Amended Adjudicator's Determination

Pursuant to the

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

Adjudication Number	**39.14.05**
Prescribed Appointor	**The Institute of Arbitrators & Mediators**
Adjudicator	**David Richard Baldry**[1]
Applicant:	[redacted]
Applicant's contact details:	[redacted]
Applicant's solicitor:	[redacted]
Applicant's solicitor's contact details and applicant's service address:	[redacted] Email: [redacted]
Respondent:	[redacted]
Respondent's contact details:	[redacted]
Project:	Construction and installation of structural steel works at [redacted]

[1] Registered Adjudicator Number 39

Amount to be paid by Respondent	$27,540.81 including GST
Due date for payment	Within 7 days of release of determination
Adjudication Fees Apportionment	Applicant: Nil Respondent: 100%
Date of Determination or Dismissal	12 December 2014
Payment Claim	Claimed Amount : **$18,568.00** including GST Dated : 18 August 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : **$21,252** including GST leaving a net position of **-$2,684** including GST
Adjudication Application	Dated: 15 October 2014
Adjudicator Acceptance	Dated: 23 October 2014
Adjudication Response	Dated: 30 October 2014

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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:

2) Pursuant to s 33(1)(b), I have determined that:

a) the respondent must pay the applicant **$27,540.81** (the "adjudicated amount") comprising:

i) the amount payable on the payment claim	
less the respondent's set-off	$11,715.00
ii) interest thereon	$210.21
iii) return of security	$3,542.00
iv) applicant's costs of adjudication up to date	
of preparation of application for adjudication	$7,536.10
v) reimbursement of 50% of adjudicator's fees	$4,537.50
	$27,540.81

and

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

BACKGROUND

3) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the Act for construction work carried out under a construction contract for construction and installation of structural steel works at [redacted] in the Northern Territory (**Project**).

4) The Subcontract was wholly written (albeit that some terms were implied by virtue of the provisions of the Act, which I will refer to in more detail below), consisting of:

a) quotation by applicant to respondent dated 10 July 2013[3];

b) email sent by respondent's [redacted] to respondent's [redacted] on 12 July

[2] Registered Adjudicator Number 39
[3] Application tab 5 documents

2013 accepting quotation[4]; and

c) purchase order no. 497 from the respondent to the applicant dated 15 July 2013 and sent by email to the applicant on 18 July 2013[5].

5) The works stated in the quotation and order were for the applicant to supply and install the following works made from painted and Duragal Section:

a) Cast-in plates;

b) M16 x bracing;

c) Work shop drawings;

d) Stud walls on IW02 and IW10 only;

e) Queuing rails;

f) Structural steel work blasted and painting inorganic zinc;

g) Purloins Duragal only, not painted;

h) The steel frames around the roller doors;

i) The doors G1 and G2; and

j) Installed with Crane Hire,

(welds and cut ends cleaned and ground smooth and painted with cold gal paint) for a lump sum price of $64,400 plus GST being $70,840 including GST.

6) The purchase order also contained the following terms and statements which are of relevance to the dispute the subject of this adjudication:

a) "PAYMENT TERMS: EOM + 30 days"

b) "RETENTION: 10% of each payment, up to a maximum of 5% of subcontract value", although there was no provision stating when such retention monies were to be released to applicant.

c) "LIQUIDATED DAMAGES: $300 + GST per calendar day"

d) "Program – Fabrication, supply & installation to correspond with [redacted] construction programme and completed by beginning of October, 2013."

e) There were no written specifications and the applicant performed the works as directed by the respondent.

[4] Application tab 6 documents
[5] Application tab 7 documents

f) "1. Subcontract Agreement to follow." Although, the applicant and respondent agree that not such agreement was ever provided.[6]

g) "2. All works are to be undertaken as per site visits, plans and specifications, manufacturer's specification, council requirements, D.A. report, BCA and in compliance with Work Cover requirements & house rules."

7) Upon request by the applicant, the respondent provided the applicant with CAD drawings attached to 2 emails sent on 29 and 30 July 2013[7] which the applicant used to prepare 32 workshop drawings for the subcontract works[8]. The applicant provided them to the respondent by email on 13 August 2013[9] and the principal , the [redacted] approved them on 14 August 2013[10].

8) The applicant says it did not receive an initial works program from the respondent, the first works program it received being a program headed "Completion Program" sent to it by email on 25 October 2013.[11]

9) The respondent has submitted that it presumes that a copy of its initial works program for the whole of the various subcontracted works to be performed at [redacted] dated 27 June 2013 would have been provided to the applicant soon after the respondent's ex-project manager [redacted] met the applicant's personnel to "talk timing" (which he stated in an email sent to the applicant's director [redacted] on 12 July 2013) he intended to do and, in any event, a copy of that program was always available at the site shed for the subcontractors to review[12], but it has not provided any direct evidence supporting those presumptions.

10) The applicant says the first time it saw the program dated 27 June 2013 was when it first read the respondent's letter to the applicant dated 20 March 2014[13].

11) The payment claim the subject of this adjudication application ("18/08/2014 Final Payment Claim")[14]:

a) consisted of:

i) an invoice no. 42622 by the applicant dated 18 August 2014, which was addressed the respondent at the respondent's post office box

[6] Application submissions para 2.7 and response submission para 36
[7] Application submissions para 2.8 and tab 8 documents in application
[8] Application submissions para 2.9 and tab 10 documents in application
[9] Application submissions para 2.10 and tab 9 documents in application
[10] Application submissions para 2.10 and tab 10 documents in application
[11] Application submissions para 2.21 and tab 19 documents in application
[12] Response submissions paras 35, 90 (table row 3.0) and tabs 8, 9 and 45 documents in response
[13] Application submissions page 3 and paras 2.37 and row 19 of table in para 3.1 and some of documents in tab 26 documents in application
[14] See first 2 documents at tab 2 of the application

address in [redacted] in NSW and was signed;

ii) a covering of a letter from the applicant to the respondent addressed to both the respondent's post office box address in [redacted] in NSW and by email to a director of the respondent named [redacted]; and

iii) an email sent by [redacted] (the applicant's lawyer) to the respondent's [redacted] on 18 August at 2:43 pm attaching the said covering letter and invoice no. 42622.

b) both the covering letter and invoice stated that it was a "Final Payment Claim";

c) Invoice no. 42622 claimed $18,568.00 inclusive of GST, comprising:

i) $12,700 for "Scope of Works as per Quotation of 10 July 2013 and PO 497 dated 15 July 2013", before adding GST to such amount;

ii) $300 for variation to "Remove concrete and add to cast in plates , due to incorrect location. As per instructions by Site Foreman [redacted]", before adding GST to such amount;

iii) $850 for variation to "Remove 2 off purlins from walkway area and shorten at [redacted] yard and refit as per email", before adding GST to such amount;

iv) $2,000 for variation to "Fabricate louvered doors", before adding GST to such amount;

v) $580 for variation to "Fabricate columns for Airconditioning Enclosure to allow for drainpipe as per instruction by site foreman [redacted]", before adding GST to such amount;

vi) $450 for variation to remove and modify Roller Shutter Tracking and refit back on site as per instructions by site foreman [redacted]", before adding GST to such amount; and

vii) GST of $1,688.

12) The applicant has also claimed for legal costs and interest, which I will deal with in more detail later in this determination.

13) The respondent has not paid any monies claimed in the Final Payment Claim.

14) The respondent:

a) contends the 18/08/2014 Final Payment Claim:

i) is a repeat claim, because the same claim, in part (i.e. the non-

variation component), was claimed in two (2) earlier payment claims (being in invoice no. 41497 dated 13 December 2013 and invoice no. 42161 dated 3 March 2014);

ii) was made too late, because the dispute dates for the earlier two payment claims (assuming they were due to be paid within 28 days of delivery, i.e. respectively on 10 January 2014 and 31 March 2014) and irrespective of which of those two due dates is considered appropriate the 90 day period under s. 28 of the Act for serving this adjudication application expired before this application for adjudication was served on the prescribed appointor and the respondent;

iii) is in any event invalid, because it did not provide the mandatory information required in the subcontract implied provisions in cl. 3 of Division 3 of the schedule to the Act and cls. 5(1)(f) and 5(2) of Division 4 of the schedule to the Act for each component claimed collectively, and, alternatively, individually; and

iv) that I should therefore dismiss the application for adjudication, without making any determination on its merits.

b) also contends that the payment claim dated 13 December 2013 should be treated as having been signed by the applicant in satisfaction of the implied requirement for signing in clause 5(h) of Division 4 of the Schedule to the Act, because it would have been delivered to the respondent by email and the electronic signature on such email should be taken to satisfy that requirement;

c) also contends that none of the amounts claimed for variations in the 18/08/2014 Final Payment Claim, when considered on their merits, are payable by the respondent;

d) also contends that it is entitled to set-off against the total amount claimed in the 18/08/2014 Final Payment Claim the following claims for incomplete works, defective works and damages arising from the applicant's alleged failure to complete the subcontract works by the due date for completion:

i) part of delay damages incurred by the respondent in the sum of $6,500, excluding GST (being $7,150 including GST) allegedly incurred by the respondent due to having to engage another roofing contractor for a higher amount;

ii) part of delay damages incurred by the respondent in the sum of $3,500, excluding GST (being $3,850 including GST) allegedly incurred by the respondent due to having to engage another rendering contractor for a higher amount;

iii) liquidated damages in the sum of $2,700, excluding GST (being $2,970 including GST) calculated at $300 per day x 9 days;

iv) supply and installation of padlocks – estimated at $330 including GST;

v) rectify incorrectly centred roller door bulkhead steel frames – estimated at $2,376 including GST;

vi) installation of access panels for bulkhead frames around roller door frames which were required to be installed as part of the subcontract works but had not been installed – estimated at $1,485 including GST;

vii) installation of 3 further access panels associated with bulkhead frames around roller door frames which were required to be installed as part of the subcontract works but had not been installed - estimated at $2,475 including GST; and

viii) rectification of defectively aligned louvered doors - estimated at $616 including GST.

e) also disputes the applicant's claims for interest and solicitor's costs.

APPOINTMENT OF ADJUDICATOR

15) Pursuant to section 28(1)(c)(iii) of the ACT, the applicant served its adjudication application dated 15 October 2014 on the Institute of Arbitrators & Mediators, which is a prescribed appointor under the Act.

16) On 23 October 2014 the adjudication application was referred to me as adjudicator by the Institute of Arbitrators & Mediators pursuant to section 30(1)(a) of the Act.

17) On 24 October 2014 the prescribed appointor informed me that a copy of the application for adjudication was served on it on Friday 17 October 2014.

18) On 26 October 2014 I sent a letter to the applicant, the applicant's solicitor and the respondent by post and by email, which amongst other things of a procedural nature:

a) notified them of my appointment as the adjudicator of this matter by the Institute of Arbitrators & Mediators;

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;

c) stated I had been provided with communications between the prescribed appointor and the parties which indicated they do not object to me acting as the adjudicator of this adjudication (which I considered appropriate, given I had adjudicated some other adjudications involving the respondent as respondent for other works performed at the same works site as for the subcontract in this adjudication) and, therefore, notified

the parties that I accepted my appointment as adjudicator;

d) asked the parties to advise me by return when and how the application and supporting documents were served; and

e) stated my understanding that both parties had been informed that I will be absent overseas from 2 November 2014 returning to work on Friday 28 November 2014 and I would therefore ask the Registrar to extend the time for me to deliver my determination until Friday 12 December 2014.

19) On 26 October 2014 I received an email from the applicant's solicitor which stated that the application was served upon the respondent's place of business and registered office address by TOLL Priority overnight courier service on 17 October 2014.

20) On 27 October 2014 I received an email from the Respondent's [redacted] which, amongst other things stated that the application was served on the respondent on 17 October 2014.

21) On 27 October 2014 I sent an email to the applicant's solicitor and [redacted] informing them that, pursuant to s. 29 of the Act, the respondent had until Friday 31 October 2014 to serve its response.

22) On 27 October 2014 I asked the registrar to grant me an extension, pursuant to s. 34(3)(a) of the Act, **until and including Friday 12 December 2014** to make a determination and on 27 October I received an email from the Acting Construction Contracts Registrar (which was copied to the applicant's solicitor and [redacted]) informing me that she consented to me making my determination up to and including that date.

23) A hard copy of the response was delivered to my office prior to 5:00 pm on 31 October 2014.

24) I have been informed by the applicant's solicitor and the respondent that a copy of the response was served on the applicant's solicitor by facsimile and upon the applicant by facsimile and in hard copy by hand prior to 5:00 pm on 31 October 2014. However, the applicant's solicitor also informed me that the photographs in all service copies of the response as well as a photograph of a quote were illegible.

25) On 2 December 2014 I informed the applicant's solicitor and [redacted] by email that some of those photographs also appeared in the application so I considered it did not matter that the copies of them in the copies of the response served on the applicant were illegible, but I would ignore the other photographs and the quotation, even though they were legible in the copy of the response served on me, because the copies of them served on the applicant were illegible.

DOCUMENTS

26) The following documents were provided to me:

a) Adjudication application submissions dated 15 October 31 tabs in 1 ring binder;

b) Adjudication response submissions dated 30 October 2014 and supporting documents in 48 tabs in 1 ring binder;

c) The applicant's further submissions dated 3 December 2014;

d) The respondent's further submissions dated 4 December 2014 (x2); and

e) The applicant's further submissions dated 4 December 2014.

f) The applicant's further submissions dated 5 December 2014.

g) The respondent's further submissions dated 5 December 2014.

h) The respondent's further submissions dated 8 December 2014.

i) The respondent's further submissions dated 9 December 2014.

j) The applicant's further submissions dated 9 December 2014.

k) The respondent's further submissions dated 10 December 2014.

l) The applicant's further submissions dated 10 December 2014.

m) The respondent's further submissions dated 12 December 2014.

n) The applicant's further submissions dated 12 December 2014.

IMPLIED AND PROHIBITED TERMS OF CONTRACT

27) The applicant has submitted that because the Subcontract did not have written or orally agreed terms about certain matters ss. 16 to 25 of the Act operate so as to impliedly include the terms set out in Divisions 1 to 9 of the Act as contractual terms.

28) I find that, as the Subcontract did not contain any express terms dealing with any of the matters referred to in ss. 16, 17 and 19 to 24 of the Act, all the implied terms in the Schedule to the Act referable to those sections were implied as terms of the Subcontract.

29) However, I note that s. 25 does not provide for the implication of any terms. It is an interpretation provision.

30) The terms implied pursuant to sections of the Act which are pertinent to this

matter are the terms implied by ss. 16 (dealing with variations of contractual obligations), 17 (dealing with, amongst other things, determining the amount, that a contractor is entitled to be paid), 19 (dealing with making payment claims), 20 (dealing with responding to payment claims and time for payment) and 21 (interest on overdue payments) and I find that all of those sections operated in this Subcontract so as to imply the relevant terms in the Schedule to the Act dealing with those topics.

31) The terms implied by virtue of those sections of the Act are as follows:

a) The terms implied by s. 16 i.e. dealing with variations of contractual obligations, are found in cl 1 of Division 1 of the Schedule to the Act, which state:

> *"**1 Variations must be agreed***
>
> *The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on:*
>
> *(a) the nature and extent of the variation of the obligations; and*
>
> *(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of the obligations."*

b) The terms implied by s.17, i.e. amongst other things, determining the amount, that a contractor is entitled to be paid, are found in cl 2 of Division 2 of the Schedule to the Act, which state:

> ***"2 Contractor entitled to be paid***
>
> *(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.*
>
> *(2) Subclause (1) applies whether or not the contractor performs all of its obligations."*

c) The terms implied by s. 19 of the Act, i.e. the making of payment claims, are found in cl 5 of Division 4 of the Schedule to the Act, which state:

> ***"5 Content of claim for payment***
>
> *(1) A payment claim under this contract must:*
>
> *(a) be in writing; and*
>
> *(b) be addressed to the party to which the claim is made; and*
>
> *(c) state the name of the claimant; and*
>
> *(d) state the date of the claim; and*
>
> *(e) state the amount claimed; and*

(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

(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(2) For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:

*(a) if this contract states that the principal must pay the contractor one amount (the **contract sum**) for the performance by the contractor of all of its obligations under this contract (the **total obligations**) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or*

(b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or

(c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.

(3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).”

d) The terms implied by s. 20 of the Act, i.e. responding to payment claims and time for payment, are found in cl 6 of Division 5 of the Schedule to the Act, which state:

“6 Responding to payment claim by notice of dispute or payment

(1) This clause applies if:

(a) a party receives a payment claim under this contract; and

(b) the party:

(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(ii) disputes the whole or part of the claim.

(2) The party must:

(a) within 14 days after receiving the payment claim:

(i) give the claimant a notice of dispute; and

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

(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must:

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

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

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

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

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

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

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

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

e) The terms implied by s. 21, i.e. interest on overdue payments, are found in cl 7 of Division 6 of the Schedule to the Act, which state:

> ***"7 Interest payable on overdue payments***
>
> *(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."*

32) The applicant also contended that the payment term "EOM +30 days" contravened s.13 of the Act, because it required payment to be made more than 50 days after the payment is claimed. The respondent agreed with this contention.

33) While it is not uncommon for construction contracts to provide that that progress claims be rendered at the end of each month and paid within 30 days thereafter and such a provision would not be taken to breach s. 13 of the Act, because in such contracts it is also commonly provided that any progress claims rendered before the end of the month, be deemed to have been rendered at the end of that month. In this subcontract there is no clarity in that regard.

34) I therefore find that:

a) the term "PAYMENT TERMS: EOM + 30 days" did breach s. 13 of the Act, particularly considering that the expected term of this subcontract was relatively short, i.e. about 3 months from 3 July 2013 to the beginning of October 2013;

b) therefore the implied term in cl. 6 of Division 5 of the Schedule to the Act required payment of the whole amount of payment claims to be made within 28 days after the party to whom it is addressed receives the payment claim; and

c) given that the 18/08/2014 Final Payment Claim was delivered to the respondent on 18 August 2014 it was due to be paid by no later than 16 September 2014.

PRIOR INVOICES

35) The respondent says that the applicant rendered a first progress claim pursuant to the subcontract by invoice no. 41851 on 18 October 2013 ("First Progress Claim")[15], but I have been unable to locate a copy of such progress claim in the application or the response. It appears to have been for $45,000 excluding GST[16]. Presumably, it was paid in full, excepting that $3,542 appears to have

[15] Response submissions para 94
[16] See reference to same in payment schedule found at tab 3 of response

been retained by the respondent.

36) However, it is not relevant to the dispute in this adjudication other than to note the amount rendered in it in order to confirm that the amount claimed in the 18/08/2014 Final Payment Claim was rendered for the balance of the quoted Subcontract works and to note the amount retained by the respondent.

37) Progress Claim No. 2, being invoice no. 41497 dated 13 December 2013 (**Second Progress Claim**):

a) was addressed to the respondent at its post office address in [redacted] in NSW;

b) described the claim as being for "Balance of quote for T[redacted] fabricate and fit steelwork as quoted.";

c) claimed $21,340 inclusive of GST; and

d) was not signed.

38) I have not been able to locate a copy of an email delivering the Second Progress Claim to the respondent so I am unable to find when it was delivered to the respondent, whether it was delivered by email or whether any such email included an electronic signature which might have been taken to satisfy the requirements of cl. 5(1)(h) in division 4 of schedule to the Act.

39) I therefore find that the Second Progress Claim did not comply with the requirements of cl. 5(1)(h) of division 4 of the Schedule to the Act (i.e that it be signed).

40) The respondent issued a payment schedule relative to the Second Progress Claim deducting $12,700 excluding GST for delay damages comprising alleged additional roofing and renderer sub-contractor costs and liquidated damages and presumably on or about 13 December 2013 part paid the balance being $7,370[17].

41) By invoice rendered by the applicant to the respondent no. 42163 dated 28 February 2014 (**03/03/2014 Tax Invoice**)[18] the applicant appears to have claimed for the balance owing in respect of the Second Progress Claim Invoice, i.e. $13,970 inclusive of GST comprising the claim of $12,700 plus GST of $1,270.

42) The 03/03/2014 Tax Invoice was relied on as a payment claim in an adjudication application, which was dismissed by an adjudicator named Charles W Wright delivered on 28 July 2014, because he found that the 03/03/2014 Tax Invoice was not valid because it did not strictly comply with the Schedule. Implied

[17] Response document in tab 3 and remittance advice forming part of documents at tab 22 of application
[18] See part of documents at tab 25 of application

Provisions, Division 4, section 5(1)(f) and section 5(2)(a)[19].

NOTICE DISPUTING PAYMENT CLAIM AND DATE OF PAYMENT DISPUTE

43) On 29 August 2014 the respondent delivered a notice disputing the claims made in the 18/08/2014 Final Payment Claim (which included a covering letter dated 29 August 2014 from the respondent to the applicant addressed care of the applicant's lawyers Powell and Co marked "Without Prejudice" and payment schedule no. 5 and 3 appendices to such payment schedule) to the applicant by facsimile transmission and by email to [redacted] and [redacted] a director of the applicant (**Notice of Dispute**).

44) I find that Notice of Dispute:

a) was served upon the applicant within the 14 day period required by cl. 6(2)(a) of Division 5 of the Schedule to the Act, which 14 day period expired on 1 September 2014; and

b) included all of the information required to be included in such a notice by cl. 6(3) of Division 5 of the Schedule to the Act.

45) The applicant has contended that the 18/08/2014 Final Payment Claim was due for payment within 28 days after 18 August 2014, i.e. by 16 September 2014 and, because none of the amount claimed was paid within such period a dispute arose under s. 8 of the Act on the last date for payment, i.e. on 16 September 2014.

46) The applicant has also submitted that as none of the amount claimed in the 18/08/2014 Final Payment Claim was paid by 16 September 2014 a dispute arose under s. 8 of the Act on 16 September 2014.

47) The Notice of Dispute made the following assertions:

a) that the claim for $13,970 pertaining to the Subcontract scope of works failed to comply with the terms of the Subcontract implied by cl. 5(1)(f) in Division 4 of the Schedule to the Act, because it did not connect any of the scope of work to it, and was therefore invalid;

b) that the claims for variations failed to comply with the same implied clause and were therefore invalid, because:

i) the applicant had practically completed all their works by 2 December 2013 and it did not perform any works after that date;

ii) the 03/03/2014 Tax Invoice did not make any claims for variations;

iii) the 08/08/2014 Final payment Claim was rendered some 8 months after the date of practical completion;

[19] see determination by Charles H Wright at tab 32 of response

iv) given the time elapsed from the date of practical completion, the applicant had no right to make the new variation claims;

v) the variation claims were not substantiated; and

vi) there had been 11 days since the respondent asked the applicant for substantiation details of its variation claims but it had not provided such substantiation;

c) in any event all of the variation claims should be assessed as nil for various reasons which I will deal with in the section of these submissions dealing with the adjudication response set-off claims;

d) The respondent was entitled to make the following set-off or back charges:

i) Loss of profit suffered by the respondent due to the applicant's failure to complete the Subcontract works by 1 August 2014 in the following components:

(1) additional monies (being $71,243.35 plus GST) paid to a different roofing subcontractor because the original roofing subcontractor could no longer perform its works due to the late completion of the applicant's works, of which the respondent set-off $6,500 plus GST against the applicant's claim;

(2) additional monies paid to a different subcontractor to engaged to perform rendering works subcontractor because the original rendering subcontractor could no longer perform its works due to the late completion of the applicant's works, of which the respondent set-off $3,500 plus GST; and

(3) 9 days of liquidated damages at $300 per being $2,7006 plus GST;

ii) the cost of completing the following works which the applicant did not complete and which were completed by the respondent:

(1) installation of padlocks and bolts - $300 plus GST;

(2) installation of roller shutter steel frame - $2,160 plus GST; and

(3) supply and install 3 access panels - $1,350 plus GST;

iii) cost of completing rectification of the following works which have still not been completed:

(1) supply and install 3 access panels - $2,250 plus GST; and

(2) service enclosure gate - $560 plus GST.

48) The applicant provided further particulars of its variation claims in the

18/08/2014 Final Payment Claim in a letter from [redacted] dated 13 September 2014 (which appears to have been sent by email to [redacted]). I will make further reference to those particulars in the section below dealing with the variation claims.

APPLICATION FOR ADJUDICATION

49) Section 28(1) of the Act entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.

50) I find that the 18/08/2014 Final Payment Claim:

a) was not a repeat claim (see paragraphs 88 to 106 below);

b) was delivered to the respondent on 18 August 2014; and

c) was due to be paid within 28 days after 18 August 2014, i.e. by 16 September 2014.

51) I am satisfied that the payment dispute occurred on 16 September 2014.

52) The applicant applied for adjudication of the payment dispute on 17 October 2014, which is within the time permitted by and in accordance with s. 28(1) of the Act. Specifically;

a) The application is in writing as required by s. 28(1)(a) and s. 28(2) of the Act.

b) The application was served on the respondent on 17 October 2014 by facsimile transmission and by delivering it to the respondent's place of business and registered office address, pursuant to s. 25 of the *Interpretation Act*, NT and s. 28(1)(b) of the Act.

c) The application was served on the Institute of Arbitrators & Mediators on 29 September 2014 pursuant to section 28(1)(c)(iii) of the Act.

53) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the Act.

ADJUDICATION RESPONSE

54) Pursuant to section 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.

55) The respondent served its adjudication response on 31 October 2014, save that as stated in paragraphs 24 and 25 of this determination, the copies of some of the photographs in it served on the applicant were illegible so I have disregarded them.

56) I am therefore satisfied that the respondent served its response within the timeframe prescribed in the Act.

REQUESTS FOR FURTHER SUBMISSIONS AND FINDINGS IN RELATION TO SAME

First request - defects

57) In an email sent by the applicant's solicitor to me on 13 November 2014 she stated that the respondent had raised new issues in its response, "specifically regarding new defects and potential defects, which had not been previously raised with the Applicant" and used them as a set off to the applicant's claim. She requested that I seek further submissions in respect of such new issues pursuant to s. 34(2)(a) of the Act.

58) In an email sent to me by [redacted], for the respondent, on 14 November 2014, it was contended that none of the defects set off claims in the response were new issues and requested that I not seek further submissions in relation to defects.

59) In my email to [redacted] sent on 2 December 2014 I sought the following further submissions pursuant to s. 34(2)(a) of the Act concerning defects:

> *"Despite there being a disagreement between you both concerning, whether the response raises any new defects or potential defects set-off claims, I intend to allow [redacted] to make further submissions in relation to any new defects or potential defects set-off claims and to allow [redacted] to provide further submissions in reply to any such further submissions by [redacted]*
>
> *I request that [redacted] submissions in this regard be delivered to me (and copied to [redacted]) by email* ***by 5:00 pm on Thursday 4 December 2014*** *and [redacted] submissions in reply in this regard be delivered to me by email (and copied to [redacted]) **by 12:00 noon on Monday 8 December 2014**."*

60) In an email from me to [redacted] sent on 4 December 2014 at 10:52 ACST I said the following concerning this topic:

> *"I requested these further submissions after [redacted] told me that there were some new defects claims in the response, which had not been communicated to the applicant by the respondent before the application for adjudication was served. In those circumstances, even though he respondent contended it had not made any new defects claims, I decided to allow the applicant to make further submissions about defects which had not previously been raised by the respondent and to allow the respondent to reply to those further submissions."*

61) Both parties provided their further submissions in the time requested by me.

62) The respondent again submitted that I should disregard the applicant's further submissions relating to defects, because the response did not include any new

defects claims.

63) In my email to the parties' representatives sent on 5 December 2014 at 5:33 pm ACST I said I considered I should take the respondent's further submissions dealing with defects into account because:

> *"1. A set-off in a response is a little like a pleading in court proceedings and is the finally stated version of the respondent's set-off case.*
>
> *2. Until an applicant reads the way in which a set-off involving alleged defects is argued in the response, it is difficult for it to know how to answer it, even if it I'd* [sic was] *alluded to in a notice disputing the payment claim.*
>
> *3. In any event, your company's position is not adversely affected, because I have allowed it a right to make further submissions in reply."*

64) I refer to the respondent's defects set-off assertions and each parties further submissions on this topic and make my substantive findings concerning the respondent's defects set-off claims in the section of these submissions below dealing with them.

Second request – whether s. 43(1)(b) applies due to earlier determination by Charles H Wright

65) In my email to [redacted] sent on 2 December 2014 I also sought the following further submissions pursuant to s. 34(2)(a) of the Act:

> *"Whether the prohibition in s. 43(1)(b) of the Construction Contracts (Security of Payments) Act (the "Act") which states that "on the adjudication of a payment dispute the appointed adjudicator makes a determination ….a party to the dispute cannot later apply for an adjudication of the dispute" applies to when the earlier application is dismissed, as was the case when Mr Charles H Wright delivered his determination between the parties on 28 July 2014."*

66) I asked that the applicant and respondent deliver further submissions on that matter to me by email by 5:00 pm on Thursday 4 December 2014.

67) In an email from me to [redacted] sent on 4 December 2014 at 10:52 ACST I said the following concerning this topic:

> *"Given there has been a previous determination by Mr Charles H Wright of a payment claim involving the same subcontract, I will need to consider whether s. 43 applies to this adjudication application. That section has not been referred to in the application or the response submissions. I therefore sought submissions in relation to that section, because it may be arguable that if I did not do so and made reference to it in my determination, I would not have given the parties the opportunity to make submissions concerning the section and therefore failed to afford them natural justice."*

68) Both parties provided their further submissions in the time requested by me.

69) The respondent submitted that s. 43 applied, because there had been a previous determination and the 18/08/2014 Final Payment Claim was making the same claim as that made in the prior payment claim determined by Mr Wright and, therefore the applicant was not permitted to re-argue the same dispute.

70) I agree with the respondent that a substantive part of the 18/08/2014 Final Payment Claim appeared to making the same claim as that made in the payment claim the subject of the payment claim relied on by the applicant in its application before Mr Wright, i.e. that part of same which made a claim for payment of $13,700 excluding GST. However, the variation claims in the 18/08/2014 Final Payment Claim were not made in the payment claim relied on by the applicant in its application before Mr Wright.

71) The applicant submitted that s. 43 did not apply, because that section only applies if a determination has been made, which did not occur in the adjudication by Mr Wright because:

a) he decided that the payment claim relied on was invalid; and

b) he therefore lacked jurisdiction to determine the application and dismissed it without determining it on its merits.

72) I find that s. 43(1)(b) does not apply due to the reasons submitted by the applicant and also, because the definition of 'determination' in the Act is:

> ***"determination** means a determination made on an adjudication under Part 3 of the merits of a payment dispute."*

73) That meant that even though Mr Wright wrote what he entitled as being a determination dismissing the claim before him, it was not a determination as defined by the Act and, therefore s. 43(1)(b) cannot apply, because it is in the following terms:

> ***"43 Determination final***
>
> *(1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination* [emphasis added]*:*
>
> *(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and*
>
> *(b) a party to the dispute cannot later apply for an adjudication of the dispute.*
>
> *….."*

Third request – unliquidated damages and liquidated damages

74) In my email to [redacted] sent on 2 December 2014 I also sought the following further submissions pursuant to s. 34(2)(a) of the Act:

> *"Whether a party can claim general damages for breach of contract when the contract already provides for liquidated damages."*

75) I asked that the applicant and respondent deliver further submissions on that question to me by email by 5:00 pm on Thursday 4 December 2014.

76) In my email to [redacted] sent on 3 December 2014 I revised my request for further submissions on that topic to:

> *"Whether, in a construction subcontract, which provides for liquidated damages to be payable by the subcontractor to the builder if the subcontractor fails to complete the contract works by the due date for completion, a builder can also claim unliquidated damages from a subcontractor flowing from the subcontractor's failure to complete the works by the due date for completion."*

77) No change was made to the time by which such further submissions were to be provided to me.

78) In an email from me to [redacted] sent on 4 December 2014 at 10:52 ACST I said the following concerning this topic:

> *"The respondent has claimed both kinds of delay damages as part of its set-off claims. Neither party has made any submissions concerning whether it is possible to do so under the terms of the subcontract. I have therefore sought further submissions in this regard from the parties in order to be further assisted in relation to this aspect of the set-off when making my determination."*

79) Both parties provided further submissions in relation to this topic within the requested time.

80) The applicant submitted that both kinds of damages can exist in the same contract, but, if that happens, unliquidated damages could only relate to damage flowing from delays occurring prior to the required date for practical completion and liquidated damages would apply for damages flowing from the subcontractor's failure to complete by the required time for practical completion.

81) The respondent appeared to realise that it could not claim both liquidated and unliquidated damages for damages flowing from the alleged failure by the applicant to complete the works by the required date for practical completion and attempted to argue its case for unliquidated damages on a new basis.

82) Without firstly asking me to seek further submissions from the applicant in relation to these recast submissions by the respondent, [redacted], for the applicant, then made further submissions in answer to the respondent's recast submissions.

83) The respondent objected to those further submissions made by [redacted] because I had not sought them.

84) [redacted] then sought to justify making such further submissions by citing *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd & Anor*[20].

85) I find that if parties to a construction contract agree that damages flowing from the subcontractor's failure to complete the works by the due date for practical completion shall be assessed on a liquidated daily rate thereafter, unliquidated damages cannot also be claimed for damages flowing from such a breach of the contract by the subcontractor, because when the parties decide to provide for a daily rate of delay damages for failing to complete by the due date for practical they have chosen that method of calculating damages flowing from such a breach of contract in order to avoid the often difficult and expensive task of proving the amount of such damages in an unliquidated manner.

86) I also told the parties that I would not allow the respondent to re-argue its submissions for the previously claimed unliquidated set-off damages and that I would therefore not consider its further submissions in that regard and, in those circumstances I would also not consider [redacted] unsolicited further submissions in answer to the respondent's attempt to re-argue its unliquidated set-off damages.

87) I make further findings in relation to the claim for liquidated damages later in this determination.

Fourth request – repeat claim

88) In my email to [redacted] sent on 2 December 2014 at 4:52 pm ACST I also sought the following further submissions pursuant to s. 34(2)(a) of the Act:

> *"In the light of the respondent's submissions that this adjudication application should be dismissed, because the Final Payment Claim dated 18 August 2014 is a repeat claim, I request that:*
>
> *1. [redacted] provide further submissions regarding whether the Final Payment Claim dated 18 August 2014 was a repeat claim; and*
>
> *2. you both provide me with further submissions concerning whether the invoice rendered by the applicant as a second progress claim being invoice no 41497 dated 13 December 2013 complied with the mandatory implied terms for payment claims contained in the relevant implied clauses in the Schedule to the Construction Contracts (Security of Payments) Act."*

[20] [2010] NTSC 20

89) I requested that those further submissions be sent to me by email by 5:00 pm on Friday 5 December 2014.

90) On 3 December 2014 at 5:48 pm I received an email from [redacted] with a [redacted] sign off which said:

> *"I have noted your request for submissions on various questions and, by way of some preliminary information for your consideration, I make the following comments.*
>
> *It cannot be a repeat claim as the prior claim was found to be invalid under the construction contract by the previous Adjudicator, Mr Wright.*
>
> *As the Adjudicator's jurisdiction in the NT and WA legislation can only arise in the **payment dispute** and not the payment claim as is the case in the East Coast legislation, the Adjudicator must dismiss and he did so.*
>
> *An Adjudicator cannot then jump into a payment claim on the merits after he has found the claim to be invalid under the construction contract as the Adjudicator has no jurisdiction to do so.*
>
> *This issue also goes to the prior question you have asked in relation to s. 43 of the Act, which is irrelevant in this matter. Put simply, if a payment claim is found to be invalid there can be no dispute and the Adjudicator cannot then seize jurisdiction to commence an Adjudication.*
>
> *It is of considerable concern that you appear to be singularly focused on the payment claim rather than the payment dispute.*
>
> *The payment claim in question has already been assessed by the Respondent's contract's administrator, a Payment Certificate was issued for a claim amount to be paid, an admission has been made that the claim is due and payable, but the payment has then been counterclaimed by set-off which has caused the dispute and lies at the very heart of this Adjudication.*
>
> *In such circumstances, the Adjudicator cannot step in between the parties, contract on their behalf and unwind the bargain that has already been made as he has no jurisdiction to do so.*
>
> *The question that falls from this issue for the Adjudicator is - where do you stop? Do you, for example, unwind the entire contract and contract on the parties' behalf?*
>
> *I will provide further detailed submissions in relation to these questions if required. However, if you have already determined that this a repeat or invalid payment claim there seems little point in continuing with further submissions, as they seem to be ongoing and continuous and at considerable cost to our client.*
>
> *I seek your earliest response."*

91) I was subsequently informed that [redacted] had been retained by [redacted] to act as a consultant in the matter for the applicant.

92) On 3 December 2014 at 6:09 pm ACST I sent the following email to [redacted]:

> *"I do not consider it appropriate for me to enter into a debate with you regarding the appropriateness of my requests for further submissions.*
>
> *Even so, you should not assume that the requests made indicate an intention on my part to dismiss the application."*

93) In an email from me to [redacted] sent on 4 December 2014 at 10:52 ACST I said the following concerning this topic:

> *"The first time that this assertion* [i.e. that the 18/08/2014 Final Payment Claim was a repeat claim] *was made was in the response submissions. It is arguable that the applicant could not have anticipated such a submission when preparing its application submissions. I therefore sought further submissions in this regard to enable the applicant to make submissions about the assertion and therefore afford it the benefit of natural justice.*
>
> *A subset of this request for further submissions is my request for further submissions regarding whether applicant's tax invoice no. 41497 dated 13 December 2013 complied with the implied terms for payment claims. I have sought this further submission, because the respondent also contends that the payment claim dated 18 August 2014 was a repeat of part of the claim in that invoice."*

94) The applicant provided further submissions regarding this question in addition to those made in [redacted] email sent on 3 December 2014 at 5:48 pm referred to above at 5:04 pm on 4 December 2014, i.e 4 minutes later than the time within which I requested that they be provided, but I exercise my discretion under s. 34(1)(a) and (b) of the Act to act informally and inform myself in any way I consider appropriate. I consider provision of further submissions 4 minutes later than the deadline set by me for doing so is so close to the deadline that it does not matter that they were provided slightly later than the deadline.

95) The applicant's second set of further submissions in relation to this question stated that as the payment claim before Mr Wright was found to be invalid under the subcontract in cannot survive as payment claim and there cannot be a payment dispute. It then cited *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor*[21].

96) After receiving those further submissions on 5 December 2014 at 10:25 am I sent an email to [redacted] reminding them that neither of them had provided submissions concerning whether invoice no. 41497 dated 13 December 2013 complied with the mandatory implied terms provisions in cl. 5 of Division 4 of the Schedule tot the Act. I then asked them to provide those further submissions by 12 noon on 5 December 2014.

97) The applicant asked until 5:00 pm on 5 December 2014 to provide those further submissions and on 5 December 2014 at 10:47 am I sent an email to [redacted]

[21] [2011] NTCA at [250 to [253]

[redacted] advising that those further submissions could be provided by 5:00 pm on 5 December 2014.

98) The applicant provide those further submissions within the time requested by me in an email sent on 5 December 2014 at 4:57 pm.

99) Its submissions in that email concerning Invoice 41497 dated 13 December 2013 were that it was invalid, because, not being signed, it failed to comply with the mandatory requirements of cl. 5(h) of the implied provisions in the Schedule to the Act. It then again cited *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and anor*[22] to support that contention.

100) However, the applicant also made further submissions in relation to whether the 18/08/2014 Final Payment Claim was a repeat claim. I did not ask the applicant to supplement its 2 prior sets of further submissions in that regard, so I intend to disregard its third set of further submissions on that topic.

101) In the same email the applicant also made further submissions concerning the inclusion of a number of documents in the application and response marked "without prejudice".

102) I considered that that topic was a serious new issue arising in the adjudication which made it necessary to seek further submissions from the parties. I deal with that topic under the heading below entitled "Fifth request – without prejudice documents.

103) The respondent provided its further submissions in relation to invoice no. 41497 in an email received by me on 5 December 2014 at 5:01:37 pm. So those submissions were provided to me about 1.5 minutes later than the time requested by me.

104) I also exercise my discretion under s. 34(1)(a) and (b) of the Act to act informally and inform myself in any way I consider appropriate. I consider provision of further submissions 1.5 minutes later than the deadline set by me for doing so is so close to the deadline that it does not matter that they were provided slightly later than the deadline.

105) The respondent made the following submissions in the response and in its further submissions concerning whether the 18/08/2014 Final Payment Claim was a repeat claim and whether invoice 41497 was a valid payment claim as follows:

a) the 18/08/2014 Final Payment Claim was a repeat claim, because it repeated the claims made in both invoice 41497 and in invoice 42161 (the latter invoice being the payment claim found to be invalid by Charles H Wright;

[22] Ibid at [250 to [253]

b) invoice 41497 claimed $19,400 plus GST for "Balance of quote for [redacted]…";

c) the respondent responded to it in its payment certificate no. 2 on the basis of approving the whole of the amount claimed in invoice 41497 and then deducting $12,700 excluding GST for alleged liquidated and unliquidated delay damages;

d) the respondent subsequently paid the balance of invoice 41497, being $7,370;

e) the $12,700 claimed in the 18/08/2014 Final Payment Claim was also claimed for the same works;

f) invoice 41497 complied with the mandatory provisions in cl. 5(1)(f) in Division 4 of the Schedule the Act, because it clearly stated it was for the balance of the quoted works, and cl. 5(1)(h) because all other communications between the parties had been by email and presumably, invoice 41497 was sent by the applicant to the respondent by email and it would have included an electronic signature, which would have complied with the signing requirements of cl. 5(1)(h).

106) I find that:

a) Invoice 41497 was not signed, because the respondent's submissions to the contrary that it was sent by email which would have included an electronic signature which would have satisfied the signing requirements in cl. 5(1)(h) are only suppositions by the respondent which are not supported by actual evidence, e.g. by providing a copy of such email;

b) Invoice 41497 therefore did not comply with the mandatory implied provisions of the subcontract for the contents of a payment claim in cl. 5(1)(h);

c) Applying the reasoning Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and anor* as all of the implied provisions in cl. 5 were mandatory the failure to comply with any of them makes a payment claim invalid under the terms of the Subcontract;

d) So invoice 41497 was invalid;

e) Charles H Wright dismissed the adjudication application pertaining to the payment claim made in invoice 42161 after finding that it was invalid because it did not comply with some of the mandatory implied provisions for the contents of payment claims;

f) as both invoices 41497 and 42161 were invalid, even though the 18/08/2014 Final Payment Claim in part claimed for the same claim under the subcontract, the 18/08/2014 Final Payment Claim was not a repeat

claim of the claims made in invoices 41497 and 42161.

Fifth request – without prejudice documents

107) In an email sent to me on 4 December 2014, by [redacted], for the applicant, he notified me as follows:

> *"There is however, an issue that may be relevant to the Adjudicator in this matter and will likely require further consideration and/or submissions.*
>
> *It seems the Response at sections "E" and "F" has been provided on a "Without Prejudice" basis. It also appears that much of the Respondent's correspondence has been provided under the cloak of privilege.*
>
> *There is an argument that, should an Adjudicator rely on such information, and the material were found to be privileged, it could be problematic to any determination reached.*
>
> *Normally such information is redacted and/or isolated prior to commencing an Adjudication and in reaching any determination of a payment dispute.*
>
> *The Applicant can make further submissions on this matter if required."*

108) In an email sent to me on 5 December 2014, by [redacted], he asserted that:

a) the respondent's assertions and arguments to the effect that the 18/08/2014 Final Payment Claim is not a valid payment claim, because the invoice did not comply with s. 5(1)f) due to making vague claims for the applicant, were made on a "Without Prejudice" basis both in the Response to the 18/08/2014 Final Payment Claim and in the Response documents at section "E" and "F"; and

b) *"The issue that falls from this is whether privileged documents may be considered in an Adjudication. The Applicant submits that privileged material may in fact be inadmissible (see Gelncot v Ben Barett [2001] BLR 207), but may not be fatal to the impartiality of an Adjudicator (see Ace Constructions & Rigging Pty Ltd v. ECR International Pty Ltd, Local Court of New South Wales, 26 October 2007)."*

109) In my email to [redacted] sent on 6 December 2014 at 10:30 am ACST I also sought the following further submissions pursuant to s. 34(2)(a) of the Act:

> *"The applicant has correctly stated that the respondent included the words ' without prejudice' in both in the Response to the Final Payment Claim of 29 August 2014 and the Response Document at sections "E" and "F". I also note that the email sent by you to [redacted] on 29 August 2014 at 5:48 pm attaching the response to the final payment claim dated the same date (included as part of the documents at tab 28 of the application for adjudication) is also headed "Without Prejudice".*

I request that the respondent provide me with further submissions in relation to whether the respondent contends that these documents using the words "without prejudice":

(a) are properly characterised as "without prejudice" communications made in an attempt to settle the dispute between the parties; and
(b) whether I should disregard those documents when determining this adjudication application; or
(c) whether I should disregard part of such documents when determining this adjudication application; and
(d) if the respondent considers I should disregard part of such documents, which part of them does the respondent consider should be disregarded.

*I request that these further submissions be provided to me by email (copied by email to [redacted]) **by 12 noon on Tuesday 9 December 2014**.*

*I also request that the applicant provide me by email (copied by email to [redacted]) with further submissions in reply to the respondent's further submissions in this regard by **5:00 pm on Tuesday 9 December 2014**."*

110) Both parties provided me with further submissions in this regard within the time requested by me.

111) The respondent submitted that:

a) the use of the words 'without prejudice' in the respondent's response to the payment claim was not a proper characterisation of what was intended and it consents to that document being put into evidence because it is relevant to determining liability for costs; and

b) the reference to the use of the word "without prejudice" by the applicant in relation to the documents at section "E" and "F" of the response was incomplete, because what was stated was "without prejudice and without derogating from .." which means "without affecting or detracting from .." the matters as noted set out in the application.

112) The applicant submitted, after reading the respondent's further submissions on the topic, as follows:

"It is unclear as to whether the Respondent has in fact provided a waiver because it appears that the use (or misuse) or the cloak of privilege is to enable the Respondent to have a bet each way. That is, all that can be implied by adding the words "...and without derogating from the position…" is that if the adjudicator is of a mind to find in the Respondent's favour then the material is to be included. If, however, the adjudicator is of a mind to find against the Respondent, then the privilege is to be maintained.

Whether (a) the material is privileged or not, and (b) whether the adjudicator wishes to take the material into account for the purposes of the adjudication, are questions for the adjudicator and not, in our view, questions to be decided by the most persuasive argument of the parties."

113) On 10 December 2014 at 12:35 pm I sent the following email to [redacted]:

"In relation to the documents marked "without prejudice" I am presently minded to find that none of them are properly categorised as documents in which the respondent was attempting to settle the dispute between the parties and, therefore, they can remain as documents for me to consider in the adjudication.

While the respondent's further submissions on this topic in relation to its response to the 18/08/2014 Final payment Claim appears to state that that is the case and, in the alternative, appears to attempt to waive any claim to privilege as a document prepared for that purpose it might have in relation to that document, it does not appear to be stating that the other documents marked "E" and "F" in the response submissions are not documents created for the purpose of conducting settlement negotiations.

To this point the applicant has adopted the position that the question of whether these documents were created for the purpose of conducting settlement negotiation was a question which only I should answer.

In these circumstances, I consider that I should give the parties another the opportunity to make further submissions regarding whether any of the documents marked "without prejudice" were prepared for the purpose of conducting settlement negotiations in respect of the dispute between the parties and that that such further submissions be provided to me by email (and copied by email to each other) ***by 10 December 2014 at 5:00 pm****."*

114) The applicant made the following further submissions within the time requested by me:

"The Applicant's position is that those documents were used precisely for that purpose. The Applicant sent its final payment claim to the Respondent on 18 August 2014 for the purpose of finalising the matter.

I again refer the Adjudicator to the Respondent's letter of 29 August 2014. In that letter the Respondent clearly puts forward its primary position, which is stated to be as follows:

"By way of response, there is no entitlement for your client [redacted] to make a claim for the quantum value of works as claimed against [redacted] Further with breach of the contract, we believe to have entitlement and right to claim for damages and seek compensation for incurring additional cost in completing the purported contracted works. Therefore the purported payment claim by [redacted] is invalid and of no effect".

The Respondent then goes on to say that:

"Without prejudice to and without derogating from the position that there is no requirement for [redacted] to issue a payment schedule, and for the avoidance of doubt, please find enclosed … notice of dispute and payment schedule number 05 dated 29 August 2014…."

whereby the Respondent then proceeds, on a "Without Prejudice" basis, to make

an assessment of the Applicant's claim and to make a counter claim. That is, an offer of settlement to the Applicant by the Respondent based on that assessment. The Respondent's assessment and counter claim were understood by the Applicant to be the Respondent's offer to bring the dispute (and the Applicant's claim) to an end.

The Respondent repeats precisely the same process in its Response to the Adjudication.

If the Adjudicator considers that the documents were not prepared for the purpose of conducting settlement negotiations, then there is nothing further the Applicant can say about the matter.

The difficulty here, as I see it, is that the question of whether any documents are privileged and, if so, then whether they can be considered for the purpose of an adjudication is a threshold question that, with respect, ought to be properly addressed by an adjudicator prior to commencing the adjudication. In this matter those documents go to the very heart of the payment dispute which is what provides the jurisdiction to an adjudicator to commence the adjudication."

115) The respondent made the following further submissions within the time requested by me:

"that all of the documents marked with the words 'without prejudice' as included in our Responses were NOT properly characterised and prepared for the purpose of conducting settlement negotiations in respect of the dispute between parties."

116) I find as follows concerning the documents marked "without prejudice":

a) *Gelncot v Ben Barett [2001] BLR 207)* and *(Ace Constructions & Rigging Pty Ltd v. ECR International Pty Ltd* deal with the questions of whether the inclusion of without prejudice documents in adjudication submissions or which otherwise come to the attention of an adjudicator during the course of the adjudication make it necessary for an adjudicator to decide to cease to act for reasons of apprehended bias or whether he has a discretion to continue to act after reading such documents if he considers that he can nevertheless remain impartial and whether if an adjudicator continues to act in such circumstances his determination is invalid.

b) The cases indicate that there is not an absolute requirement for an adjudicator to cease to act if such documents are read by him, it being an objective question of degree as to whether that would follow in the particular circumstances of the case.

c) I consider that there is a fundamental question that must first be answered, i.e. whether the documents in this adjudication marked 'without prejudice' are properly categorised as documents dealing with settlement negotiations between the parties.

d) Having read all of the documents marked 'without prejudice' I find that

none of them can be classified as dealing with settlement negotiations because none of them:

i) make an offer of settlement;

ii) respond to an offer of settlement;

iii) make a counter-offer;

iv) respond to a counter-off; or

v) make reference to other communications between the parties in which such communications have occurred.

e) I find that all of such documents can form part of the documents I can consider in this adjudication.

Sixth request – retention monies security

117) In my email to [redacted] sent on 12 December 2014 at 5:51 am ACST I also sought the following further submissions pursuant to s. 34(2)(a) of the Act:

> *"I am obliged by s. 33(1)(b)(ii) of the Act to determine whether any security held under the Subcontract should be returned.*
>
> *My current view is that I should find that the respondent should return the retention monies it is holding, because:*
>
> 1. *the Subcontract made no provision for a defects liability period or for how to make calls on the retention monies or when retention monies should be released to the applicant if not called upon by the respondent; or*
>
> 2. *alternatively, if there were terms in the Subcontract dealing with the defects liability period and release of retention monies, if the defects liability period was a 12 month period commencing from the date of practical completion (which the parties agree was on 2 December 2013), that period came to an end on 2 December 2013* [sic 2014] *and the retention monies should be released to the applicant, if the respondent has not made any call on that security prior to 2 December 2014.*
>
> *I understand from the respondent's payment schedule at tab 21 of the application that the retention monies held by the respondent are in the sum of $3,542, but I need the parties to confirm that that understanding is correct.*
>
> *As the parties have not made any claim in relation to the retention monies or made submissions to me about whether the retention monies should be released, I request that the parties provide me with the following further submissions:*
>
> *(a) were there any express terms in the Subcontract for a defects liability period or for calls on retention monies and release of the retention monies and, if so, what calls were made and what document or documents evidence such terms, if in writing;*

(b) if such terms were oral please advise how they arose and state what the agreed oral terms were;

(c) when did the defects liability period end;

(d) upon what date was the retention monies due to be released to the applicant if the respondent did not make any calls on the retention monies;

(e) has any of the retention monies been released to the applicant, if so, how much, and when did that occur;

(f) what is the current amount of retention monies held by the respondent;

(g) has the respondent made any call on the retention monies held, if so please advise when such call took place and provide me with a copy of the communication making such call;

As I have to complete my determination today I request that these further submissions be provided to me by email (and copied by email to each other) ***by 10:00 am today****."*

118) I received the following submissions from the applicant within the time requested by me:

"The Applicant submits that the retention monies should be returned, particularly given that the Respondent has not called on those monies and has not provided any evidence of purported defects as a basis on which to draw from those monies.

Please find below a response to your questions relating to the issue of retention monies:

(a) there were no express terms in the contract relating to the defects and liability period and there were no terms on any process to be followed to call on or release the retention monies held. Subject to any period of time specified in a contract, the industry standard for defects and liabilities is 12 months from PC. At the time the Applicant lodged its application, the defects and liabilities period had not yet expired;

(b) the Respondent set the amount of retention monies to be held and the Applicant apparently agreed at the time of entering the contract, though I am unable to confirm this with my client prior to 10.00am. Generally, the amount of retention monies is determined by the Principal in the head contract and the Respondent then determined the amount to be withheld from each of its subcontractors;

(c) the defects and liability period ended on 2 December 2014;

(d) as the Respondent did not respond to our letter of 13 September 2014 requesting evidence of purported defects, then the retention monies cannot be held and the Applicant submits should have been returned on 3 December 2014.

(e) none of the retention monies have been returned to the Applicant;

(f) as I have no instructions to the contrary, the amount of retention monies withheld are $3,542;

(g) the Respondent did not specifically make calls to withhold the retention monies; it simply counter-claimed our client's final payment claim with a series of additional 'expenses' which it has not substantiated and purported defects and potential defects which it also has not substantiated. However, as the defects and liabilities period in the contract had come to an end on 2 December 2014, I wrote to the Respondent again on 8 December 2014 requesting that it provide evidence of the purported defects or return the retention monies. A copy of that letter is attached (second last paragraph refers)."

119) I have read the letter attached to the applicant's email containing its further submissions on this topic and do not consider that it was pertinent to the further submissions on this topic. So I have disregarded it.

120) The respondent requested an extension to the time for it to provide its further submissions in this regard Monday 15 December 2014 at 5:00 pm.

121) On 12 December 2014 at 9:41 am I sent the following email to [redacted]:

"As you know, prior to going overseas in November, it was necessary for me to seek an extension until and including today ,from the Construction Register [sic Registrar]*, to provide my determination.*

I do not think it appropriate for me to seek a further extension until next Monday or later, because you want to seek legal advice in relation to my most recent request for further submissions.

I am also otherwise committed today from 12 noon. I therefore request that you provide your further submissions on this topic ***by 10:15 am today****."*

122) The respondent provided the following further submissions within the time requested by me:

"We are getting extremely concerned in the manner further submissions are being sought and responded, where yet again we note that the Applicant has taken another opportunity to submit their further submission ie. ***letter dated 08 December 2014 that was apparently dis-regarded by you on 08 December 2014 (attached).***

We strongly urge you to exercise your discretion and disregard and dismiss the Applicant' further response, as it is based off a letter that has been disregarded by you and nothing but an attempt by the Applicant to include additional evidence without any form of basis.

Further, our request for additional time being not granted and without having the opportunity to seek legal advice in the limited time we were accorded to submit our response, please note the following.

Firstly, please note that the retention monies have been drawn upon to rectify the defects works as claimed. (please refer to our application response pages 36 - 42, para 149 - 150). All of such defect claims have been substantiated and evidenced in our application response.

Secondly, *the* ***Applicant has made no attempt to claim the retention monies, because it was aware of the defects and presumably were of the opinion that they had no entitlement to make any such claim.***

Response to Para (a) of your request: There were no express terms noted within the Contract pertaining to the Defect liability Period, however there were express terms noted regarding the Retention amount to be retained.

Response to Para (b) of your request: It is our understanding that the Applicant was verbally notified of the Defects Liability Period at the time of being awarded the Contract.

Response to Para (c) of your request: It will end on 23 December 2014, being end of our defect liability period.

Response to Para (d) of your request: The retention monies would have been due to be released on 23 December 2014, however please note all of the Retention monies has been drawn upon by Respondent to rectify the defects.

Response to Para (e) of your request: There has been no retention monies released to the Applicant.

Response to Para (f) of your request: All of the retention monies have been drawn upon, therefore the current mount of retention monies held by the Respondent is 'NIL'.

Response to Para (g) of your request: Yes we have on numerous occasions advised the Applicant to return to site and rectify the defects, failing which we have rectified the defects. please refer to please refer to our application response pages 36 - 42, para 149 – 150 for further clarification and substantiation."

123) I make the following findings concerning the retention monies and the terms of the contract dealing with same:

a) That although the Subcontract contained a provision entitling the respondent to retain 10% of each payment, up to a maximum of 5% of the Subcontract value, there was no term dealing with a defects liability which one would normally find in a construction contract and be pertinent to terms dealing with call on security held by a party to the construction contract and release of such security if not called upon. Nor were there any terms dealing with calls on security or retention monies and release of security or retention monies.

b) That in those circumstances the Subcontract was deficient and therefore the respondent never had the right to retain the retention monies.

c) That the retention monies held by the respondent are in the sum of $3,542.

d) All of the retention monies held by the respondent (i.e. $3,542) should be released by the respondent to the applicant.

JURISDICTION

124) The parties entered into a subcontract to carry out construction and installation of structural steel works at [redacted] in the Northern Territory on or about 18 July 2013[23] (**Subcontract**).

125) It was wholly in writing.

126) The Subcontract was entered into after the commencement of s. 9 of the Act.

127) The work carried out under the Subcontract is '*construction work*' as defined in s. 6(1) of the Act, because it was in part for constructing part of a building on a site in the Northern Territory.

128) Accordingly, the Subcontract is a construction contract as defined in s. 5(1) of the Act and the Act applies to payment disputes arising under the Subcontract.

129) S. 19 of the Act applied so as to imply terms into the Subcontract dealing with making payment claims.

130) Pursuant to s. 9 of the Act, the applicant claimed an amount in a '*payment claim*' dated 18 August 2014 under the Subcontract.

131) S. 13 of the Act applied to require payment within 28 days after the date of service of the 18/08/2014 Final Payment Claim on the respondent and it was served on 18 August 2014.

132) The payment claim was due for payment on 16 September 2014. None of the amount claimed in the payment claim was paid and, accordingly, a payment dispute arose on 16 September 2014 for the purposes of the Act.

133) Pursuant to section 27 of the Act, the applicant is a party to the Subcontract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.

134) The applicant submitted an application for adjudication on 17 October 2014 in accordance with the Act. The respondent submitted its response on 31 October 2014 in accordance with the Act.

135) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or other person or court or other body dealing with a matter arising under the Subcontract as referred to in ss. 27(a) or 27(b) of the Act.

136) Given that I have found against various additional jurisdictional challenges made

[23] Application tab 7 documents

by the respondent (see my findings in above section headed requests for further submissions and findings in relation to same), I am, therefore, satisfied that I have jurisdiction to determine the adjudication application on its merits.

MY FINDINGS IN RESPECT OF AMOUNTS PAYABLE IN PAYMENT CLAIM

Subcontract Works claim - $12,700 plus GST

137) As stated previously, the claim for this amount had already been attempted to be claimed in the Second Progress Claim rendered as part of invoice no. 41497 dated 13/12/2013 and in the 03/03/2014 Tax Invoice in invoice no. 42161 dated 3 March 2014.

138) I find that:

a) after the conclusion of the adjudication proceedings before Charles H Wright, as the applicant would have then known that both of those claims were invalid, the applicant was entitled to render a final payment claim again making the claims in those invalid payment claims and for anything else the applicant considered it was entitled to claim;

b) it was appropriate, from an accounting perspective, for the applicant to issue the credit note it issued on or about 31 July 2014 for $13,970 including GST[24] for the whole of the amount claimed in the 03/03/2014 Tax Invoice prior to rendering the 18/08/2014 Final Payment Claim; and

c) it did not matter that the 18/08/2014 Final Payment Claim was rendered several months after the applicant completed the Subcontract works on 2 December 2013.

139) I find that the description of this part of the 18/08/2014 Final Payment Claim satisfied the requirements of cl. 5(1)(f) of Division 4 of the Schedule to the Subcontract, which states *"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"*, because:

a) there had already been a first progress claim rendered for $45,000 excluding GST (i.e. $49,500 including GST) for part of the quoted Subcontract works[25] and it was accepted by the respondent in full and paid in full, excepting that the respondent withheld $3,542 as retention monies;

b) that payment claim was headed final payment claim;

c) there is no dispute that practical completion of the Subcontract works occurred on 2 December 2013;

[24] Application one of documents at tab 2

[25] see payment schedule issued by respondent on 19 December 2013 in response to the Second Progress Claim rendered by applicant referred to in application submissions para 2.23 and found at tab 21 of application

d) the covering letter with the 18/08/2014 Final Payment Claim stated – *"The claim is made up of two components, the first being a lump sum payment for the remainder of the scope of work and the second for five variations…"* which made it clear that the first component was for the balance of the Subcontract works not claimed in the First Progress Claim;

e) it would have been obvious to the respondent that that component was for the balance of the Subcontract works not already rendered and paid in the First Progress Claim;

f) in all those circumstances the respondent was capable of assessing that part of the claim and did so; and

g) other than disputing the applicant's entitlement to make this part of the claim by arguing that the whole of the 18/08/2014 Final Payment Claim was invalid or a repeat claim or made too late, or alternatively, that this part of it was invalid or a repeat claim, the respondent accepted the applicant's claim for this component of the 18/08/2014 Final Payment Claim in full and then attempted to make various set-off claims to reduce the amount payable by the respondent to nil.

140) I find that the description of this component of the 18/08/2014 Final Payment Claim complied with the provisions of cl. 5(2) in Division 4 of the Schedule to the Act because it is obvious that the works claimed to have been performed are the rest of the Subcontract works to be performed after the works claimed in the First Progress Claim.

141) I assess the amount payable by the respondent to the applicant in respect of this component of the 18/08/2014 Final Payment Claim to be **$12,700 excluding GST**.

Variations

142) In this section I will firstly make general comments about all the claims for variations in the 18/08/2014 Final Payment Claim. I will then make findings concerning each variation claim.

143) In an email from [redacted] to [redacted] dated 19 August 2014 a request was made that the applicant *"provide particulars substantiating the variation claims, pertaining to Tax Invoice no 42622."* and in an email in response from [redacted] dated 26 August 2014 she said she was seeking instructions in relation to such request and expected she would revert to him shortly to provide such particulars.[26]

144) In its document headed "Payment Schedule in Response to Payment Claim" dated 29 August 2014 it sates that "…it has been some 11 days and over since the time of payment claim that [redacted] have till date not been provided with the

[26] Application part of documents at tab 28

substantiation supporting the variation claims as requested."[27]

145) In such documents the respondent made a general assertion that all the variation claims failed to comply with the requirements of cl. 5(1)(f) in Division 4 of the Schedule to the Act, because the description of them did not contain sufficient "substantiation" which I take to mean did not provide sufficient detail for the respondent to assess the claim.

146) The applicant attempted to provide further and better particulars of all the variation claims in a letter from [redacted] to the respondent dated 13 September 2014.[28]

147) The application submissions do not make any further submissions about the variations.

148) I find that to fulfil the mandatory requirements of cl. 5(1)(f) a payment claim must itself provide sufficient detail for the respondent to assess the claim. It is not sufficient to provide such detail later. It is understandable that that is the case, because the Act and the implied terms in cl. 6 of Division 5 of the Schedule to the Act impose a term in the Subcontract for a 14 day deadline to respond to payment claims, absent which there are debt obligations imposed.

149) I will now refer to the description of each variation claim and make findings concerning whether I consider sufficient detail was provided.

Remove concrete and add to cast in plates, due to incorrect location. As per instructions by Site Foreman - $300 excluding GST

150) In the 18/08/2014 Final Payment Claim the description for this variation was as stated in the above heading."

151) There was no breakdown of the amount claimed.

152) I find that:

a) this description did not provide sufficient detail for the respondent to assess the claim, because it did not state where the concrete was removed, or how many cast in plates were involved and did not break down the claim for $300;

b) this variation claim did not comply with the mandatory provisions of cl. 5(1)(f); and

c) I assess the amount payable by the respondent to the applicant in respect of this variation to be **$nil**.

[27] Application document at tab 28 para 15(6a)
[28] Application document at tab 29

Remove 2 off purlins from walkway area and shorten at [redacted] yard and refit as per email - $850 excluding GST

153) In the 18/08/2014 Final Payment Claim the description for this variation was as stated in the above heading."

154) There was no breakdown of the amount claimed.

155) In [redacted] letter dated 13 September 2014 they state that this work involved removing and modifying *"two adjacent roofing purlins to create an opening for the air conditioning duct work at HD4 of the walkway area. This was not indicated to [redacted] at the time the AutoCad plans were provided to [redacted] for the workshop plan preparation and approval. The requirement for ductwork access was only discovered once the air conditioning sub-contractor bought it [redacted] attention on site."*

156) Whilst this additional description of these works contain more details about the works performed, the reason for needing to do so and why such works were not part of the original Subcontract works, I find that there was sufficient information about these works performed in the description in the 18/08/2014 Final Payment Claim to enable the respondent to assess these variation works.

157) In the response the respondent submitted that[29]:

a) Relying on a statutory declaration by [redacted], there was a verbal agreement that all the variations referred to in it (which included this variation) would be performed by the applicant without charge.[30]

b) A quote for this work was requested in an email sent to the applicant on 21/10/2013[31]

c) Such agreement was also stated in an email from [redacted] to [redacted] dated 17 January 2014[32].

d) No quotation was ever provided for these works.

e) The respondent did not instruct applicant to complete these works for a charge of $850 excluding GST;

f) The amount payable for this variation claim should be assessed at $nil.

158) I find that:

a) There was an agreement between the parties that these variation works would be performed by the applicant without charging the respondent; and

[29] Response submissions para 126(b)
[30] Application document at tab 16
[31] Part of response document at tab 35
[32] Part of response document at tab 35

b) I assess the amount payable by the respondent to the applicant for this variation claim to be **$nil**.

Fabricate louvered doors - $2,000 excluding GST

159) In the 18/08/2014 Final Payment Claim the description for this variation was as stated in the above heading."

160) There was no breakdown of the amount claimed.

161) I find that:

a) this description did not provide sufficient detail for the respondent to assess the claim, because it did not state where the doors were located, how many were fabricated and did not break down the claim for $2000;

b) this variation claim did not comply with the mandatory provisions of cl. 5(1)(f); and

c) I assess the amount payable by the respondent to the applicant in respect of this variation to be **$nil**.

Fabricate new columns for Airconditioning Enclosure to allow for drainpipe as per instruction by site foreman [redacted] - $580.00 excluding GST

162) In the 18/08/2014 Final Payment Claim the description for this variation was as stated in the above heading."

163) There was no breakdown of the amount claimed.

164) In [redacted] letter dated 13 September 2014 they state that this work involved removing and re-fabricating *"two columns on the air conditioning enclosure at HD7 to facilitate the installation of the drainage pipework and ductwork…."* and *"The requirement for ductwork access was only discovered once the air conditioning sub-contractor bought it [redacted]' attention on site."*

165) Whilst this additional description of these works contain more details about the works performed, the reason for needing to do so and why such works were not part of the original Subcontract works, I find that there was sufficient information about these works performed in the description in the 18/08/2014 Final Payment Claim to enable the respondent to assess these variation works.

166) In the response the respondent submitted that[33]:

a) these works were not variation works and were works required to be performed in drawing no. B13-3616;

b) these works were never performed by the applicant;

[33] Response submissions para 126(d)

c) annexed a photograph purporting to depict the pipe which had not been enclosed[34]; and

d) in any event were works performed by the applicant to correct defective works (ie. installing incorrectly fabricated columns (reverse to what was required and shown on drawing B13-3598).

167) It is important to note that none of the respondent's submissions are supported by statutory declarations or statements by anybody and that many of its submissions are only made in the body of its submissions. Whereas the applicant has supported many of its factual contentions by including statutory declarations or letters from a number of people. In those circumstances, I have tended not to place very much weight on the respondent's assertions about factual matters if they are not supported by some form of corroborating evidence.

168) I find that:

a) on the balance of probabilities that these works were performed;

b) these works were not part of the Subcontract works;

c) these works were not performed by the applicant to correct defective works (ie. installing incorrectly fabricated columns (reverse to what was required and shown on drawing B13-3598);

d) cl. 1 in Division 1 of the Schedule to the Act does not apply to this variation because it only relates to binding a contractor to perform variation works if the builder and contractor have agreed on the amount or way of calculating an amount that the builder must pay the contractor in relation to the variation of the obligations and in those circumstances cl. 2 in division 2 of the Schedule to the Act applies to the affect that the contractor is entitled to be paid a reasonable sum for performing its obligations, which would include performing variation works which the respondent asked the applicant to perform;

e) $580 excluding GST is a reasonable sum to pay the applicant for performing these works; and

f) I assess the amount payable by the respondent to the applicant in respect of this variation to be **$580 excluding GST**.

Remove and modify Roller Shutter Tracking and refit back on site as per instructions by site foreman [redacted] - $450 excluding GST

169) In the 18/08/2014 Final Payment Claim the description for this variation was as stated in the above heading."

[34] Response photos a tabs 37 and 38. However, I have already stated I would not take those photographs into account because the copies of them served on the applicant were illegible.

170) There was no breakdown of the amount claimed.

171) In [redacted] letter dated 13 September 2014 they state that this work involved removing and modifying *"the roller shutter tracking and re-fit on site. This was not part of the [redacted] agreed scope of work and is a corrective action of a defect caused by [redacted]. [redacted] directed these works and [redacted] undertook the work on a variation basis."*

172) Whilst this additional description of these works contain more details about the works performed, the reason for needing to do so and why such works were not part of the original Subcontract works I find that there was sufficient information about these works performed in the description in the 18/08/2014 Final Payment Claim to enable the respondent to assess these variation works.

173) In the response the respondent submitted that[35]:

a) Relying on a statutory declaration by [redacted], there was a verbal agreement that all the variations referred to in it (which included this variation) would be performed by the applicant without charge.[36]

b) A quote for this work was requested in an email sent to the applicant on 21/10/2013[37]

c) Such agreement was also stated in an email from [redacted] to [redacted] dated 17 January 2014[38].

d) No quotation was ever provided for these works.

e) The respondent did not instruct applicant to complete these works for a charge of $850 excluding GST;

f) The amount payable for this variation claim should be assessed at $nil.

174) I find that:

a) There was an agreement between the parties that these variation works would be performed by the applicant without charging the respondent; and

b) I assess the amount payable by the respondent to the applicant for this variation claim to be **$nil**.

175) Therefore, the total amount which I assess to be payable by the applicant to the respondent as claimed in the 18/08/2014 Final Payment Claim, before deducting any set-off amount, to be **$13,280 excluding GST**.

[35] Response submissions para 126(b)
[36] Application document at tab 16
[37] Part of response document at tab 35
[38] Part of response document at tab 35

RESPONDENT'S SET-OFF CLAIMS

176) I therefore now turn to each individual set-off item claimed by the respondent.

Unliquidated Damages - $10,000 excluding GST

177) In the response this part of the set-off claimed unliquidated damages being the loss of profit suffered by the respondent due to the applicant's failure to complete the Subcontract works by the required date for practical completion split into the following bases:

a) loss of profit associated with the extra monies payable to another roofing contractor - $6,500 excluding GST; and

b) loss of profit associated with the extra monies payable to another rendering contractor - $3,500 excluding GST.

178) I have already found that the respondent is not entitled to claim unliquidated damages for alleged loss of profit flowing from the applicant's breach of the Subcontract for failing to complete the Subcontract works by the due date for practical completion when the Subcontract already provides for such damages to be assessed on a daily liquidated damages basis.

179) I therefore assess the amount to be set-off the applicant's claim for this component of the respondent's set-off claim to be **$nil**.

Liquidated Damages - $2,700 excl GST

180) The respondent has claimed that as the Subcontract required the applicant to complete its works by 1 October 2014 and it did not practically complete such works until 2 December 2013, the respondent could claim well over 24 days of liquidated damages at $300 per day, but limited its claim in that regard to 9 days of liquidated damages at $300 per day, i.e. $2,700 excluding GST.

181) The applicant has submitted that:

a) On 25 October 2013 the respondent extend the time for practical completion of the Subcontract works to 7 December 2013; and

b) as the applicant achieved practical completion of the Subcontract works on 2 December 2013 the respondent had no right to claim liquidated damages.[39]

182) Linked to those submissions are the applicant's following submissions concerning the respondent's claims for unliquidated damages arising from the same alleged breach by the applicant to complete the Subcontract works by the due date of practical completion of 1 October 2013:

[39] application letter from [redacted] to respondent dated 13 September 2014 at tab 29

a) the first time the applicant saw the construction program dated 22 June 2013 was when it was sent to the applicant by the respondent under cover of a letter from the respondent to the applicant dated 20 March 2014 responding to the Payment Claim and the respondent provided that program to the applicant then in an apparent attempt to argue a spurious case for delay damages[40];

b) the attempt in an email from the respondent to the applicant dated 16 September 2013 to require the applicant to complete the Subcontract works by 19 September 2013 indicated that:

i) the respondent did not appreciate the date for practical completion of the Subcontract works was then 1 October 2013;

ii) the respondent was reacting to the likelihood that the principal under the head contract had indication an intention to issue a notice to show cause to the respondent why the principal should not terminate the head contract; and

iii) the respondent had failed to effectively manage the performance of the various subcontractors' works;

c) that the respondent never provided the applicant with a works program until it sent it a completion program by email on 25 October 2014[41];

d) the main reasons that the applicant was unable to complete the Subcontract works by 1 October 2013 were, because:

i) the respondent had failed to adequately manage and correctly sequence the works performed by the various subcontractors evidenced by having to engage 3 project managers; and

ii) in those circumstances the works had not reached the stage of completion of other subcontractor works to enable the applicant to complete the Subcontract works.

e) the respondent had to engage several alternative roofing and rendering contractors at ever increasing subcontract prices, because the respondent was not paying the various subcontractors.

183) Those submissions are supported in many ways, i.e amongst other things:

a) in a letter from [redacted], the Managing Director of [redacted] addressed to "Whom it may concern" dated 23 June 2014 confirming he acted as the respondent's project manager for a period of time[42];

b) in a statutory declaration by [redacted], a supervisor

[40] application submissions paras 2.31 to 2.33 and documents at tab 26
[41] application submissions para 2.21 and documents at tab 19.
[42] Application document at tab 14

employed by the applicant, 24 June 2014[43];

c) in a letter from [redacted] addressed "to whom it may concern" dated 23 June 2014, another one of the persons who for a period acted as the respondent's project managers for the various subcontracted works at this site[44]; and

d) a statutory declaration by [redacted] declared on 23 June 2014 who is he Managing Director of [redacted], one of the roofing subcontractors engaged by the respondent to perform subcontract roofing works at the site[45].

184) The respondent submitted that:

a) it did not inadequately manage the works performed by the various subcontractors;

b) it did pay its subcontractors and, in particular, its roofing and rendering sub-contractors;

c) it had to engage several roofing and rendering sub-contractors at higher and higher subcontract prices, because of the applicant's failure to complete the Subcontract works by the required date of practical completion; and

d) it did not engage [redacted] to be a project manager of the various subcontractor works.

185) Again I note that the respondent's submissions are not supported by any witness statements.

186) I find on the balance of probabilities that all of the submissions by the applicant referred to above are correct.

187) In particular, I find that the respondent created its liquidated and unliquidated damages submissions on spurious grounds in order to attempt to create a substantial set-off of the applicant's 18/08/2014 Payment Claims and earlier payment claims and that such set-offs were unfounded, because it the respondent well knew that it had not managed the Project well and it had to hire new roofing and rendering subcontractors due to not paying the earlier roofing and rendering subcontractors. This will impact later in this determination in the section headed costs.

188) I therefore assess the amount to be set-off the applicant's claim for this component of the respondent's set-off claim to be **$nil**.

Incomplete Works – 3 claims totalling $3,810 excluding GST

189) This component of the respondent's set-off claim is for the cost of performing

[43] Application document at tab 16
[44] Application document at tab 18
[45] Application document at tab 24

some of the Subcontract works which were not performed by the applicant and which the respondent asserts it performed.

190) In the preamble to the respondent's claim for this section of the respondent's set-off claims in the response submission it made the following assertion:

> *"Second component of our counterclaim is for Applicant' works that were performed by the Respondent. During the contract period there were contract works that were omitted by the Applicant with an understanding that these omitted works would be offset against some additional works that the Applicant may have possible undertaken…."*[46]

191) As I have made findings in relation to some of the applicant's variation claims that there was such an agreement and assessed the amount payable by the respondent to the applicant in respect of those variations to be $nil, I now hold the respondent to its obligations pursuant to that agreement.

192) I therefore assess the amount to be set-off the applicant's claim for this component of the respondent's set-off claim to be **$nil**.

Defects – 2 claims totalling $2,810 excluding GST

193) The third and last component of the respondent's set-off is for the cost of rectifying two items of the Subcontract works which the respondent alleges were defectively performed by the applicant.

194) I will now make reference to each of those defective works claims.

Access panels - $2,250 excluding GST

195) The respondent contends that[47]:

a) the Subcontract works required the respondent to build and install steel frames around roller doors with 600 x 600 and that that part of the works are depicted in drawings B13 – 3601 (A07 of 23) and B13 – 3607 (A07 of 23) as "bulkhead frame for roller doors;

b) on plan detail 1 and plan detail 3 the 600 x 600 hinged access panels to each end, with key locks key locks can be seen as an express requirement of the Subcontract drawing, to be installed with the bulkhead frames bulkhead drawings;

c) the applicant did not install any of the access panels (which are 3 in number), but the applicant claims it has provided the access panels to the respondent on site, which the respondent rejects; and

d) the respondent estimates the cost of performing such works to be $2,250 excluding GST made up as follows:

[46] Response submissions para 149
[47] Response submission para 150 (i)(a) to (d) and documents at tab 47 of response

i) site establishment, school children protection and fencing and demobilisation - $300 excluding GST for each access panel x 3 = $900 excluding GST;

ii) supply 3 access panels and other associated materials – at $180 per panel = $540 excluding GST;

iii) install 3 panels, 1 carpenter 3 hours per panel @ $90 per hour excluding GST = $810 excluding GST.

196) On 4 December 2014 the applicant provided the following further submissions in relation to both alleged defects:

> ***"Defects***
>
> *The Respondent is now arguing that several of its defect claims are "incompleted or non-conformance works" by the Applicant. In the conduct of the project, this raises serious issues as to the Respondent's conduct of specification supervision and inspection that are likley* [sic likely] *fatal to these claims.*
>
> 1. *the Respondent is currently holding retention in the contract for defects and the Applicant has presented to site to undertake any defects in its work;*
> 2. *the works were inspected and passed at PC which is listed as activity "Hand Over" at 6 December 2013 in the schedule of works;*
> 3. *at that time and there were three (3) defects listed against the Applicant in the D&L defects listing of 31 December 2013 (Response Appendix 29). It appears that the defects listing is incomplete as it is missing a column or it has been tampered with;*
> 4. *to-date these are the only defects that have been directed to the Applicant by the Respondent to resolve and apparently the Applicant has rectified the defects listed;*
> 5. *since that time the Respondent has then raised claims for "non-conformance works"and "incomplete works" in circumstances of their failure to supervise the works; and*
> 6. *most recently, defects that have been notified to the Applicant but are now claimed in case of the Applicant's failure to rectify such defects. In other words, additional retention for future defect work."*

197) The applicant did not make any submissions concerning whether it had already supplied the 3 manholes in question or whether it considered that the amount claimed by the respondent for supplying and installing the 3 manholes was reasonable.

198) On 8 and 9 December 2014 the respondent provided further submissions which:

a) asserted that the applicant's contention that it had not had prior notice of

these defects claims was incorrect, because the same defect claims were made in the respondent's answers to the applicant's earlier two invalid payment claims;

b) the assertion by the applicant that it had returned to the work site after practical completion to perform rectification works was incorrect because its protocol for subcontractor defect rectification performance is to require subcontractors to firstly seek the respondent's approval to return to perform defects and the applicant did not do so; and

c) it also listed the defective works listed in a defects list served on the applicant on or about 31 December 2013, but none of those works included the defects claimed in this part of the respondent's set-off.

199) I find that:

a) this claim is really not a claim to rectify defective works, but rather a claim to complete incomplete works;

b) the scope of works required these three manholes to be supplied and installed by the applicant;

c) the applicant has had plenty of notice of this allegation that this part of the works had not been completed to enable it to arrange to inspect the works and ascertain whether the manholes had been supplied and/or installed and if not to do so;

d) even though the respondent does appear to hold $3,542 in retention monies, I should nevertheless assess this claim as part of the set-off in this adjudication;

e) the amount claimed by the respondent for performing these incomplete works is reasonable.

200) I therefore assess the amount to be set-off the applicant's claim for this component of the respondent's set-off claim to be **$2,250 excluding GST**.

Gates - $560 excluding GST

201) The respondent contends that the Subcontract drawing B13-3598 (A04 of 23) requires the applicant to install two aligned gate/doors G1 and G2 and that although the applicant installed them they were mis-aligned[48].

202) The respondent also included a photograph of the gates at tab 48 of the response, but I have already found that I will disregard that photograph, because the copy of it served on the applicant was illegible.

203) The further submissions made in relation to the previous alleged manhole set-off claim also apply to this defect claim, because they were made in general terms by both parties.

[48] Response submission para 150 (ii)(a) to (d) and documents at tab 36 of response

204) The respondent estimates the cost of performing such rectification works to be $560 excluding GST made up as follows:

a) Travel to and from site including minimum call out fee = $200 excluding GST;

b) Carpenter to attend site and re-align them (2 carpenters, 2 hours @ $90 per hour excluding GST = $360 excluding GST.

205) I find that:

a) the scope of works required these gates to be supplied and installed by the applicant and that they be aligned;

b) the applicant has had plenty of notice of this alleged defect to enable it to arrange to inspect the works and ascertain whether the gates were misaligned and if so to align them;

c) even though the respondent does appear to hold $3,542 in retention monies, I should nevertheless assess this claim as part of the set-off in this adjudication;

206) I consider that it would only be necessary for one carpenter to align these doors, rather than two, but otherwise consider the respondent's assessment of this claim is reasonable, which would result in the rectification cost assessment to be reduced to $380 excluding GST.

207) I therefore assess the amount to be set-off the applicant's claim for this component of the respondent's set-off claim to be **$380 excluding GST**.

208) Therefore the total amount to be set-off against the amount of **$13,280, excluding GST** assessed by me to payable in respect of the 18/08/2014 Final payment Claim is **$2,630 excluding GST** leaving a balance payable by the respondent to the applicant of $10,650 excluding GST being **$11,715.00 including GST**.

RETURN OF SECURITY

209) I am required as part of my functions by s. 33(1)(b)(ii) of the Act to determine on the balance of probabilities whether any party to the payment dispute is liable to return any security, the amount of such security and the date on which it must be returned.

210) Due to my findings concerning security and retention monies I determine that the respondent release the retention monies in the sum of $3,452 to the release within 7 days of the date of delivery of this determination.

COSTS

211) The applicant has submitted that I should exercise my discretion under the Act to order that the respondent pay the whole of the costs of the adjudication,

including my fees and it seeks payment of $7,536.10 including GST for the applicant's legal costs up to the date of filing of the application. I expect that it would have incurred further legal costs since then, due to the need to prepare the further submissions requested by me. Although, the applicant has not provided me with details of any such additional costs.

212) The applicant contends that I should do so, because the Respondent's set-off claims relating to delay were fabricated.

213) 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.

214) 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 (i.e. the adjudicator's fees).

215) In paragraph 187 I found that the respondent made unfounded submissions. That is a very serious matter.

216) The respondent has contended that I should not order that the respondent pay the applicant's claimed legal costs in relation to the adjudication in the sum of $7,536.10 including GST supported by an invoice from the applicant's solicitor, because no details of the work performed have been provided.

217) I find that the amount of $7,536.10 including GST is a reasonable amount for the applicant's solicitor to charge for acting on the applicant's behalf up to the date of preparation of the application for adjudication.

218) My adjudicator's fees for this matter are $9,075 including GST and the applicant and the respondent have each paid 50% of such amount, i.e. $4,537.50.

219) I therefore make the following determinations:

a) That the respondent pay **$7,536.10 including GST** to the applicant within 7 days after the date of release of this determination to the parties; and

b) That respondent pay $100% of my adjudicator fees, of which it has to date paid 50% thereof and the respondent pay the applicant a further **$4,537.50** within 7 days after the date of release of this determination to the parties by way of reimbursement of the share of such fees already paid by the applicant.

INTEREST

220) The applicant has also claimed interest pursuant to s. 21 of the Act at 8.5 % per annum in the sum of $116.75 including GST.

221) It has not stated what date the interest should be computed from.

222) I agree that the appropriate rate to apply is 8.5% because s. 21 of the Act and the regulations to the Act invoke the method of calculating interest up to judgment used by the Supreme Court of the Northern Territory, which in turn involves the method of calculating interest up to judgment used by the Federal Court of Australia and it provides that such interest be calculated at the most recently published cash rate target by the Reserve Bank of Australia (which at 3 December 2014 was 2.5% per annum) plus 6%.

223) I find that the interest payable should be calculated from the day following the dispute date. As the dispute date for the 18/08/2014 Final Payment Claim was on 16 September 2014, interest should be calculated from 17 September 2014 until the date of this determination, i.e. 12 December 2014.

224) I determine that the respondent pay interest to the applicant on $11,715.00 at the rate of 8.5% per annum from 17 September 2014 to 12 December 2014 (being 77 days at $2.73 per day), which amounts to **$210.21**.

THE DETAILS OF THE DETERMINATION

225) Pursuant to s 34(1)(a) of the Act, I have made this determination on the basis of the application and its attachments, the response and its attachments and the further submissions by the parties requested by me.

226) Pursuant to section 36(1) of the Act, the respondent shall pay 100% of the applicant's costs in relation to this adjudication up to the date of preparation of the adjudication application, assessed by me to be $7,536.10.

227) Pursuant to section 46(5) of the Act, 100% of the costs of the adjudication shall be paid by the respondent.

228) Pursuant to s 33(1)(b), I have determined that:

a) the respondent must pay the applicant **$27,540.81** (the "adjudicated amount") comprising:

i)	the amount payable on the payment claim	
	less the respondent's set-off	$11,715.00
ii)	interest thereon	$210.21
iii)	return of security	$3,542.00
iv)	applicant's costs of adjudication up to date of preparation of application for adjudication	$7,536.10
v)	reimbursement of 50% of adjudicator's fees	$4,537.50

$27,540.81

and

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

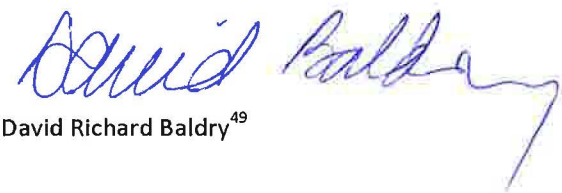
CONFIDENTIAL INFORMATION

229) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.

230) In any event, pursuant to s. 38(1)(e) of the Act I consider that the following information, because of its confidential nature, is not suitable for publication by the Registrar under s. 54 of the ACT:

a) the identity of the parties, their legal advisers and any other persons or entities referred to in this determination; and

b) the identity and location of the project.

Signed: 

David Richard Baldry[49]

Date: 12 December 2014

[49] Registered Adjudicator Number 39