# Adjudicator's Determination

**Pursuant to the**

***Construction Contracts (Security of Payments) Act, NT (Act)***

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|---|---|
| Adjudication Number | **39.18.04** |
| Prescribed Appointer | **NT Law Society** |
| Adjudicator | **David Richard Baldry**[1] |
| Applicant: | |
| Applicant's contact details: | |
| Applicant's solicitor: | |
| Applicant's solicitor's contact details and applicant's service address: | |
| Respondent: | |
| Respondent's Solicitor: | |
| Respondent's solicitor's contact details: | |
| Project: | |
| Adjudicated Amount to be paid by Respondent | **$10,673.93** |
| Due date for payment of Adjudicated Amount | **Within 7 days of the date of release of this determination** |
| Adjudication Fees Apportionment | Applicant: 50%<br>Respondent: 50% |
| Date of Determination or Dismissal | 23 April 2018 |

1 Registered Adjudicator Number 39

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| Payment Claim | Claimed Amount (relevant to adjudication): **$17,426.76 or $15,866.38** |
| Notice of Dispute / Response to Payment Claim | Notice of Dispute Amount : NIL |
| Amount Claimed in adjudication application: | **$17,426.76 or $15,866.38** |
| Adjudication Application: | Dated: 20 March 2018 |
| Adjudicator Appointment: | Dated: 22 March 2018 |
| Adjudication Response: | Dated: 4 April 2018 |

## DETERMINATION

1) I, David Richard Baldry[2], the adjudicator appointed pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) (**Act**), for the reasons set out below, determine that:

   a) the Respondent must pay the applicant $10,673.93, (the "adjudicated amount") comprising $10,388.37 incl. GST in respect of invoice no. 8 in the 17 December Payment Claim and interest thereon in accordance with s. 35(1)(b) of the Act from 16 January 2018 to 23 April 2018 in the sum of $285.56; and

   b) the Respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

## APPOINTMENT OF ADJUDICATOR

2) Pursuant to s. 28(1)(c)(iii) of the Act, on 20 March 2018 the Applicant served its adjudication application dated 20 March 2018 (**Application**) and accompanying submissions and supporting documents on the Northern Territory Law Society (**LSNT**), which is a prescribed appointor under the Act.

3) On 22 March 2018, the adjudication application was referred to me as adjudicator by the LSNT pursuant to s. 30(1)(a) of the Act and I collected the adjudication application and accompanying submissions and supporting documents from its office on that day.

4) On 22 March 2018, I sent a letter dated the same date to the Applicant's solicitor and the Respondent by email, which amongst other things of a procedural nature:

   a) notified them of my appointment as the adjudicator of this matter by the LSNT;

   b) advised that I did not consider that any circumstance existed which would require, pursuant to s. 31 of the Act, that I be disqualified as the adjudicator of this Application; and

   c) asked them whether they had any objection to my appointment as adjudicator.

5) On 22 March 2018 the Applicant's solicitor informed me that the Applicant was not aware of any circumstances, which would disqualify me from adjudicating the payment dispute under s. 31 of the Act.

6) Neither the Respondent not the Respondent solicitor, [redacted] [redacted] have at any time objected to my appointment as adjudicator.

7) On 4 April 2018, pursuant to s. 34(3)(c) of the Act, the parties' solicitors to this

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[2] Registered Adjudicator Number 39

adjudication and the parties' solicitors to another adjudication between different parties (the latter of which I had not then been appointed to adjudicate – **Other Adjudication**) consented to me simultaneously adjudicating both this adjudication and the Other Adjudication. I was subsequently appointed by the LSNT to adjudicate the Other Adjudication.

8) On 4 April 2018, a hard copy of the Respondent's Response and supporting documents was delivered to my chambers (**Response and Supporting Documents**). I also received a copy of the Response and Supporting Documents on that day by email from the Respondent's solicitor.

9) I note that I make a finding in the section of this determination headed 'Adjudication Response' that the Applicant was served with a copy of the Response on 4 April 2018.

## DATE FOR MAKING DETERMINATION

10) I calculated that the last date for me to make my determination pursuant to s. 33(1)(b) of the Act would be on Wednesday 18 April 2018, unless the time for me to do so was extended pursuant to the provisions of s. 34(3)(a) of the Act.

11) On 16 April 2018, the Adjudication Registrar consented to the extension of the time for me to make my determination to Monday 23 April 2018 and on 16 April 2018 I extended the time, for me to do so, to Monday 23 April 2018 and notified the parties' solicitors accordingly.

## DOCUMENTS

12) On 22 March 2018 the LSNT provided me with:

a) the original of the Applicant's solicitor's letter to the LSNT dated 20 March 2018 serving the adjudication application on it;

b) a copy of the LSNT's letter dated 22 March 2018 notifying of my appointment as adjudicator; and

c) the original adjudication application dated 20 March 2018, prepared on behalf of the Applicant, which contained the following documents:

i) a cover sheet;

ii) a table containing prescribed appointer, party name and address details and other pertinent information about the Application;

iii) a general contents page;

iv) a submissions contents page;

v) 7 pages of submissions; and

vi) the following 8 annexures listed in the contents as being:

- Annexure 1 Email from the respondent to the Applicant dated 11 December 2017.
- Annexure 2 Respondent's spreadsheet, emailed on 20 December 2017.
- Annexure 3 Payment Claim dated 5 January 2018.
- Annexure 4 Response to Payment Claim, dated 9 January 2018.
- Annexure 5 Email from applicant's lawyers dated 11 January 2018.
- Annexure 6 the reasons for decision in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1.
- Annexure 7 Letter from Applicant's lawyers to Respondent's lawyers dated 6 February 2018.
- Annexure 8 Statutory declaration of [redacted] dated 20 March 2018 with annexure ([redacted] **Declaration**),

(collectively, **Application and Supporting Documents**)

13) On 4 April 2018, the original the Response and Supporting Documents dated 4 April 2018 was provided to me by being delivered to my chambers in a single lever arch ring binder, which contained:

a) a cover sheet;

b) a procedural formalities sheet providing adjudicator, party details, party legal representatives details and party service details;

c) 6 pages of submissions; and

d) a statutory declaration by [redacted] declared on 4 April 2018, together with 12 annexures to same marked '[redacted]-1' to '[redacted]-12' ([redacted] **Declaration**).

## BACKGROUND

14) The contract the subject of the Application **(Contract)** was predominantly an oral contract with some written components. I make further reference to this later.

15) The Applicant has submitted that the Contract was orally entered into between the Applicant and the Respondent, during a meeting on 1 November 2017. The evidence in support of that submission is contained in the Hunter Declaration[3].

16) [redacted] refers to a meeting, which took place at the Respondent's [redacted] premises, also attended by two (2) personnel of the Respondent named [redacted] and [redacted] on 1 November 2017 and, save for a quoted discussion concerning rates to be charged by the Applicant, without providing much detail of the discussions at that meeting, stated that the discussions:

a) related to: the terms on which the Applicant might agree to do the

[3] Paragraphs 3 to 6.

work; and

b) that [redacted] agreed to those terms.

17) The Respondent has not made a submission concerning the date upon which the Contract was entered into, but has provided the following evidence in the [redacted] Declaration:

a) that a meeting, between the same persons took place on 1 or 2 November 2017 at the Respondent's [redacted] premises[4];

b) in a telephone conversation between he and [redacted] in November 2017 (the exact date of which is not stated, but, which impliedly, and I find, took place after the meeting on 1 or 2 November 2017, [redacted] said to [redacted] *"words to the effect that* [the Respondent] *would engage* [the Applicant] *to carry out the work"*;[5] and

c) he sent a contract purchase order numbered PKB9375 by email to [redacted] on 12 December 2017 (**Purchase Order**)[6].

18) Curiously a copy of an email in exactly the same terms is included in the Application and Supporting Documents, but is dated 11 December 2017[7].

19) Both emails appear to have been sent by [redacted], who I presume is one of the Respondent's personnel, but the sign off to such email is by [redacted]. So I find that, it was sent by [redacted] on behalf of [redacted], but nothing turns on that circumstance.

20) The Applicant's submissions state that that email sets out the rates previously agreed.

21) [redacted]'s evidence about what occurred during the meeting on 1 or 2 November 2017 can be summarised as follows:

a) the drawings were examined and there were discussions about the methodology of how to perform the works; and

b) [redacted] said he would charge $120 as supervisor, $100 for his labourers, charge $400 per day for pump hire and $1,500 plus GST for mobilisation (the latter of which [redacted] understood would include all travel time for uplifting personnel and materials to the work site ready to commence work and for travel departing from the site, but [redacted] did not then state what mobilisation would include) and that [redacted] agreed to the quoted amount for mobilisation.

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4 Paragraph 12 of the [redacted] Declaration

5 Paragraph 14 of the [redacted] Declaration

6 Paragraph 16 of the [redacted] Declaration and annexure '[redacted]-3'

7 At tab 1

22) The Purchase order stated the following:

> *"Hi ███,*
>
> *As discussed your order number is PKB9375, for the agreed rates of:*
>
> *Allan - $120.00 an hour*
>
> *Labour - $100.00 an hour*
>
> *Mobilisation - $1,500.00*
>
> *Hire of Pump - $400.00 a day;*
>
> *Accommodation and Meals to be provided by* [the Respondent]*.*
>
> *Address for the accommodation is: ███ ███"*

23) Whilst the Purchase Order did not state that those rates and charges were all stated as being, exclusive of GST, it appears that both parties have proceeded on the basis and I therefore also find that that was the case.

24) As the evidence provided by both declarants about contract offer and acceptance negotiation discussions (which is critical for deciding when a substantially oral contract was entered into) is scant, it is difficult for me to make a definite finding about when the contract was entered into.

25) However, I consider that I should do the best I can, given the available evidence, to make that finding. I find, on the balance of probabilities, that the contract was entered into on either **11 or 12 December 2017**, when the Purchase Order was received by the Applicant, because:

    a) the preamble in the Purchase Order of referring to a discussion having occurred between ███ and ███ lend support, on a fairly contemporaneous basis, to the probable occurrence of the discussion ███ said he had with ███ on some date in November 2017 having happened later in time to the meeting on 1 or 2 November 2017;

    b) I accept the veracity of ███'s the evidence of that discussion, which was to the effect that he told ███ that the Respondent <u>would at some future time</u> engage the Applicant to carry out the work;

    c) The Purchase Order is when that engagement occurred consummating the prior discussions during which, the Applicant had made various offers about the terms of contract and the Respondent had indicated they were acceptable in principle, but the contract engagement would take place subsequently.

26) I note that nothing turns, in this adjudication, on whether the Contract was entered into on 1 or 2 November 2017 or on 11 or 12 December 2017.

27) I also find, due to what has been stated in both of the statutory declarations provided by the parties, that the works the subject of the Contract, was to

perform and related works at the (**Contract Works**), but, due to lack of evidence before me, I am unable to state with any particularity, what those related works entailed.

28) I also find that, from what was stated in the Declaration[8], (there being nothing stated in the Declaration about what follows) that:

a) while the Applicant's employees were at the to perform the Contract Works, they had also agreed to perform:

i) rectification works (**Rectification Works**) of works said to have been defectively performed by (being works); and

ii) other unspecified works for (**Other Works**)

b) the Rectification Works and Other Works would be paid for by ;

c) would separately enter into a contract with the Applicant for the Applicant to perform the Rectification Works and Other Works;

d) Even so, between 15 and 17 December 2017, in a telephone conversation between of the Respondent and , it was agreed that the Applicant could invoice the Respondent for the Rectification Works and Other Works and the Respondent would on-charge such invoice to .

29) I also find that the rates, which would be used for paying the Applicant for performing the Contract Works were those set out in the Purchase Order, exclusive of GST. I note, however, that they do not include any provision fallowing the Applicant to charge for materials it used when performing the Contract Works or in what manner.

30) I find that the Contract was partly oral and partly in writing, the written parts being:

a) a number of pre-contractual negotiation emails;

b) an email attaching some drawings (which drawings were not been included with the papers provided to me, but which appear to have been emailed by to on 31 August 2017); and

c) an email in response sent on 1 September 2017 commenting about such drawings; and

d) the Purchase Order.

31) There is also no dispute between the parties in this adjudication and I find that the Contract did not did not contain written provisions about:

a) how a party must make a claim to another for payment;

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8 Paragraphs 16, 17 and 19 of the Declaration and annexure ' -3'

b) when and how a party must respond to a payment claim made by another party;

c) by when a payment must be made; or

d) interest on overdue payments; and.

in those circumstances, the terms in Divisions 5, 6 and 7 of the Schedule to the Act are implied into the Contract, pursuant to sections 19, 20 and 21 of the Act.

32) There is also no dispute between the parties in this adjudication and I find on the balance of probability, based upon evidence in the statutory declarations provided by the parties, that the on-site the Contract Works were performed on Friday 15 December 2017, Saturday 16 December 2017 and Sunday 17 December 2017.

33) The dispute the subject of this adjudication relates to the following 3 invoices rendered by the Applicant to the Respondent, none of which were signed when first issued to the Respondent, none of which the Respondent has paid in whole or part:

a) Invoice no. 4 dated 10 December 2017 for $900.38 inclusive of GST;

b) Invoice no. 8 dated 17 December 2017 for $15,866.38 inclusive of GST; and

c) Invoice no. 9 also dated 17 December 2017 for $660 inclusive of GST.

34) I make further detailed reference to those emails below.

## APPLICATION FOR ADJUDICATION

35) The Application makes claims on the following alternative basis:

a) The primary submission made is to the effect that:

i) the individual invoices numbered 4, 8 and 9, when first sent to the Respondent by email, were not payment claims, because for reasons, which I will refer to in more detail in the sections of this determination entitled 'Implied Terms' they did not satisfy the terms implied into the Contract pursuant to the Act for making payment claims; and

ii) only one valid payment claim under the Act was made when copies of all 3 invoices (this time each of which having been signed by the Applicant), were delivered to the Respondent by hand on 5 January 2018 under cover of a letter from [redacted] to the Respondent dated the same date.

b) The secondary submission made is to the effect, that if I find that each of the 3 invoices were valid payment claims, when they were first provided to the Respondent by email, the Applicant will only pursue adjudication in this adjudication of the payment dispute arising in respect of the amount claimed in invoice no. 8.

36) In both alternative submissions, the Applicant is claiming the total amounts claimed in each of the relevant invoices, because the Respondent has not paid any part of the amounts claimed in them, together with interest thereon from the date upon which the amounts claimed were due to be paid at the rate applicable to the interest rate provision implied under the Act.

## ADJUDICATION RESPONSE

37) Pursuant to s. 29(1) of the Act, 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.

38) The Respondent served the Response and Supporting Documents on me on 4 April 2018, by email and by delivery of a hard copy paper set of same to my chambers on that day.

39) Due to my finding in paragraph 55 hereof that the Respondent had until 5 April 2018 to serve a copy of the Response on me, I now find that the Respondent served a copy of the Response and Supporting Documents on me within the 10 working day period required under the Act.

### *Preliminary Issue – Service of Response on Applicant*

40) On 10 April 2018, when providing further submissions I requested be provided on 8 April 2018, the Applicant's solicitor raised as a preliminary issue a submission to the effect that:

a) the Respondent had not served a copy of the Response upon the Applicant within the 10 working day period required under s. 29 of the Act; and

b) in those circumstances I should not take the Response into consideration when preparing this determination.

41) I decided that it was appropriate for me to deal with this submission as a preliminary issue, because if I were to find that the Response had not been served on the Applicant within the time required by the Act, it may not be appropriate for me to take it into account.

42) As is readily apparent from the voluminous submissions, which follow, this became a hotly contested issue in the adjudication.

43) The Applicant's submissions to that effect were as follows:

***"Preliminary issue - service of response***

1. *A preliminary issue which arises before consideration is given to the matters upon which submissions are sought is the question whether the adjudicator has power to have regard to the respondent's response at all, by reason of section 34(1)(a)(ii) of the Act.*

2. *The respondent respectfully submits that the adjudicator has no such power to consider the respondent's response in this instance.*

3. *Section 34 of the Act provides the manner in which the adjudicator is to exercise the power in section 33 to make a determination.*

4. *Section 34(1)(a)(ii) provides that the adjudicator must, if possible, make the determination on the basis of the application and its attachments and, if a response has been served in accordance with section 29, the response and its attachments.*

5. *The response does not comply with section 29 because it was not served on the applicant. The respondent's lawyers simply delivered the response to the applicant's lawyers without asking whether or obtaining confirmation that they had instructions to accept service on behalf of the applicant.*

6. *The applicant's lawyers are not aware of any decision of the Supreme Court of the Northern Territory in relation to the effect of a failure to comply with section 29 of the Act.*

7. *A similar provision has been the subject of judicial determination by the Supreme Court of Western Australia.*

8. *The equivalent provision in the Western Australian legislation, section 32 of the Construction Contracts Act (2004), was considered in the decision of Re Graham Anstee-Brook; Ex parte Karara Mining Ltd [No 2] [2013] WASC 59 (with which the court in Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd [no 2] [2013] WASC 161 agreed). In that case, the response had not been served in accordance with section 27 (the equivalent of section 29) and the adjudicator accordingly ignored the response in reaching his determination.*

9. *The Supreme Court of Western Australia upheld this approach, and found that the adjudicator was under no obligation to consider anything in the response.*

10. *In reaching its decision, the Court referred to a previous decision of Witham v Raminea Pty Ltd [2012] WADC 1, in which the adjudicator had not considered a response on the basis it had been served late. The Western Australian District Court at [59] found that the WA Act "does not allow the adjudicator a discretion to consider a response prepared and served otherwise than in accordance with CCA s 27". The WA Supreme Court agreed that a response filed out of time is not a response for the purposes of s 27 of the Act and there is accordingly no obligation to consider it (see [20], [22]).*

11. *A respondent who does not serve a response on the applicant is in no different position than a respondent who serves out of time. In each instance, there is a failure to comply with section 29 of the Act.*

12. *Accordingly, the adjudicator has no power under section 34(1)(a)(ii) to have regard to a non-compliant response in reaching a determination. The adjudicator should proceed to determine the application solely on the basis of the Application and its attachments.*

13. *The Court in Re Graham Anstee-Brook speculated, in obiter, that there may be circumstances in which an adjudicator who received a response out of time might properly have regard to the material in the response in making his or her determination. However, that is not a question which it was required to consider to resolve the matter and the applicant submits that it is an erroneous*

*approach given the express terms of section 34(1)(a)(ii) and the terms and context of section 34(1)(b).*

*14. The applicant submits that the adjudicator should act consistently with section 34(1)(a)(ii) of the Act and refuse to have regard to the response, consistent with the position upheld by the Supreme Court of Western Australia.*

*15. If the adjudicator proceeds in that manner (as he should), it is inappropriate to seek submissions on the issues identified to the extent they arise from the respondent's response. The submissions below are provided subject to this primary submission."*

44) On 11 April 2018 I made the following request to the Applicant's' solicitor:

*"I have not as yet decided whether to make a finding in my determination that the Response has not been served upon the Applicant.*

*.....*

*I request that the Applicant provide me with the following further information and submissions:*

1. *Whether the Applicant or any of its personnel have been provided the Response and supporting documents by [redacted] or any of its personnel, and, if so, when that occurred.*
2. *......*

*I request that the applicant do so by email to me (and copied to the Respondent's solicitor)* ***by 5:00 pm on 11 April 2018 CST****.*

*.....*

*If I do make a finding that a copy of the Response and supporting documents was not served on the Applicant or received by the Applicant in the time required by the Act, I will disregard anything stated in the Response and will also disregard any further submissions provided to me by the parties concerning matters raised in the Response."*

45) Later the same day I sent an email to the parties' solicitors which said:

*"Please disregard what I said in the last paragraph of my email below* [i.e. what is set out in the past quoted paragraph in paragraph 44 hereof]. *Having now read the 2 WA cases cited by the Applicant concerning the effect of serving a Response late, I may have overstated the effect under the Act of that occurring. I will therefore decide what I should do in relation to the Response, if I decide it was not served on the Applicant when required, in my determination."*

46) Later the same day the Applicant's solicitor responded in the following manner:

*"We respectfully submit that the question of whether a response to an application for adjudication may have come to the attention of an applicant other than by service by the respondent is not a consideration which is relevant under the Construction Contracts (Security of Payment) Act (NT)(**Act**).*

*Under section 34(1)(a)(ii) of that Act an adjudicator must act informally and if possible make his or her determination on the basis of the application and its attachments and, if a response has been prepared and served in accordance with section 29, the response and its attachments. Section 29 requires the respondent to serve a copy of its response on the applicant. The available methods of service are prescribed by section 25 of the Interpretation Act (NT) and do not include a situation where a response is not served in accordance with those methods but might otherwise come to the attention of the applicant.*

*The above position can be contrasted with other legislative regimes which permit a person or body to direct that a document be taken to have been served where service was not effected in accordance with the particular legislative requirements. An example is the Supreme Court Rules (NT) where under order 6.10 the Court may direct that a document may be taken to be served on a person where the document has not been served in the manner required by or under a law in force in the Territory or by the Rules but steps have been taken for the purpose of bringing, or which may have a tendency to bring, the document to the notice of the person to be served.*

*The Act and the Interpretation Act (NT) do not provide for the exercise of such a discretion in relation to service of a response.*

*For the above reasons, we do not consider that the information you have requested is in any way relevant to the question of whether the response was served in accordance with section 29 of the Act. Notwithstanding the above, we confirm that the response was sent to [redacted] (who is not a director of the applicant) by email on 5 April 2018 at 7:43 am.*

*We confirm that the applicant reserves its rights in relation to the relevance of this request for information."*

47) On 11 April 2018 the Respondent's solicitor made the following submissions in relation to service of the Response:

*"1. The Respondent makes the following submissions in reply to the submissions of the Applicant dated 10 April 2018 ("Applicant's further submissions") which were prompted by two requests of the Adjudicator pursuant to s.34(2)(a) of the Construction Contracts (Security of Payments) Act (NT) ("Act'") contained in his emails dated 8 April 2018.*

*2. In the Applicant's further submissions, the following positions are advanced:*

*a. That the Response should be disregarded because it was not served upon the Applicant in accordance with s. 29 of the Act.*

*b. …..*

*c. …..*

*d. …..*

3. *The Respondent addresses each of these positions below.*

<u>Service of Response</u>

4. *The Applicant's solicitors contend that they did not have instructions to accept service on behalf of the Applicant and, accordingly, service within the meaning of s. 29 of the Act was not effected when the solicitors for the Respondent delivered the Response to the Applicant's solicitors by email on 4 April 2018 and by hand on 5 April 2018.*

5. *The Applicant's solicitors contend that the Respondent's solicitors did not ask or obtain confirmation that the Applicant's solicitors had instructions to accept service on behalf of the Applicant. As a result of that omission, service was not effected and the Adjudicator should disregard the Response.*

6. *In support of their position, the Respondent refers to the following cases in the Western Australian jurisdiction: Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No2] WASC 59; Witham v Raminea Pty Ltd [2012] WADC 1; Re David Scott; Ex Parte Triple M Mechanical Services Pty Ltd [no 2] [2013] WASC 161 ("Cases").*

7. *Even regardless of the divergence of jurisprudence on the uniform security of payment legislation enacted across the States and Territories and the question of whether the jurisprudence of the Western Australian courts should be adopted, it is clear that the Cases presented are not analogous to the facts at hand. Those Cases are relevant only to the issue of whether or not an Adjudicator is bound pursuant to the Northern Territory equivalent of s. 34(1)(a)(ii) to consider a response served outside of the 10 day timeframe prescribed in the Act. The Cases conclude that the Adjudicator is not so bound because the requirement to serve a response within the 10 day timeframe is to be construed strictly in accordance with the purpose of the legislation.*

8. *The Applicant asserts that a failure to serve the response upon the Applicant should be construed equally strictly however this construction of the issue that falls to be determined is misguided. The issue here is not whether the Adjudicator is bound to disregard a response in the event of a failure of service by the Respondent but rather whether, in these specific factual circumstances, the Respondent's actions in delivering its response to the Applicant's solicitors failed to fulfil the criteria of service pursuant to s. 29.*

9. *In that context, the Cases are not instructive and should be disregarded.*

10. *The Respondent submits that the relevant facts are as follows:*

    a. *The Applicant is represented by solicitors and was represented by solicitors at all materials times, including at the time of making the application*

    b. *The Applicant's solicitors have been corresponding with the Adjudicator on behalf of the Applicant since the time of making the application*

c. *The Applicant's solicitors have been corresponding with the Respondent's solicitors on behalf of the Applicant since 6 February 2018 when the parties entered into without prejudice negotiations to the present day and have accepted various documents on behalf of the Applicant.*

d. *The Applicant's solicitors included their address on the cover page of the Application and signed the Application "[redacted], Lawyers for the applicant".*

e. *The Response stated that the Applicant's address for service was that of the Applicant's solicitors.*

f. *The Respondent's solicitors obtained confirmation of the Applicant's solicitors' instructions to receive service by presenting a "Filing and Service Form" ("Form") to [redacted], an employee of the Applicant's solicitors' firm, and requesting that she sign that Form. That Form noted that the purpose of the delivery of documents was "Serving" in the matter of "[redacted] (Applicant) and [redacted]" and that the documents were "Served on: [redacted] – FTAO [for the attention of] [redacted]".*

g. *In signing the Form, particularly in view of the words "Serving" and "Served on" included within that Form, the Applicant's solicitors acknowledged that they were accepting service on behalf of the Applicant and held instructions to do same. Had the Applicant's not held those instructions, the proper course would have been to inform the Respondent's course that it could not execute the Form and thereby confirm the express assertions contained therein.*

h. *The Applicant's solicitors did not refuse service at that point or otherwise inform the Respondent's solicitors or the Adjudicator that the Applicant considered that it had not received service of the Response. Rather, it proceeded on the basis that it had instructions to accept service; to consider the contents of the Response on behalf of its client; and to communicate with the Adjudicator on those same terms when they received his request on 8 April 2018 for further submissions.*

*The Form is annexure TW-1 to the statutory declaration of [redacted] filed together with these submissions.*

*The Respondent seeks leave to enter this statutory declaration together with its submissions in reply on the basis that the documents annexed thereto are directly relevant to the issues arising in the further submissions and will assist the Adjudicator to contextualise the parties' arguments.*

11. *In view of the facts above at paragraph [10], it could not be said that the appointor, the Adjudicator or the parties were in any way confused about the fact that the Applicant's solicitors acted for the Applicant in this adjudication process and that the Applicant's solicitors held instructions to correspond and receive correspondence, including adjudication documents, on behalf of the Applicant. By their conduct and representations, the Applicant's solicitors (and the Applicant) are precluded from asserting otherwise.*

> 12. *The Respondent further submits that the inclusion of the Applicant's solicitors' details in the cover page of the Application has the same effect as the inclusion of a party's solicitors' details on any originating process in the courts which is to indicate to all parties and the court that the relevant party is legally represented and should not be contacted personally whether for the purposes of service or otherwise.*
>
> 13. *This position is confirmed by r. 23.1 of the Rules of Professional Conduct and Practice issued by the Law Society of the Northern Territory which prohibit a solicitor from directly contacting a represented party except in specific circumstances (none of which apply here).*
>
> 14. *Accordingly, the Respondent submits that the delivery of the Response to the Applicant's solicitors constituted service in accordance with s. 29 of the Act and the Adjudicator is bound by s. 34(1)(a)(ii) to consider the Response in making a determination. "*

48) The statutory declaration of [redacted] declared on 11 April 2018, filed with these submissions annexed copies of:

a) her firm's filing and service form dated 5 April 2018;

b) emails from the Respondent to [redacted] dated 6 December 2017, 10 December 2017 and 17 December 2017 enclosing their respective invoices.

49) The filing and service form is so entitled and is sub-entitled, above a table, 'Serving', which table states the following:

a) the documents served were a folder containing Respondent's Response and [redacted] Declaration;

b) the time and date of service was 9:40 am on 05/04/2018;

c) they were delivered to [redacted] office at [redacted] [redacted] for the attention of [redacted]; and

d) the name of the recipient was [redacted], who also appears to have signed the form as the recipient.

50) On 12 April 2018 the Respondent's solicitor made the following further submissions in relation to service of the Response:

***"Respondent's Further Submissions in Reply***

> 16. *The Respondent makes the following submissions in reply to the submissions of the Applicant dated 11 April 2018 which were prompted by a request of the Adjudicator pursuant to s.34(2)(a) of the Construction Contracts (Security of Payments) Act (NT) ("Act'") contained in his email dated 11 April 2018.*

*Whether the Applicant or any of its personnel have been provided the Response and supporting documents by [redacted] or any of its personnel and, if so, when that occurred*

17. *Contrary to the Applicant's submissions, the Respondent submits that this issue is relevant because it goes to the question of whether the requirement of service in s. 29 of the Act was fulfilled.*

18. *First, the Respondent repeats paragraphs [4] to [14] of its submissions filed on 11 April 2018 as to why it contends the response was properly served and why the Applicant's solicitors and the Applicant are precluded from asserting otherwise. In particular, the Respondent refers to the Filing and Service Form which the Applicant's solicitors signed upon receipt of the Response thereby confirming that they had accepted service on behalf of the Applicant. The Respondent also refers to the Applicant's solicitors failure to make timely submissions to the contrary until the Adjudicator requested further submissions (on separate issues) on 8 April 2018. The Respondent submits that these factors together with those set out in the submissions dated 11 April 2018 strongly support the assertion that the Applicant's solicitors had instructions to receive service on behalf of the Applicant.*

19. *Second, the Respondent submits that s. 25(1)(iii) of the Interpretation Act provides that service has been validly effected if the document is given to "in any case – a person authorised by the recipient to receive the document". The facts in this case and the conduct of the Applicant's solicitors in forwarding the Response to a representative of their client (the fact of his status as director being irrelevant to the question of whether he was empowered to receive documents on behalf of the entity, which the Respondent submits was clearly the case) strongly support the assertion that those solicitors were authorised to receive service on behalf of the Applicant. If this were* [this part of these submissions appears to be incomplete]

20. *Finally, the Respondent submits that the Act in general and s. 29 in particular does not define the term "serve". For a response to be compliant with s. 29, it must be served, but the content and purpose of s. 29 is to prescribe the timeframe for the response and the form in which that response should be drafted including the relevant procedural formalities that must be observed (s. 29(2)).*

21. *The question that falls to be determined is whether or not the Response was served in accordance with s. 29. In order to determine this question, it is necessary to consider the content of the term "serve". The Act and its regulations are silent on this point.*

22. *In the absence of the definition of this term in either the Act or the regulations, the Respondent submits that s. 34(6) of the Act applies to allow the Adjudicator to determine his own procedure in relation to the content of the term "serve" and that such determination can and should draw from the rules of the Supreme Court of the Northern Territory (being the superior court of the jurisdiction) which provide for consideration of whether the effect of service has been achieved. Given that the Applicant was notified of the Response within 24 hours of its delivery to the Applicant's solicitors (which the Respondent contends was a valid act of service), it is clear that the*

*purpose and effect of service, which was to inform the Applicant of the case in reply, was achieved in this case.*

23. *The Respondent submits that even if the Adjudicator were to determine that he must disregard the Response, the issues of jurisdiction, consent, multiple payment claims and the 90 day limitation period (amongst other jurisdictional provisions in the Act) remain bars to the Adjudicator's jurisdiction such that he must make a determination on those issues in order to be satisfied that he has jurisdiction to determine the dispute. Those matters arise from the Act and are independent of the content of the Response.*

*……"*

51) On 12 April 2018 the Applicant's solicitor made further submissions in response to the Respondent's submissions made on 11 April 2018:

***"Service of response***

*The legislation is clear on the requirements for service. They have not been observed in this instance.*

*The only issue of substance raised by the respondent's submissions in whether the form referred to in paragraph 10 (f) of the submissions, signed by ██████, constitutes acceptance of service by a person authorised by the recipient to receive service of the document.*

*██████ does not declare in her statutory declaration that the person from her office who delivered the form enquired as to whether Ms ██████ was authorised and able to accept service of a document on behalf of the applicant.*

*If necessary, ██████ will provide a statutory declaration confirming that this did not occur.*

*The fact that ██████ signed for receipt of the document in no way provides confirmation that she held instructions to accept service on behalf of the applicant.*

*The regime under the Construction Contracts (Security of Payments) Act (NT) is strict. It is for this reason that parties need to carefully ensure the obligations under that Act are met.*

*In relation to service, the applicant did so by ensuring the application for adjudication was validly served on the respondent by three clearly identifiable means: service by hand at the respondent's registered office in Brisbane; service by hand on an executive officer of the respondent in Darwin; and service on ██████ ██████ upon receipt of express confirmation that ██████ was authorised to accept service on behalf of the respondent.*

*These matters were previously drawn to your attention upon request. Please let us know if you require evidence of the same.*

*This is the proper course required to ensure lawful service.*

*The applicant has addressed all remaining matters in its primary submissions on this topic.*

*…… "*

52) On 12 April 2018 the Respondent's solicitor objected to me taking those submissions into account, because they were not requested by me and later the same day the Applicant's solicitor initially withdrew them, but on 13 April 2018 the Applicant's solicitor sent the following email to me in relation to me:

> *"We consider that the attached submissions, sent by email below, raise new issues on which the applicant has not yet had an opportunity to respond; including the statutory declaration of [redacted] which is enclosed by those submissions.*
>
> *In the circumstances, if those matters may be treated as relevant by the adjudicator, we respectfully submit that it is appropriate that we be permitted to respond (in the form of the submissions which were briefly provided and then retracted yesterday). "*

53) On 13 April 2018 the Respondent's solicitor sent me an email, which again objected to me taking these further submissions by the Applicant into account. That email said:

> *"The Respondent objects to the Applicant's solicitors request.*
>
> *The Applicant's submissions on service were unsolicited in the first instance. Those submissions referred to the delivery of the Response to the Applicant's solicitors. The Applicant must have known that the signing and filing form was part of that delivery and yet it made a forensic decision not to raise it in the first instance. It had ample opportunity to make out how and that delivery did not constitute service and should not be allowed to make further submissions at this point. The Response insofar as it related to this issue was confined to the circumstances of the delivery of the Response, well known between the parties, and raised no new issues to the Applicant at all.*
>
> *The object of the Act and this adjudication process is to provide "for rapid resolution of payment disputes". The continual back-and-forth of unsolicited submissions and necessary responses runs contrary to the intent of the Act and should not be permitted at this late stage. There is no provision in the Act for the request made by the Applicant and it should not be allowed."*

54) I agree that the Respondent's submissions made on 11 April 2018 did raise new issues concerning service of the Response, which the Applicant could not have been expected to anticipate, in particular the legal import of the Respondent's filling and service form and, in those circumstances, I consider that I should take the Applicant's further submissions on that issue made in 12 April 2018 into account.

### *My findings about service of the Response on the Applicant*

55) As a copy of the Application and Supporting Documents was served on the Respondent on 20 March 2018, the last day for the Respondent to serve a copy of the Response and Supporting Documents on me and on the Applicant was on 5 April 2018.

56) The critical matter for me to determine in relation to this issue is whether in all the circumstances, [redacted] was, at the time the Response and Supporting Documents were delivered to [redacted], authorised by the Applicant to accept service of those documents on the Applicant's behalf.

57) That is the critical question to be answered, because the Act does not state clearly how service of a Response can be done. That means that one has to look to s. 25(1)(iii) of the *Interpretation Act,* which provides that service has been validly effected if the document is given to *"in any case – a person authorised by the recipient to receive the document"*.

58) I do not consider that the following circumstances constitute evidence that the Applicant's solicitor was authorised by the Applicant to accept service of a Response on behalf of the Applicant:

a) that the Applicant has been is represented by solicitors and was represented by solicitors at all materials times, including at the time of making the Application, because, in general, where a solicitor acts for a party in proceedings, specific instructions are required regarding whether the solicitor has instructions to accept service of process on behalf of the party for whom they act. There is a good reason for this requirement. For example, the party may live overseas or be hard to contact and it would be unfair, in all circumstances, if all that was necessary, to effectively serve a party with process, would be to serve it on the party's solicitor. In court proceedings, sometimes, if no such authority is given to a solicitor, the serving party may apply for an order for substituted service on the basis that the Court order that service on the solicitor is sufficient, but such an order will not always be made simply due to the party having a solicitor acting for them and will depend on the Court assessing whether, in the circumstances, the process would be likely to come to the attention of the party to be served, by being delivered to that party's solicitor. However, an adjudication is a different situation to a Court case. In an adjudication an adjudicator has no power to make a substituted service order.

b) The Applicant's solicitors have been corresponding with the Respondent's solicitors on behalf of the Applicant since 6 February 2018 when the parties entered into without prejudice negotiations to the present day and have accepted various documents on behalf of the Applicant. While I agree that that has been so, I do not consider that that constitutes evidence that [redacted] had been authorised to accept service of the Response on behalf of the Applicant.

c) The Applicant's solicitors included their address on the cover page of the Application and signed the Application "[redacted], Lawyers for the applicant". I do not consider that that constitutes evidence that [redacted] had been authorised to accept service of process on behalf of the Applicant, because it goes no further than to indicate that [redacted] are acting for the Applicant in the adjudication and prepared the Application.

d) The Response stated that the Applicant's address for service was that of the Applicant's solicitors. I consider that that is irrelevant, because the Response was not prepared by the Applicant and cannot constitute

evidence that [redacted] had been authorised to accept service of process on behalf of the Applicant.

e) That [redacted]' firm name and contact details were included on the cover sheet of the Application. I consider that all that that indicates is that [redacted] prepared the Application on behalf of the Applicant.

59) I also do not consider it would be appropriate for me to follow the rules relating to service of process in the NT Supreme Court, because these are not Supreme Court proceedings.

60) However, I find that:

a) the signing of the filing and service form by an employee of [redacted] by way of acknowledgment that the Response and Supporting Documents had been received by [redacted], where the form itself stated that the documents were being provided by way of service upon the Applicant, is sufficient evidence that that [redacted] employee was, as a result, indicating that [redacted] had been authorised to accept service of the Response and Supporting Documents on behalf of the Applicant; and

b) it does not matter that:

i) the person delivering them did not ask the employee whether [redacted] had been so authorised; or

ii) the employee did not appreciate the legal effect of signing the acknowledgment on the filing and service form; or

iii) may not have read it before signing it; and

c) it should be borne in mind that it is a basic legal principle that if someone signs a document they are taken to:

i) have read it;

ii) understood what its contents mean; and

iii) by signing it, indicated that what it stated is accepted by the recipient.

61) Perhaps, in future, [redacted] will instruct its employees not to sign such an acknowledgment or, if an employee does so, to insert words on the acknowledgment, to the effect that, it should not be taken to be the case that accepting delivery of documents listed in it should be taken to be an indication that [redacted] has authority to accept service of them on behalf of anyone.

62) I therefore find that service of the Response and Supporting Documents on the Applicant was affected on **4 April 2018**.

63) This situation indicates to me that it may be worthwhile for consideration to be given to amending the Act to provide that if a solicitor indicates that he or she is acting for a party in an adjudication, service of an adjudication application or response can be effected by delivering them to the relevant party's solicitor

without there being any need to firstly ascertain whether the solicitor acting for a party upon whom service of process needs to be effected has been authorised to accept service on his or her client's behalf.

64) However, in any event I find that service of the Response was also effected on the Applicant on **5 April 2018** when the Applicant's solicitor provided a copy of it to an employee of the Applicant named Mr [redacted] by email on 5 April 2018 at 7:43 am. I do not think that it matters that Mr [redacted] was not a director of the Applicant, because he was obviously a person who was an important employee of the Applicant, insofar as the Contract was concerned, was involved in negotiating the terms of the Contract and performing a significant part of the Contract Works as is indicated in the [redacted] Declaration an, was important to the Applicant during the course of the adjudication, because the [redacted] Declaration constituted a significant part of the Applicant's evidence in the Application.

65) When the question of service occurring comes up for consideration and various methods for service permitted by the provisions of different legislation also need to be considered, the need to decide whether any permitted methods of service of the process has been followed is no longer required if it is able to be established on the facts that the party who needs to be served has in fact received the relevant process, which is what happened when it was provided to [redacted] on 5 April 2018 by that email.

66) I also find that [redacted] received and read that that email on that day, because the Applicant has not made any submissions to the effect that he did not receive it then or read it on 5 April 2018, which I expect it would have done, when advising about [redacted]' email sending a copy of the Response and Supporting Documents to him, if that was the case.

67) In those circumstances I also find that the Applicant received a copy of the Response within the 10 working day period required by s. 29 of the Act and it is therefore appropriate for me to take the Response into account as well as any further submissions that I have asked to be provided to me which relate to matters raised in the Response.

## IMPLIED TERMS

68) The Applicant has submitted that the terms in Division 4 of the Schedule to the Act implied into the Contract, which are of relevance in this adjudication about how a party must make a claim to another party for payment are as follows:

> "*(1)* *A payment claim under this contract must:*
>
> …
>
> "*(f)* *for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*
>
> …
>
> "*(h)* *be signed by the claimant…*"

69) The Applicant then submitted that:

a) At the time that the invoices were originally issued, they were not signed and therefore were not payment claims for the purposes of the term implied by Division 4 of the Schedule to the Act.

b) Further, the Respondent has contended that the invoices did not itemise and describe the obligations the applicant had performed and to which the claims related in sufficient detail for it to assess the claims (see paragraph 10 of ██████ Declaration, which confirms that the Respondent was raising queries in relation to the basis of calculation of the invoices shortly after they were issued). This is in contrast to the Respondent's ability to understand the information contained in the Payment Claim, in that by the time the Payment Claim was served, the Respondent had available to it images of diary entries which showed the hours worked by each employee on each day, broken down between Contract work and other work, and had demonstrated its understanding of the breakdown of the claim by providing a spreadsheet[9].

c) If the Respondent's contention in this regard is correct, then it follows that the invoices were not payment claims for the purposes of the term implied by Division 4 of the Schedule.

### *Applicant's Primary Submissions*

70) The Applicant then made the following submissions in support of its primary submission that a payment claim in the form required by the terms of the Contract was made on 5 January 2018 (**Purported 5 January Payment Claim**):

a) The Purported 5 January Payment Claim is constituted by a letter from ██████████ to the Respondent dated 5 January 2018, which enclosed signed copies of the above invoices[10].

b) The Purported 5 January Payment Claim constitutes a payment claim for the purpose of the term implied by Division 4 of the Schedule, because:

i) it, and each invoice it enclosed, was signed; and

ii) it itemised and described the obligations the Applicant had performed and to which the claim related in sufficient detail for the Respondent to assess the claim, this criterion having, in order to be workable, to be considered in the context of the other information with which a Respondent has been provided at the time it receives the payment claim. At the time the Respondent received the Purported 5 January Payment Claim, it had received the information referred to in paragraph 69(b) above, and demonstrated its understanding of that information as referred to in the same paragraph.

c) The Purported 5 January Payment Claim was delivered on 5 January 2018 by hand to Mr ████████████, Managing Director of the

[9] Annexure 2 to Application

[10] Annexure 3 to Application

Respondent at the Respondent's principal place of business as set out at the top of the Payment Claim. The Respondent confirmed receipt by responding to the Payment Claim on 9 January 2018.[11]

71) The Applicant then submitted that the full amount claimed in the Purported 5 January Payment Claim was payable, because a notice of dispute had not been given within 14 days after 5 January 2018:

a) Pursuant to the term implied into the Contract by Division 5 of the Schedule to the Act, the Respondent was required by the Contract to:

i) within 14 days after receiving it:

i) give the Applicant a notice of dispute; and

ii) if the Respondent disputed part of the claim – pay the amount of the claim that is not disputed; or

ii) within 28 days after receiving the Purported 5 January Payment Claim, pay the whole of the amount of the claim.

b) The implied term required a notice of dispute to (among other things):

"*(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;*

"*(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*".

c) On 9 January 2018, the Respondent sent an email to the Applicant's lawyers in relation to the Purported 5 January Payment Claim[12].

d) The Applicant's lawyers responded to the email by email on 11 January 2018[13].

e) The content of the Respondent's email sent on 11 February 2018 does not satisfy the requirements of paragraph 71(b) above, for the following reasons:

i) It did not provide the reasons for believing the Purported 5 January Payment Claim had not been made in accordance with the Contract or why any item was disputed. It stated that "*the information that has been provided shows inaccuracies and a discrepancy in hours claimed*" but did not state what the Respondent saw as being the discrepancy or inaccuracy (on the basis of which it refused to pay the Payment Claim); and

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11 Annexure 4 to Application

12 Annexure 4 to Application

13 Annexure 5 to Application

ii) the email was not signed.

f) No other written response was provided by or on behalf of the Respondent within 14 days of the Purported 5 January Payment Claim. As a result, the Respondent did not give the Applicant a notice of dispute under the Contract within 14 days of receiving the Applicant's Purported 5 January Payment Claim.

g) Accordingly, pursuant to the terms of the Contract, the Respondent's opportunity to dispute the claim has passed, and it is contractually obliged to pay the full amount of the Purported 5 January Payment Claim, being $17,426.76 including GST (see e.g. *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1 at [47].

h) On 1 February 2018 (27 days after the Purported 5 January Payment Claim was served), the Respondent's lawyers wrote to the Applicant's lawyers. The Applicant's lawyers responded by letter on 6 February 2018, referring to the matters set out in the letter dated 1 February 2018. The letter dated 1 February 2018 was expressed to be without prejudice and so it, and the parts of the Response which disclose matters in that letter, are not disclosed. A redacted copy of the Response dated 6 February 2018 being provided[14].

72) In the alternative, the Applicant submitted that if I find that the email sent by the Respondent on 9 January 2018 is a notice of dispute in accordance with the Contract (which the Applicant denies is the case):

a) The Respondent is nevertheless obliged to pay the full amount claimed in the Purported 5 January Payment Claim for the work properly performed by the Applicant and charged in accordance with the Contract.

b) It appears that the Respondent:

i) does not accept that the Applicant's employees in fact worked the hours claimed. The Respondent's spreadsheet indicates (for ██████ works):

i) Supervisor worked 20 hours; and

ii) Labourers worked 33 hours; and

ii) does not accept the charge in the invoice for "mobilise to site - $1,650".

**Hours worked**

c) In reaching these figures, the Respondent appears to have failed to account for travel to site. Travel time for each of the three workers was 7.5 hours to site and 6.5 hours from site. The travel time to site was longer due to the heavy rain and muddy conditions of the roads on the relevant day (see █████ Declaration at paragraph 12).

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14 Annexure 7 to Application

e) The balance of the difference appears to be a contention by the Respondent that one of the Applicant's labourers worked 0.5 hours on the Sunday of the works. The Applicant confirms that that contention is incorrect. The Applicant is at a loss to understand how the Respondent could have reached that view, given that its representative was absent from site on the Sunday (see ███ Declaration at paragraph 11).

f) The Applicant then contended that:

i) the oral agreement between the parties specifically included a term that the Applicant would be paid at its hourly rates for travel time (see ███ Declaration at paragraphs 3 to 6). The written component of the Contract (at Annexure 1) provides the rates at which that is charged; and

ii) a term to that effect is implied by Division 2 of the Schedule to the Act to the extent that the written agreement does not provide a way of determining the amount that the Applicant is entitled to be paid for the obligations the Applicant performs. That division provides that the Applicant is entitled to be paid a reasonable amount for performing its obligations. The Applicant submits that travel to site was an essential part of the work required to be performed under the Contract, and that it is entitled to be paid for that part of the work. This is particularly so in circumstances where the site was 6.5 to 7.5 hours' travel away from Darwin.

**Mobilisation**

d) It appears that the Respondent does not accept the charge in the invoice for "*mobilise to site - $1,650*".

e) The written component of the Contract provides that the Respondent would be paid $1,500.00 plus GST in respect of mobilisation.

f) The Applicant confirms that its hours worked in respect of mobilisation were not included in the hourly rates recorded in its invoices, and mobilisation was charged at the unit rate agreed between the parties. The Applicant confirms that mobilisation is not the same as travel and should not be confused with that item (see ███ Declaration at paragraph 13).

g) The work which the Applicant undertook in respect of mobilisation (and which was not charged for on hourly rates) was extensive and amounted to an estimated 20 hours. It included, but was not limited to (see ███ Declaration at paragraph 13):

i) purchase diaphragm and chrome dipped worm drive for pump;

ii) perform full service on pump; and

iii) purchase materials required to undertake works, including super flow, conduits, sacrificial ball valves, hammer drill bits, ball valves and all fittings for the injection line, buckets, measuring jugs, tool box items and related travel.

h) The Applicant contends that it is entitled to payment for this item:

   i) pursuant to the written agreement between the parties which provided for a unit price for this item; alternatively and in any event

   ii) pursuant to the term implied by Division 2 of the Schedule to the Act which provides that the Applicant is entitled to be paid a reasonable amount for performing its obligations. The Applicant submits that mobilisation was an essential part of the work required to be performed under the Contract, and that it is entitled to be paid for that part of the work.

### *Applicant's Secondary Submissions*

73) In the alternative, if I find that the Applicant's issuing of the three (3) invoices in December constituted three (3) separate payment claims (**Purported December Payment Claims**) , the Applicant stated that it solely relies on invoice number 8 dated 17 December 2017 in the amount of $15,866.38 as giving rise to the payment dispute in respect of which the Application is made and does not press for a determination of any dispute in relation to the other two invoices in this Application.

74) The Applicant then submitted that:

   a) If I find that invoice no. 8 was a payment claim and it was made on 17 December 2017, the last date for making this Application is no earlier than 20 March 2018, being 90 days after the first correspondence from the Respondent, if, contrary to the submissions below, I find that that correspondence constitutes a notice of dispute under the Contract.

   b) If I find that the invoice no. 8 was payment claim made on 17 December 2017:

      i) the amount claimed was $15,866.38;

      ii) payment was due (if not disputed) by 14 January 2018;

      iii) the response received on 20 December 2017 did not constitute a notice of dispute under the Contract for the same reasons as stated in the Applicant's above submissions about the Respondent's response to the Purported 5 January 2018 Payment Claim;

      iv) the Respondent therefore did not give a notice of dispute under the Contract within 14 days of the invoice no. 8 payment claim; and

      v) the Respondent is therefore liable to pay the full amount claimed in the invoice no. 8 payment claim for the same reasons;

      vi) alternatively, the Respondent is nevertheless obliged to pay the full amount of the invoice no. 8 payment claim as it has performed and charged for work to that value under and in

accordance with the Contract for the reasons the Applicant set out above.

### *Respondent's Submissions in Response to Applicant's Primary and Secondary Submissions*

75) The Respondent's submissions in response to the Applicant's two alternative submissions were:

#### Purported December Payment Claims – notice of dispute

a) After the Respondent agreed that the same provisions in the schedule of the Act were implied as contract terms as those referred to by the Applicant, the Respondent made the following submissions:

i) The Purported December Payment Claims rendered in December 2017 were payment claims, because they satisfied the criteria set out in clause 5 of Division 4 of the Act.

ii) As deposed in the [redacted] Declaration, the itemised lines in the Purported December Payment Claims contained sufficient detail for the Respondent to assess the claim and to form the view that invoice #8 appeared to lack veracity in the first instance. This assessment led the Respondent to seek further detail and clarification from the Applicant in relation to the supervisor and labourer hours claimed in invoice #8 so as to ascertain whether it ought to issue a notice of dispute.

iii) The Act does not require that the invoice is signed, but that the payment claim is signed. The payment claims comprise the whole of the emails of 10 December 2017 and 17 December 2017 and their attachments, namely invoices #4, #8 and #9 respectively. The email identifies the sender and the intention in respect of the information communicated.

iv) The *Electronic Transactions (Northern Territory) Act* permits the use of electronic signatures in certain conditions in s. 9 as follows:

*"9 Signatures*

*(1) If, under a law of the Territory, the signature of a person is required, the requirement is taken to have been met in relation to an electronic communication if:*

*(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and*

*(b) the method used was:*

*(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the*

*light of all the circumstances, including any relevant agreement; or*

*(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and*

*(c) the person to whom the signature is required to be given consents to the requirement being met by the use of the method mentioned in paragraph (a)."*

v) The entirety of the correspondence between the parties has been undertaken by email between [redacted], [redacted] of the Applicant and [redacted] of the Applicant and by implication the Applicant has given consent to the requirement being met. Indeed, the Applicant is estopped by conduct from asserting otherwise.

vi) The Respondent disputed that the Purported December Payment Claims under cl. 6(1)(b)(ii) of the Schedule to the Act because, in the Respondent's assessment of the claim, the claim as to supervisor's and labourer's wages appeared to be inflated.

vii) A notice of dispute must, in accordance with cl. 6 of Division 5:

*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.*

viii) Upon this criteria, the Respondent rendered several notices of dispute on 19 December 2017 and 20 December 2017 well within the 14 day timeframe required.

ix) Each of the text messages deposed to in the [redacted] Statutory Declaration satisfied the criteria in cl. 6 of Division 5 because

they:

i) were in writing;

ii) were addressed to [redacted] in his capacity as director of the Applicant who was the claimant;

iii) stated the name of the party giving the notice in that [redacted]'s name and contact number was displayed on [redacted]'s phone as he read the text message;

iv) was time and date stamped;

v) identified the claim and the disputed items by referring to and requesting breakdown of the supervisor and labourer hours;

vi) stated the reasons for disputing those claims, namely that the Respondent was not convinced of the veracity of the claims and required more detail to reconcile its on site records and other sources with the claim;

vii) was signed in accordance with s. 9 of the Electronic Transactions (Northern Territory) Act.

x) It is evident in the text messages that there was no confusion whatsoever on part of both parties; that the parties knew each other's exact identities and roles within their respective companies; that the parties knew exactly which invoice was disputed and which items within that invoice were disputed and the reasons why the Respondent disputed those items (albeit that the Applicant disagreed with the Respondent's reasons).

xi) In the alternative, the Respondent submits that the email sent from [redacted] to [redacted] of the Applicant on 20 December 2017 containing the spreadsheet of assessed hours constituted a notice of dispute complaint with cl. 6 of Division 5 and delivered within 14 days of receipt of the invoice. It was compliant because it:

- Was in writing
- Was addressed to the Applicant by its representative [redacted] with whom [redacted] had exchanged numerous emails prior
- Stated clearly in the signature block the name of the Respondent
- Stated the date in the time and date stamp of the email
- Referred to the disputed invoice #8
- Identified the items disputed within the spreadsheet namely the supervisor and labourers being the only two items in that invoice that pertained to human labour. Identified the reason for the dispute being that the Respondent did not believe that the hours claimed in invoice #8 were accurate.

- Was signed in accordance with the *Electronic Transactions (Northern Territory) Act.*
- Was issued within 14 days of receipt of the January Payment Claims.

xii) Therefore, a dispute arose on 19 December 2017 or, alternatively, on 20 December 2017.

## Purported January Payment Claims – notice of dispute

b) In the alternative, if I determine that the December Payment Claims were not payment claims within the meaning of cl. 5 of Division 4, then the Respondent submits that on 9 January 2017 it rendered a notice of dispute by email in accordance with cl. 6 of Division 5 of the Act in response to the Purported January Payment Claims.

c) In compliance with cl. 6 of Division 5, the email of [redacted] dated 9 January 2017:

i) Was in writing.

ii) Was addressed to the Claimant by its solicitors [redacted].

iii) Stated clearly in the signature block the name of the Respondent.

iv) Stated the date in the time and date stamp of the email

v) Referred to the disputed invoice #8.

vi) Identified that the items disputed were those relating to hours worked for “each person who worked”, that is the supervisor and labourers being the only two items in that invoice that pertained to human labour. Identified the reason for the dispute being that the Respondent believed that invoice #8 contained “inaccuracies and a discrepancy in hours claimed”. As a result, the Respondent requested further information, that is, a “complete and thorough breakdown of hours including the start, finish and break times” so as to reconcile what was claimed against the information it had received thus far from the Applicant.

vii) Was signed in accordance with the *Electronic Transactions (Northern Territory) Act.*

viii) Was issued within 14 days of receipt of the January Payment Claims.

d) It could not be fairly said that having received the email dated 9 January 2017, the Applicant was confused as to what the Respondent was disputing in invoice #8 and why. It is clear that the Applicant disagreed with the Respondent’s basis for the dispute but was nevertheless well aware of the nature of that dispute.

### Quantum Meruit – Work Done

e) The Respondent also submitted that it had sound bases for refusing to make payment to the Applicant in relation to the supervisor and labourer hours in invoice #8. The Applicant was not able to justify its claims in that regard and, further, could not provide a consistent account of the hours that were worked.

f) It is trite to say that the Respondent should not be made to pay for hours that the Applicant did not work or for travel that the Applicant agreed would be subsumed into the pre-agreed allowance for mobilisation.

g) The Respondent's assessments of invoice #8 were based on a combination of on-site sources, contemporaneous documents and a fair synthesis of the Applicant's various contradictory claims. The Respondent submits that, at its highest, it should not be made to pay more than $13,517.38 incl GST to the Applicant being the aggregate figure calculated on the spreadsheet deposed to in the Statutory Declaration for invoices #4, #8 and #9.

## REQUESTS FOR FURTHER SUBMISSIONS

### *First Request – service of adjudication application*

76) On 26 March I made the following request for further submissions:

a) To enable me to calculate critical dates when tasks need to be performed by the Respondent (i.e. filing and serving a Response) and by me (i.e. delivering my determination), I request that the parties provide me with further submissions concerning when and how the adjudication application and supporting documents were served on the Respondent.

b) I request that these further submissions be provided to me by email (and copied to each other by email) **by 5:00 pm today, i.e. Monday 26 March 2018) Australian Central Standard time (CST)** and, if so desired, the parties can reply to each other's further submissions in that regard in the same manner **by 12 noon CST on Tuesday 27 March 2018**.

77) The Applicant's solicitor responded to that request, within the time requested by me, by stating that the Application was served by:

a) being delivered by hand to the Respondent's registered office at care of [redacted], relying in support on an ASIC search of the Respondent and the so addressed service letter, on 20 March 2018;

b) being delivered by hand to Mr [redacted] at the Respondent's principal place of business at [redacted], again relying on such ASIC search and so addressed service letter) on 20 March 2018; and

c) being delivered by email to the Respondent's solicitor on 20 March 2018, who confirmed acceptance of service by return email on 21 March

2018.

78) The Applicant's solicitor also provided me with copies of the documents referred to above, the ASIC search of the Respondent company being a Current Organisation Extract, which was obtained on 5 January 2018, which stated that the registered office address of the company was then the address referred to above and that its principal place of business was then the address stated above.

79) The Respondent's solicitor responded to my request late on 28 March 2018 by:

a) stating that she had been instructed that the adjudication application was served at the registered address of the Respondent after 4pm on 20 March 2018;

b) stating that she understood that the Respondent has 10 working days from the day after receipt of service within which to serve a Response;

c) by stating that by her reckoning, the Respondent is due to submit its Response by COB on 5 April 2018; and

d) asked me to confirm that I agreed.

80) On 28 March 2018 the Applicant's solicitor asked the Respondent's solicitor to explain her submission or request by identifying the basis on which service after 4.00 pm might be treated as if effected on the following day.

81) On 29 March 2018, in an email to the Respondent's solicitor, I asked:

a) whether the Respondent's solicitor was contending that service of the Application and Supporting Documents on the Respondent after 4:00 pm on 20 March 2018 might be treated as if effected on the following day;

b) if so, on what basis;

c) whether she had excluded both the Good Friday and Easter Monday public holidays from her working day calculations for the deadline for serving the Response in s. 29 of the Act; and

d) if not, exactly how she calculated the required 10 working day period in s. 29 of the Act in order to arrive at COB on 5 April 2018 as being the deadline in this matter.

82) On 29 March 2018 the Respondent's solicitor replied to that request for an explanation in the following manner:

a) She did not make the contention that the service of the application late in the afternoon of 20 March 2018 might be treated as if effected on the following day.

b) She calculated the 10 working day period by :

i) excluding the Good Friday and Easter Monday public holidays in accordance with the definition of "working day" in s. 4 of the Act and s. 29(1) of the Act;

ii) excluding Saturday and Sunday in accordance with s.4 of the Act and s. 29 (1) of the Act;

iii) noting s. 29(1) which states, "Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication…" – this wording does not, in her submission, include the day of actual service being 20 March 2018. Therefore the first working date from which the 10 working day period commences is the date after the date of actual service, that is, 21 March 2018.

c) In her submission, the 10 working days span across 21, 22, 23, 26, 27, 28, 29 March 2018 and 3, 4, and 5 April 2018.

83) On 29 March 2018 the Applicant's solicitor responded to the Respondent's email referred to in paragraph 79 by:

a) noting the Respondent's solicitor's confirmation as to service; and

b) stating that the time for serving any Response to the Application is prescribed by s. 29 of the Act and submitted that the calculation of that time and the method by which any response is provided is a matter for the Respondent and is not an appropriate matter for submission, or determination, prior to the provision of any Response.

84) On 29 March 2018 I responded to the Respondent's solicitor's response referred to in paragraph 79 in the following way:

a) by noting its contents; and

b) by stating that I did not think it would be appropriate for me to advise a party in relation to its obligations under the Act, including its obligations relative to the time by which it is obliged to serve a Response. That is a matter, concerning which, I will make a finding in my determination in due course.

### My Findings in relation to First Request - service of adjudication application

85) I now find that:

a) the Application and Supporting Documents were served on the Respondent on 20 March 2018 by being personally delivered to the Respondent's Mr [redacted] at the Respondent's principal place of business at [redacted] and

b) given that in the NT the Good Friday public holiday was on 30 March 2018 and the Easter Monday public holiday was on 2 April 2018, the 10 working day period for the Respondent to serve its Response upon me and upon the Applicant, pursuant to s. 29 of the Act, expired on **Thursday 5 April 2018**.

### *Second Request*

86) On 8 April 2018 I made the following request for further submissions :

*"Both parties have submitted that as the contract did not have a written provision about how a party must make a claim to another party for payment, s. 19 of the Construction Contracts (Security of Payments) Act (Act) applies so as to imply the provisions of Division 4 of the Schedule to the Act as terms of the contract.*

*It is stated in the Application submissions that invoice 4 dated 10 December 2017 was issued by email on 10 December 2017, but no copy of the email doing so was included in the Application and supporting documents.*

*A copy of the email dated 10 December 2017 has also not been provided with the Response, but in any event, the Respondent appears to have confirmed that the Respondent first received that invoice by email on 10 December 2017.*

*The Application states that It appears from the statutory declaration of [redacted] [redacted], provided with the Response, that invoices 4 and 8 both dated 17 December 2017, were first sent as attachments to an email sent by the Applicant's [redacted] [redacted] to the Respondent's Mr [redacted] on 17 December 2017.*

*The Applicant has submitted, in part, that when the 3 invoices were sent to the Respondent in that manner, they did not satisfy the provision in clause 5 of Division 4 of the Schedule to the Act, which requires payment claims to be signed, because none of those invoices were signed.*

*The Respondent has contended that:*

1. *it is not necessary for invoices to be signed and that the payment claims comprised the whole of each of the emails of 10 December 2017 and 17 December 2017 and their respective attachments; and*

2. *as the entirety of the correspondence between the parties has been undertaken by email, the Applicant is estopped, by its conduct, from asserting that it did not give the consent required in s. 9(1)(c) of the Electronic Transactions (Northern Territory) Act for permitting electronic signatures in certain conditions.*

*If the Respondent's contentions to the above effect are correct, it may be appropriate for me to find that 2 payment claims were made, i.e. one on 10 December 2017 and another on 17 December 2017.*

*As the Respondent's submissions in this regard were first made in the Response, I request pursuant to the provisions of s. 34(2)(a) of the Act, that the Applicant provide further submissions in answer to the Respondent's submissions in this regard referred to in numbered paragraphs 1 and 2 above, by email to me (which is also copied to the Respondent's solicitor)* ***by 5:00 pm on Tuesday 10 April 2018.***

*I also request that the Respondent provide me with any further submissions it may want to make in reply to the Applicant's further submissions by email*

*(which are also copied to the Applicant's solicitor)* ***by 5:00 pm on Wednesday 11 April 2018****."*

87) Later the same day I asked the parties' solicitors, when providing such further submissions to also give consideration as to whether an email sign off can be treated as a signature for the purposes of clause 5 of Division 4 of the Schedule to the Act and, when doing so, they refer to court decisions of relevance.

88) On 10 April 2018 the Applicant's solicitor provided further submissions. She also then said:

*"We note that, in addition to the matters addressed in those submissions, the purported response also raises issues at paragraph 11 and 17 (referring to the statutory declaration of ) to which the applicant has not had an opportunity to respond.*

*We would be grateful if you would please let us know, if those matters are likely to be material to your determination, whether you require submissions from the applicant on them, and if so, by when."*

89) The Applicant's solicitor provided the following further submissions on the issues I referred to in my above email sent on 8 April 2018, within the time requested by me:

***"Whether it is necessary for invoices to be signed***
***Emails as part of payment claims***

1. *The applicant agrees that where a payment claim is sent by email, the email may be treated as forming part of the claim, provided that it is clear that that was the intended effect.*

***Electronic Transactions Act (NT) (ETA)***

2. *The ETA does not apply to the invoices sent by email to the respondent.*

3. *Section 19 of the Act implies the provisions at Division 4 of the Schedule (as applicable) into the contract between the parties.*

4. *Section 9 of the ETA does not apply to contracts. This is clear from its express terms. It only applies where a signature is required under a law of the Territory. Pursuant to section 17 of the Interpretation Act, "a law of the Territory" includes Territory Acts and the common law, but it does not include any requirement which arises from a private contract between parties. The requirement of a signature arises under an implied term of the contract and not under a law of the Territory. The fact that the terms are implied into the contract by a law of the Territory in no way changes that position.*

5. *The fact that section 9 of the ETA does not apply to contracts is also clear from other provisions of the ETA. Section 14E of the ETA expressly renders section 7 and 13 to 13B of the ETA applicable to contracts but it does not do the same in respect of section 9.*

6. *The position that section 9 does not apply to requirements for a signature which arise under a contract is confirmed by Seddon and Ellinghaus, Cheshire and Fifoot's Law of Contract (8th ed.) at 3.44.*

7. *It is therefore unnecessary to consider the potential application of section 9 of the ETA. The following submissions are made if, for some reason, the adjudicator concludes that section 9 may apply.*

8. *Consent may include that which may reasonably be inferred from the conduct of the person concerned (section 5).*

9. *The applicant does not agree with the respondent's contention that the entirety of the correspondence between the parties has been undertaken by email. It is clear from the application and the purported response that communications have been undertaken by telephone, in person, by text message and by email.*

10. *In Aristocrat Technologies Inc v IGT (2008) 80 IPR 413 the Delegate Commissioner of Patents indicated that a recipient of information in the form of electronic communication could not be deemed to have consented, in the context of the equivalent Commonwealth legislation, if there were "one or two isolated communications".*

11. *In the present matter, only two relevant emails were sent; one on 10 December 2017 and one on 17 December 2017. The respondent did not pay the invoices or otherwise treat them as giving rise to any obligation on it under the contract. In the circumstances there is no conduct on the part of the respondent from which consent might reasonably be inferred.*

12. *The applicant submits that principles of estoppel have no role to play in circumstances where consent is expressly required under the ETA and provision is made within the ETA for consent to be reasonably inferred from the conduct of the person concerned. The Act provides the basis for any inference and principles of estoppel do not come into play.*

***Whether an email sign off can be treated as a signature for the purposes of clause 5 of Division 4 of the Schedule to the Act***

13. *The first point to note is that neither the email nor the invoice contained a signature, whether electronic or otherwise.*

14. *At the most, there is reference to the author's name at the end of the email. The inclusion of a name at the end of an email cannot be treated as a signature for the purposes of the clause in the contract which is described at Division 4 of the Schedule to the Act.*

15. *The ETA was enacted to provide a statutory framework to regulate certain electronic transactions and common means of communication. For the reasons explained above, section 9 which applies to signatures was not extended to contracts between parties.*

16. *The manner in which signing requirements are dealt with remains a matter for agreement between the parties in their contract. Where there is not a provision dealing with how a payment claim is made, then the necessary provisions are implied under the Act, one of which is the requirement for signing.*

17. *The requirements set out by a contract for how a payment claim is to be made are to be construed and applied strictly: K and J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor [2011] NTCA 1, including at [236]-[241]).*

18. *In circumstances where so much follows from the making of a payment claim under a contract, it is essential that those requirements are complied with to the letter (including to provide certainty as to when a payment dispute arises: see K and J Burns at [151] and [152]).*

19. *The contract does not require that the payment claim be authenticated by whatever means a party desires. It requires that the payment claim be signed. The wisdom of such a requirement is obvious; it is simple and certain.*

20. *The contract expressly requires that the payment claim be signed. The natural and obvious meaning of that requirement is that it bear a hand-written signature. To interpret the contract as permitting an email sign-off to satisfy the requirement that a payment claim be signed would require a leap of construction which is not consistent with its plain words."*

90) On 11 April 2018 the Respondent's solicitor provided the following further submissions in reply to the Applicant's submissions about these issues:

*"Electronic Transactions Act (NT)*

*The Applicant submits that s. 9 of the ETA does not apply to private contracts because signatures under such contracts are not required "under a law of the Territory" where a "law of the Territory" is defined under s.17 the Interpretation Act to include Territory Acts and the common law.*

*The Respondent agrees that the term "under a law of the Territory" ought to be read as including Territory Acts and the common law. In that context, the Respondent submits that private contracts are not formed in a legal vacuum. The contract in this case was formed in the Northern Territory for work to be carried out in the Northern Territory between parties whose principal places of business are located in the Northern Territory. Accordingly, the contract was formed under the common law of the Northern Territory and is caught by s. 9 of the ETA.*

*In the Second Reading Speech for the ETA, the relevant moving Member of Parliament said of the intent of the legislature:*

> *"The Electronic Transactions (Northern Territory) Bill is a light-handed regulatory regime for the use of electronic communications in transactions. The bill facilitates the development of electronic commerce in the Territory by **removing existing legal barriers that may prevent people** from using electronic communications to satisfy legal obligations under Northern Territory law, **including statute and common law**. This legislation will assist Territorians to achieve the full potential of e-commerce…*
>
> *The bill is based on two main principles: functional equivalence (also known as media neutrality) and technology neutrality. Functional equivalence means that **paper-based documents and transactions and electronic documents and transactions will be treated equally by the law**. Technology neutrality means that the bill does not discriminate between different forms of technology.*
>
> *The bill is not designed to change existing laws such as contract, property or commercial laws. **Instead, it permits transactions that are currently undertaken in writing to be undertaken electronically.**"*

*The Applicant's contention that private contracts are somehow excluded from the reach of the ETA is incongruent with both the plain meaning of the words "under a law of the Northern Territory" and the stated intention of the legislature when passing the ETA. Plainly the legislature intended the ETA to apply broadly into the commercial dealings of persons and businesses within the Northern Territory. The Applicant's construction of the law leaves unanswered the question of exactly what law governs the contract if neither the common law or statute law of the Northern Territory may apply to a contract formed in the circumstances set out in paragraph [16] above. Plainly the contract is not "lawless" in origin and any assertion to the contrary cannot be supported.*

*The Respondent further submits that the regulations of the ETA expressly exempt wills, powers of attorney and personal service from the ambit of the ETA. Had the legislature intended that private contracts would also be exempt, it would have done so in the regulations rather than provide generally for them in s.7 of the ETA.*

*Further or in the alternative, the Respondent submits that the implied provisions of the contract were implied under the operation of the Act which is "a law of the Territory". But for the operation of the Act, the relevant provisions would never have been implied into the contract. The requirement for a signature on the payment claim is so required because of the provisions Act applied to the contract between the parties. There can be no plainer iteration of the applicability of s. 9 of the ETA than that the only reason a signature is required is because of the operation of the Act.*

*The Applicant's submissions on s. 14E of the Act fail to take into account the operation of s. 14E(2) which provide that where Part 2 of the ETA (inclusive of s. 9 of the ETA) applies of its own force, s. 14E has no further work to do. The purpose of s. 14E is to catch the remainder of contractual transactions that are not caught by Part 2 such that the broad spectrum of contractual dealings may be caught generally by the ETA.*

*It is instructive to consider the Note for s. 14E which states (emphasis mine):*

> *This section applies provisions of Part 2 to contracts or proposed contracts to the extent that those provisions do not apply merely because they are expressed to apply in relation to a law of the Territory. This section also disapplies the provisions of Part 2A to the extent that Part 2 would apply of its own force.* ***An example where Part 2 may not apply of its own force is where a contract is being negotiated in a State or Territory from a supplier located overseas.***

*Plainly the legislature intended that Part 2 would apply to private contracts because even in its example it uses a private supply contract negotiated in the Northern Territory between a Northern Territory Party and an overseas party. The note is included to express that Part 2A (inclusive of s. 14E) is intended to catch contracts that may not, because of cross-vesting and other geographical factors, necessarily fall "under a law of the Northern Territory". This is not applicable in this case.*

*The Respondent submits that s. 9 of the ETA must apply in this case.*

*Estoppel*

*If s.9 of the ETA applies, then the issue is whether the Applicant is estopped from denying that it had consented to exchange correspondence and, relevantly, invoices with the Respondent through the medium of email.*

*To that end, the Applicant submits that because there were only two occasions in which the Applicant rendered payment claims by email to the Respondent and the Respondent did not "pay the invoices or otherwise treat them as giving rise to any obligation on it under the contract", the Respondent therefore could not have consented to receiving payment claims by email.*

*First, it is inaccurate to say that simply because the Respondent did not pay the invoice, it did not treat those invoices as giving rise to any obligation. The Respondent did what it was contractually obliged to do which was to assess the invoices. Having assessed them as lacking in veracity, the Respondent sought further information. The Respondent did this on numerous occasions both in relation to the invoices in question and also an earlier invoice (invoice #2) that was rendered on 6 December 2017. Invoice #2 was subsequently withdrawn by the Applicant. Annexed to the statutory declaration of [redacted] and marked [redacted]-2 is a bundle of emails in which the Applicant encloses invoice #2 as well as the invoices in question.*

*These emails show that the parties had established a course of conduct whereby the Applicant would communicate generally with the Respondent by email, indeed since the inception of the contract, and further, that the Applicant would render its payment claims to the Respondent by email. The emails also show that the Respondent considered that it had received payment claims from the Applicant upon receipt of emails containing invoice because after receiving those emails, the Respondent would make enquiries to the attached invoices contained therein. The Respondent thereby consenting to the payment claims being rendered that way. The Respondent's conduct is consistent with having consented to receiving general correspondence and payment claims by email. Otherwise, the Respondent would have simply ignored the payment claims, denied knowledge of them when approached by the Applicant for payment and demanded that they be rendered in another manner.*

*The fact that various conversations also occurred between the parties by text message, by telephone in person in addition to by email does not detract from the fact that it was an accepted course of conduct for the Applicant to render its payment claims to the Respondent by email and that the parties identified one another with certainty through the use of their respective email addresses.*

*Email sign off*

*The Respondent refers to annexure [redacted]-2 of the statutory declaration of [redacted] [redacted] which contains the cover emails for the emails dated 10 December 2017 and 17 December 2017. The Respondent notes the Adjudicator's comment that he is not in possession of those two emails in particular and submits that they are material*

*to the question of whether an email sign-off can be treated as a signature for the purposes of the Act.*

*The Respondent repeats its submissions above as to the established course of conduct between the parties as to the respective email addresses of the Applicant and Respondent.*

*The Applicant's assertion that the email did not contain a signature and that "at the most there is a reference to the author's name at the end of the email" is incorrect. The relevant emails are signed off as:*

*Further, the email address from which those emails were sent is .*

*Further to the submissions above on the ETA, the Respondent submits that the Applicant's submissions that the Act prohibits any course other than a hand-written signature finds no bearing in the modern approach adopted in the ETA.*

*In the High Court case of Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3, the court held that a proposed council by-law certificate was "signed" pursuant to the South Australian equivalent of the ETA even though no handwritten signature was present on that certificate because the form had been emailed to the council by a legal practitioner. The High Court found that the document had been signed because "the certificate was provided by an email in circumstances which allowed the identification of the legal practitioner and unequivocally showed that he subscribed to the view expressed in the certificate even though he did not sign it".*

*Additionally, in Faulks v Cameron [2004] NTSC 6, the Supreme Court held a "Separation agreement" which was evident by email correspondence was "signed" in accordance with s 9 of the ETA for the purpose of s. 45(2) of the De Facto Relationships Act (NT) even though no handwritten signature was included in that email.*

*The Respondent submits that in view of the jurisprudence above there can be no argument that the payment claim must be signed by hand but rather the provisions of the ETA apply to allow a document to be signed provided that the conditions in s. 9 are satisfied.*

91) On 20 April 2018, I asked the Applicant's solicitor to provide me with a copy of the passage in Seddon and Ellinghaus, Cheshire and Fifoot's Law of Contract (8th ed.) at 3.44 cited in the Applicant's further submissions dealing with the application of the Electronic Transactions Act, NT and  did so the same day.

## My Findings in relation to Second Request

92) I should note that when I sought further submissions on these issues in my email

to the parties' solicitors sent on 8 April 2018, I mistakenly said that invoice numbers 4 and 8 were both dated 17 December 2017, when the correct position is that invoice numbers 8 and 9 were both dated 17 December 2017 and invoice 4 was dated 10 December 2017, but I do not consider that anything turns on that mistaken statement by me.

93) I also note that it is evident from the Statutory Declaration declared by the Respondent's solicitor on 11 April 2018 that the following emails were sent by the Applicant to the Respondent:

a) an email from [REDACTED] using as her email address ( [REDACTED] ) to someone named [REDACTED] [presumably [REDACTED] ] at the Respondent, dated 6 December 2017, with the subject [REDACTED] Invoice", which attached an unsigned invoice numbered 2 from the Applicant to the Respondent making a claim for labour and materials – the sign off for such email being "Kind regards, [REDACTED];

b) an email from [REDACTED] using her same email address to an unspecified person at the Respondent, dated 10 December 2017 attaching a revision to the aforesaid invoice number 2, this time being the unsigned invoice number 4 dated 10 December 2017 (being one of the three invoices the subject of this adjudication), with the same subject as in the email dated 6 December 2017 and signed off in the same way as that email;

c) an email from [REDACTED] using her same email address to [REDACTED], dated 17 December 2017, attaching unsigned invoice numbers 8 and 9, (being the other 2 invoices the subject of this adjudication), which was signed off "[REDACTED]'.

94) I firstly find that s. 9 of the Electronic Transactions Act, NT applies to the Contract, because even though s. 9 would not normally apply to private contracts, because:

a) Even though it is limited in its operation to where a signature is required *under a law of the Territory*; and

b) pursuant to s. 17 of the *Interpretation Act*, "*a law of the Territory*" includes Territory Acts and the common law, but it does not include any requirement which arises from a private contract between parties,

in this case, there is Law of the Territory which is requiring that a payment claim be signed, i.e. the provisions in the Act which imply that provision as a term of the Contract.

95) I secondly find that the Respondent gave its consent to the Respondent under s. 9(i)(b) of the *Electronic Transactions Act* to the use of the method used, because:

a) in essential terms the same method was used when the Applicant sent invoices in respect of the Contract Works and in respect of the other works being performed for [REDACTED] on three separate dates being on 6 December 2017, 10 December 2017 and on 17 December 2017; and

b) there is no evidence presented to me that the Respondent objected to that method being used when sending invoices and, to the contrary the Respondent dealt with them in the way one would normally expect to see invoice receiving party to deal with invoices, i.e. to consider their contents, request the renderer to amend them or send queries to the renderer about their contents; and

c) in those circumstances, the Applicant is estopped from denying that it consented to payment claims, emails and communication being sent between the parties, by email.

96) I secondly find that the implied terms of the Contract in relation to requiring a payment claim to be signed, were not specific in relation to the signing methods and, therefore a generalised signature requirement would have included the kind of email sign off used for each of the emails referred to in paragraph 93 hereof.

97) I thirdly find that the terms of the Contract permitted a single payment claim to be made by a signed off email which attached 2 unsigned invoices.

98) I fourthly find that each of the emails referred to in paragraph 93 hereof and attached invoices, were received by the Respondent on the dates upon which each of them were sent.

99) I fifthly make the following findings concerning each of the emails referred to in paragraph 93 hereof:

a) The email sent on 6 December 2017 and attached invoice was a single payment claim (**6 December Payment Claim**).

b) The 6 December Payment Claim was replaced by the email sent on 10 December 2017 and attached invoice, which was a single payment claim (**10 December Payment Claim)**.

c) The email sent on 17 December 2017 and attached two invoices was a single payment claim (**17 December Payment Claim**).

100) I appreciate that my finding in paragraph 99(b), is a finding, which is not based upon any submissions by either party and, normally, for reasons of procedural fairness, I should, in those circumstances, seek further and consider further submissions about that possible finding, before making the finding, but, in this case, I do not consider that that is necessary, because:

a) making this finding does not make any material difference in the adjudication result; and

b) the available time left for me to make my determination does not allow me sufficient time to seek and consider such submissions.

101) I sixthly find that, as the provisions for how to respond to a payment claim in cl. 6 of Division 5 of the schedule to the Act were implied into the Contract:

a) the dates upon which payment claims were due to be paid was 28 days after they were served served on the Respondent;

b) as the 17 December Payment Claim was sent to the Respondent on 17 December 2017, even though 17 December 2017 was a Sunday, as the Respondent first responded to it on 17 December 2017, I find that it was served on the Respondent on 17 December 2017;

c) the 17 December Payment Claim was due to be paid on **15 January 2018**, 14 January 2018 being a Sunday.

102) In those circumstances, I find that the Purported 5 January Payment Claim has no operation under the Contract, because the prior payment claims dealing with the same three invoices were effective as two (2) individual payment claims.

103) In those circumstances, as I have not accepted the Applicant's first submission and the Applicant's alternative second submission has been made solely on the basis that it only wants me to assess the amount payable in respect of the claim made in invoice no. 8, I will limit my assessment to that invoice only.

### *Third Request – effect of purported abandonment of invoices #4 and #9 in Part 7 of Application*

104) On 4 April 2018 the Respondent's solicitor sent an open letter to the Applicant's solicitor and copied me in on that letter. Amongst other things, it asserted that the adjudication application contained three separate payment claims, referred to the requirement in s. 34(3)(b) of the Act which requires the consent of the parties for there to be a simultaneous adjudication of more than one payment claim in an adjudication, stated that the Respondent had not been asked to consent to that happening and therefore invited the Applicant to withdraw the adjudication application.

105) The following is a complete quotation of what was stated in that letter:

> *"We act for* [redacted] *("Client").*
>
> *We refer to the Application for Adjudication ("Application") pursuant to the Construction Contracts (Security of Payments) Act ("Act") served upon our client on 20 March 2018.*
>
> *We note that in paragraphs 14 and 20 of the Application you have set out three separate and distinct payment claims in each of the two alternative cases posed. Paragraph 42 of the Application further confirms that there are three separate and distinct payment disputes in the Application.*
>
> *Our Client* ***does not consent*** *to having two or more payment disputes adjudicated simultaneously by the Adjudicator appointed for this application. Absent the consent of the parties, section 34(3)(b) of the Act precludes the appointed Adjudicator from continuing with the adjudication process.*
>
> *The principle of section 34(3)(b) operating as a bar upon the continuation of the Adjudication process was determined in Gwelo Developments Pty Ltd v Brierty Limited (2014) 36 NTLR 1 (and affirmed by the Court of Appeal in Brierty Limited v Gwelo Developments Pty Ltd (2014) 35 NTLR 3) in which the applicant failed to seek the consent of the opposing party prior to bringing the application.*

*At paragraph [48] of Justice Kelly's judgment in first instance, Her Honour was clear:*

> *""The law is clear – an adjudicator may not adjudicate two or more payment disputes simultaneously without the consent of the other party – and the defendant chose to take the risk of making an application for adjudication containing two distinct payment disputes without first asking the plaintiff if it would consent to this course".*

*We therefore invite your client to withdraw is Application under section 28A of the Act.*

*In the event that your client continues to press its Application despite the above, our client will seek its costs on an indemnity basis.*

*We note that time is of the essence and therefore expect confirmation of your client's withdrawal by* ***4:30PM this afternoon****. "*

106) On 4 April 2018 the Applicant's solicitor sent an email to the Respondent's solicitor (which was copied to me) in response to the Respondent's solicitor's letter referred to in the previous paragraph hereof, which said:

*"Thank you for your letter dated 4 April 2018.*

*Your letter asserts that our client's application for adjudication sets out three separate and distinct payment claims in each of the two alternative cases posed (emphasis added).*

*This statement is inaccurate and misconceives the basis upon which the application is made. We thought this was self-explanatory from the application itself.*

*We draw your attention to the following matters in order to restate the position:*

1. *The primary position is stated in paragraph 20 of the application, which clearly states that the relevant payment claim is that constituted by the letter dated 5 January 2018 from ████████ to your client with the relevant enclosures. That is a single payment claim in respect of the amount due to our client;*

2. *The alternative position is stated in paragraph 42 of the application, which clearly states that if the events identified in that paragraph obtain, our client relies solely on invoice number 08 dated 17 December 2017.*

*In the circumstances, this matter does not raise any issue of consent under section 34(3) of the Act.*

*The reality is that our client performed work for your client under one construction contract for which your client has refused to pay a single cent. Your client accepted the works performed but refuses to make any payment whatsoever. Our client is a small business which has been forced to proceed to adjudication as a result of your client's unwillingness to meet its contractual payment obligations.*

*It is not clear to us why you consider it is appropriate to copy your correspondence to*

*the adjudicator. As you have chosen to do so, it is appropriate that the adjudicator be made aware of our response. "*

107) I would not normally take correspondence passing between the parties' lawyers during an adjudication into account, but I think it was appropriate for me to do so in this instance, because:

a) the matters raised are relevant to the question of whether I have jurisdiction under the Act to make a determination of the payment claim dispute the subject of this adjudication application on the merits; and

b) the Respondent has relied upon submissions it made in its said email in the responsive submissions made by the Respondent which I invited and refer to below.

108) On 11 April 2018 I responded to the Applicant's solicitors request to be allowed to respond to the Respondent's submissions in paragraphs 11 and 17 of the Response in the following manner:

*"…..*

*I am also presently uncertain whether the issues raised in paragraph 11 of the Response (concerning the purported abandonment of invoices #4 and #9 in Part 7 of the Application) and/or paragraph 17 of the Response (concerning the Applicant's alleged inability to justify amounts claimed in its payment claim and an inability to provide a consistent account of the hours that were worked) are likely to become material to my determination.*

*I consider that I should give the Applicant the opportunity to provide responsive submissions in answer to the issues raised by the Respondent in paragraph 11 of the Response, because it would not have been possible for the Respondent to have anticipated that those issues would have been raised by the Respondent in the Response, but I do not consider that the Respondent would not have been able to anticipate that the Respondent might raise the issues in paragraph 17 of the Response before reading the Response and, therefore do not consider that I should give the Applicant the opportunity to provide responsive submissions in answer to the issues raised by the Respondent in paragraph 17.*

*I request that the Applicant provide me with the following further information and submissions:*

1. *……*
2. *That the Applicant provide any submissions it may want to make in response to the submissions made by the Respondent in paragraph 11 of the Response.*

*I request that the applicant do so by email to me (and copied to the Respondent's solicitor)* ***by 5:00 pm on 11 April 2018 CST****.*

*If the Respondent wants to respond to the further submissions of the Applicant on the issue referred to in numbered paragraph 2 above, it can do so in the same manner.* ***by noon on 12 April 2018 CST****.*

109) Paragraph 11 of the Response stated the following:

> *"11. The Applicant's purported abandonment of its claims for invoices #4 and #9 in Part 7 of its Application is cast in the alternative in the event that the Adjudicator finds against the Applicant that the invoices issued in December 2017 were payment disputes within the meaning of s. 8 of the Act. This purported abandonment does not take effect until such time as the Adjudicator makes a finding as to the nature of the invoices and, further, is not an active abandonment as an alternative case in the event that its other claims fail. The Respondent submits that the bar in s. 34(3)(b) has the effect of extinguishing the Adjudicator's jurisdiction at the outset such that there is no opportunity for the Application to "become" a single payment dispute Application. The Respondent further submits that the Act intentionally prescribes a precise Adjudication process that does not allow for the amendment of Applications after their service upon Adjudicator and opponent."*

110) On 11 April 2018 the Applicant's solicitor provided the following responsive submissions to this issue to me by email:

> *"……*
>
> ***2. That the Applicant provide any submissions it may want to make in response to the submissions made by the Respondent in paragraph 11 of the Response***
>
> *These submissions are provided subject to the submissions on service dated 10 April 2018 provided to the adjudicator.*
>
> *The applicant relies on the matters set out in the email from [redacted] to [redacted] dated 4 April 2018 (which was copied to the adjudicator).*
>
> *There is no application for the simultaneous adjudication of more than one payment dispute.*
>
> *The applicant's primary position is stated in part 4 of the application, which clearly states that the relevant payment claim is that constituted by the letter dated 5 January 2018 with the relevant enclosures. That is a single payment claim in relation to the amounts claimed.*
>
> *The alternative position is stated in part 5 of the application, which clearly states that if the events identified in that part obtain, the applicant relies solely on invoice number 08 dated 17 December 2017.*
>
> *The circumstances described in part 4 and part 7 of the application are truly alternative to one another: if the email sent on 5 January 2018 is a payment claim then the invoices sent on 10 and 17 December 2017 must necessarily not be, and vice versa. Only one of those legal positions can be correct.*
>
> *There are not, as the respondent alleges, two legal positions until such time as the adjudicator makes a finding as to which one is correct. The adjudicator's finding does not <u>create</u> any legal circumstance; it <u>confirms</u> that that circumstance exists.*
>
> *As set out in part 7 of the application, if the circumstances in that part are correct, the application is for adjudication of the payment dispute arising from invoice 8 only. That was clearly expressed at the time the application was made. The*

*respondent's contention that there is an abandonment of some simultaneous application for adjudication of a payment dispute which takes effect only at the point of the adjudicator's determination - in order to make the argument that section 34(3)(b) applies - involves a contortion of logic and of the plain words of the application to the point of absurdity.*

*It must be remembered that the applicant performed the work for the respondent under a single contract and in respect of which it sought payment from the respondent for that work performed. The alternative submission does not constitute an additional payment dispute - it simply recognises the potential that the dispute can only be one or the other of the identified outcomes.*

*In the circumstances, this matter does not raise any issue of consent under section 34(3) of the Act."*

111) I make findings in relation to this issue in the next section of the determination entitled 'Jurisdiction'.

## JURISDICTION

112) The Respondent has submitted that I do not have jurisdiction to determine this payment dispute Application on the merits and should dismiss it, because the Respondent has not consented to the simultaneous adjudication of two (2) or more payment disputes as required by s. 34(3)(b) of the Act, which states:

> *"(3) An appointed adjudicator may:*
> *(a)…*
> *(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties*
> *(c)…."*

113) There are a number of other jurisdictional matters, which I need to consider, which are not contentious in this adjudication. I will make reference to and make findings about the non-contentious jurisdictional matters after I deal with this submission regarding the application of s. 34(3)(b).

114) The Respondent made the following submissions about the application of s. 34(3)(b):

a) The Applicant's primary submission that there was one payment claim made on 5 January 2018 is incorrect, because there are three (3) separate payment disputes arising from of the three (3) invoices rendered at that time, i.e:

i) Invoice 4 dated 10 December 2017 for $900.38;

ii) Invoice 8 dated 17 December 2017 for $15,866.38; and

iii) Invoice 9 dated 17 December 2017 for $660.

b) The Applicant's secondary submission suffers from the same incorrect premise because there are still three (3) separate payment disputes in

issue in this adjudication arising from the same three (3) invoices.

c) Justice Kelly's decision on appeal in *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44 ("Gwelo") - which was later affirmed on appeal in *Brierty Limited v Gwelo Developments Pty Ltd* (2014) 35 NTLR 3 - found that failure to seek the consent of the other party precluded the Adjudicator in that case from adjudicating more than one payment dispute contained together in a single Application. Relevantly, Her Honour was clear in paragraph 48 of her judgment as to the effect of s. 34(3)(b):

> "*[48]…the adjudicater was precluded from determining both payment disputes contained in the application together without the consent of the plaintiff, which was not a form of Russian roulette. They gamble on including more than one payment dispute in an application for an adjudication and, if consent is not forthcoming from the other party, the applicant is precluded from obtaining adjudication on those disputes together. The answer to that is that the gamble is one of the defendant's [Applicant in first instance] own making.* ***The law is clear – an adjudicator may not adjudicate two or more payment disputes simultaneously without the consent of the other party – and the defendant chose to take the risk of making an application for adjudication containing two distinct payment disputes without first asking the plaintiff if it would consent to this course*** [emphasis added]."

d) The Applicant chose to "take the risk" by not seeking the Respondent's consent prior to making the Application. The Respondent does not consent and further, would not have consented, to the simultaneous adjudication of the three (3) invoices whether rendered in December 2017 or in January 2018.

e) The decision in *Gwelo* is reinforced in the decision of Southwood J in *M&P Builders Pty Ltd v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 ("M&P Builders") where, in paragraphs 47, 49 and 50 of that judgment, His Honour describes the function of s. 34(3)(b) as a "bar" or a preclusion to simultaneous adjudications where there is no consent from the other party. Relevantly:

> "*[47]…in my opinion, there is nothing in the Act which precludes more than one payment dispute being included in a single application* ***provided the parties consent to the simultaneous adjudication of each dispute: s 34(3)(b) of the Act*** [emphasis added]."
>
> *"[49] …the plaintiff chose to include three payment disputes in one application. The plaintiff thereby consent to the payment disputes being adjudicated simultaneously. The first defendant did not object to such a course, it joined each payment dispute. By its conduct, the first defendant consented to the simultaneous adjudication of each of the payment disputes.*
>
> *"[50] In the circumstances,* ***there was no bar to the simultaneous***

***adjudication of these three payment disputes*** [emphasis added].

f) The language is unequivocal in both the cases of *Gwelo* and *M&P Builders.* As a result of the lack of consent on part of the Respondent, I may not adjudicate multiple payment disputes in this Application.

115) The Applicant submitted that:

a) the Respondent's submissions regarding the need to obtain the Respondent's consent were misguided, no matter whether I find that payment claims were made in December 2017 or on 5 January 2018, because s. 34(3)(b) does not apply;

b) it does not apply in relation to the Respondent's primary submission that the payment claim was made on 5 January 2018, because if I find that that was the case only one payment claim was made then consisting of three (3) invoices and the terms of the Contract do not prohibit one payment claim comprising more than one invoice;

c) if I find that separate payment claims were made when each invoice was rendered, as the Applicant has stated in the Application that in those circumstances it only wants there to be an adjudication of the payment dispute in respect of invoice no. 8, so, as the application is being made for one payment claim s. 34(3)(b) does not apply.

116) I consider that the Applicant's submissions in this regard are correct and therefore, as s. 34(3)(b) does not apply, the obtaining of the Respondent's consent was unnecessary, because:

a) It is well established that, provided that the contract terms do not prohibit single payment claims for several invoices being made, a single payment claim can be made under the Act which includes several invoices, if all invoices were firstly effectively rendered when sent as a single payment claim;

b) the Contract contains no such prohibition;

c) the Applicant's said alternative contentions were clearly and unequivocally stated in the Application and did not require findings being made by me before creating single payment claim dispute claims in the alternative, neither of which resulted in the requirements of s.34(3)(b) being invoked;

d) even if I do not find that the first time a payment claim was made in in respect of these invoices, in accordance with the manner of making payment claim requirements in the Contract, was on 5 January 2018, because separate payment claims were made when each of the three invoices were first delivered to the Respondent in December 2017, as, in those circumstances, the Applicant has limited its application to a determination of the payment dispute concerning the claim in invoice 8, s. 34(3)(b) does not apply; and

e) the only way that I could make a finding which would make the operations of s. 34(3)(b) being invoked, would be if I were to make a finding that the email sent by the Applicant on 5 January Payment Claim

constituted three (3) separate payment claims, but in the circumstances of this case, there is no possibility that I would make such a finding.

117) I therefore find that I should not dismiss this Application on the grounds that the Applicant did not comply with the requirements of s. 34(3)(b), because for the reasons stated by me above, there was no need for the Applicant to seek the Respondent's consent pursuant to the requirements of s. 34(3)(b) of the Act., before making the Application.

118) The following sections of the Act impact upon an adjudicator's jurisdiction under the Act:

a) S. 33(1)(a) of the Act, which requires adjudicators to firstly determine whether they have jurisdiction to determine the payment claim dispute on the merits. If I decide that I do not have jurisdiction to do so, I am required to dismiss the adjudication application without making any determination on the merits.

b) S. 33(1)(a) provides as follows:

***"33 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*

*(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*

*….."*

119) S. 28 of the Act is in the following terms:

***"28 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):*

*(a) prepare a written application for adjudication; and*

*(b) serve it on each other party to the contract; and*

*(c) serve it on:*

*(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or*

(ii) if the parties to the contract have appointed a prescribed *appointer – the appointer; or*

*(iii) otherwise – a prescribed appointer chosen by the party; and*

*(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).*

*(2) The application must:*

*(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and*

*(b) state the details of or have attached to it:*

*(i) the construction contract involved or relevant extracts of it; and*

*(ii) any payment claim that has given rise to the payment dispute; and*

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

*(3) Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection."*

120) S. 8 of the Act provides as follows:

***"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."*

121) Dealing with those requirements in turn:

### *Does the application concern a construction contract?*

122) I find that the Contract is a construction contract under the Act, because:

a) the works to be performed fall within the definition of 'construction work' in s. 6(1) of the Act, due to involving construction of civil works and a structure that will form part of land; and

b) none of the categories of works excluded from the definition of construction works in s. 6(2) of the Act apply.

### *Has the application been prepared and served in accordance with s.28?*

123) I find that the Application has been prepared and served in accordance with the requirements of s. 28 of the Act, because:

a) the payment dispute in relation to the 17 December Payment Claim, arose on **20 December 2017** when [redacted] sent an email to the Applicant's [redacted] attaching a spreadsheet with [redacted]'s breakdown of the hours worked for invoice nos. 4, 8 and 9 and, according to my calculations, the Applicant applied to have the 17 December Payment Claim dispute adjudicated before the expiration of the 90 day period in s. 28 (being on 20 March 2018), the application having been made on 20 March 2018;

b) the Applicant also complied with the other formal requirements of s. 28, i.e:

i) the adjudication application is in writing;

ii) it was delivered to a prescribed appointor;

iii) it was served on the Respondent;

iv) it was prepared in accordance with and had details in it required by the Regulations to the Act;

v) it included in the application what the Applicant considered to be relevant extracts of the construction contract involved; and

vi) it stated or had attached to it all the information, documents and submissions on which the Applicant relies in the adjudication.

***Has an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract made an order, judgment or other finding about the dispute that is the subject of the application?***

124) In the absence of any evidence to the effect that an arbitrator or other person or a court or other body dealing with a matter arising under the Contract has made an order, judgment or other finding about the dispute that is the subject of the Application, I find that none of those things have occurred.

***Should I find that it is not possible to fairly make a determination, because of the complexity of the matter, or, because the prescribed time or any extension of it, is not sufficient for another reason, viz s. 33(1)(a)(iv)?***

125) Neither party has made any submissions to the effect that this matter is too complex for me to fairly make a determination, because the prescribed time or any extension of it is not sufficient.

126) I also formally find that the complexity of the matter would not prevent me from fairly make a determination of this payment claim dispute, within the prescribed time or any extension of it.

## DISPUTE NOTICE

127) The Applicant made the following alternative submissions, if I find that the payment claim was made on 17 December 2017:

a) the amount claimed was $15,866.38;

b) payment was due (if not disputed) by 14 January 2018;

c) the response received on 20 December 2017 did not constitute a notice of dispute under the Contract, for the same reasons as set out in part 5 of the Application submissions, which submitted as follows:

***"5. Full amount of Payment Claim payable as notice of dispute not given within 14 days***

*23. Pursuant to the term implied into the Contract by Division 5 of the Schedule to the Act, the respondent was required by the Contract to:*

*(a) within 14 days after receiving the Payment Claim:*

*(i) give the applicant a notice of dispute; and*

*(ii) if the respondent disputed 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.*

24. *The implied term required a notice of dispute to (among other things):*

    *"(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;*

    *"(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".*

25. *On 9 January 2018, the respondent sent an email to the applicant's lawyers in relation to the Payment Claim. ……*

26. *The applicant's lawyers responded to the email on 11 January 2018. …….*

27. *The content of the respondent's email at Annexure 4 does not satisfy the requirements of paragraph 24 above, in that:*

    (a) *for paragraph 24(f) and (g), it did not provide the reasons for believing the Payment Claim had not been made in accordance with the Contract or why any item was disputed. It stated that "the information that has been provided shows inaccuracies and a discrepancy in hours claimed" but did not state what the respondent saw as being the discrepancy or inaccuracy (on the basis of which it refused to pay the Payment Claim); and*

    (b) *for paragraph 24(h), the email was not signed.*

28. *No other written response was provided by or on behalf of the respondent within 14 days of the Payment Claim. As a result, the respondent did not give the applicant a notice of dispute under the Contract within 14 days of receiving the applicant's Payment Claim.*

29. *Accordingly, pursuant to the terms of the Contract, the respondent's opportunity to dispute the claim has passed, and it is contractually obliged to pay the full amount of the Payment Claim, being $17,426.76 including GST (see e.g. K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd [2011] NTCA 1 at [47] ………*

30. *On 1 February 2018 (27 days after the Payment Claim was served), the respondent's lawyers wrote to the applicant's lawyers. The applicant's lawyers responded by letter on 6 February 2018, referring to the matters set out in the letter dated 1 February 2018. The letter dated 1 February 2018 was expressed to be without prejudice and so it, and the parts of the response which disclose matters in that letter, are not disclosed. …………."*

d) *the respondent therefore did not give a notice of dispute under the Contract within 14 days of the payment claim dated 17 December 2017; and*

e) the *respondent is therefore liable to pay the full amount claimed in the payment claim dated 17 December 2017 for the same reasons set out in part 5 above; alternatively*

f) the *respondent is nevertheless obliged to pay the full amount of the payment claim dated 17 December 2017 as it has performed and charged for work to that value under and in accordance with the Contract for the reasons set out in part 6* [of the Application]*"*.

128) The Respondent's submissions in this regard were as follows:

a) The Respondent disputed that the December Payment Claims under cl. 6(1)(b)(ii) of the Schedule to the Act because, in the Respondent's assessment of the claim, the claim as to supervisor's and labourer's wages appeared to be inflated.

b) A notice of dispute must, in accordance with cl. 6 of Division 5:

i) be in writing; and

ii) be addressed to the claimant; and

iii) state the name of the party giving the notice; and

iv) state the date of the notice; and

v) identify the claim to which the notice relates; and

vi) 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

vii) 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

viii) be signed by the party giving the notice.

c) Upon this criteria and in reliance on the Respondent's submissions concerning payment claim principles, the Respondent rendered several notices of dispute on 19 December 2017 and 20 December 2017 well within the 14 day timeframe required.

d) Each of the text messages deposed to in the [redacted] Declaration satisfied the criteria in cl. 6 of Division 5, because they:

i) were in writing;

ii) were addressed to [redacted] in his capacity as director of the Applicant;

iii) stated the name of the party giving the notice in that [redacted]'s name and contact number was displayed on [redacted]'s phone as he read the text message;

iv) was time and date stamped;

v) identified the claim and the disputed items by referring to and requesting breakdown of the supervisor and labourer hours;

vi) stated the reasons for disputing those claims, namely that the Respondent was not convinced of the veracity of the claims and required more detail to reconcile its on site records and other sources with the claim; and

vii) was signed in accordance with s. 9 of the *Electronic Transactions (Northern Territory) Act*.

e) It is evident in the text messages that there was no confusion whatsoever on part of both parties; that the parties knew each other's exact identities and roles within their respective companies; that the parties knew exactly which invoice was disputed and which items within that invoice were disputed and the reasons why the Respondent disputed those items (albeit that the Applicant disagreed with the Respondent's reasons).

f) In the alternative, the email sent from [redacted] to the Applicant's [redacted] [redacted] of 20 December 2017 containing the spreadsheet of assessed hours constituted a notice of dispute complaint with cl. 6 of Division 5 and delivered within 14 days of receipt of the invoice. It was compliant because it:

i) was in writing;

ii) was addressed to the Applicant by its representative [redacted] with whom [redacted] had exchanged numerous prior emails;

iii) stated clearly in the signature block the name of the Respondent;

iv) stated the date in the time and date stamp of the email

v) referred to the disputed invoice number 8;

vi) identified the items disputed within the spreadsheet namely the supervisor and labourers being the only two items in that invoice that pertained to human labour. Identified the reason for the dispute being that the Respondent did not believe that the hours claimed in invoice #8 were accurate;

vii) was signed in accordance with the *Electronic Transactions Act, NT*; and

viii) was issued within 14 days of receipt of the January Payment Claims [sic 17 December Payment Claim] .

g) Therefore, a dispute arose on 19 December 2017 or, alternatively, on 20 December 2017.

129) I make the following findings concerning the dispute notice issue:

a) The various text messages sent between [redacted] and [redacted] on

19 and 20 December 2017 or the two emails sent by [redacted] to [redacted] on 19 December 2018 were not dispute notices, because they made no assessment of invoice no. 8, in its entirety, but rather, in part, and made requests for additional information to be provided by the Applicant's [redacted].

b) The email sent by [redacted] to [redacted] on 20 December 2017, together with the spreadsheet attached to same was a notice of dispute which complied with all the Contract's notice of dispute making requirements, because it:

i) was in writing;

ii) was addressed to the Applicant by its representative [redacted] with whom [redacted] had exchanged numerous prior emails;

iii) stated clearly in the signature block the name of the Respondent;

iv) stated the date in the time and date stamp of the email;

v) referred to the disputed invoice number 8;

vi) identified the items disputed within the spreadsheet namely the supervisor and labourers being the only two items in that invoice that pertained to human labour. Identified the reason for the dispute being that the Respondent did not believe that the hours claimed in invoice #8 were accurate, which references, could be understood in context, as being an assessment, based, in part, on comments by [redacted] to [redacted], in text messages sent on 19 and 20 December 2017.

vii) was signed in accordance with the *Electronic Transactions Act, NT*

viii) was issued within 14 days of receipt of the 17 December Payment Claim.

c) As the Respondent sent a valid dispute notice in response to the 17 December Payment Claim to the Applicant, within the time required by the terms of the Contract, even though the Respondent did not pay to the Applicant the undisputed portion of the 17 December Payment Claim, I find that the giving of a valid dispute notice is enough to make it necessary for me to assess the amount properly payable in relation to the whole of invoice no. 8, based on the evidence presented to me and on the balance of probabilities.

## ASSESSMENT OF AMOUNT PAYABLE

130) The Applicant made the following submissions concerning the assessment of invoice no. 8:

a) It appears that the Respondent does not accept:

i) that the Applicant's employees in fact worked the hours claimed. The Respondent's spreadsheet indicates (for [redacted] works):

i) Supervisor worked 20 hours; and

ii) Labourers worked 33 hours; and

b) does not accept the charge in the invoice for "mobilise to site - $1,650".

**Hours worked**

c) In reaching these figures, the Respondent appears to have failed to account for travel to site. Travel time for each of the three workers was 7.5 hours to site and 6.5 hours from site. The travel time to site was longer due to the heavy rain and muddy conditions of the roads on the relevant day (see [redacted] Declaration at paragraph 12).

d) The balance of the difference appears to be a contention by the Respondent that one of the Applicant's labourers worked 0.5 hours on the Sunday of the works. The applicant confirms that that contention is incorrect. The Applicant is at a loss to understand how the Respondent could have reached that view, given that its representative was absent from site on the Sunday (see [redacted] Declaration at paragraph 11).

e) The Applicant contends that:

i) the oral agreement between the parties specifically included a term that the Applicant would be paid at its hourly rates for travel time (see [redacted] Declaration at paragraphs 3 to 6). The written component of the Contract provides the rates at which that is charged; and

ii) a term to that effect is implied by Division 2 of the Schedule to the Act to the extent that the written agreement does not provide a way of determining the amount that the Applicant is entitled to be paid for the obligations the Applicant performs. That division provides that the Applicant is entitled to be paid a reasonable amount for performing its obligations. The Applicant submits that travel to site was an essential part of the work required to be performed under the Contract, and that it is entitled to be paid for that part of the work. This is particularly so in circumstances where the site was 6.5 to 7.5 hours' travel away from Darwin.

**Mobilisation**

f) It appears that the Respondent does not accept the charge in the invoice for "mobilise to site - $1,650".

g) The written component of the Contract provides that the Respondent

would be paid $1,500.00 plus GST in respect of mobilisation.

h) The Applicant confirms that its hours worked in respect of mobilisation were not included in the hourly rates recorded in its invoices, and mobilisation was charged at the unit rate agreed between the parties. The Applicant confirms that mobilisation is not the same as travel and should not be confused with that item (see [redacted] Declaration at paragraph 13).

i) The work which the Applicant undertook in respect of mobilisation (and which was not charged for on hourly rates) was extensive and amounted to an estimated 20 hours. It included, but was not limited to (see [redacted] Declaration at paragraph 13):

   i) purchase diaphragm and chrome dipped worm drive for pump;

   ii) perform full service on pump; and

   iii) purchase materials required to undertake works, including super flow, conduits, sacrificial ball valves, hammer drill bits, ball valves and all fittings for the injection line, buckets, measuring jugs, tool box items and related travel.

j) The Applicant contends that it is entitled to payment for this item:

   i) pursuant to the written agreement between the parties which provided for a unit price for this item; or

   ii) alternatively and in any event pursuant to the term implied by Division 2 of the Schedule to the Act which provides that the Applicant is entitled to be paid a reasonable amount for performing its obligations. The Applicant submits that mobilisation was an essential part of the work required to be performed under the Contract, and that it is entitled to be paid for that part of the work.

131) The Respondent made the following submissions concerning the assessment of invoice no. 8:

a) referring to the [redacted] Declaration, the Respondent submitted that it had sound bases for refusing to make payment to the Applicant in relation to the supervisor and labourer hours in invoice #8. The Applicant was not able to justify its claims in that regard and, further, could not provide a consistent account of the hours that were worked.

b) It is trite to say that the Respondent should not be made to pay for hours that the Applicant did not work or for travel that the Applicant agreed would be subsumed into the pre-agreed allowance for mobilisation.

c) The Respondent's assessment of invoice number 8 were based on a combination of on-site sources, contemporaneous documents and a fair synthesis of the Applicant's various contradictory claims. The Respondent submits that, at its highest, it should not be made to pay more than $13,517.38 incl GST to the Applicant being the aggregate figure calculated on the spreadsheet deposed to in the Statutory Declaration for invoice

numbers 4, 8 and 9.

132) I assess the amount properly payable in respect of invoice 8 to be $10,388.37 in the following manner:

a) In general I found the account of relevant events in [redacted]'s statutory declaration to have been much more detailed, and I consider, on balance, more likely to be reliable, than the accounts of same in [redacted]'s statutory declaration.

b) On balance I also consider that [redacted]'s account of pre-contractual discussions to be more likely to be correct and, in particular, that during the discussions between [redacted] and [redacted] on 1 or 2 September 2017, during which the rate for mobilisation was agreed, there was no discussion concerning what mobilisation would entail and no discussion about the Applicant's travel to or from site and, in particular, charging for the time spent so travelling.

c) There was a distinct lack of any account of what discussions took place and text messages were exchanged between [redacted] and [redacted] on 19 and 20 December 2017 in [redacted]'s statutory declaration and I am not surprised that that was the case, due to the intemperate comments often using expletives in a number of the text messages sent by [redacted] and, because in them, in general terms he showed himself to be un-cooperative and refused to provide information reasonably requested by [redacted] about time spent travelling to and from site, working hours for different employees during the three (3) days at site, time spent by the Applicant's workers on the work being performed for [redacted], and time spent on lunch and other breaks.

d) I therefore accept on balance [redacted]'s version of those discussions, including the telephone discussion that took place between [redacted] and [redacted] on 19 December 2017[15] during which, amongst other things, [redacted] said that [redacted] acknowledged that travel time to and from the site should be included in the mobilisation charge and that, as those hours had also been included in invoice no. 8, he agreed that the Applicant should remove the effectively double charge for travel time component in it.

e) In those circumstances, I find that:

i) the terms of the Contract were that there would be no separate charge for travel time and that the time spent by the Applicant's personnel traveling to and from the works site would be subsumed in the lump sum mobilisation charge; and

ii) therefore the Applicant's submissions in reliance on the Act's implied terms entitling a contractor to charge a reasonable amount for performing work which is not provided for in the Contract does not apply.

f) I also find that [redacted]'s account of discrepancies about information provided by [redacted] to [redacted] in answer to [redacted]'s queries

15 [redacted] Declaration paragraph 26

about the hours worked, to on balance be correct.

g) I also find that, [redacted]'s assessment of the amounts properly payable by the Respondent in relation to the amounts claimed in invoice number 8 (bearing in mind such discrepancies and the other pertinent inquiries made by [redacted]), in the spreadsheet attached to the notice of dispute email sent on 20 December 2017 to have been reasonably made and based upon a correct application of pertinent terms of the Contract.

h) I also find that the total time spent by:

i) [redacted] at the works site, performing the Contract Works on 15, 16 and 17 December 2017 was 20 hours, being 5.5 hours on 15/12/2017, 8 hours on 16/12/2017 and 6.5 hours on 17/12/2017;

ii) the Applicant's labourer named [redacted] at the works site, performing the Contract Works on 15, 16 and 17 December 2017 was 14 hours, being 7.5 hours on 15/12/2017, 6 hours on 16/12/2017 and .5 hours on 17/12/2017; and

iii) the Applicant's labourer named [redacted] at the works site, performing the Contract Works on 15, 16 and 17 December 2017 was 19 hours, being 4.5 hours on 15/12/2017, 8 hours on 16/12/2017 and 6.5 hours on 17/12/2017.

i) I assess the component parts of invoice number 8 in the following way[16], after excluding, the labour overcharges and improperly made separate charges referable to travel time to and from the works site:

| | | | |
|---|---|---|---|
| i) | Amount charged, excluding GST | | $14,423.98 |
| ii) | Less 15 hours charged | | |
| | for superviser at $120 per hour | $1,800.00 | |
| iii) | Less 32 hours charged for other | | |
| | 2 labourers at $100 per hour | $3,200.00 | $5,000.00 |
| Total: | | | $9,443.98 |
| Plus GST | | | $944.39 |
| Total, inclusive of GST: | | | **$10,388.37** |

## INTEREST

133) I find that as the Contract did not have any provision for the payment of interest on overdue payment claims and in those circumstances the provisions of cl. 7 of

16 I note that the agreed contract rates make no reference to charging for materials, but given that the Respondent has not disputed the Applicant's right to charge for same or that the amounts so charged were incorrect, I have included them in my assessment of the amount properly payable without any variance to the amount charged for all materials in invoice no. 8.

Division 6 to the Schedule to the Act applies, which provides that interest is payable on any the amount of a payment claim that has not been paid calculated from the day after the due date for payment of the payment claim and ending on and including the date upon which the amount payable is paid at the rate prescribed by the Construction Contracts (Security of Payments) Regulations (**Regulations**).

134) Regulation 9 to Regulations state that the rate to be applied is the rate fixed from time to time by s. 85 of the Supreme Court Act, NT, being the interest rates used for judgments of the Supreme Court.

135) The Supreme Court in turn applies the interest rates fixed from time to time by the Federal Court of Australia on its judgments.

136) The due date for payment of the 17 December Payment Claim was on **15 January 2018** (14 January 2018 being a Sunday), being 28 days after 17 December 2017 (even though that was also a Sunday), being the date upon which it was delivered to and first considered by the Respondent.

137) In the period from and including 16 January 2018 to the date of this determination being 23 April 2018, the Federal Court interest rate on judgments has been 7.5 % per annum.

138) I therefore calculate the interest payable on the assessed amount of $10,388.37 in the period from 16 January 2018 to 23 April 2018 (both dates inclusive, being 76 days at $2.13 cents per day) to be $161.88.

## COSTS

139) I think it appropriate for me to make some preliminary observations about the costs of this adjudication. Given, the total amount claimed by the Applicant was approximately $17,400, or alternatively, approximately $15,900, I doubt, given the high relative amount of my fees (which are far more than I would normally have wanted to charge for a claim of this size, but have been charged, due to the numerous and often complicated legal issues which arose in this adjudication), that, when each of the parties' solicitor's costs are also taken into account, the result will not be cost effective for either party. The risk of a possible uncommercial outcome to prosecuting a legal dispute is always present when a claim is not large in amount. That risk is exacerbated when the facts of the adjudication indicate that the claim is not able to be based upon simple legal principles. Clearly, and regrettably, this was not that sort of simple claim. In these circumstances, I have decided to discount my fees.

140) S. 36(1) states that the normal position in relation to the payment of the costs of an adjudication is that each party bear their own costs of the application.

141) S. 36(2) gives adjudicators the discretion, if satisfied that a party to an adjudication has caused the other to incur costs due to frivolous or vexatious conduct or, because the other party has made unfounded submissions, to decide that the other party must pay some or all of the other party's costs in relation to the adjudication and the costs the parties are liable to pay under s. 46 of the Act.

142) I consider that the normal position should apply in this adjudication in relation

to the payment of my fees and relation to any other costs of the adjudication, incurred by the parties.

143) I have today rendered an invoice for my fees on the basis that each party pay fifty per centum (50%) of my adjudicator's fees and, upon payment of same by both parties, I will provide them with a copy of my determination.

144) I therefore determine that, in accordance with s. 36(1) of the Act, each party to this adjudication bear their own costs in relation to the adjudication, including the costs the parties are liable to pay under s. 46 of the Act.

## THE DETAILS OF THE DETERMINATION

145) Pursuant to s 34(1)(a) of the Act, I have made this determination on the basis of the Application and Supporting Documents, the Response and Supporting Documents and the further submissions provided by the parties requested by me.

146) Pursuant to s. 36(1) of the Act, I have determined that each party to this adjudication bear their own costs in relation to the adjudication, including the costs the parties are liable to pay under s. 46 of the Act.

147) Pursuant to s 33(1)(a), I have determined that the Respondent should pay the application be dismissed without me making a determination of its merits.

## CONFIDENTIAL INFORMATION

148) Neither party has made any submissions to the effect that it would not be possible, by redacting some of the information in the determination, to keep the parties' identities and the Contract confidential.

149) In accordance with the requirements of s. 38(1)(e) of the Act, I find that, by redacting some of the information in this determination, such as:

a) the parties' names and their employees' names; and

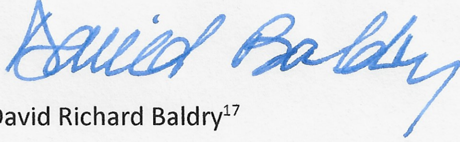
b) the parties business addresses; and

c) the nature of the works; and

d) the location of the works site,

it would be possible keep the parties' identities and the Contract confidential so as to make a redacted copy of this determination suitable for publication by the Registrar under s. 54 of the Act.

150) I have therefore prepared a redacted version of this determination in that manner, will advise the Registrar accordingly and provide copies of the redacted copy of this determination to him and to the parties' solicitors.

Signed: 

David Richard Baldry[17] Date: 23 April 2018

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