mean multiple document parts metered out by an applicant over the 90 days and then treated as the one application document for preparation and service of the application. Allowing for the moment that this were the case, absent notification from an applicant, a respondent would have no certainty that an applicant had finalised an application and that all the documents of the application had been served. There are no provisions in the Act that allow for this to take place and, more relevantly, the Act at s.28 provides for 'preparation and service of a written application' as a specific document prepared and served at a distinct point in time rather than multiple documents each served at different points in time and then collectively taken to be the service of an application with no real quantification of precisely which time the application was actually served and on which a respondent may rely for the preparation and service of a response under s.29 of the Act. The process of multiple parts of an application would be unfair to a respondent and see natural justice denied to a respondent. It could also allow an applicant to 'steal a march' which would be inconsistent with the object of the Act at s.26 of the Act.

68. The Act has no provisions for service of an application in multiple parts and I find that the Applicant's further submissions dated 26 September 2017 were provided under s.34(2) but were not called for by the Adjudicator.

69. The fact that the Respondent was also served with these further submissions and has had the benefit of reading them before serving the Response compels me to include them in the adjudication process, despite their content adding little to my consideration or determination of the issues before me. I accept the Applicant's further submissions to ensure there is procedural fairness and natural justice and do so in line with the reasoning of Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at 42.

70. The payment dispute under s.8 of the Act commenced on 30 June 2017, being the day after the May Claim was to have been paid in full. The Applicant must within 90 days after the dispute arises prepare and serve the Application. By calculation, the Application was to have been prepared and served on or before 27 September 2017 and the Applicant has prepared and served the Application within time under the Act.

71. I am satisfied that the Application is a valid Application for Adjudication for the purposes of s.28 of the Act and contains the relevant information prescribed by the Act and Regulation 6 of the *Construction Contracts (Security of Payments) Regulations* ("the Regulations").

72. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 9 October 2017, served on the Applicant and the Adjudicator on 9 October 2017.

73. The Response was due to have been prepared and served on the Adjudicator and the Applicant within 10 working days after the Application was served on the Respondent. By calculation, the Response was to have been prepared and served on or before 9 October 2017 and the Respondent has prepared and served the Response within time under the Act.

74. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of s.29 of the Act and contains the relevant information prescribed by the Act and Regulation 7 of the Regulations.

75. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent under s.33(1)(b) of the Act.

Merits of the Claims

76. The May Claim made by the Applicant on 1 June 2017 contains the following components:

    (i) A daily rate of $5,000.00 for 18 days hire of the Surface Miner calculated in the sum of **$90,000.00 (excluding GST)**; and

    (ii) A cubic metre rate of $5.71 for 12,804.1 cubic metres of excavated material over the 18 days calculated in the sum of **$80,422.55 (excluding GST)**.

    A total claim of **$179,422.55 (including GST)**.

77. In its Response the Respondent says that the rates of $5,000.00 per day for the Surface Miner and $5.71 per cubic metre of excavated material were based on a daily production of 1,500 cubic metres per day.

78. The Respondent also says that, due to the poor daily production rates achieved by the Applicant's Surface Miner, the job has run longer than anticipated and the cost has risen beyond that of the initial budget for the work.

79. The Respondent has counterclaimed for the poor production rates and the additional costs it has incurred first in its letter of 2 August 2017 and later revised in the letter of 11 September 2017 containing the following components:

(i) Overcharges by the Applicant due to the poor production achieved by the Surface Miner calculated in the sum of **$115,313.97 (including GST)** based on the Surface Miner achieving only 52% of the offered production rate in the Contract ("the Production Rate Claim");

(ii) Additional accommodation costs due to the Applicant being on site longer than anticipated as a result of the poor production calculated in the sum of **$6,090.00 (including GST)** based on a room night cost of $145.00 for 2 personnel for 21 days ($145 x 2 x 21 = $6,090) ("the Accommodation Claim");

(iii) Replacement staff provided to the Applicant by the Respondent calculated in the sum of **$13,110.00 (including GST)** based on a cost of $690.00 for 1 staff member for 19 days ($690 x 1 x 19 = $13,110) ("the Staff Claim");

(iv) Plant costs incurred by the Respondent as a result of regrading the oversize excavated material from the Applicant's Surface Miner calculated in the sum of **$71,956.50 (including GST)** based on regrading excavated material 100mm or above to meet the required 'passing sieve' specification at a cost of $2.31 per cubic metre (presumably the amount of material processed was 31,150 cubic metres) ("the Plant Claim"); and

(v) Delays to the Respondent's programme of 7 days calculated in the sum of **$92,400.00 (including GST)** based on a daily cost of $13,200.00 ("the Delay Claim").

A total counterclaim of **$298,870.47 (including GST)**.

The Contract Agreement between the Parties

80. The Contract is a "Plant Hire Agreement" which comprises a front cover page identifying the project, the works and the plant hire, one page setting out the "Details" of each party, one page setting out the "Agreement Particulars" which contains the "Hire" rates agreed between the parties and two pages of "Schedule 1 - Special Conditions" with the parties' signatures contained on the last page. In all, five pages. It is clear from the documents that the agreement is a 'wet plant hire agreement' for the Surface Miner and operator, including all maintenance. The Respondent is to provide fuel for the normal daily operations. There is no mention of a 'production rate' or a 'stand-by rate' in the document, however there is a whole of contract provision in the form of a Note which states:

> *"...Following documents constitute the contract ("the Contract") between the parties:*
>
> *1) Special conditions as included in Schedule 1 of this Agreement Particulars;*
>
> *2) This Agreement Particular;*
>
> *3) The Plant Hire-in General Condition Term Agreement...."*

81. The risk profile of the Contract is clear in that the Applicant holds the risk of the serviceable supply of the Surface Miner and operator for the purpose of normal daily operations, while the Respondent holds the risk of the provision of fuel, accommodation and available work for the purpose of normal daily operations consistent with its scope of works under the head contract. The contracting arrangement is not back-to-back with the head contract and is a hire agreement only.

The Applicant's May Claim

82. The Applicant's May Claim is made under the Contract for work done over an 18-day period of normal operations and is calculated in the sum of $179,422.55 (including GST).

83. Attendance to the evidence in the Statutory Declaration of the Applicant's [*Mr N*], the daily timesheets and the "Daily Shift Reports" signed daily by the Respondent's representative demonstrate the work done and approved by the Respondent. The "Attachment 6" in [*Mr N's*] evidence is a spreadsheet summary of the operational activity between the period of 1 February 2017 and 24 May 2017 inclusive and, by calculation, it can be seen that the Applicant excavated a total of 12,805 cubic metres of material over that period. This quantity correlates with that claimed by the Applicant in the May Claim.

84. The period of time claimed by the Applicant is 18 days and by attendance to Attachment 6 of [*Mr N's*] evidence it can be seen that the Applicant was on site for 20 days of normal operations during which 2 days of normal operations had been stood down on instructions from the Respondent. This period correlates with that claimed by the Applicant in the May Claim.

85. The Respondent does not dispute the 18 day period and 12,805 cubic metre quantity claimed by the Applicant in the May Claim but says that, due to the lower than expected production achieved by the Surface Miner during operations, there should be a reduction in the overall claim to "...mitigate costs incurred by [*the Respondent*] as a result of [*the Applicant*] failing to achieve production rates offered....". The Respondent has provided a series of Daily Shift Reports and a spreadsheet that identifies a series of production shortfalls on a daily basis.

86. I am not with the Respondent on this point.

87. The Applicant has claimed under the rates agreed in the Contract and has shown the number of normal operational days that the Surface Miner was on hire and the amount of excavated material achieved on a per day basis over that period. The Applicant has claimed for the excavated material on a per cubic metre basis under the rates agreed in the Contract. The Respondent has not disputed the number of days of operation or the amount of material excavated during that time.

88. The Applicant has properly claimed the May Claim under the terms of the Contract and I award the sum of **$179,422.55 (including GST)** for the Applicant's May Claim.

The Respondent's Counterclaims

89. The Respondent raised five counterclaims ("claims") in the Response totaling $298,870.47 (including GST) for cost overruns the Respondent claims it has incurred. I called for and received further submissions in relation to the Respondent's claims.

90. The Respondent's further submissions contained some additional documentation and a Geotechnical Report extract showing the size distribution of the excavated material from the Surface Miner. No further calculation or evidence to support the claims was submitted. The Respondent maintained that its claims are valid.

91. The Applicant says that there is no basis for the Respondent's claims and there are simply no calculations or evidence to support the claims.

The Production Rate Claim

92. The Respondent claims a total of $115,313.97 (including GST) for the difference in production achieved by the Applicant during the 18 days of work associated with the May Claim.

93. In calculating the Production Rate Claim the Respondent says that the Applicant only achieved an average of 5 productive hours per day as opposed to the expected 10 hours per day to produce the estimated 1,500 cubic metres of excavated material. The Respondent argues that, as a result the claim should be reduced by $115,313.97 (including GST), which equates to at or about a 52% production.

94. The Applicant says that, irrespective of the Respondent's counterclaims, because the Respondent did not dispute the May Claim in whole or in part within the prescribed 28 days under the Contract when amended by the prohibited provisions for payment, the May Claim must be paid in full.

95. The Applicant also argues that, if the Production Rate Claim is to be considered, there is no basis of claim available under the Contract and there are no calculations or breakdown that could support or allow for interrogation of the Production Rate Claim.

96. I am not with the Respondent on the Production Rate Claim.

97. The Contract is clear that the Surface Miner is available on "*Wet hire rates*" in a combination of a "...*Fixed daily rate*..." and "...*Per bcm of rock*...", "bcm" being a Bank Cubic Metre of loose material as excavated. The Contract contains no production rate on a per day basis or a maximum or minimum of material to be excavated per day by the Surface Miner. It is clear that the Contract is a Plant Hire Agreement only for the wet hire of the Surface Miner and the production rate, location and control of operation of the Surface Miner is at the Respondent's direction.

98. The production risk under the Contract was the Respondent's to manage and in the event of a shortfall of excavated material it was up to the Respondent to ensure the Surface Miner worked for the maximum available time per day it was on hire. The Daily Shift Reports are countersigned each day by the Respondent's representative and it could not be said that the Respondent did not have control over where, when and for how long each day the Surface Miner operated.

99. There is simply no evidence to support the Respondent's Production Rate Claim and I value the Respondent's Production Rate Claim at "Nil" in the Adjudication.

The Accommodation Claim

100. The Respondent claims a total of $6,090.00 (including GST) for the costs of accommodation for 2 personnel for 21 days at a rate of $145 each per night.

101. The Respondent says that because the productivity rate of the Surface Miner was less that expected the Applicant's staff were on site longer doing the work and this caused the additional cost of the accommodation.

102. The Applicant says that, irrespective of the Respondent's counterclaims, because the Respondent did not dispute the May Claim in whole or in part within the prescribed 28 days under the Contract when amended by the prohibited provisions for payment, the May Claim must be paid in full.

103. The Applicant argues that there is no basis available under the Contract for the Respondent to make its Accommodation Claim as the Contract at Special Condition 13 expressly provides that: "....*Accommodation, meals and transportation between workers' camp and site for the machine operator will provided by [the Respondent]* [sic]....".

104. I am not with the Respondent on the Accommodation Claim.

105. The Contract is clear that the accommodation, meals and site transport is to be provided by the Respondent. As I have found in paragraph [98] above, the Respondent had full control over where, when and for how long the Applicant's machinery and staff were on site. Had the Respondent not wanted to incur any additional cost of accommodation, it had the option of taking the Applicant's equipment off hire and demobilising the Applicant's equipment and staff.

106. Again, there is no evidence to support the Respondent's Accommodation Claim and the Contract is against the Respondent in relation to the accommodation, meals and site transport. I value the Respondent's Accommodation Claim at "Nil" in the Adjudication.

The Staff Claim

107. The Respondent claims a total of $13,110.00 (including GST) for the costs of providing the Applicant one of the Respondent's staff as a replacement for the Applicant's operations. In its Response at paragraph 16.41 the Respondent has reassessed the Staff Claim and reduces the claim by $8,625.00 (including GST) due to the evidence of [*Mr N*] and [*Mr S*] in their respective Statutory Declarations in the Application. The Staff Claim is calculated at a rate of $690.00 per day for a total of 19 days, however this claim now calculates to $4,485.00 (including GST).

108. The Respondent says that the Applicant did not have the agreed staff in attendance under the Contract and due to the shortfall the Respondent had to supplement personnel to the Applicant's Contract.

109. The Applicant says that, irrespective of the Respondent's counterclaims, because the Respondent did not dispute the May Claim in whole or in part within the prescribed 28 days under the Contract when amended by the prohibited provisions for payment, the May Claim must be paid in full.

110. The Applicant also argues that the Daily Shift Reports signed by the Respondent's representative at the end of each shift shows that the Applicant had an operator in attendance for every day in which work was claimed in the May Claim.

111. I am not with the Respondent on the Staff Claim.

112. The Contract contains no rates for either the Applicant's staff or the Respondent's staff and there are no provisions for rates for personnel in the Contract. The Contract is a wet-hire contract for a Surface Miner to undertake work for the Respondent on site when, where and for how long as directed by the Respondent.

113. Attendance to the Daily Shift Reports shows that the Applicant has only claimed for the 18 days of operation and hire of the Surface Miner while the two non-productive days were directed by the Respondent for either inclement weather or maintenance days for the machine.

114. There is no provision in the Contract and there is no evidence to support the Respondent's Staff Claim. I value the Respondent's Staff Claim at "Nil" in the Adjudication.

The Plant Claim

115. The Respondent claims a total of $71,956.50 (including GST) for having to use its machinery ("Plant") to regrade oversized material that had been excavated by the Applicant's Surface Miner.

116. The Respondent says that the Applicant had advised that the material excavated by the Surface Miner would be at or less than 75 mm in size. The Respondent says that the Applicant's Surface Miner produced material in excess of 100mm in size, which would not meet the passing sieve specifications, and it was necessary for the Respondent to regrade the material using their Plant at additional cost in the Contract.

117. The Applicant says that, irrespective of the Respondent's counterclaims, because the Respondent did not dispute the May Claim in whole or in part within the prescribed 28 days under the Contract when amended by the prohibited provisions for payment, the May Claim must be paid in full.

118. The Applicant argues that The Respondent has provided no evidence to support their claim and says that it did not represent to the Respondent that the Surface Miner would only produce excavated material of 75mm or less.

119. The Applicant also says that, due to its configuration and operation, the Surface Miner generally produces excavated material of at or about 75mm or less and if there are boulders in the strip being excavated these are sometimes not fully crushed but can be pushed aside.

120. The Applicant submits that the Respondent's allegations are, in any event, not connected to their performance required under the Contract.

121. I am not with the Respondent on the Plant Claim.

122. The email correspondence between the parties shows no representation of excavated material sizings by the Applicant to the Respondent and the Contract contains no rates or provisions that would or could oblige the Applicant to excavate material of a particular size.

123. The Contract has a daily wet hire rate for the Surface Miner and a rate for each bank cubic metre of material the Surface Miner excavates each day. There is no minimum or maximum production rate or size requirement for the excavated material. It would in fact be in the interests of the Applicant to excavate as much material each day as possible as that would increase the revenue available from the Surface Miner.

124. There is no evidence to support the Respondent's Plant Claim under the Contract and I value the Respondent's Plant Claim at "Nil" in the Adjudication.

The Delay Claim

125. The Respondent claims a total of $92,400.00 (including GST), at the rate of $13,200.00 per day for 7 days delay caused by the Applicant to the Respondent's programme.

126. The Respondent argues that the delay was caused by the Applicant's lower than expected production rate per day which equates to 52% of the 1,500 cubic metres production the Respondent says was offered by the Applicant when entering into the Contract.

127. The Applicant says that, irrespective of the Respondent's counterclaims, because the Respondent did not dispute the May Claim in whole or in part within the prescribed 28 days under the Contract when amended by the prohibited provisions for payment, the May Claim must be paid in full.

128. The Applicant also argues that there is no production rate in the Contract, there is no basis of claim available under the Contract and there is no delay claim available to the Respondent under the Contract.

129. I am not with the Respondent on the Delay Claim.

130. The Contract is a Plant Hire Agreement only and contains no provisions that relate to time or programming of the work. The Applicant's obligation is to provide the Surface Miner and an operator as directed by the Respondent under the Contract.

131. There is no programme for the work, no time within which to complete the work and certainly no critical path for construction in the Contract that could demonstrate delay.

132. There is no evidence to support the Respondent's Delay Claim under the Contract and I value the Respondent's Delay Claim at "Nil" in the Adjudication.

Reconciliation of the Claims

133. The May Claim of the Application for Adjudication is reconciled at Table 1 below together with the Respondent's counterclaims.

Claims of the Adjudication			
Item	**Applicant**	**Respondent**	**Determined**
April Claim	$179,422.55	$0.00	$179,422.55
Production Rate Claim	$0.00	$115,313.97	Nil
Accommodation Claim	$0.00	$6,090.00	Nil
Staff Claim	$0.00	$4,485.00	Nil
Plant Claim	$0.00	$71,956.50	Nil
Delay Claim	$0.00	$92,400.00	Nil
TOTAL	**$179,422.55**	**$290,245.47**	**$179,422.55**

Table 1.

134. The claims of the Adjudication reconcile to a payment to the Applicant of **$179,422.55 (including GST).**

Interest on the claims

135. In reconciling the May Claim and the Respondent's counterclaims, the amount the Respondent is to pay the Applicant is $179,422.55 (including GST).

136. There are no written contract terms in relation to interest in the Contract and therefore the implied provisions of the Act are implied and form the contract terms applicable to the amount of interest to be paid to the Applicant. Interest on overdue payments is set out in section 7 of the Schedule and states:

> *"(1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.*
>
> *(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.*
>
> *(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time…."*

137. The rate of interest prescribed by regulation 9 of the Regulations is:

> *"….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act…"*

138. The Supreme Court Act refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate in that period is 1.5%, therefore the interest rate applicable to this contract is 7.5% per annum.

139. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an interest amount awarded in a determination under Goods and Services Tax Determination 2003/01.

140. I award interest of **$4,122.47** on the sum of **$163,111.41 (excluding GST)** from 29 June 2017, the date of due payment, to 31 October 2017, the date of determination, pursuant to s.35 of the Act.

Summary

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

(i) The contract to be a construction contract under the Act;

(ii) The work to be construction work under the Act;

(iii) The site to be a site in the Northern Territory under the Act;

(iv) The May Claim to be a valid payment claim under the Act;

(v) The dispute to be a payment dispute under the Act;

(vi) The Application to be a valid application under the Act;

(vii) The Response to be a valid Response under the Act;

(viii) The Applicant's May Claim to stand in the sum of $179,422.55 (including GST);

(ix) The Respondent's Production Rate Claim to fall;

(x) The Respondent's Accommodation Claim to fall;

(xi) The Respondent's Staff Claim to fall;

(xii) The Respondent's Plant Claim to fall;

(xiii) The Respondent's Delay Claim to fall;

(xiv) Interest is payable on the Applicant's May Claim in the sum of $4,122.47.

142. Reconciling the Applicant's May Claim and the Respondent's counterclaims against the material findings, I determine that the amount to be paid by the

Respondent to the Applicant in relation to the May Claim is **$183,545.02 (including GST and Interest)**.

143. This sum is to be paid to the Applicant by the Respondent on or before **1 December 2017**.

Costs

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

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

> *"…if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs..."*

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

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

> *"1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."*

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

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

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

Confidential Information

151. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location of the works.

Closing Remarks

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

DATED: 31 October 2017

Rod Perkins
Adjudicator No. 26