IN THE MATTER OF
an Application for Adjudication
pursuant to the *Construction Contracts (Security of Payments) Act* 2004 (NT)

BETWEEN

[Redacted] Applicant

and

[Redacted] Respondent

ADJUDICATOR'S NOTICE OF THE APPLICANT'S WITHRAWAL OF THE APPLICATION PURSUANT TO SECTION 28A(2) OF THE ACT AND DECISION ON COSTS

Dated this 31th May 2018

DETAILS OF PARTIES AND ADJUDICATION

Adjudicator	Gordon Smith (Registration Number 52) ABN 87 105 468 846 21 Lyons Street, Cottesloe, WA 6011 PO Box 797, Claremont, WA 6910 Email: gordon.smithcharb@bigpond.com Ph: (08) 9286 3125
Applicant's Name	[*redacted*]
Respondent's Name	[*redacted*]
Northern Territory Decision Number	52.18.01
Resolution Institute Matter Number	81124
Date of Adjudication Claim	30 April 2018
Date of Adjudicator's Notice and Decision on Costs	31 May 2018

NOTICE OF WITHDRAWAL AND DECISION ON COSTS

In respect of the Applicant's application for a payment dispute to be adjudicated pursuant to section 28 of the *Construction Contracts (Security of Payments) Act* 2004 (NT) ('**Act**') dated 30 April 2018 ('**Application**'), I publish this notice to record the Applicant's withdrawal of its Application, pursuant to section 28A(2) of the Act, and in relation to costs, I determine the following:

(1) the Parties are to bear their own costs in relation to the adjudication, pursuant to section 36(1) of the Act;

(2) the Applicant shall pay the Adjudicator's costs of amount $9,817.50 (including GST), pursuant to section 36(2) of the Act, details of which are set out in Schedule B (and which shall remain confidential); and

(3) taking account of the Applicant's advance on costs of the adjudication of amount $9,817.50 (including GST), there is no further payment to be made by the Applicant for the Adjudicator's costs.

The procedural background to the Applicant's withdrawal of the Application, pursuant to section 28A(2) of the Act, and the reasons for my decision on costs are annexed as Schedule A.

_____

Gordon Smith
Registered Adjudicator (Registration No 52)
21 Lyons Street, Cottesloe, WA 6011
PO Box 797, Claremont, WA 6910
Email: gordon.smithcharb@bigpond.com
Date: 31 May 2018

SCHEDULE A

PROCEDURAL BACKGROUND TO WITHDRAWAL OF APPLICATION

AND REASONS FOR DECISION ON COSTS

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1.0 Introduction

1. The Applicant is [*redacted*] c/- Gillis Delaney Lawyers, Level 40, ANZ Tower, 161 Castlereagh Street, Sydney, NSW 2000, and the Respondent is [*redacted*] C/- MinterEllison, Level 22, Waterfront Place, 1 Eagle Street, Brisbane, QLD 4001 (referred to herein singularly as '**Party**', and collectively as '**Parties**').

2. The Applicant was represented in these adjudication proceedings by Doyles Construction Lawyers, Attn: Mr Jim Doyle ('**Mr Doyle**'), until 17 May 2018, from which time the Applicant was represented by Gillis Delaney Lawyers, Attn: Mr Anthony Jefferies and Ms Kellie Van Munster, and the Respondent was represented by MinterEllison, Attn: Mr Andrew Orford ('**Mr Orford**').

3. The Applicant seeks payment of the amount of $24,517,139.30[1] (including GST)[2] arising out of the construction by the Applicant of preliminary civil works for the construction of [*redacted*] Northern Territory,[3] pursuant to [*a contract*] entered into between the Applicant and the Respondent on 14 September 2016 ('**Subcontract**').[4]

2.0 Application and Appointment

4. The Applicant applied for a payment dispute to be adjudicated pursuant to section 28 of the *Construction Contracts (Security of Payments) Act* 2004 (NT) ('**Act**') by its application dated 30 April 2018 ('**Application**'). The Application comprises of the application, together with:

   (1) the Applicant's submissions (Sections A to J), and Annexures A to C (all contained in Volume 1) (the Applicant refers to the supporting documents in Volume 1 as **'Adjudication Documents**', and I adopt the same terminology);

   (2) supporting documents in Volumes 2 to 5, including five expert reports contained in Volume 5 [*report details redacted*]; and

   (3) three Statutory Declarations of [*redacted*] contained in Volume 5.

[1] Application, Section A, and [1].
[2] Unless noted otherwise, all reference to dollars ($) are references to Australian dollars.
[3] Application, [16].
[4] Application, [18].

5. The Applicant served its Application upon both the Respondent and the Resolution Institute ('**Institute**'), a prescribed appointer as defined under section 4 of the Act, on 30 April 2018, and the Institute appointed me, Gordon Smith, as the Registered Adjudicator to adjudicate the payment dispute by its letters to the Parties dated 2 May 2018, within the period of five working days of service prescribed by section 30(1)(a) of the Act. I received from the Institute the Application in electronic form on 2 May 2018, within the period of five working days of service prescribed by section 30(1)(b) of the Act. I subsequently received from the Institute the Applicant's served Application, comprising a hard copy of the Applicant's submissions, with the remaining documents contained on a USB drive.

6. I wrote to the Parties by letter dated 4 May 2018 advising the Parties, amongst other things:

   (1) of my appointment by the Institute by its letter dated 2 May 2018, pursuant to section 30(1)(a) of the Act, to adjudicate the payment dispute;

   (2) confirmed that I have no material personal interest in the payment dispute concerned or the construction contract under which the dispute has arisen or in any Party to the Subcontract in terms of section 31(1) of the Act;

   (3) requested the Parties to advise me whether there is any further information contained in the application or the response which falls within the category of confidential information pursuant to section 54(2)(b) of the Act; and

   (4) requested all communications between the Parties and with myself to be conducted by email only unless notified otherwise by the Adjudicator, apart from the Respondent's response.

7. MinterEllison, by Mr Orford's email to the Adjudicator dated 8 May 2018, advised that they were acting for the Respondent in the adjudication proceedings.

8. By emails to the Respondent dated 8 May 2018, both myself and the Applicant agreed for the Respondent's response to the Application ('**Response**') to be served electronically, and for a hard copy of the Response to follow.

9. The Respondent electronically served its Response on 15 May 2018 within the time prescribed by section 29(1) of the Act, taking account of the public holiday in the

Northern Territory on 7 May 2018. I acknowledged receipt of the Response by my email to the Parties dated 15 May 2018. The Response comprises the following:

(1) the Respondent's written submissions in response, comprising of Parts A to I (Sections 1 to 69); and

(2) documents in support of the Respondent's written submissions, comprising:

(a) five Statutory Declarations, by [*redacted*], and a Supplementary Statutory Declaration by [*redacted*]; and

(b) five expert reports by [*redacted*]; and

(3) cases relied on by the Respondent.

10. I also received a hard copy of the Response on 16 May 2018.

11. By my letter to the Parties dated 24 May 2018, I notified the Parties that, with the consent of the Registrar, pursuant to section 34(3)(a) of the Act, I extended the time period to issue my notice recording the Applicant's withdrawal of the Application and my decision on costs, by three (3) working days, from Tuesday 29 May 2018 to Friday 1 June 2018.

3.0 Conflicts of Interest

12. I confirm, as stated in my letter to the Parties dated 4 May 2018 I have referred to in paragraph 6 above, that I have no material personal interest in the payment dispute concerned or the construction contract under which the dispute has arisen or in any Party to the Subcontract in terms of section 31(1) of the Act.

4.0 The Subcontract

13. As I have noted in paragraph 3 above, the Parties entered into the Subcontract on 14 September 2016.[5] By the definition of the term *'Subcontract'* contained in clause 1.1 of the Conditions of Subcontract, the contractual relationship between the Parties is constituted by the following documents:

(1) the Formal Agreement;

(2) the Conditions of Subcontract;

[5] Adjudication Documents, p3.

(3) the Subcontract Particulars;

(4) the Special Conditions;

(5) the Subcontract Works Description (which, by the terms of the definition of *'Subcontract Works Description'* in clause 1.1 of the Conditions of Contract, and the terms of the Subcontract Particulars, comprises of Annexures 4, 5, and 6); and

(6) the other documents (if any) referred to in the Subcontract Particulars.

14. The Subcontract contains Annexures 1 to 18 referred to in other Subcontract documents, including the Subcontract Particulars.

15. By the terms of clause 1.3(a) of the Conditions of Contract, and the reference to clause 1.3(a) in the Subcontract Particulars, the Subcontract is subject to and is to be construed in accordance with the law of the State of the Northern Territory.

5.0 Background

16. I set out below a brief summary of undisputed facts relating to the payment dispute as introductory background to the context of the Applicant's withdrawal of the Application under section 28A(2) of the Act on 21 May 2018, and my decision on costs set out in Section 7.0 below.

17. The Applicant seeks payment of the amount of $24,517,139.30[6] (including GST) in its Application. The Application arises from the Applicant's Payment Claim #25 for January 2018, which included the amount of $30,471,888.17 (including GST) for additional excavation in rock ('**Rock Claim**'), submitted to the Respondent on 16 January 2018.[7]

18. On 29 January 2018, the Respondent issued to the Applicant Payment Statement #25.[8]

19. On 15 February 2018, the Respondent assessed the amount due for the Rock Claim as $5,954,748.86 (including GST) by determining that a Latent Condition existed, and

[6] Application, Section A, and [1].
[7] Application, [26], and Adjudication Documents, pp434 and 456. I note that there is a slight difference between the amount of $30,471,188.17 referred to in the Application, Section A, and this amount.
[8] Application, [27], and Adjudication Documents, p477.

valued the Rock Claim by multiplying a rate by the cubic metres of rock excavated.[9] The Respondent has paid to the Applicant the amount of $5,954,748.86 (including GST), leaving the amount of $24,517,139.30 (including GST) in dispute between the parties.

6.0 The Applicant's Withdrawal of the Application

20. By my letter to the Applicant dated 16 May 2018, I referred to the Respondent's submissions in its Response that I should dismiss the Application without making a determination of its merits, pursuant to section 33(1)(a)(ii) and 33(1)(a)(iv) of the Act, on jurisdictional grounds, as follows:

    (1) the Applicant served its Payment Claim out of time (Section 9 of the Response);

    (2) the Applicant's Payment Claim did not comply with the contractual requirements or conditions precedent (Sections 10 and 11 of the Response);

    (3) the Applicant did not serve the Application on the Respondent within the time prescribed by section 28(1) of the Act (Section 13 of the Response); and

    (4) the Adjudicator should dismiss the Application without making a determination of its merits by reason of complexity (Section 14 of the Response),

    and considering the object of adjudication of a payment dispute set out in section 26 of the Act, pursuant to section 34(2)(a) of the Act, I allowed the Applicant an opportunity to submit written submissions in response to these jurisdiction issues of length no longer than 10 pages (excluding any evidence), to be submitted to the Respondent and the Adjudicator on or before Friday, 18 May 2018.

21. By letter to me dated 17 May 2018, Gillis Delaney Lawyers advised that they now act for the Applicant in the adjudication proceedings, and requested an extension of time until close of business on Monday, 21 May 2018 to respond to the matters set out in my letter to the Applicant dated 16 May 2018 referred to in paragraph 20 above. By my letter to the Applicant dated 17 May 2018, I granted the Applicant the extension requested.

22. By an email to me dated 18 May 2018, copied to MinterEllison, from Mr Doyle of Doyles Construction Lawyers, the Applicant's former solicitors, I received an attached document, which Mr Doyle described in his email in the following terms:

[9] Application, [29], and Adjudication Documents, p158.

'While our instructions have been withdrawn, we submit the enclosed to assist the adjudicator and to explain the Adjudication Application delivered by us.'

23. By my email to the Parties dated 18 May 2018, I advised the Applicant's solicitors of my receipt of Mr Doyle's email, and advised that I had not opened the document attached. I replied to Mr Doyle by email on 18 May 2018, copied to the Parties, advising that, in light of Doyles Construction Lawyers no longer acting for the Applicant on the adjudication, that he not send me any further communications concerning this adjudication.

24. By letter to me and the Respondent dated 21 May 2018, the Applicant withdrew its Application, pursuant to section 28A(2) of the Act, and by my letter to the Parties dated 21 May 2018, I requested the Respondent to advise whether it has any objections to the Applicant's withdrawal of the Application in terms of section 28A(3) of the Act. By letter dated 23 May 2018, the Respondent advised that it does not object to the Applicant's withdrawal of the Application, pursuant to section 28A(2) of the Act.

25. By this notice, I hereby record the Applicant's withdrawal of the Application, pursuant to section 28A(2) of the Act.

7.0 Costs

7.1 Relevant Provisions of the Act

26. Turning to consider the issue of the costs of the adjudication, section 36 of the Act deals with the allocation of the costs of the adjudication of a payment dispute, including the circumstances in which a party to a payment dispute must pay some or all of the costs of the other party. Section 36 is in the following terms:

'(1) The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute (including the costs the parties are liable to pay under section 46).

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

(3) If an appointed adjudicator makes a decision under subsection (2), the adjudicator must:

(a) decide the amount of the costs and the date on which the amount is payable; and

(b) give written notice of the decisions and the reasons for them to the parties.

(4) Divisions 4 and 5 apply (with the necessary changes) to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.'

27. Section 46 of the Act, referred to in section 36(1), deals with the *'costs of an adjudication'*, an expression which is defined in section 46(12), for the purpose of the section, in the following terms:

'(a) the entitlements of the appointed adjudicator under subsection (1A); and

(b) the costs of any testing done, or of any expert engaged, under section 34(2)(c)(ii) or (iii).'

28. Sections 46(1), (1A), and (4) to (6) of the Act are relevant to determination of the *'costs of an adjudication'* in the present case, and are in the following terms:

'(1) This section applies if:

(a) an adjudicator is appointed to adjudicate a payment dispute; and

(b) one of the following applies:

(i) the party who applied for the adjudication withdraws the application under section 28A;

(ii) the adjudicator dismisses the application for adjudication under section 33(1)(a);

(iii) the adjudicator makes a determination of the dispute under section 33(1)(b).

(1A) The adjudicator is entitled:

(a) to be paid for the adjudicator's work:

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate prescribed by the Regulations; or

(ii) if a rate is not agreed – at the rate published under section 55 for the adjudicator; and

(b) to be reimbursed any expenses reasonably incurred in connection with the work.

…

(4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(6) Subsections (4) and (5) do not prevent a decision being made under section 36(2).'

7.2 The Parties' Submissions on Costs

29. In my email to the Parties dated 23 May 2018, I referred to the Parties' respective submissions on costs in the Application and Response, and requested from the Parties their position on costs in light of the withdrawal of the Application.

30. The Applicant responded by letter to the Adjudicator dated 23 May 2018 proposing that the Parties bear their own costs, pursuant to section 36(1) of the Act, submitting that the Respondent has not objected to the Applicant's withdrawal of the Application and that both Parties have expressly reserved their rights in relation to the dispute the subject matter of the Application.

31. The Respondent submitted to the Adjudicator its costs submissions, which I refer to herein as the '**Respondent's Costs Submissions**' ('**RCS**'), on 24 May 2018, and by my letter to the Applicant dated 24 May 2018, I allowed the Applicant an opportunity to respond to the RCS, which the Applicant submitted to the Adjudicator on 28 May 2018, and which I refer to herein as the '**Applicant's Costs Submissions**' ('**ACS**').

32. The Respondent submits that, pursuant to section 36(2) of the Act, the Applicant should be ordered to pay the costs of the adjudication and the Respondent's costs associated with the wasted preparation of the Response by reason of the Applicant's frivolous or vexatious conduct,[10] with the Respondent's claimed costs totalling the sum of $209,333.10 (including GST), comprising of the following amounts:[11]

Cost Item	Amount ($)
MinterEllison's Professional Fees and Outlays	$182,603.10
Aquenta Consulting	TBA*

[10] RCS, [1.1.1], and [3.2.1].
[11] RCS, [6.2.2].

Bennett & Bennett	$1,540.00
E3 Advisory Pty Ltd	$25,190.00
Golder Associates	TBA*
Total	**$209,333.10**

* The Respondent advised that it has not claimed these costs, on the basis of absence of cost information from the relevant expert (RCS, [6.2.3]).

33. The Respondent refers to the following decisions on the meaning of frivolous and vexatious conduct:

(1) the decision of the Court of Appeal of Western Australia in its decision in *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch*,[12] in which the Court considered whether an appeal was instituted frivolously or vexatiously under the *Industrial Relations Act* 1979 (WA), as follows:[13]

'...the ordinary meaning of 'frivolously', in relation to a claim, is, relevantly, having no reasonable grounds for the claim and the ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party.'; and

(2) Deane J's dicta in the Australian High Court's decision in *Oceanic Sun Line Special Shipping* Co *Inc v Fay*[14] as to the meaning of the word *'vexatious'*, as follows:[15]

'…vexatious should be understood as meaning productive of serious and unjustified trouble and harassment'.

34. The Respondent submits that the Applicant's conduct is frivolous, and in particular, vexatious, as follows:[16]

(1) in submitting an adjudication application of the size and complexity of the Rock Claim; and

[12] *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* (Unreported Judgment) dated 15 September 2015.
[13] RCS, [4.1.4], *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* (Unreported Judgment) dated 15 September 2015, [5].
[14] (1988) 165 CLR 197.
[15] RCS, [4.1.5], (1988) 165 CLR 197, [6].
[16] RCS, [4.1.6].

(2) then, without explanation, withdrawing the Application only after the Respondent had been put to the significant expense of preparing and submitting its Response.

35. The Respondent refers to its submissions in Part B of its Response, that the Adjudicator did not have jurisdiction to hear the Application for the following reasons:[17]

(1) the Applicant's Payment Claim was made out of time;

(2) the Applicant's Payment Claim did not comply with the contractual requirements or conditions precedent under the Subcontract;

(3) the Application was served out of time; and

(4) the Applicant's claim was of greater complexity than the matters intended to be addressed under the Act.

36. The Respondent further submits that:[18]

(1) when invited to provide submissions on these issues, the Applicant failed to do so, and without explanation or warning, withdrew its Application; and

(2) given the timing of the Applicant's withdrawal of the Application, the only explanation which appears plausible is that after considering the issues raised by the Respondent regarding jurisdiction, the Applicant considered that the Application was invalid for want of jurisdiction and as such, the Applicant's claim was *'doomed to fail*'.

37. The Applicant submits the following:[19]

(1) that the Adjudicator does not have jurisdiction under section 36 of the Act to award costs in the absence of a determination on the merits of the Application;

(2) following the Applicant's appointment of new solicitors, the Applicant had a *'serious concern'* that the Application *'was filed out of time such that any successful award could not be maintained as the entire determination may lack jurisdiction'*. The Applicant submits that this concern became apparent

[17] RCS, [4.2.1].
[18] RCS, [4.2.2-4.2.3].
[19] ACS.

following the call for submissions by the Adjudicator on the jurisdiction points raised by the Respondent, and that the withdrawal was a prudent move to avoid further costs being incurred, whilst reserving all rights;

(3) in relation to the serving of the Application by the Applicant's previous lawyers, the Applicant's solicitors refer to the assumption *'that the solicitors that advised our client to pursue the Application, did so with an oversight to the jurisdictional bar or otherwise erred in calculation of the time required to file the application'*;

(4) the substance of the Application maintains strong legal merit and prospects of success, and that it is dubious to suggest that the Application was filed *'purely to cause trouble or annoyance to the respondent'*, a submission which the Respondent has not sought to promote;

(5) the Applicant does not oppose a determination that it be solely responsible for the costs of the Adjudicator in light of the Application being withdrawn prior to determination, but submits that by reason of the subsequent conduct of the Respondent, each party should bear its own costs of the adjudication, and share equally the Adjudicator's costs;

(6) the Respondent applies for its costs of the Application on the basis that serving the Application allegedly constitutes frivolous or vexatious conduct, but contrary to such submission, the Respondent, in its Response, sought to have the Adjudicator dismiss the Application without making a determination of its merits by reason of its complexity;

(7) the Respondent has not particularised the exact conduct it considers to have been frivolous or vexatious, and its application for costs should be dismissed out of hand;

(8) the claim the subject of the Application will succeed and the jurisdictional issue in no way affects the legitimacy of the Applicant's claim. Further, the substance of the Application maintains strong legal merit and prospects of success, and the Respondent has been put on notice of the Applicant's intention to litigate the matter;

(9) the Respondent has not properly quantified its costs, that some of the Respondent's claimed costs are estimates that may be payable, and that the Respondent has not proved the costs claimed. The Applicant submits that the Respondent should have done more to prove that the costs incurred allegedly in excess of $209,000 were solely attributable to the Application and were in fact thrown away in light of the impending litigation between the Parties;

(10) with respect to the work performed by the Parties referred to in paragraph 5.1.4 of the RCS,[20] it is irrational and excessive to suggest that the costs incurred by the Respondent have been *'thrown away'*; and

(11) that the Respondent itself has engaged in frivolous or vexatious conduct in making its submission on costs, compelling the Applicant to incur costs in meeting such a hopeless submission, and submits therefore the Adjudicator's costs should be borne equally by the Parties.

7.3 The Adjudicator's Analysis

38. Turning to consider the Parties' respective submissions, the cost allocation provisions of the Act are intended to even the balance between the parties, whilst providing the exceptions for frivolous or vexatious conduct, or unfounded submissions,[21] which, in light of the content of the tests for both frivolous and vexatious conduct I refer to below, is a relatively high bar to establish.

39. Turning first to consider the Applicant's submission that I do not have jurisdiction under section 36(2) of the Act to award costs in the absence of a determination on the merits of the Application, the Applicant does not provide any reasoning for this submission. There is no indication in section 36 restricting an adjudicator's jurisdiction on costs only to circumstances where an adjudicator has made a determination on the merits under section 33(1)(b) of the Act. Section 36(2) refers to the adjudicator being *'satisfied a party to a payment dispute incurred costs of the adjudication'* (emphasis added), and in light of the

[20] I am of the view that the Applicant's reference here to paragraph 5.1.4 of the RCS is a mis-reference, since paragraph 5.1.4 refers to the Adjudicator's costs.

[21] Refer to the comments of the Hon Ms Alannah MacTiernan, the Western Australian Minister for Planning and Infrastructure at the time, in Western Australian Parliament on 7 April 2004 concerning clauses 32 and 37 of the *Construction Contracts Bill* 2004 (WA), the equivalent provisions in the *Construction Contracts Act* 2004 (WA).

definition of a *'payment dispute'* in section 8 of the Act, an adjudicator's assessment of such a dispute is not confined to the determination provisions of the Act.

40. Similarly with respect to an applicant's right to withdraw an application under section 28A of the Act, there is no indication in section 28A to suggest that the cost allocation provisions of the Act are not applicable to a withdrawal of an Application. On the contrary, section 46(1)(b)(i) of the Act indicates that the provisions of the Act dealing with the costs of an adjudication continue to apply in circumstances where an applicant withdraws an application under section 28A of the Act. I am therefore of the opinion that I have jurisdiction under section 36(2) of the Act to award costs, notwithstanding that there has been no determination of the payment dispute on the merits, pursuant to section 33(1)(b) of the Act.

41. By way of introductory comments on the scope of my jurisdiction under section 36(2) of the Act, I consider it clear from the reference in section 36(1) to parties' *'own costs'* as including the costs the parties are liable to pay under section 46, which deals with the *'costs of an adjudication'*, and the expression, *'costs of the adjudication'* referred to in section 36(2), which I consider to be in wide terms, that my jurisdiction to allocate costs under section 36(2) includes allocation of the *'costs of an adjudication'*.

42. With respect to the content of the test to be applied to establish either *'frivolous'* or *'vexatious'* conduct, I find that there is no dispute between the Parties as to the content of the test to be applied in each case, each of which I consider is well established under Australian law. I adopt the tests for *'frivolous'* and *'vexatious'* conduct respectively from the decisions in *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* and *Oceanic Sun Line Special Shipping* Co *Inc v Fay* relied on by the Respondent referred to in paragraph 33 above.

43. Turning to consider the Parties' respective submissions on the application of section 36(2) of the Act in the present case, I disagree with the Respondent to the extent it submits that the Applicant's withdrawal of the Application without explanation, on its own, justifies a costs order under section 36(2) of the Act. Neither section 36(2) of the Act, nor the withdrawal provisions in section 28A of the Act, indicate that a withdrawal of the Application is sufficient to satisfy the test under section 36(2).

44. For similar reasons, I do not consider the Applicant's submission that it acted prudently in withdrawing the Application to be relevant to the test under section 36(2) of the Act.

45. With respect to the Applicant's submissions concerning the inconsistency between the Respondent's jurisdictional submissions on the complexity test under section 33(1)(a)(iv) of the Act ('**Complexity Test**') and its submissions that the Applicant's serving of the Application constitutes frivolous or vexatious conduct, I do not find these submissions to be inconsistent, for the reasons set out below.

46. First, section 33(1)(a) of the Act sets out four independent jurisdictional criteria, each of which must be satisfied prior to an adjudicator having jurisdiction to determine, on the balance of probabilities, whether a party to the payment dispute is liable to make a payment, pursuant to section 33(1)(b) of the Act.

47. Secondly, the jurisdictional tests set out in sections 33(1)(a)(i) to (iii) of the Act are different in nature to the Complexity Test, since the former are established on objective criteria, whilst the Complexity Test involves subjective considerations, that is, whether an appointed adjudicator is *'satisfied'* that it is not possible to fairly make a determination because of the complexity of the matter, which depends upon the knowledge and experience of the particular appointed adjudicator.

48. Thirdly, I am of the view that the touchstone in applying the Complexity Test is the statutory object of adjudication stipulated in section 26 of the Act *'to determine the dispute fairly and as rapidly, informally and inexpensively as possible'*, and if section 26 cannot be satisfied in applying the Complexity Test, an adjudicator is obliged to dismiss the application.

49. The factors referred to in paragraphs 47 and 48 above give rise to some uncertainty for Parties as to whether a particular appointed adjudicator will be *'satisfied'* that the Complexity Test is established.

50. In light of the independent nature of the jurisdictional tests set out in section 33(1)(a) of the Act, and the factors referred to in paragraphs 47 and 48 above, I find no inconsistency between the Respondent's submissions on the jurisdictional issues.

51. I disagree with the Applicant that the Respondent has not particularised the Applicant's alleged frivolous or vexatious conduct in the RCS. I consider it clear from the RCS that

the essence of the Respondent's submission is that the Applicant's frivolous or vexatious conduct was in serving the Application itself, on the basis that the Application was *'doomed'* in not complying with the jurisdictional criteria set out in sections 33(1)(a) of the Act.

52. Turning then to consider whether the serving of the Application by the Applicant constituted frivolous or vexatious conduct, I note that the Applicant concedes the following:

    (1) first, that the Applicant had a *'serious concern'* that the Application *'was filed out of time such that any successful award could not be maintained as the entire determination may lack jurisdiction'*, and considered it prudent to withdraw the Application; and

    (2) secondly, refers to its assumption *'that the solicitors that advised our client to pursue the Application, did so with an oversight to the jurisdictional bar or otherwise erred in calculation of the time required to file the application'*.

53. The reference to the Application being out of time is a reference to section 28(1) of the Act, which provides that to apply to have a payment dispute adjudicated, the Applicant must within 90 days after a payment dispute arises prepare and serve a written application for adjudication on the Respondent and the prescribed appointer.

54. In order to assess whether the Applicant's conduct is frivolous or vexatious in terms of section 36(2) of the Act, and in light of the Applicant's concessions I have referred to in paragraph 52 above, I find it necessary to consider the issue referred to in paragraph 35(3) above, that is, whether the Application was served outside of the 90 day time period prescribed by section 28(1) of the Act, which, in turn, depends on when a payment dispute arose, as follows:

    (1) whether the payment dispute between the Parties arose on 29 January 2018, when the Respondent wholly disputed the amount claimed by the Respondent's Payment Statement issued to the Applicant on 29 January 2018, as submitted by the Applicant;[22] or

[22] Application, [28].

(2) whether the payment dispute between the Parties arose on 25 January 2018, when the Respondent sent its letter to the Applicant dated 25 January 2018 in response to the Payment Claim submitted by the Applicant on 16 January 2018.[23]

55. If the Applicant is correct, the Applicant was required to serve the Application on or before Monday 30 April 2018, the actual date of service of the Application. However, if the Respondent is correct, the Applicant had until 25 April 2018 to serve its Application,[24] and that the Application was served 95 days after the payment dispute arose, being 5 days outside the 90 day time period prescribed by section 28(1) of the Act.[25]

56. The expression *'payment dispute'* is defined in section 8 of the Act, and includes the following in paragraph (a):

'A payment dispute arises if:

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

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

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

…'.

57. For the purpose of the issue as to whether the Application was served out of time, both Parties, correctly in my opinion, rely on the payment dispute arising in accordance with paragraph (a)(i) of the definition of *'payment dispute'*.

58. The Respondent, in its letter to the Applicant dated 25 January 2018, from [*redacted*] to the Applicant's [*redacted*], referred to the Payment Claim,[26] and referred specifically to three items of the Payment Claim, as follows:

(1) Costs of $52,367.90 associated with *'Level 1 Supervision'*;

(2) Costs of $341,043.02 associated with *'Materials on Site'*; and

[23] Response, [1.1.2].
[24] Response, [13.4.8].
[25] Ibid, [1.1.3].
[26] Adjudication Documents, p468.

(3) Costs of $30,471,888.17 associated with *'Additional Excavation in Rock'*, that is, the Rock Claim.

59. The Respondent states in its letter that it disputed each of these three claim items, as follows:

'The Contractor disputes these three items, and will issue a payment schedule in accordance with the requirements of the Subcontract setting out the actual amount that the Contractor believes to be payable to the Subcontractor. The purpose of this letter is to provide additional information to the Subcontractor in advance of the issue of the payment schedule to assist the Subcontractor to understand the Contractor's position.'

60. The Respondent then set out in its letter its position in respect of all three items referred to in paragraph 58 above. I set out in full below the Respondent's response to the Rock Claim:[27]

'**Additional Excavation in Rock**

The claim for $30,471,888.17 for "Additional Excavation in Rock" is disputed on the basis that the claim is not made in accordance with the provisions of the Subcontract and therefore has no legal basis for the claim.

The Subcontractor failed to immediately give notice when it considered that it had encountered a Latent Condition, noting that failure to provide notice strictly in accordance with Clause 7.3 forever bars the Subcontractor from any claim arising out of Clause 7.3.

The requirements of Clause 16 have not been satisfied in that the Subcontractor's [sic] has not submitted conforming notices under Clause 16.1 and has failed to comply with Clauses 16.2 and 16.3. The provisions of these clauses requires [sic] a written notice to be provided within 14 days of the first occurrence of an event leading to a claim and a written claim within 14 days providing details and information required by the clause. The Contractor notes that the Subcontractor commenced the excavation of the rock prior to submitting their notice of its intention to make a claim in September 2017.

A claim was submitted on 19 December 2017 (ref: CLAIM FOR ADDITIONAL EXCAVATION IN ROCK, dated 15 December 2017) which identifies a [sic] unsupported and unproven quantum for the claim, furthermore the quantity of rock (subject of the claim) appears to be grossly overstated, and does not establish or provide any reasonable level of understanding or basis of the rate used to value the claim.

[27] Ibid, [468].

A further request to provide a detailed breakdown of the rate included in the claim was made on 16 January 2018 (ref: Aconex correspondence LL-2-MEMO-050180) and remains unanswered.'

61. In the final paragraphs of its letter, the Respondent states the following:

'As neither of these requirements have been met [being a reference to Clauses 12.1 and 12.2 of the Subcontract] for the items discussed above, all items are disputed by the Contractor and will be identified as disputed amounts in its payment schedule.'

62. Whether a *'payment dispute'* in terms of section 8(a)(i) of the Act has arisen is a question of fact. I find that the Applicant made the Payment Claim on 16 January 2018. I also find, from my review of the language of the Respondent's letter dated 25 January 2018, that the Respondent disputed the Rock Claim in its letter, as follows:

(1) in relation to all three items referred to in its letter, the Respondent states that *'[T]he Contractor disputes these three items…'*, and *'…all items are disputed by the Contractor and will be identified as disputed amounts in its payment schedule.'*; and

(2) in relation to the Rock Claim specifically, the Applicant states that *'[T]he claim for $30,471,888.17 for "Additional Excavation in Rock" is disputed…'*.

63. In light of my assessment of the content of the Respondent's letter dated 25 January 2018, I am of the opinion that the payment dispute for the purpose of section 8(a)(i) of the Act arose on 25 January 2018, that the 90 day time period prescribed by section 28(1) of the Act expired on 25 April 2018, and that the Application, served on 30 April 2018, was served outside the prescribed 90 day time period. As such, I am of the opinion that the Application has not been prepared and served in accordance with section 28 of the Act, in terms of the jurisdictional criteria set out in section 33(1)(a)(ii) of the Act.

64. Turning to consider whether the Applicant's conduct in serving the Application was frivolous or vexatious, my opinion set out above that the payment dispute arose on 25 January 2018, rather than 29 January 2018, by itself, is clearly not sufficient to satisfy the tests of frivolous or vexatious conduct, since parties to adjudication proceedings commonly disagree, on reasonable grounds, as to whether one or more of the jurisdictional criteria set out in section 33(1)(a) of the Act have been satisfied.

65. Neither do I consider the Applicant's conduct to be vexatious in the sense of being productive of serious and unjustified trouble and harassment. However, I consider the Applicant's conduct to be frivolous, in the sense that the Applicant's submission that the payment dispute arose on 29 January 2018 is without foundation and contrary to the clear objective evidence of the Respondent's letter dated 25 January 2018 I have referred to in paragraphs 59 to 62 above.

66. Notwithstanding my finding that the Applicant's conduct constitutes frivolous conduct in terms of section 36(2) of the Act, I am not persuaded that the Applicant's conduct, which relates to the narrow jurisdictional criteria under section 33(1)(a)(ii) of the Act, and in particular, whether the Application has been served outside the prescribed 90 day time period prescribed by section 28(1) of the Act, rather than the substantive claim between the Parties, caused the incurrence of the costs of the Response in terms of section 36(2) of the Act, or alternatively, I am not persuaded that the costs claimed by the Respondent are wasted costs. The Applicant has made it clear that the Rock Claim remains in dispute between the Parties, and that the Applicant has given the Respondent notice that it intends to litigate the Rock Claim. I consider that the Respondent's claimed costs overwhelmingly involve the merits of the Rock Claim, which is now to be resolved between the Parties in litigation proceedings, and in those circumstances, I am not satisfied that the Respondent's claimed costs are payable under section 36(2), and decline to make an order for the Applicant to pay the Respondent its costs.

67. With respect to the Adjudicator's costs, since I have made no decision or determination under section 33 of the Act, in light of the Applicant's withdrawal of the Application under section 28A(2), I find that the Applicant's frivolous conduct has caused the incurrence of all of the costs of the Adjudicator in terms of section 36(2) of the Act. I note that the Applicant acknowledges that it should pay the Adjudicator's costs, subject to a submission that the Respondent's conduct has been frivolous or vexatious in making the RCS. In light of my analysis of the RCS I have set out above, I find that the Respondent's conduct in submitting the RCS does not fall within the category of being frivolous or vexatious.

8.0 Conclusion

68. In respect of the Applicant's Application for a payment dispute to be adjudicated pursuant to section 28 of the Act dated 30 April 2018, I publish this notice to record the

Applicant's withdrawal of its Application, pursuant to section 28A(2) of the Act, and in relation to costs, I determine the following:

(1) the Parties are to bear their own costs in relation to the adjudication, pursuant to section 36(1) of the Act;

(2) the Applicant shall pay the Adjudicator's costs of amount $9,817.50 (including GST), pursuant to section 36(2) of the Act, details of which are set out in Schedule B (and which shall remain confidential); and

(3) taking account of the Applicant's advance on costs of the adjudication of amount $9,817.50 (including GST), there is no further payment to be made by the Applicant for the Adjudicator's costs.

Gordon Smith
Registered Adjudicator (Registration No 52)
21 Lyons Street, Cottesloe, WA 6011
PO Box 797, Claremont, WA 6910
Email: gordon.smithcharb@bigpond.com
Date: 31 May 2018

SCHEDULE B

DETAILS OF THE ADJUDICATOR'S COSTS

[*Not included*]