06.15.01

ADJUDICATOR'S DETERMINATION

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

IN THE MATTER OF AN ADJUDICATION BETWEEN:

Applicant

And

Respondent

BY

GRAHAM ANSTEE-BROOK (ADJUDICATOR)

ISSUED: 19 January 2016

CONTENTS

1. DETAILS OF PARTIES

APPLICANT:
[redacted]
c/- Rod Perkins
Powell & Co. Legal
PO Box 868
NIGHTCLIFF NT 0814

RESPONDENT
[redacted]
c/- Bill Piper
Pipers Barristers & Solicitors
GPO Box 2717
DARWIN NT 0801

ADJUDICATOR
Graham Anstee-Brook
42 Minora Road
DALKEITH WA 6009
Email: graham.ansteebrook@aurecongroup.com

Tel: 0412 288 554

2. ADJUDICATOR'S DETERMINATION

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter of the payment dispute between [*the Applicant*] and the [*the Respondents*] determine that:

2.1. I determine that [*the Respondents*] must pay [*the Applicant*] the sum of $33,118.00 together with interest in the sum of $2,888.00 by 26 January 2016.

2.2. Each party pay half the adjudicator's fees and disbursements and as [*the Applicant*] has paid the adjudicator's fees and disbursements in the sum of $5520.00, [*the Respondents*] must pay the sum of $2760.00 by 26 January 2016.

_____

Graham Anstee-Brook

Adjudicator

3. BACKGROUND

3.1. On or about 13 November 2014 [*the Applicant*] and [*the Respondents*] entered into a Residential Building Contract in relation to the construction of a house at [redacted] in the Northern Territory (**Contract**).

3.2. Pursuant to the Contract the Contract Price for the construction of the residence was $403,000 (including GST).

4. APPOINTMENT OF ADJUDICATOR

4.1. By a letter dated 18 December 2015 from Master Builders Northern Territory I was appointed adjudicator pursuant to 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (**CCA**).

4.2. I accepted the appointment and wrote to [*the parties*] care of their appointed solicitors on 24 December 2015.

5. CONFLICT OF INTEREST

5.1. I have no material personal interest in the payment dispute or in the Subcontract under which the dispute has arisen.

5.2. I see no reason to disqualify myself pursuant to section 31 of the CCA.

6. DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA

6.1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to of section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the sub-sections to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd* [2008] WASAT 111 at [82].

Section 33(1) provides as follows:

An appointed adjudicator must within the prescribed time or any extension of it made 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;

(ii) the application has not been prepared and served in accordance with section 28;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement or other finding about the dispute the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination;

(A) because of the complexity of the matter;

(B) because the prescribed time or any extension of it is not sufficient for another reasons.

7. SERVICE OF RESPONSE

7.1. On 7 January 2016 I received correspondence from the solicitors for [*the Applicant*] stating that the Response had been received from [*the Respondents*] on 6 January 2016 by email but that a hard copy had not been received on 6 January 2016 and therefore there had not been proper service of the Response in accordance with section 29 of the CCA.

7.2. Pursuant to section 34(2) of the CCA I wrote to the solicitors for [*the Respondents*] (with a copy to the solicitors for [*the Applicant*]) requesting submissions from [*the Respondents*] in response to the allegation that the Response had not been properly served in accordance with section 29 of the CCA. I received such submissions with the time limit directed on 12 January 2016.

7.3. [*The Applicant's*] contentions are set out in two paragraphs of the email from [*his*] solicitors as follows:

> *The issue of mandatory requirements for service was considered by Southwood J. in* ***Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*** *[2008] NTSC 46 at [35 to 36] in relation to an application for adjudication. The section 29 provisions of the Act are the same and extend under the Act in relation to service of a Response and the Applicant therefore objects to the Response being served electronically.*
> *If you find that this is the case then it follows that we have not been properly served with a Response and within the time for service under section 29 of the Act.*

7.4. Section 29 of the CCA relevantly provides:

> *(1) 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 on:*
> *(a) the applicant and on any other party that has been served with the application: and*
> *(b) the appointed adjudicator or if there is no appointed adjudicator on the prescribed appointer on which the application was served under section 28(1)(c).*

7.5. [*The Respondents*] contend that ***Independent Fire Sprinklers*** dealt with the mandatory requirements for the filing and service of an adjudication application within a 90 day time limit as opposed to any mandatory requirement as to a method of service.

> Mildren J. in ***Independent Fire Sprinklers*** at [36] notes that the *Act does not prescribe how a document is to be served; that is covered by section 25 of the Interpretation Act*.
> Section 25 of the *Interpretation Act* (NT) provides that *a person may serve a document on an individual or body…by giving it to … a person authorised by the recipient to receive the document*.

7.6. In support [*the Respondents*] rely on *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR141 where the Court considered a decision by an adjudicator to reject a submission that service by email was in breach of the Victorian equivalent to the CCA. [*The Respondents*] concede that whilst the Victorian legislation is different to the Northern Territory legislation, the decision in *Metacorp* provides clarity on whether there is any mandatory requirement of how service is to be effected.

7.7. I note the wording in section 29(1) of the CCA that *the party **must** prepare a written response to the application and serve it on*. In my view it was on that basis that Mildren J. correctly found that the CCA does not determine how service is to be effected but only that service must be effected.

7.8. The following extracts from *Metacorp* are instructive.

[163] in Howship Holdings Pty Ltd v Leslie Young J. considered the position where the substantial dispute was whether service of a summons at a document exchange box was good service. His Honour held that the ordinary meaning of "service" being personal service merely means that the document in question must come to the notice of the person for whom it was intended. His Honour referred to authorities supporting the proposition that the means by which the person obtained the document were usually immaterial stating that;

The ordinary meaning of "service" is personal service and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains that document are usually immaterial.

[164] Unless this was so as observed further by Young J. in Howship Holdings one would get the absurd situation referred to McInerney J. in Pino v Prosser to which I have earlier referred where a party who acknowledges receiving a relevant document can be held not to been served with it.

7.9. I am not persuaded by [*the Applicant's*] argument that service by email is not proper service pursuant to section 29 of the CCA on the basis of what I have articulated above.

8. CONSTRUCTION CONTRACT

8.1. [*The Applicant*] was required pursuant to the Contract to build a residence for [*the Respondents*].

Pursuant to section 5 of the CCA a Construction Contract is defined as follows:

(i) a construction contract is a contract (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:

(a) to carry out construction work.

Construction work is defined in section 6 of the CCA as follows:

(i) construction work is any of the following on a site in the Territory:

(a) …

(b) …

(c) *constructing the whole or any part of the civil works or a building or structure forms or will form (whether permanently or not and whether or not in the Territory) part of land or the seabed (whether above or below it)*

(d) *fixing or installing on or in anything mentioned in paragraph (c) any fittings forming or to form (whether or not permanently) part of the thing (including);*

(i) *fittings for electricity gas water fuel oil air sanitation irrigation telecommunications airconditioning heating ventilation fire protection cleaning the security of the thing or the safety of people; and*

(ii) *lifts escalators insulation furniture or fittings*

8.2. I am satisfied that the Contract is a construction contract as defined by the CCA.

9. APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA

9.1. To satisfy the requirements of section 28 of the CCA:

9.1.1. within 90 days after a payment dispute arises [*the Applicant*] must prepare a written application for adjudication, serve the application on the other party to the contract and on a Prescribed Appointer

9.1.2. [*the Applicant*] must prepare the application in accordance with and the application must contain the information prescribed by the Regulations

9.1.3. the application must set out the details of the construction contract and the payment claim that has given rise to the payment dispute

9.1.4. [*the Applicant*] must attach information and documentation to be relied upon by the party to the adjudication.

[The Applicant's] Payment Claims

9.2. The Application contains four claims for payment as follows:

Claim 1. *a claim for the two (2) unpaid invoices for 4 August 2015 in the sum of $33,118.00 including GST;*

Claim 2. *a claim for interest pursuant to Clause A15 of Appendix A of the Contract in the sum of $2,095.12 (being 127 days at $16.497 per day);*

Claim 3. *a claim for the Applicant's legal costs for attending to the Application in the sum of $9,398.40 including GST; and*

Claim 4. *a claim for the Applicant's costs in relation to the Adjudicator's fees.*

9.3. The claims for payment are the subject of a final payment claim by [*the Applicant*] in the form of Invoice No. 0870 dated 4 August 2015 and Invoice No. 1010 dated 4 August 2015 which [*the Applicant*] contends are fully compliant with the Contract which is not disputed by [*the Respondents*].

At Tab 2 of the Application, [*the Applicant*] provides an extract of clause 21 of the Contract which deals with progress payments. Clause 21 of the Contract provides that payment of invoices submitted by [*the Applicant*] must be paid within 7 days.

9.4. There is no issue between the parties that Invoices No.s 0870 and 1010 have not been paid by [*the Respondents*] within the 7 day period.

9.5. [*The Respondents*] do not in the Response contend that the Application has not been prepared and served in accordance with section 28 of the CCA.

9.6. [*The Respondents*] maintain that the amounts claimed in Invoices 0870 and 1010 are not payable for other reasons and I will deal with these contentions below.

9.7. I am satisfied that the Application has been made within the time limits prescribed by section 28 of the CCA.

10. COMPLEXITY

10.1. I am satisfied that it is possible to fairly make a determination on this adjudication.

11. INVOICE 0870 (VARIATIONS)

11.1. [*The Respondents*] contend that the amount claimed is not due for a number of reasons:

11.1.1 no Cost Variation Notice was given by [*the Applicant*] to [*the Respondents*] in accordance with the Contract;
11.1.2 a payment claim for the purposes of the CCA is limited to *matters arising under the Contract*;
11.1.3 the costs the subject of Invoice 0870 have not arisen under the Contract;
11.1.4 and by reason of the preceding three sub-paragraphs the payment claim in respect of 0870 is invalid.

11.2. Invoice 0870 claimed for *extras above contract price* in respect of:

- upgrade ceiling battens;
- supply and fix Insulbrik to external walls;
- granite bench tops

[*The Respondents*] do not deny that this work was done but does state at paragraph 5.3 of the Response that they *were of the belief that there was an allocation for the matters contained in Invoice 0870 in the original quote from the Applicant.* There is no further support for this contention and on a balance of probabilities I do not accept this argument.

11.3. The main thrust of [*the Respondents*'] argument is that no Cost Variation Notice was given.

11.4. The Application contains a letter from the solicitors for [*the Applicant*] to the solicitors for [*the Respondents*] dated 16 December 2015 which specifically responds to [*the Respondents'*] contention that as no notice in writing was given regarding the variations no payment is due. That letter contains the following salient paragraph:

The fact that the three variations were directed by your clients and carried out by the builder and that your clients are enjoying the benefits of those variations are not in contention. As we understand it your clients now claim they have no obligation to pay for them because there was no agreement in writing. As you know this position simply cannot be sustained.

[*The Respondents*] do not put in issue or deny any of the matter alleged in the preceding italicised paragraph.

11.5. Whilst the Contract does provide that a Variation Notice must be submitted before a variation is undertaken there is nothing in the Contract which amounts to a bar on claims if the Variation Notice is not given. In my view the provisions relating to a Variation Notice are to allow the parties to agree the cost of a variation.

The Contract does provide:

- at clause 15(e) *The cost of all extra Works will be added to this contract price. Where a price for any variation has been agreed it will be added to the next Progress Payment.*
- *at clause 15(f) Where a price has not been previously agreed and the Builder must carry out the variation the price will be the cost of the extra works plus the percentage specified in Item 18 Appendix A.*

11.6. [*The Respondents*] do not take issue with the cost of the variation and I am persuaded that the claim is *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.

11.7. I am not persuaded by the contentions of [*the Respondents*] that Invoice 0870 should not form part of the Application because it is invalid as the costs have not arisen under the Contract.

12. INVOICE 1010 (FINAL STAGE)

12.1. [*The Respondents*] contend that Invoice 1010 is not due for the following reasons:

12.1.1 at the time the Invoice was issued the Works had not been completed (and have still not been completed);

12.1.2 the definition of payment claim requires the claim to be 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 a*nd as the obligations of [*the Applicant*] have not been performed in accordance with the Contract the payment claim is not valid;

12.1.3 [*the Applicant*] has not performed its obligations in accordance with the Contract;

12.1.4 the Final Stage as defined by the Contract in clause 23 has not been satisfied;

12.1.5 and by reason of the above the part of the payment claim dependent on Invoice 1010 is invalid.

12.2. Pursuant to clause 23 of the Contract the Final Stage is complete when *An Occupancy Certificate – the stage when the Occupancy Certificate has been granted for the works and a copy of the Occupancy Certificate has been given to the owner.*

There is nothing in the Contract which states who is required to give the Occupancy Certificate to [*the Respondents*].

At paragraph 6.11 of the Response [*the Respondents*] concede that the Occupancy Certificate was received.

[*The Respondents*] do use somewhat confusing terminology in that there is reference to Occupancy Permit and Occupancy Certificate. Given the context in which these terms are used in the Response I am persuaded that they are one in the same document.

12.3. [*The Respondents*] argue that [*the Applicant*] did not provide a copy of the Occupancy Certificate however the Contract does not require [*the Applicant*] to do so.

12.4. I am persuaded on a balance of probabilities that as the Occupancy Certificate was received by [*the Respondents*] on 7 August 2015 (as conceded by [*the Respondents*] at paragraph 6.11 of the Response) and as Invoice 1010 was issued after that date the Final Stage had been achieved that [*the Applicant*] was entitled to issue Invoice 1010. That Invoice is not invalid.

12.5. [*The Respondents*] argue that as the works were not complete the part of the payment claim the subject of this adjudication which relies on Invoice 1010 is invalid. I am not persuaded by this argument. Whilst I accept that parts of the works may not have been completed in accordance with the Contract that does not mean that Invoice 1010 was invalid but may be a ground upon which [*the Respondents*] can argue that there is a set off in relation to rectification costs.

13. FINAL STAGE

13.1. Pursuant to clause 23 of the Contract the Final Stage is reached under various circumstances relevantly:

23(a) the Final Stage is complete when

(i) the Works which require an Occupancy Certificate the stage when the Occupancy Certificate has been granted for the Works and a copy of the Occupancy Certificate has been given to the owner.

23(f) if the owner possesses or uses the Works or any part without the written agreement of the Builder the date of the Final Stage is the date of possession or use unless the Final Stage has already been reached.

13.2. I refer to paragraph 12.4 and that [*the Respondents*] received the Occupancy Certificate on 7 August 2015 and by that date the Final Stage had been reached.

13.3. [*The Applicant*] contends that the Final Stage was reached earlier when [*the Respondents*] possessed or used the house that was being constructed without the written agreement of [*the Applicant*]. [*The Respondents*] do not contend that they had the written agreement of the Builder to use the Works but that they did have permission to do so.

13.4. At paragraph 4.14(g) of the Response says that [*the Applicant*] informed them that they could reside in the residence but only took up residence after being shown a copy of the Occupancy Certificate on 7 August 2015.

13.5. [*The Applicant*] says that on or about 23 June 2015 [*the Respondents*] occupied the house and on that date Final Stage was reached. [*The Applicant*] denies that any consent was given for such occupation.

13.6. In support of [*the Applicant's*] allegation that [*the Respondents*] occupied the premises the Application contains a statutory application of [*CS*] in which she states that:

13.6.1 she is part time cleaner and was employed by [*the Applicant*] to clean the house

13.6.2 she attended the house to clean in late June 2015 but returned on 14 July 2015 after complaints by [*the Respondents*] that the cleaning was not satisfactory. [*CS*] states that on that day whilst at the property [*one of the Respondents*] had a meeting in the house with three other ladies and they were discussing the coming school term.

[*CS*] goes on to say that whilst at the house she noticed clothes lying in most rooms and that the beds were made up and looked like they had been slept in and that the child's bedroom was messy with sheets wedged into the louvers. She states further that [*one of the Respondents*] went into one of the bedrooms to have a sleep and that [*the other Respondent*] was preparing food in the kitchen and that the bathrooms looked occupied as they contained toiletries. Further there were framed photographs throughout the house and there were children's toys in a number of the rooms.

13.6.3 [*CS*] again attended at the residence on 16 July 2015 to carry out further cleaning.

13.6.4 [*CS*] carried out further cleaning and that there were a series of texts relating to the home and the question of whether the home was occupied and by when.

- 20 July 2015 – text [*CS*] to [*one Respondent*] to ascertain attendance to clean.
- 20 July 2015 – text [*Respondent*] to [*CS*] at 8.00pm *Sorry [CS] for the very late reply. [L] goes to sleep around 10.00 until roughly 1.00pm is there any chance you coming any earlier or in the arvo ? sorry.*

- 30 July 2015 – text [*Respondent*] to [*CS*] Y*ep tomorrow morning should be fine. My mum will be there with [L] as I have to work. He goes to sleep for 10ish so maybe just do his room first if that OK? You might just need to look at all the windows as a lot of them still have paint splatter on them.*

13.7. In support of [*the Respondents*'] contention that occupancy only took place in August the Response contains the following:

13.7.1 Statutory declaration from [*CAD*] stating that in late August she attended the house to look after the [*the Respondent*s'] child so they could move personal items from the shed to the house.

13.7.2 Statutory declaration of [*SF*] in which states that:

- she attended the house on a number of occasions in July and August and that the [*Respondents*] were living in the shed; and
- in mid-August she was informed by [*one of the Respondents*] that the cleaner had damaged a dressing table.

13.8. A statutory declaration of [*one of the Respondents*] in which he states that [*the Applicant*] authorised the [*Respondents*] to live in the house but that they did not do so until 7 August 2015.

13.9. I have carefully considered all of the material put to me by [*the Applicant*] and [*the Respondents*] and on a balance of probabilities I accept [*the Applicant's*] version that the [*Respondents*] took occupation of the house on or about the 23 June 2015. I am particularly persuaded by this view given the texts messages to which I have referred above and which were not denied or refuted by [*the Respondents*] in the Response.

14. PAYMENT

14.1. [*The Applicant's*] solicitors wrote to [*the Respondent*'s] solicitors on 16 December 2015 claiming that [*the Respondents*] were liable to pay for the variations and the final payment on the basis of occupation of the premises and the provisions of clause 23(f) of the Contract given that the Final Stage had been reached.

14.2. [*The Applicant*] contends that pursuant to clause 24(b) of the Contract the amount of the final claim was due and payable.

Clause 24 of the Contract provides relevantly:

(a) on completion of the Final Stage the Builder is entitled to receive the unpaid balance of the Contract Price together with any other money that is payable under this Contract;

(b) the amount due must be paid to the Builder within 5 days of a written request which gives particulars of the claim;

…

(f) the Owner is not entitled to withhold any monies from the Builder for works which are:

(i) deemed to be practically complete ;and

(ii) *which are minor in nature and can be properly corrected or rectified within the defects liability period.*

14.3. [*The Applicant*] contends that the Final Payment Claim comprised of Invoices 0870 and 1010 both dated 4 August 2015 meant that [*the Respondents*] were due to make payment by 11 August 2015 which both parties concede was not done.

14.4. Accordingly, subject to any question or setoff I determine that [*the Applicant*] is entitled to be paid $33,118.

[*The Applicant*] contends that any amount payable attracts interest at the rate of 20% per annum pursuant to A15 of the Contract. There is no denial by [*the Respondents*] that such interest is payable and I determine that interest is payable if any amount is due to [*the Applicant*].

15. SETOFF

15.1. [*The Respondents*] contend and refer to paragraphs 4.18, 4.26 and 4.27 of the submissions in support of [*their*] position that the Works were not complete. These paragraphs contain a catalogue of alleged defects. To successfully claim setoff [*the Respondents*] must prove that the Works were defective and must prove the cost of such rectification.

15.2. The only information contained in the Response relating to the cost of rectification are found at paragraph 3.5 of the submissions in the Response and Document 15 of the Response.

15.3. Paragraph 3.5 states relevantly:

Alternatively the costs to complete the Works and the costs to make good the defects or faults identified by the Respondents should be set off against any amounts owing (if at all) by the Respondents. In this regard, the Respondents:

a. have obtained a quote from [redacted] Builders in relation to other matters required to be done to complete the house in accordance with the Permit to Build Drawings. This quote is for the amount of $29,169.90 plus GST (Document 15); and

b. are yet to obtain a quote in relation to the installation of the rangehood with an anticipated cost of $700-$1,000.

Document 15 is a document on the letterhead on [redacted] Builders referring to quotation 248.

Dear [redacted]

Further to your request please find below details of a Lump Sum quotation for the construction works at the abovementioned address as per the drawings provided.

This quotation is based on the following inclusions and exclusions:

Inclusions

- *removal of existing lights and fans to external V'dahs and reinstate post custom orb ceiling cladding?*

- *removal of existing damage wall cladding fixings and reinstate with new*
- *supply and installation of new custom orb sheeting to the complete underside of the existing V'dahs fixed as per the DTC Details including all flashings and fixings as per the plans provided*
- *removal of existing ridge capping and roof sheets (where required) so as the rafters can be exposed and re-welded correctly as per the Ridge Joint Detail 2 on the drawings provided reinstatement of removed roof sheets and ridge cap*
- *supply and installation of new flush panel redicoat hollow core internal doors utilising existing hinges and furniture.*

The total price of the above works is $29,169.60 plus GST.

Of the remedial works bullet points 1, 3 and 4 above relate to ceilings in the verandahs with which I will deal with below.

16. CEILINGS TO VERANDAH

16.1. In the Application, by a letter dated 16 December 2015, [*the Applicant*] contends that [*the Respondents*] were as at that date attempting to shift the installation of ceilings to the verandahs to the scope of works to be performed by [*the Applicant*]. [*The Applicant*] explains that from the outset of the Contract, which included several viewings by [*the Respondents*] of display homes, [*the Respondents*] indicated that they did not wish to have the verandahs included as this was at a cost of $25,000 which was too expensive and that they would later install the ceilings. As a consequence the word *optional* was removed from the plans by the architect who also discussed this issue with [*the Respondents*] the word *optional* was removed so that [*the Respondents*] could later install the ceilings without having to obtain a further building permit.

16.2. [*The Respondents*] contend that the ceilings to the verandahs were to be installed by [*the Applicant*] and refer to the approved plans which contain a requirement to install Hardiflex ceilings in the verandahs and to the assessment by [*a building consultant*] in which he states after a desk top study that the verandah lining is called up in the permit to build but has not been installed.

16.3. I have perused their response including the statutory declarations and find no denial by [*the Respondents*] of the matters referred to in paragraph 16.1 above.

I also note that at paragraphs 4.18, 4.26 and 4.27 of the submissions in the Response that [*the Respondents*] do not contend that the ceilings to the verandah had not been installed and that [*the Applicant*] was required to do so.

16.4. I am satisfied on a balance of probabilities that the ceilings to the verandahs were not part of [*the Applicant's*] scope.

17. PROOF OF RECTIFICATION COSTS

17.1. It is incumbent upon [*the Respondents*] to prove the costs of rectification and as I have indicated above there are only two dollar figures provided being in relation to the rangehood and the rectification referred to in the quotation of [redacted] Builders.

17.2. As early as 24 August 2015 (paragraph 4.18 of the submissions in the Response) [*the Respondents*] have maintained that the rangehood was to be installed by [*the Applicant*] yet in the Response which is dated 5 January 2015 [*the Respondents*] say that no quotation has been obtained for the installation of the rangehood however there is an anticipated cost of $700-$1,000. There is no estimation from anyone other than that which is contained in the submissions to the Response and I am not satisfied that [*the Respondents*] have the skill or expertise to assess insulation costs of a range hood and on a balance of probabilities I am not satisfied that [*the Respondents*] have proven the cost of installation.

17.3. I have determined that the ceilings were not within [*the Applicant's*] scope and accordingly the quotation from [redacted] Builders is of little value in assisting me to determine what amounts can be set off against the claimed in the Application. Even if I were to find that the remedial works referred to in bullet points 2, 4 and 5 of the [redacted] Builders' quotation are matters appropriate for the account of [*the Applicant*] and the subject of a setoff I have no proof from [*the Respondents*] as to what amounts relate to the ceilings in the verandah and what amounts relate to the other work and accordingly I determine that [*the Respondents*] have not discharged the burden of proving the cost of those works which are to be rectified.

17.4. I determine that [*the Respondents*] must pay [*the Applicant*] $33,118.00 inclusive of GST by 26 January 2016.

18. INTEREST

18.1. I have determined that any amount payable to [*the Applicant*] attracts interest at the rate of 20% per annum and as the amount of $33,118.00 was due and payable to [*the Applicant*] on 12 August 2015 that sum attracts interest.

18.2. I determine that [*the Respondents*] must pay [*the Applicant*] interest at 20% per annum calculated from 12 August 2015 to 19 January 2016 in the sum of $2,888.00 by 26 January 2016.

19. COSTS

19.1. Both parties contend that I should invoke the provisions of Section 36(2) to award costs on the basis of the other party's frivolous or vexatious conduct or that the other party has made unfounded submissions.

19.2. The test for determining whether a proceeding is vexatious can be found in ***Attorney General v Wentworth* (1988) 14 NSWLR.**

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*.

The test is ***Attorney General v Wentworth*** has been approved in Western Australia in *Katz v Watson HJ & Associates* (2008) 173 IR 113.

19.3. Proceedings are said to be frivolous if they are such that *no reasonable person could properly treat as bona fide and contend that [a Plaintiff] had a grievance which [it] was entitled to bring before the court which test was used by the Full Court of the WA Supreme Court* in ***Re Buck [SM]; ex-parte Coolgardie Gold NL v Copperfield Gold NL*** **(unreported WASC10 26 May 1995)**.

19.4. I am not persuaded that either party has acted in a way that requires me to invoke the provisions of Section 36(2) and I decline to do so.

19.5. [*The Applicant*] contends that pursuant to section 46(7) (I assume the reference should be to reference 46(6)) of the CCA I should order [*the Respondents*] to pay the costs of the adjudicator.

19.6. On the same basis that I have declined to invoke the provisions of clause 36(2) of the CCA, I decline to invoke the provisions of section 46(6) of the CCA.

19.7. I determine that each party should pay their own legal costs.

19.8. I determine that each party should pay the adjudicator's costs in equal shares.

19.9. At the commencement of this adjudication, [*the Applicant*] provided the adjudicator with a security deposit which has been used to satisfy the adjudicator's costs in the sum of $5520.00 and accordingly I determine that [*the Respondents*] must pay [*the Applicant*] the sum of $2760.00 by 26 January 2016.