

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

BETWEEN:

[Redacted]

(“**Applicant**”)

and

[Redacted]

(“**Respondent**”)

AMENDED REASONS FOR DECISION

1. On 8 March 2018 I was appointed Adjudicator to determine a payment dispute between the Applicant (Subcontractor) and the Respondent (Contractor) by the Master Builders Northern Territory (“MBNT”) as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations* (“the Regulations”). I collected the Letter of Appointment and the Application documents from the MBNT offices that same day, 8 March 2018.
2. On 12 March 2018 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions until 2:00pm CST on Thursday 15 March 2018 should either party object to the appointment. There were no objections to my appointment.
3. In my letter of 12 March 2018 I confirmed that the Letter of Appointment advised that the Application was served on the Prescribed Appointer on 7 March 2018. I also requested that the parties confirm the date of service of the Application on the Respondent.

4. Later that same day, 12 March 2018, I received an email from the Applicant advising that they had no objections to my appointment as adjudicator and attached a full copy of the contract between the parties, including a copy of the purchase order, and a copy of the Applicant's site diary.
5. On 14 March 2018 I received a further email from the Applicant, also copied to the Respondent, which advised the final documents of the dispute which were attached to that email. The attachment contained further copies of the documents I had received on 12 March 2018.
6. On 19 March 2018 I wrote to the parties as follows:

"....Dear [K] and [D]

I confirm receipt of [the Applicant's] email of 12 March 2018 in reply to my correspondence in the above matter.

I have not received any response from [the Respondent's representative] and it is unclear as to whether he has instructions in relation to this matter.

My letter of 8 March 2018 [incorrectly referenced should be 12 March 2018] asked the parties to confirm the date of service of the Application on the Respondent. I did not receive that information.

I now direct the parties to advise:

1. *The date of service of the Application on the Respondent, pursuant to s.28(1)(b) of the Construction Contracts (Security of Payments) Act and s.25 of the Interpretation Act;*
2. *The method of service of the Application.*

*Response is required by **2:00pm CST 20 March 2018**..."*

7. On 20 March 2018 I received a lengthy email from the Respondent which advised that the Respondent had received documents on 8 and 9 March 2018 purporting to be an application and then set out in some detail that in their view that application had not been properly served in accordance with s. 28(1) of the Act and that the application had not been prepared in accordance with s.28(2) of the Act and that, as a result, I would be required to dismiss the application in accordance with s.33(1)(a)(ii) of the Act.
8. That same day 20 March 2018 I received an email from the Applicant advising that the documents of the application had been served by post, email and facsimile on 19 March 2018. The email also advised that the facsimile transmission was unsuccessful but the Respondent had confirmed receipt of the documents of the application by email. Attached to the Applicant's email was an Australia Post express post tracking number and a delivery receipt of the documents of the application to the Respondent on 20 March 2018.
9. To ensure completeness for the purposes of s.28 of the Act, later that same day, 20 March 2018, I wrote to the parties requesting the emails of 8 and 9 March 2018 referred to by the Respondent in their email earlier that day. Both the Applicant and the Respondent forwarded copies of the Applicant's emails of 8 and 9 March 2018.
10. On 21 March 2018 I wrote to the parties as follows:

"....Dear [C] and [K],

I confirm receipt of the email documents of 8 March 2018 and 9 March 2018 in the above matter.

The questions I asked the parties were related to service of the Application on the Respondent and not related to the unsolicited submissions from the Respondent as to the veracity of the Application. That is a matter for the jurisdiction of the Adjudication.

The documents of the 8 March 2018 were initially sent to the Master Builders Northern Territory (“the Appointer”) on 7 March 2018 and then forwarded by the Appointer to the Respondent on 8 March 2018. It is not for the Appointer to serve the documents of the Application as that falls to the Applicant under s.28(1)(b) of the Construction Contracts (Security of Payments) Act.

The documents of 9 March 2018 were also initially sent by the Applicant to the Appointer on 7 March 2018 and then copied by the Applicant’s solicitor to the Respondent’s solicitor on 9 March 2018.

I view the carriage of email correspondence of both 8 March 2018 and 9 March 2018 as service of the Application on the Appointer and acceptance of that correspondence by the Appointer as service that would fall under s.8 and s.9 of the Electronic Transactions (Northern Territory) Act.

The documents sent to me on 12 March 2018 by the Applicant with a copy to the Respondent are also unsolicited submissions from the Applicant. That too is a matter for the jurisdiction of the Adjudication.

The documents sent by the Applicant to the Respondent on 19 March 2018 both electronically at 1:29pm EST and then by express post received by the Respondent at 1:00pm EST 20 March 2018 by tracking confirmation from Australia Post, would in my view satisfy service of the Application under s.25 of the Interpretation Act.

By my calculation, the Response would therefore be due on or before 5 April 2018. I request the parties please confirm that calculation.

Thank you for your continued assistance.....”

11. On 22 March 2018 I received confirmation emails from both the Applicant and the Respondent confirming the Response to be due on or before 5 April 2018. The Respondent also sought confirmation of service of the Response by electronic means.
12. Later that same day 22 March 2018 I again wrote to the parties in relation to service of the documents by electronic means as follows:

“...Dear [C] and [K],

In relation to service of the Response I refer you to my letter of 12 March 2018 (Copy attached).

I did not receive confirmation from either party in relation to electronic service of documents.

Would you kindly confirm your acceptance or otherwise of service of the documents of the adjudication by electronic means as per my letter of 12 March 2018.

Thank you for your assistance.....”

13. On 22 March 2018 I received confirmation from the Applicant of service of the documents of the adjudication by electronic means.
14. On 23 March 2018 I received confirmation from the Respondent of service of the documents of the adjudication by electronic means.
15. On 5 April 2018 I received by email a copy of the Response which was also copied to the Applicant. The Respondent's email also contained a download link to the Response documents which was made available until 31 May 2018.
16. That same day 5 April 2018 I wrote to the parties confirming receipt of the Response and within time and advised the parties that there were some questions on which I required the parties to make further submissions as follows:

“....Dear [C] and [K],

I confirm receipt of the Response by dropbox and by email and within time.

I also confirm [C's] telephone message to me in relation to receipt of the Response. I am presently overseas and there will be at least a 12 hour delay in my response.

I have read the Application and the Response but have not fully absorbed the detail and there are several questions on which I would like the parties to make further submissions.

Once I have framed those questions I will send them through to the parties with an appropriate response time for the further submissions.

I will also seek a short extension of time from the Construction Registrar within which to make my determination of this matter.

Thank you for your continued assistance.....”

17. On 14 April 2018 I wrote to the parties with two questions relating to the scope of work and the Respondent’s counterclaim and requested they provide further submissions on these questions under s.34(2) of the Act as follows:

“.....Dear [C] and [K]

I have read the documents of the Application and Response in detail and there appears to be some inconsistency as to the scope of work under the contract and performance of the scope by the parties.

Accordingly, it is appropriate for me to request further submissions under s.34(2) of the Construction Contracts (Security of Payments) Act on the following questions:

- 1. The scope of work under the contract is set out in the Respondent’s purchase order, however the performance of that scope included additional items which were performed by agreement between the parties, I would presume as variations to the contract. To ensure consistency of the scope of work under the contract, I invite the parties to clearly set out, to the best of their knowledge, the scope of work under the contract; and*
- 2. The Respondent’s counterclaim contains items that may or may not be applicable to the works as well as items that may be part of scope creep under the contract. Again to ensure consistency, I invite the parties to clearly set out their understanding of the items in the Respondent’s counterclaim together with any agreements reached as to each of those items.*

I request these further submissions to ensure procedural fairness is afforded to each party. This has been considered and reasoned by Barr J in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20, see paras 32, and 42 through to 47 and I am guided by those in this respect.

*I require the submissions from each party to be provided by **4:00pm CST, 26 April 2018**.*

Thank you for your continued assistance in this matter....”

18. On 15 April 2018 I wrote to the Construction Registrar and sought an extension of time within which to make my determination up to and inclusive of 11 May 2018. On 16 April 2018 the Construction Registrar granted an extension of time for the determination up to and inclusive of 11 May 2018.
19. On 17 April 2018 I confirmed the extension of time for the determination to 11 May 2018.
20. On 26 April 2018 and within time I received the further submissions from both the Applicant and the Respondent on the two questions I had asked.
21. On 29 April 2018 I confirmed receipt of the further submissions and, given the information in the Application and the Response documents together with the further submissions from the parties, I required no further information to determine the payment dispute.

Introduction

22. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to provide wall and floor tiling services for the bathrooms (“the Contract”) at [*the project site*] in the Northern Territory of Australia (“the site”).
23. The Applicant claims that it is entitled to be paid its payment claim dated 9 February 2018 in the sum of **\$158,790.88 (including GST)**. The Respondent’s payment claim assessment and Notice of Dispute dated 21 February 2018 assessed the claim for the sum of **\$118,206.00 (including GST)** and then deducted counterclaims in the sum of **\$44,902.00 (including GST)** from the

claim and paid the Applicant the sum of **\$73,304.00 (including GST)**. The Applicant submits it is entitled to the unpaid portion of the claim in full without deduction in the sum of **\$85,486.89 (including GST)**, which is made up of the following components:

- (i) Wall Tiling - calculated in the sum of **\$17,033.45 (including GST)**;
- (ii) Floor Tiling – calculated in the sum of **\$6,061.44 (including GST)**;
- (iii) Tile Adhesive – calculated in the sum of **\$3,663.00 (including GST)**;
- (iv) Chef for Meals – calculated in the sum of **\$9,075.00 (including GST)**;
- (v) Meals – calculated in the sum of **\$494.00 (including GST)**;
- (vi) Air Tickets – calculated in the sum of **\$3,157.00 (including GST)**;
- (vii) A Variation – calculated in the sum of **\$1,100.00 (including GST)**;
- (viii) Return of counterclaim for materials – calculated in the sum of **\$39,952.00 (including GST)**; and
- (ix) Return of counterclaim for defective work – calculated in the sum of **\$4,950.00 (including GST)**.

A total claim of **\$85,486.89 (including GST)**.

- 24. The Applicant has not sought interest on its claim.
- 25. The Applicant has not sought Costs of the Adjudication.

26. The Respondent submits that its payment schedule assessment dated 21 February 2018 contained errors and it has reassessed the Applicant's payment claim at **\$116,912.18 (including GST)** which is a further reduction of the payment by **\$1,623.82 (including GST)** as a further counterclaim. The Respondent submits that it is entitled to its counterclaims as follows:

- (i) Counterclaim for materials purchased for Applicant – calculated in the sum of **\$39,952.00 (including GST)**;
- (ii) Counterclaim for rectification of defective work – calculated in the sum of **\$4,950.00 (including GST)**; and
- (iii) Counterclaim for reassessment of tiling quantities and defects costs – calculated in the sum of **\$1,623.82 (including GST)**.

A total counterclaim of **\$46,525.82 (including GST)**.

27. The Respondent says that the Applicant has not performed the contract work or the variation work to the extent claimed or at all and that it is entitled to its counterclaims for the costs it has incurred under the Contract in providing materials to the Applicant and rectifying defective work done by the Applicant.

28. The Respondent also says that the Applicant's claim for meals, a chef to prepare those meals and airline tickets in the Applicant's payment claim are not goods or services relating to construction work and therefore the Adjudicator holds no jurisdiction to determine such a claim.

29. The Respondent submits that the Application was not prepared and served properly under s.28 of the Act and as such is to be dismissed in accordance with s.33(1)(a)(ii) of the Act.

30. The Respondent seeks that interest at the rate of 8% be implied into the construction contract.

31. The Respondent seeks Costs of the Adjudication to be wholly paid by the Applicant because:
1. the Application was not properly prepared and served in accordance with the Act;
 2. the Applicant is not entitled to any further payment in relation to its payment claim; and
 3. the Respondent has been put to considerable cost responding to the Applicant's Application.
32. This determination is in relation to the Applicant's payment claim dated 9 February 2018 and the Respondent's counterclaims dated 21 February 2018 and the Respondent's further counterclaim dated 5 April 2018.

Procedural Background

The Application

33. The Application is somewhat informal, does not contain a general submission and is not in a format generally recognised as an application for adjudication. Nonetheless, the Application documents comprise the following:
- (a) An email request for adjudication of a payment claim;
 - (b) A copy of the payment claim dated 9 February 2018;
 - (c) Letters between the Applicant and the Respondent;
 - (d) The Respondent's claim assessment and Notice of Dispute dated 21 February 2018;
 - (e) Terms of the Contract including the Purchase Order; and
 - (f) A site diary from the Applicant's project staff including photographs and airline tickets as exhibits.

34. The Application is dated 7 March 2018 and was served on the Respondent on 20 March 2018, however the Respondent has raised issue with the service and preparation of the Application pursuant to s.28 of the Act.

The Response

35. The Response is dated 5 April 2018 and comprises a general submission and 13 attachments with exhibits in each attachment. The attachments include:
- (a) A copy of the Contract and Purchase Order;
 - (b) A copy of the payment claim dated 9 February 2018;
 - (c) A copy of the claim assessment Notice of Dispute dated 21 February 2018;
 - (d) The Applicant's Tax Invoices;
 - (e) Email and letter correspondence between the parties;
 - (f) A copy of the re-assessment of the payment claim dated 5 April 2018;
 - (g) Plans of the bathrooms [*on the site*]; and
 - (h) A copy of the Applicant's project staff site diary, including the photographs.
36. The Response was served on 5 April 2018 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

37. The following sections of the Act apply to the Subcontract for the purposes of the Adjudicator's jurisdiction.
38. Section 4 of the Act – **Site in the Territory** – the site is [*redacted*] in the Northern Territory of Australia. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

39. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the work to be carried out under the contract. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the Contract which contained the Purchase Order for tiling works to be carried out on the site. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s. 5(1)(a) of the Act.
40. Section 6 of the Act – **Construction Work** – the work is to carry out tiling works to the bathrooms [*on the site*]. That work falls within the provisions of s.6(1)(c) of the Act and I am satisfied that the work is construction work for the purposes of the Act.
41. The Respondent submits that the Applicant’s payment claim contains items of claim that “...are not for “*construction work*” or for “*goods and services related to construction work*”...” in accordance with s.6 of the Act. The Respondent says that the Applicant’s claim for meals, a chef to prepare those meals and the airline tickets for the project staff transport to the site are components of the payment claim that do not relate to construction work and therefore fall outside the jurisdiction of the Adjudicator to determine.
42. I disagree. Attendance to numerous remote sites throughout Australia would show companies such as ESS Cater Care and Australian Camp Services, for example, providing broad services, including meals, accommodation and transport to construction contractors performing construction contracts at these remote locations. Similarly, air transport, be it for equipment, materials or personnel, is generally negotiated and discussed between the parties well in advance of entering into the construction contract and well before mobilising to the project site, such that those services form a component or integral part of the construction contract for the purposes of cost control and safety management on the project site.
43. I am satisfied that services of this nature, which have been referred by the Respondent, meet the test for construction work under s.6(1)(f) of the Act being:

“.....any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a), (b), (c), (d) or (e)...”

that work mentioned in those paragraphs (a) to (e) of s.6(1) of the Act being construction work for the purposes of the Act.

44. I am satisfied that the work under the contract is construction work for the purposes of the Act.

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

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

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

46. The Applicant submits that it made a valid payment claim under the terms of the Contract on 9 February 2018.

47. The Respondent accepted the Applicant’s payment claim as a valid payment claim made under the construction contract and provided an assessment of the claim on 21 February 2018 agreeing to and paying some components of the claim and disputing others.

48. The Respondent also issued a “*Notice of Dispute*” on 21 February 2018 in relation to the disputed components of the Applicant’s payment claim.

49. I am satisfied that the Applicant’s claim made on 9 February 2018 complies with the stipulations of clause 22 of the Contract for the making of a claim for payment for work done and is therefore a valid Payment Claim for the purposes of s.4 of the Act.

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

“...8 Payment dispute

A payment dispute arises if:

(a) *a payment claim has been made under a contract and either:*

(i) *the claim has been rejected or wholly or partly disputed; or*

(ii) *when the amount claimed is due to be paid, the amount has not been paid in full; or*

(b) *when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*

(c) *when any security held by a party under the contract is due to be returned under the contract, the security has not been returned...”.*

51. The Applicant made a valid payment claim on 9 February 2018 for the provision of work performed under the Contract.

52. The Respondent accepted the Applicant’s payment claim as a valid payment claim made under the construction contract and assessed the claim. The Respondent’s assessment reduced some amounts claimed, rejected others and applied back-charge counterclaims against the amount due to be paid to the Applicant.

53. In addition to providing a claim assessment, the Respondent issued the assessment as a “*Notice of Dispute*” dated 21 February 2018 setting out the “*Response*” for their assessment.

54. A Payment Dispute arises under s.8(a)(i) of the Act when a payment claim has been rejected or wholly or partly disputed as the Respondent has done in this case.

55. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 21 February 2018 under section 8(a)(i) of the Act.

56. Section 28 of the Act – **Applying for Adjudication** – The documents of the Application were served on the Appointer on 7 March 2018 with additional documents, some of which were copies of earlier documents, sent to the Appointer on 8 March 2018 and copied to the Respondent on 9 March 2018. Further documents were provided to the Adjudicator on 12 March 2018 and largely duplicated again on 14 March 2018.
57. The Respondent submits that the documents of the Application:
1. were not properly served on the Respondent under s.25 of the *Interpretation Act* and therefore the Application has not been validly served on the Respondent in accordance with s.28(1)(b) of the Act;
 2. did not state the details or have attached to it the construction contract involved or relevant extracts and as such the Application has failed to comply with s.28(2)(b)(i) of the Act; and
 3. did not state or have attached to it all the information documents and submissions on which the party making it relies in the adjudication and as such has failed to comply with s.28(2)(c) of the Act.

Service of the Application

58. The Respondent submits that there is no provision in the Act for service, which then calls on s.25 of the *Interpretation Act* to provide for the method of service of the Application. Similarly, with the consent of the parties, s.8 and s.9 of the *Electronic Transactions (Northern Territory) Act* provides for the service of documents electronically, which would include an Application served on the Appointer.
59. The question is whether the documents served on the Appointer and then copied to the Respondent on 9 March 2018 satisfied service of an application for adjudication on the Respondent. By reference to the covering email on 7 March 2018 and 8 March 2018 to the Appointer, I am satisfied that the documents of the Application have been validly served on the Appointer under s.8 and s.9 of the *Electronic Transactions (Northern Territory) Act*.

60. However, the email to the Appointer of 7 March 2018 that was copied to the Respondent on 9 March 2018 does not satisfy the provisions of service, either under the *Interpretation Act* which makes no provision for service electronically, or the *Electronic Transactions (Northern Territory) Act* which requires the consent of the Respondent under s.8(1)(b). No consent was given by the Respondent to accept the documents and the Respondent raised issue with accepting any documents purporting to be an application for adjudication.
61. The documents provided to the Adjudicator on 12 March 2018 and then largely duplicated and again provided on 14 March 2018 comprise the actual contract documents and the project staff site diary documents with photographs and airline tickets. Those documents fall under my discretion in s.34(2) and s.34(6) of the Act as to whether I am prepared to accept such documents as documents of the Adjudication. It is important to note that at that point in time the Application had not been served on the Respondent and time had not begun to march for either the Response or the Determination under the Act. I will accept the Applicant's documents and do so to ensure procedural fairness is provided to the Applicant in the Adjudication. In accepting the Applicant's documents, I have considered the decision of Bar J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at 32 and 42 through to 47.
62. The Application served on the Respondent on 20 March 2018 by express post comprise the entirety of the documents of the Application and I am satisfied that the Application was validly served pursuant to s.28(1) of the Act.

Contract and additional documents

63. The Respondent also submits that the documents copied to them on 8 March 2018 and 9 March 2018 is not a proper application for adjudication as they do not comply with s.28(2)(b)(i) of the Act and s.28(2)(c) of the Act.
64. The casual appearance of the Application does not invalidate it under the Act.

65. It has been shown above that the two emails of 8 March 2018 and 9 March 2018 do not satisfy service of an application for adjudication on the Respondent. The Application for Adjudication was served on the Respondent on 20 March 2018 by express post.
66. The Respondent has raised no issue with the documents of the Application served on them on 20 March 2018 and attendance to those documents shows the Application to contain the relevant information required by s.28(2) of the Act.
67. I am satisfied that the Application is a valid Application for Adjudication for the purposes of s.28 of the Act and contains the relevant information prescribed by the Act and Regulation 6 of the *Construction Contracts (Security of Payments) Regulations* (“the Regulations”) and was validly served on the Respondent on 20 March 2018.
68. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 5 April 2018 served on the Applicant and the Adjudicator on 5 April 2018.
69. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of s.29 of the Act and contains the relevant information prescribed by the Act and Regulation 7 of the Regulations.
70. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the Payment Dispute between the Applicant and the Respondent.

Merits of the Claims

71. The Payment Claim made by the Applicant on 9 February 2018, which was assessed and disputed in part by the Respondent on 21 February 2018, contains the following components set out in Table 1. below:

Item	Applicant Claim Component	Applicant Amount Claimed	Respondent Assessment Component	Amount Assessed	Disputed Component	GST	TOTAL
1	Wall Tiling 888.23 m2 x \$65	\$ 57,734.95	Wall Tiling 650 m2 x \$65	\$ 42,250.00	\$ 15,484.95	\$ 1,548.50	\$ 17,033.45
2	Floor Tiling 546.72 m2 x \$70	\$ 38,270.40	Floor Tiling 468 m2 x \$70	\$ 32,760.00	\$ 5,510.40	\$ 551.04	\$ 6,061.44
3	Waterproofing 37 Rooms x \$300	\$ 11,100.00	Agreed	\$ 11,100.00	\$ -	\$ -	\$ -
4	Bedding 37 Rooms x \$200	\$ 7,400.00	Agreed	\$ 7,400.00	\$ -	\$ -	\$ -
5	Glue Topping 37 Rooms x \$90	\$ 3,330.00	No entitlement in Contract	\$ -	\$ 3,330.00	\$ 333.00	\$ 3,663.00
6	Chef 21 Nov to 23 Dec - 33 days x \$250	\$ 8,250.00	No entitlement in Contract	\$ -	\$ 8,250.00	\$ 825.00	\$ 9,075.00
7	Meals \$450 x 32 days	\$ 14,400.00	Value Incorrectly calculated 31 days x \$450	\$ 13,950.00	\$ 450.00	\$ 45.00	\$ 495.00
8	Air Ticket	\$ 2,870.00	No entitlement in Contract	\$ -	\$ 2,870.00	\$ 287.00	\$ 3,157.00
9	Variation type E Room 2017,2211 & 2207 - Retiling & waterproofing after shower modifications	\$ 1,000.00	No entitlement in Contract - Not requested and no agreement for the work	\$ -	\$ 1,000.00	\$ 100.00	\$ 1,100.00
10	Respondent Counterclaim for Materials Purchased	\$ -	Respondent Counterclaim for Materials Purchased	\$ (36,320.00)	\$ 36,320.00	\$ 3,632.00	\$ 39,952.00
11	Respondent Counterclaim for Defect Rectification	\$ -	Respondent Counterclaim for Defect Rectification	\$ (4,500.00)	\$ 4,500.00	\$ 450.00	\$ 4,950.00
TOTAL		\$ 144,355.35		\$ 66,640.00	\$ 77,715.35	\$ 7,771.54	\$ 85,486.89

Table 1.

72. In its Response the Respondent re-assessed the Applicant's Payment Claim due to a "...re-check of the amount of tiling work performed..." by the Applicant in the Works. That re-assessment is set out in Table 2 below:

Item	Applicant Claim Component	Applicant Amount Claimed	Respondent Assessment Component	Amount Assessed	Disputed Component	GST	TOTAL
1	Wall Tiling 888.23 m2 x \$65	\$ 57,734.95	Wall Tiling 753 m2 x \$65	\$ 48,941.10	\$ 8,793.85	\$ 879.39	\$ 9,673.24
2	Floor Tiling 546.72 m2 x \$70	\$ 38,270.40	Floor Tiling 356 m2 x \$70	\$ 24,892.70	\$ 13,377.70	\$ 1,337.77	\$ 14,715.47
3	Waterproofing 37 Rooms x \$300	\$ 11,100.00	Agreed	\$ 11,100.00	\$ -	\$ -	\$ -
4	Bedding 37 Rooms x \$200	\$ 7,400.00	Agreed	\$ 7,400.00	\$ -	\$ -	\$ -
5	Glue Topping 37 Rooms x \$90	\$ 3,330.00	No entitlement in Contract	\$ -	\$ 3,330.00	\$ 333.00	\$ 3,663.00
6	Chef 21 Nov to 23 Dec - 33 days x \$250	\$ 8,250.00	No entitlement in Contract	\$ -	\$ 8,250.00	\$ 825.00	\$ 9,075.00
7	Meals \$450 x 32 days	\$ 14,400.00	Value Incorrectly calculated 31 days x \$450	\$ 13,950.00	\$ 450.00	\$ 45.00	\$ 495.00
8	Air Ticket	\$ 2,870.00	No entitlement in Contract	\$ -	\$ 2,870.00	\$ 287.00	\$ 3,157.00
9	Variation type E Room 2017,2211 & 2207 - Retiling & waterproofing after shower modifications	\$ 1,000.00	No entitlement in Contract - Not requested and no agreement for the work	\$ -	\$ 1,000.00	\$ 100.00	\$ 1,100.00
10	Respondent Counterclaim for Materials Purchased	\$ -	Respondent Counterclaim for Materials Purchased	\$ (36,320.00)	\$ 36,320.00	\$ 3,632.00	\$ 39,952.00
11	Respondent Counterclaim for Defect Rectification	\$ -	Respondent Counterclaim for Defect Rectification	\$ (4,800.00)	\$ 4,800.00	\$ 480.00	\$ 5,280.00
TOTAL		\$ 144,355.35		\$ 65,163.80	\$ 79,191.55	\$ 7,919.16	\$ 87,110.71

Table 2.

73. The Respondent's re-assessment deducted a further \$1,623.82 (including GST) as a counterclaim against the Applicant's Payment Claim.
74. The Applicant and the Respondent have agreed on components 3 and 4 in the above tables for the waterproofing and the sand bedding preparation for tiling works to commence. It is unnecessary for me to consider these components of the Applicant's Payment Claim.

The Tiling Works

75. The tiling works for the floor and walls of the 37 bathrooms relate to components 1 and 2 for the Applicant's Payment Claim and components 10, 11 and the re-assessed sum of \$1,623.82 (including GST) for the Respondent's counterclaims. It is therefore appropriate I deal with these components of claim simultaneously.
76. It is uncontroversial that the rate for tiling of the walls is \$65.00 (excluding GST) per square metre and \$70.00 (excluding GST) for tiling of the floors of each bathroom.
77. The issue in the floor and wall tiling is quantum.
78. The Respondent has made three attempts to assess the wall and floor tiling throughout the project as follows:
- (i) Assessment 1 dated 15 November 2017 - The Purchase Order No. 035
Wall Tiling 800 m² and Floor Tiling 490 m²;
 - (ii) Assessment 2 dated 21 February 2018 - The first assessment of the Applicant's Payment Claim and Notice of Dispute
Wall Tiling 650 m² and Floor Tiling 468 m²; and
 - (iii) Assessment 3 dated 5 April 2018 - The second assessment of the Applicant's Payment Claim in the Response
Wall Tiling 753 m² and Floor Tiling 356 m².
79. The Respondent's assessment of the quantum of wall and floor tiling in the tiling work for 37 bathrooms has varied by over 35% in some cases, which is well outside what could be reasonably expected as a limit of accuracy for a professional fit-out company.

80. The Applicant, on the other hand, has carried out a site measure for the quantum of wall and floor tiling work they have done over the 37 bathrooms and have concluded the wall tiling to be 888.23 m² and the floor tiling to be 546.74 m². By attendance to the Applicant's site diary, it also appears that the quantum was calculated at regular intervals throughout the conduct of the works on site and varies by at or about 10% at the most from the original amount assessed and agreed in the Purchase Order. This variance in quantum is what would generally be expected and would lead me to conclude the Applicant's site based assessment to be more accurate.
81. The Applicant has, however, in its further submissions to me of 26 April 2018 advised that it is satisfied with the agreed quantum in the Purchase Order of 800m² for the wall tiles and 490 m² for the floor tiles.
82. The contract at clause 1(b) states that "*...Prices detailed in the PO include all taxes, charges, delivery and GST and shall not be increased, unless otherwise agreed in writing by the Company...*". The Purchase Order also reflects those terms and states that the price will not vary except by "*...direction in writing...*" from the Company.
83. The Contract is not a rates-based contract where the risk of the quantum would lie with the Applicant under the rate offered in their tender or quote and would see a re-measure of quantum on completion of the work. The Respondent has sought to limit and fix its risk in the Contract by establishing a quantum for the wall and floor tiles by a bill of quantity and a pre-agreed rate from the Applicant to lay that amount of tiles. The nature of such a contract is a fixed-price contract where the Respondent is obliged to pay for the quantum they have assessed and agreed at the time of fixing the price for the work. It is not open to re-measure and neither the Applicant nor the Respondent has advanced any evidence that the Contract was varied to provide for re-measure.
84. The wall tiling quantum is 800m² and the floor tiling quantum is 490 m² under the Contract and the price for that quantum is **\$57,200.00 (including GST)** for the wall tiles and **\$37,370.00 (including GST)** for the floor tiles.

85. The Respondent has initially assessed the tiling works at \$46,457.00 (including GST) for 650 m² of wall tiles and \$36,036.00 (including GST) for 468 m² of floor tiles as set out in Table 3 below.

FIRST ASSESSMENT								
Item	Component	Claim	GST	Total	Assessment	Amount	GST	Total
1	Wall Tiling 888.23 m ² x \$65	\$57,734.95	\$ 5,773.50	\$63,508.45	Wall Tiling 650 m ² x \$65	\$42,250.00	\$4,225.00	\$ 46,475.00
2	Floor Tiling 546.72 m ² x \$70	\$38,270.40	\$3,827.04	\$42,097.44	Floor Tiling 468 m ² x \$70	\$32,760.00	\$3,276.00	\$ 36,036.00

Table 3.

86. The Respondent then carried out a re-assessment of the tiling works at \$53,835.21 (including GST) for 753 m² of the wall tiles and \$27,381.97 (including GST) for 356 m² of floor tiles as set out in Table 4 below.

RE-ASSESSMENT								
Item	Component	Claim	GST	Total	Assessment	Amount	GST	Total
1	Wall Tiling 888.23 m ² x \$65	\$57,734.95	\$5,773.50	\$63,508.45	Wall Tiling 753 m ² x \$65	\$48,941.10	\$4,894.11	\$ 53,835.21
2	Floor Tiling 546.72 m ² x \$70	\$38,270.40	\$3,827.04	\$42,097.44	Floor Tiling 356 m ² x \$70	\$24,892.70	\$2,489.27	\$ 27,381.97

Table 4.

87. I do not agree with either assessment made by the Respondent. The value of the tiling under the Contract is **\$57,200.00 (including GST)** for the wall tiles and **\$37,370.00 (including GST)** for the floor tiles and I accept that value.

Counterclaims

88. The Respondent has made three counterclaims against the tiling works under the Contract as set out in Table 5 below:

Item	Counterclaim Items	Amount	GST	Counterclaim
1	Materials for Applicant	\$36,320.00	\$3,632.00	\$39,952.00
2	Defect Rectification	\$4,500.00	\$450.00	\$4,950.00
3	Overpayment	\$1,476.20	\$147.62	\$1,623.82
TOTAL		\$42,296.20	\$4,229.62	\$46,525.82

Table 5.

89. The overpayment of \$1,623.82 (including GST) relates to the re-assessment of the tiling works and an increase in the Defect Rectification of \$330.00 (including GST) for 3 tilers for 3 days work.
90. The Respondent argues that it engaged [*a second tiler*] to undertake defect rectification to the Applicant's tiling works and has supplied an invoice at Tab 13 of the Response from [*the second tiler*] in the sum of \$97,856.00 (including GST) for tiling works to the [*site*].
91. The Respondent says that the defect rectification work was undertaken during 9 and 10 December 2017 and took 80 man-hours to complete.
92. The Respondent also says that the Contract specifically allows the Respondent to withhold payment from the Applicant where the work contains defects and to rectify the defective work at the Applicant's expense. The Respondent does refer to a provision of the Contract in this regard but, presumably, the Respondent is referring to clause 27 to clause 29 inclusive which deals with defects under the Contract.
93. I do not agree with the Respondent in this counterclaim.
94. The issue for the Respondent in the counterclaim is that the Applicant would be obliged to first notify the defective work to the Applicant under clause 27 and then provide an opportunity to the Applicant under clause 29 to make good any defects in its work. The Respondent did not do this.

95. A further issue for the Respondent is that the tiling work undertaken by [*the second tiler*] at the [*site*], according to [*the second tiler's*] invoice provided by the Respondent at Tab 13 of the Response, took place between 9 February 2018 and 9 March 2018 and not 9 and 10 December 2017. The Applicant was still on site and had emailed the Respondent on 12 December 2017 to inspect the work for any defects that might require remedial work. The Respondent's counterclaim therefore could not be attributed to defect rectification work by [*the second tiler*]. This appears to be a false claim which is a very serious issue indeed.
96. I am not satisfied that the Respondent has made out its counterclaim and as such I value the Defects Counterclaim and the Overpayment Counterclaim, items 2 and 3 in Table 5 above, at "**Nil**".
97. The Respondent has also counterclaimed for supplying additional materials to the Applicant in order to allow the Applicant to perform its work. The Respondent says that the materials provided formed part of the Contract and were materials the Applicant was obliged to provide as part of its Works.
98. The Respondent has counterclaimed the sum of \$39,952.00 (including GST) for providing contract materials to the Applicant. The list of materials provided by the Respondent together with the various supplier invoices is at Tab 12 of the Response.
99. Attendance to the Suppliers' Tax Invoices provided at Tab 12 by the Respondent shows some materials purchased by the Respondent that would be the responsibility of the Applicant under the Contract, but other materials that would be the responsibility of the Respondent and appear to be for the purposes of fit-out works, for example drill bits. The Respondent's counterclaim has also been made using additional suppliers, such as Bunnings, but there are no invoices provided in support of the counterclaimed items. Absent supporting evidence, the counterclaimed item would fail.
100. The materials counterclaimed by the Respondent and evidenced in the supplier invoices is set out in Table 6 below.

Item	Invoice Number	Description	Order Date	Amount
1	20029758	Tiling Sundry Items	21-Nov-17	\$5,402.47
2	20029854	Tile Grout	28-Nov-17	\$3,417.60
3	20029854	Tile Grout and Sundries	28-Nov-17	\$2,109.00
4	20029893	Tile Adhesive	29-Nov-17	\$544.82
5	20029920	Tile Adhesive and Grout	30-Nov-17	\$2,219.21
6	20030019	Floor Levelling and Primer	6-Dec-17	\$2,064.11
7	20030055	Tile Adhesive and Sundries	7-Dec-17	\$425.53
8	20030146	Tile Adhesive and Waterproofing	13-Dec-17	\$784.83
9	20030145	Tile Grout	13-Dec-17	\$540.00
10	20030160	Tile Grout and Sundries	14-Dec-17	\$568.96
11	20030183	Tile Adhesive	15-Dec-17	\$754.04
12	20030195	Tile Adhesive and Sundries	16-Dec-17	\$502.73
13	20030204	Tile Grout	18-Dec-17	\$561.18
Sub-total				\$19,894.48
GST				\$1,989.45
TOTAL				\$21,883.93

Table 6.

101. The scope of work set out on the Purchase Order for the wall and floor tile installation is clear and in relation to the installation of the wall and floor tiles is “...to include labour, all materials including trims, Glue grout and any sundries...”. The Applicant could not have been confused by this statement on the Purchase Order and has provided no evidence that would show a variation to the Contract for the Respondent to provide materials to the Applicant to lay the tiles. As it is, the price of \$65.00 for wall tiles and \$70.00 for floor tiles is generous and would include materials to lay the tiles.
102. Attendance to the suppliers’ invoices evidencing each counterclaimed item shows the invoices at items 5 and 10 in Table 6 above to contain claims for drill bits, which would be associated with fit-out works for the fittings in each bathroom. I have therefore reduced the claimed sum in item 5 by \$170.10 (including GST) and item 10 by the sum of \$80.04 (including GST), a total reduction of this counterclaim of \$250.14 (including GST).

103. I am satisfied that the remainder of the Respondent's counterclaim stands in the sum of **\$21,633.79 (Including GST)**.

Glue Topping

104. As set out at paragraph [99] above, the glue is included as materials in laying the tiles and is clearly set out on the Purchase Order to be included in the price to lay the tiles.
105. I am not with the Applicant on this claim component and I value this claim component as "**Nil**".

Chef

106. The Applicant has claimed for a Chef to prepare the meals for the tiling crew while on site. This claim is in addition to the meals provided by the Respondent at the rate of \$450.00 (excluding GST) per day.
107. The Respondent says that there is no contractual entitlement for a Chef to prepare meals at a rate of \$250 (excluding GST) per day.
108. There is no evidence whatsoever that would allow for or entitle the Applicant to have a Chef on the site at the Respondent's cost. It was entirely the choice of the Applicant to bring a Chef to site for meal preparation and the cost per day for meals agreed under the Contract is appropriate for the site.
109. I am not with the Applicant on this claim component and I value this claim component as "**Nil**".

Meals

110. The Applicant and the Respondent agree that meals are to be provided by the Respondent at the agreed rate of \$450.00 (excluding GST) per day for the tiling crew when on site.

111. The disputed issue with this component of claim is that the Applicant says they were on site from 21 November 2017 to 22 December 2017, 32 days in all. The Respondent says that the Applicant completed the Contract on 13 December 2017 and the Applicant has no contractual entitlement outside that period. This would contradict the Respondent's counterclaim for supply of materials to the Applicant up to and inclusive of 18 December 2017. In any event, the Respondent says that it has paid the meals rate to the Applicant for the time the Applicant performed work on the site between 21 November 2017 and 21 December 2017 inclusive, 31 days in all.
112. The dispute is over one day of meal allowance at the rate of \$450.00 (excluding GST) per day.
113. The Respondent has provided no evidence to support its position, whereas the Applicant's project staff site diary, included in the Respondent's evidence at Tab 9 of the Response, clearly shows the Applicant demobilising from the site on 22 December 2017 at midday. This calculates to 32 days on site.
114. I award the sum of **\$495.00 (including GST)** which brings the total of the Applicant's claim for meals to \$15,840 (including GST) minus the Respondent's assessment of the claim component at \$15,345.00 (including GST).

Airfare

115. The Applicant, in its further submissions of 26 April 2018, says it demobilised four of its site staff from the site in November 2017, two on 17 November 2017 and two on 27 November 2017, due to a shortage of available workfronts on the site. The Applicant says that it then notified the Respondent of the staff demobilisation on 10 December 2017. The Applicant also says that it demobilised its staff part way through the project in order to save money.

116. On 17 December 2017 the Respondent notified the Applicant of a shortfall of tilers on site and directed the Applicant to bring two more tilers to the site. The Applicant complied with the direction and paid for two tilers' airfares in the expectation that the Respondent would reimburse the Applicant the cost of the ticket. The Applicant seeks its cost of the airfare to fly the two tilers to the site.
117. The Respondent says that the Applicant chose to change its staff part way through the project and that that was at the risk of the Applicant. The Respondent has paid for the cost of the airfares to mobilise and demobilise the Applicant's staff, however the Respondent says that the Applicant has no contractual entitlement to an air ticket and there is no basis for the Respondent to refund this expense.
118. The issue for me to determine is whether the Respondent is obliged to pay for the two tilers it directed the Applicant to bring to the site in circumstances where the Applicant had already demobilised some of its staff and failed to notify the Respondent for several weeks.
119. I am not with the Applicant on this issue.
120. The Respondent paid for the mobilisation and demobilisation of the Applicant's staff for the project. As with the meals, there is no written change to the scope of work for the project but there is clearly a variation of the Contract to include the cost of airfares to fly the Applicant's staff to and from the site. The Respondent's obligation in that regard would be limited to mobilisation and demobilisation as the entirety of the tiling period was only 32 days, a little over a month.
121. Once work on the site slowed and workfronts became constricted, it was the sole risk of the Applicant to demobilise its staff in order to save money. The Respondent would not be obliged to pay the Applicant the cost of airfares to fly its staff to and from the site due to work delays. It was for the Applicant to seek additional cost and time from the Respondent for delays to the work. The Applicant did not seek any additional time and cost for delay by the Respondent.

122. I value this claim component as “**Nil**”.

Variation

123. The Applicant claims a variation in the sum of \$1,100.00 (including GST) for reworking the wall tiles on a section of the bathroom wall in rooms 2017, 2207 and 2211 in order to allow the plumbing contractor to relocate some pipework in what appears to be, from the photos, the services void in each bathroom.

124. The Respondent submits that it made no request for or acceptance of any variation to the Contract for reworked wall tiles in the three bathrooms. The Respondent also says that the Contract holds a “...*strict regime*...” under clause 13 of the Contract that says “....*The Seller [Applicant] shall have no claim for a variation not approved in writing from the Company [Respondent]...*”.

125. The Contract is quite clear in relation to variations particularly where the Applicant would have been asked to retile the wall, however failed to get confirmation in writing. From the photos the rework of the wall tiles covers a sufficient area of the wall that would have cause for comment in the site diary by the project staff. Turning to the dates between 18 and 21 December 2017 and beyond there is no mention of a rework of the wall tiles. From the photos it may also be an area of the wall that is yet to be tiled in each bathroom.

126. There is no written variation request from the Respondent to the Applicant for a variation to the Contract to rework the tiles in the three bathrooms. While the photos clearly show an area of the wall that is yet to be tiled, these are entirely unhelpful in establishing a variation to the work under the Contract.

127. I am not with the Applicant on this variation and I value the Applicant’s claim component for the tiling rework on three bathrooms at “**Nil**”.

Reconciliation of the Claims

128. The claims of the Application for Adjudication are reconciled at Table 7 below, together with the Respondent’s payments and re-assessment of the Payment Claim dated 5 April 2018 that was provided in the Response.

Claims of the Adjudication						
Claim Component	Applicant Payment Claim	Respondent Assessment	Respondent Re-assessment	Paid	Determined	Payment Due
Wall Tiling	\$57,734.95	\$42,250.00	\$48,941.10	\$42,250.00	\$57,200.00	\$14,950.00
Floor Tiling	\$38,270.40	\$32,760.00	\$24,892.70	\$32,760.00	\$37,730.00	\$4,970.00
Waterproofing	\$11,100.00	\$11,100.00	\$11,100.00	\$11,100.00	\$11,100.00	\$0.00
Bedding	\$7,400.00	\$7,400.00	\$7,400.00	\$7,400.00	\$7,400.00	\$0.00
Glue Topping	\$3,330.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Chef	\$8,250.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Meals	\$14,400.00	\$13,950.00	\$13,950.00	\$13,950.00	\$14,400.00	\$450.00
Air Ticket	\$2,870.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Variation	\$1,000.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Materials	\$0.00	(\$36,320.00)	(\$36,320.00)	(\$36,320.00)	(\$19,667.08)	\$16,652.92
Defects	\$0.00	(\$4,500.00)	(\$4,800.00)	(\$4,500.00)	\$0.00	\$4,500.00
Sub-total	\$144,355.35	\$66,640.00	\$65,163.80	\$66,640.00	\$108,162.92	\$41,522.92
GST	\$14,435.53	\$6,664.00	\$6,516.38	\$6,664.00	\$10,816.29	\$4,152.29
TOTAL	\$158,790.88	\$73,304.00	\$71,680.18	\$73,304.00	\$118,979.21	\$45,675.22

Table 7.

129. The adjudicated Payment Claim reconciles to a payment to the Applicant of **\$41,522.92 (excluding GST)**.

Interest on the claims

130. In determining the Applicant's Payment Claim, the Respondent's Initial Assessment and Re-assessment, the amount the Respondent is to pay the Applicant is \$41,522.92 (excluding GST).

131. The Applicant has not expressly sought interest on its Payment Claim but, as the Respondent has submitted at paragraph 79 of the Response, interest may be determined by the Adjudicator under s.35(1) of the Act.

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

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

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

“...the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act...”

134. The Supreme Court Act refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6-month period being considered. The Reserve Bank cash rate is currently 1.5% and has been for the last 13 periods of review, therefore the interest rate applicable to this contract is 7.5% per annum. The Respondent submits that the interest rate is 8% but I disagree for the reasons above and I set the applicable interest rate at 7.5% per annum.

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

136. I award interest of **\$665.50** on the sum of **\$41,522.92 (excluding GST)** from 21 February 2018, the date the payment was disputed, to 11 May 2018, the date of determination, pursuant to section 35 of the Act.

Summary

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

- (a) The contract to be a construction contract under the Act;
- (b) The work to be construction work under the Act;
- (c) The site to be a site in the Northern Territory under the Act;
- (d) The claim to be a valid payment claim under the Act;
- (e) The dispute to be a payment dispute under the Act;
- (f) The Application to be a valid application under the Act;
- (g) The Response to be a valid response under the Act;
- (a) The wall tiling claim to stand for an additional payment of \$16,445.00 (including GST);
- (b) The floor tiling claim to stand for an additional payment of \$5,467.00 (including GST);
- (c) The waterproofing and bedding claims are agreed and not determined;
- (d) The glue topping claim to fail;
- (e) The claim for a chef to fail;
- (f) The claim for meals to stand for an additional payment of \$495.00 (including GST);
- (g) The air ticket claim to fail;
- (h) The variation claim to fail;
- (i) The counterclaim for materials purchased by the Respondent to be adjusted down to **\$21,663.79**;
- (j) The counterclaim for defects rectification to fail; and
- (k) Interest is applied in the sum of \$661.86.

138. Reconciling the Applicant's Payment Claim, the Respondent's Initial Assessment and Re-assessment against the material findings I determine that the amount to be paid by the Respondent to the Applicant in relation to the Applicant's Payment Claim dated 9 February 2018 is **\$46,340.72 (including GST and Interest)**.
139. This sum is to be paid to the Applicant by the Respondent on or before **8 June 2018**.

Costs

140. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.
141. The Act at section 36(2) gives Adjudicators discretion to award costs:
- "...if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs..."*
142. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.
143. The test for determining whether a proceeding is vexatious can be set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:
- "1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
- 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

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

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

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

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

Closing Remarks

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

Confidential Information

148. The following information is confidential:

- (a) the identity of the parties;
- (b) the identity of the principal; and
- (c) the location of the works.

DATED: 5 June 2018

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a vertical stroke and a horizontal stroke.

Rod Perkins
Adjudicator No. 26