Determination 26.16.01

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) ("**The Act**")

BETWEEN:

("**Applicant**")

and

("**Respondent**")

REASONS FOR DECISION

1. On 30 May 2016 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Law Society Northern Territory ("LSNT") as prescribed Appointer under the Act. I received a Letter of Appointment on 30 May 2016 and I collected the application documents from the LSNT offices on 31 May 2016.

2. By attendance to the application documents, there are two applications to adjudicate, the first being a payment dispute in relation to the February Progress Payment Claim ("February Claim") and the second a payment dispute in relation to the March Progress Payment Claim ("March Claim").

3. Both applications are dated 20 May 2016 and were served on the LSNT, as Appointer, on 23 May 2016. Both applications were also served on the Respondent that same day, 23 May 2016.

4. On 31 May 2016 I contacted each of the parties by telephone, advised my appointment as Adjudicator and sought:

   (a) a single point of contact for the conduct of the Adjudication; and

(b) consent from the parties to adjudicate both payment disputes simultaneously under s.34(3)(b) of the Act.

The Applicant and the Respondent confirmed their contact details and each consented to me adjudicating both payment disputes simultaneously under s.34(3)(b) of the Act.

5. On 3 June 2016 for jurisdictional completeness I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions until 2:00pm CST on Wednesday, 8 June 2016, should either party object to the appointment. There were no objections to my appointment. In my letter of 3 June 2016 I confirmed that the parties had consented to me adjudicating both payment disputes simultaneously under s.34(3)(b) of the Act and requested each party confirm their consent in writing.

6. In my letter of 3 June 2016 I also confirmed that I would accept service of the Response by email, which I calculated was due on or before 6 June 2016, with attachment documents made available through a Drop Box which is accessible by all parties to the adjudication. A hard copy of the documents was to follow in due course. I also confirmed that service by electronic means complies with s.8 of the *Electronic Transactions (Northern Territory) Act*. There were no objections from the parties in relation to the electronic service process.

7. On 6 June 2016 I received written consent from both parties to adjudicate both payment disputes simultaneously under s.34(3)(b) of the Act.

8. On 7 June 2016 I wrote to the parties and confirmed receipt of the Response at 11:28pm CST on 6 June 2016. I also requested the Applicant confirm the receipt details of the Response. That same day, 7 June 2016, the Applicant confirmed receipt of the Response at 11:56pm EST on 6 June 2016 together with access details to an *Accellion*^{R} file sharing link.

9. On 17 June 2016 I wrote to the Construction Registrar confirming that I had undertaken a preliminary reading of the 17 lever-arch files of documents and considered the matters before me to be complex and requiring detailed analysis. I requested additional time under s.34(3)(a) of the Act up to and inclusive of 8 July 2016 to make a determination of each payment dispute. The Construction Registrar approved the extension that same day, 17 June 2016. There were no objections to the extension from the parties.

10. On 1 July 2016 having undertaken a detailed reading of the voluminous material of each Application and the relevant Response, I again wrote to the Construction Registrar and requested some additional time under s.34(3)(a) of the Act, up to and inclusive of 15 July 2016, to make a determination of each payment dispute. The Construction Registrar approved the extension on 4 July 2016. There were no objections to the extension from the parties.

11. On 7 July 2016 I wrote to the parties confirming that a thorough reading of the voluminous material of each Application and its Response had answered many of my earlier questions, however I had one question for the parties, as follows:

> *".....please advise the contracting relationship between [redacted] (Principal) and [redacted] (Contractor) - Lump Sum, Cost Reimbursable, Rates, BOQ or other….".*

12. On that same day, 7 July 2016, the Respondent advised that:

> *"….the Contract between [redacted] (Principal) and [redacted] (Head Contractor) is a turnkey lump sum EPC contract….".*

13. On 14 July 2016 due there being two simultaneous determinations in relation to complex matters, I wrote to the Construction Registrar and sought another short extension of time, under s.34(3)(a) of the Act, until 20 July 2016 to make the determinations. That same day, 14 July 2016, the Construction Registrar approved the extension up to and inclusive of 20 July 2016. There were no objections from the parties to the further extension.

Introduction

14. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to provide [redacted] electrical and instrumentation works to the Respondent (the "Contract"). The [redacted] electrical and instrumentation works (the "Works") were provided to the construction site of [*principal and site details redacted*] in the Northern Territory of Australia.

15. The Applicant claims that it is entitled to be paid its March Claim, dated 20 March 2016, in the sum of **$2,973,799.00 (excluding GST)**, which includes the following components of claim:

    (i) EOT 007 for extension to the Date for Practical Completion and Delay Costs - **$820,857.00 (excluding GST)**;

    (ii) Wrongful deduction of liquidated damages - **$924,284.83 (excluding GST)**;

    (iii) VQ-005 Variation between IFT and IFC documents Rev 2 - Cable schedules and I&E Lists - **$1,209,049.67 (excluding GST)**;

    (iv) VQ-131 ST-803 [*redacted*] - **$16,177.90 (excluding GST)**; and

    (v) VQ-107 Delays to HV Access - **$3,429.60 (excluding GST)**.

    A total claim of **$2,973,799.00 (excluding GST)**.

16. The Applicant also seeks interest on its claim at 8.0%, as the applicable rate of interest under the Supreme Court Rules, until the date of determination. The Contract does not provide for a rate of interest on overdue payments.

17. The Applicant seeks Costs of the Adjudication and the Application fee be paid in full by the Respondent.

18. The Respondent submits that its Payment Schedule Assessment dated 24 March 2016 (the "March Certificate") of the March Claim should stand and that a payment in respect of the Application claim, assessed in the March Claim of $262,208.76 (excluding GST), is the only component of claim that should be successful as follows:

    (i) EOT 007 for extension to the Date for Practical Completion and Delay Costs - **$Nil**;

    (ii) Wrongful deduction of liquidated damages - **$Nil**;

    (iii) VQ-005 Variation between IFT and IFC documents Rev 2 - Cable schedules and I&E Lists - **$262,208.76 (excluding GST)**;

    (iv) VQ-131 ST-803 [*redacted*] - **$Nil**; and

    (v) VQ-107 Delays to HV Access - **$Nil**.

    A total payment of **$262,208.76 (excluding GST)**.

16. The March Certificate has assessed the payment for the work and variations done in the Contract at **$924,284.84 (excluding GST)**. However, by the Certificate of Practical Completion the Respondent has applied and deducted Liquidated Damages ("LDs") in the sum of **$935,066.52 (excluding GST)** at the Contract rate of $20,000.00 per day from the date for Practical Completion to the date of Practical Completion ("PC"), capped at 15% of the total contract sum, giving the Respondent an outstanding amount payable by the Applicant of **$10,781.69 (excluding GST)**. In applying the LDs, the Respondent submits that its application of LDs was accurate and that the Applicant is not entitled to recover any amount of LDs in its Application claims.

17. The Respondent also says that the variation VQ-005 has already been assessed and disputed in an earlier January Progress Payment Claim, dated 23 January 2016, and is therefore out of time under the 90 day requirement to apply for adjudication under s.28(1) of the Act.

18. The Respondent seeks Costs of the Adjudication and the Application fee be paid in full by the Applicant.

19. This determination is only in relation to the Application for the March Claim.

Procedural Background

The Application

20. The Application is dated 20 May 2016 and comprises a general submission and 7 lever-arch files containing 12 attachments with numerous exhibits in each attachment. The attachments, *inter alia*, include:

(a) a copy of the Contract;

(b) a copy of the March Claim and the March Certificate;

(c) a copy of a delay impact analysis report for delay and disruption in the Contract; and

(d) supporting evidence including statutory declarations, spreadsheet reports, Gantt chart programs of the Works, photographs, specifications, site instructions, notices of delay and letter and email correspondence between the parties relied on in the general submission.

22. The March Claim was submitted to the Respondent on 20 March 2016. The Respondent has assessed and issued its March Certificate on 24 March 2016 assessing the amounts payable and later applying LDs to these amounts such that there is a balance due to the Respondent to be deducted from future progress claims made by the Applicant.

23. The Application was served on 23 May 2016 pursuant to s.28 of the Act.

The Response

24. The Response is dated 6 June 2016 and comprises a general submission and 4 lever-arch files containing 9 attachments with numerous exhibits in each attachment. The attachments, *inter alia*, include:

(a) a copy of the Contract;

(b) a copy of a delay impact analysis report for delay and disruption in the Contract; and

(c) supporting evidence including statutory declarations, spreadsheet reports, Gantt chart programs of the Works, photographs, specifications, site instructions, variation assessments and letter and email correspondence between the parties relied upon in the general submission.

25. The Response says that the Respondent paid the Applicant $924,284.83 (excluding GST) on 26 April 2016, however no monies were paid as the Respondent has applied LDs in the sum of $935,066.52 (excluding GST) on 8 April 2016. The net result being a further deduction by the Respondent from future progress claims made by the Applicant.

26. The Response was served on 6 June 2016 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

27. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

28. Section 4 of the Act – **Site in the Territory** – the site is [*redacted*] in the Northern Territory. [*Redacted*]. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

29. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the Work to be carried out under the Contract [*head contract redacted*] is a construction project. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the "Works Subcontract". I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under section 5(1)(a) of the Act.

30. Section 6 of the Act – **Construction Work** – the work [*redacted*] falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.

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

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

32. In its submissions the Applicant says that it made a valid payment claim that "….*complies with the requirements set out in clause 18 of the Subcontract*…" and, as such, the March Claim was served as "*Payment Claim 008*" on 20 March 2016. The March Claim is a compliant claim under the Contract and fulfils the Payment Claim requirements of s.4 of the Act.

33. The Respondent at paragraph 12 of its submissions agrees with the Applicant that the March Claim is a compliant claim under the Contract and fulfils the Payment Claim requirements of s.4 of the Act.

34. I am satisfied that the March Claim made on 20 March 2016 complies with the stipulations of clause 18 of the Contract for the making of a claim for payment for work done and is therefore a valid payment Claim for the purposes of s.4 of the Act.

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

> *"(a) a payment claim has been made under a contract and either:*
>
> *(i) the claim has been rejected or wholly or partly disputed; or*
>
> *(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*

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

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

36. The Applicant made a valid payment claim on 20 March 2016 in the form of the March Claim for the provision of Works in the Contract.

37. The Contract provides for payment of a valid payment claim on two grounds, namely:

(a) under clause 18 the "*Payments*" terms of the Contract, clause18.5(b) provides for "….*Within* ***35 Business Days*** [emphasis added] *after the Superintendent receives the payment claim*…" payment of the determined amount; and

(b) under clause 19 the "*Payments Act*" terms of the Contract, clause 19.9 provides for payment "*…**25 business days*** [emphasis added] *after the payment claim is made…*" where the Subcontractor (the Applicant) becomes entitled to a progress payment.

In this Adjudication, payment of the March Claim was due on or before 27 April 2016.

38. The Respondent issued its March Certificate on 24 March 2016 assessing for payment the sum of $924,284.83 (excluding GST). On 8 April 2016 the Respondent then issued its Certificate of Practical Completion (the "Certificate of PC") with a PC date of 7 April 2016. In the Certificate of PC the Respondent applied LDs in the sum of $935,066.52 (excluding GST) causing no actual payment to be made to the Applicant. When the Respondent failed to pay the assessed amount in the March Certificate on or before 27 April 2016, a payment dispute then commenced on 28 April 2016 for the March Claim.

39. The Respondent has argued that the March Claim contained components of claim that had been previously assessed in an earlier progress payment claim. The Respondent says that the work under variation VQ-005 was 100% completed and was claimed in the January Progress Payment Claim and on 23 January 2016 it certified that work for payment. The Respondent says that the Applicant cannot now recycle or recast its VQ-005 claim into the February Progress Payment Claim and, in turn, the March Claim.

40. I am not with the Respondent on this issue on three grounds. First, the Contract at clause 18.1(c) has very precise times for the making of a claim for payment:

> "*…which is:*
>
> *(i) one of the Payment Claims Times set out in item 44 of the Subcontract Particulars;*
>
> *(ii) fourteen (14) days after the Superintendent issues a Certificate of Practical Completion; and*
>
> (iii) *twenty-eight (28) days after the last Defects Liability Period expires….*".

41. Should the Applicant make a claim for payment outside these times, the terms of "*item 44*" act to prevent any claim made outside the precise terms of clause 18.1(c) of the Contract, namely;

> "*…Monthly progress payments (to be submitted on the 20th of each month. Any claim for payment received after this day will be deemed to be received on this day the next calendar month) are calculated on agreed performance of the Subcontract Sum….*".

42. The Contract also ensures these precise times are adhered to by the use of clause 18.2 as follows:

> "*…Despite clause 18.1(c), the date upon which the Subcontractor shall be entitled to lodge any payment claim shall be deferred to the date which is the later of:*

(a) *(**Stated Times**) the date the Subcontractor is otherwise to lodge a payment claim under clause 18.1(c)……".*

43. It is generally only open to the Applicant to make its variational claims together with its monthly progress payment claim and the claim for VQ-005 was made, certified and paid with progressive monthly progress claims on a progressive "rolling claim" basis.

44. Second, the work component of the variation VQ-005 accounts for only a small portion of the overall variation. The main issue with the variation is the cable length discrepancy from the Issued for Tender information through iterations to the Issued for Construction information and how this has impacted the lump sum allowance the Applicant made in the Contract.

45. The Respondent cannot rely on completion of the work component, which has taken place, to suggest the variation has been fully satisfied in the January Progress Payment Claim. There are several components of the variation and some of these components are still on foot and need to be addressed as part of the ongoing monthly progress claim process in the Contract.

46. Third, the Contract allows for a rolling monthly claim with payment based on progress "…*having regard to the Subcontract Sum…*". Each progress payment claim is calculated under clause 18.3 of the Contract as follows:

"*…Subject to the other terms of the Subcontract, as at each date for a payment claim to be made under the Subcontract, the Subcontractor may claim for an amount calculated as:*

*(a) (**Agreed Milestone Payment**) the amount specified in item 45 of the Subcontract Particulars as payable for the relevant progress payment (adjusted by the amount of any previous adjustment to the Subcontract Sum which is reasonably attributed to the work included in the achievement of the relevant milestone); or*

(b) *(**Initial Value of Works**) if no amount is specified, the value of the work completed to the date of the claim (having regard to the Subcontract Sum*

and additions or deductions under the Subcontract) as determined by the Superintendent…….".

47. The progress payment claim is then calculated on progress or quantum against the overall Subcontract Sum under the categories of clause 18.4, being in summary, *Amounts Previously Paid, Unfixed Plant or Materials, Deductions, Defects* and *Retentions* amongst others. A variational claim made, certified and paid as a component part of a monthly progress payment claim cannot therefore be considered to be a recast or repeat claim. It is made, certified and paid based upon progress as a "rolling claim" consistent with the Contract.

48. The issue of repeat claims was considered by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [118] to [124] where Her Honour said:

"[118] The second matter I want to comment upon is the question of "repeat claims".

[119] In AJ Lucas, Southwood J made the following remarks:

> *Clause 13 of the appellant's standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat claim in respect of the performance of the same obligations under a construction contract.*

[120] The underlined words in this passage were used as the basis for a submission that, as a matter of law, the Act does not allow for (indeed prohibits) what have been referred to as "repeat claims". It was said that s 8 defines when a payment dispute arises, and once a dispute has arisen about a particular amount, it cannot arise again. Read in the context of the whole passage, the underlined words are not authority for such a proposition.

[121] As Southwood J made clear, the contract in question in AJ Lucas provided for monthly invoices and made no provision for "repeat claims".

> *[122] In this case,* ***the contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a "rolling claim". That is to say, each payment claim is to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim*** [emphasis added]. *It is readily apparent that if any payment claim is not paid in full:*
>
> *(a) a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and*
>
> *(b) despite that, each subsequent payment claim must include a "repeat claim" for that unpaid part.*
>
> *[123] There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon.* ***What the adjudicator is obliged to do when faced with a payment claim under a contract of this kind is the same as he does for any other contract: he should look at the contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the contract (if payable), and whether the application has been lodged within 90 days of that date*** [emphasis added].
>
> *[124] I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period.* ***In each case one must look to the contract to determine when a payment was due and hence when the payment dispute arose*** [emphasis added]. *One imagines that in most contracts, a "repeat invoice" claiming no new work and simply served in an attempt to "re-set the clock" for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the contract to determine when the payment dispute arose according to the express and/or implied terms of the contract."*

49. I am of the view that the variational claim VQ-005 forms part of the March Claim and, when the March Claim was not paid on or before 27 April 2016, a payment dispute commenced the next day on 28 April 2016.

50. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 28 April 2016 under section 8(a)(ii) of the Act.

51. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 20 May 2016, served on the Respondent and the Prescribed Appointer LSNT on 23 May 2016. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

52. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 6 June 2016, served on the Applicant and the Adjudicator on 6 June 2016. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.

53. Having now considered the relevant sections of the Act and the Regulations and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claims

54. The claims made by the Applicant in the Application are as follows:

(a) Claim 1 - EOT 007 - claim for extension of time and delay costs - $820,857.00 (excluding GST);

(b) Claim 2 - Wrongful deduction of liquidated damages - $924,284.83 (excluding GST);

(c) Claim 3 - VQ-005 - Variation between IFT and IFC documents revision 2 cable schedules and I&E lists - $1,209,049.67 (excluding GST);

(d) Claim 4 - VQ-131 - Variation for ST-803 [*redacted*] - $16,177.90 (excluding GST);

(e) Claim 5 - VQ-107 - Variation for delays [*redacted*] - $3,429.60 (excluding GST);

55. The Respondent has applied LDs against the Applicant's March Claim as follows:

(a) Claim 6 - Liquidated Damages under the Contract – $935,066.52 (excluding GST).

56. In dealing with these claims it is appropriate to deal concurrently with the Applicant's EOT 007 extension of time and associated delay costs, the Applicant's wrongful deduction of LDs and the Respondent's applied LDs under the Contract, as these claims are inextricably linked to time in the Contract.

Claim 1 - EOT 007 - claim for extension of time and delay costs - $820,857.00 (excluding GST)

57. The Applicant submits that it is entitled to and should be granted an extension of time by the Respondent to 4 April 2016 with delay costs payable to 19 March 2016.

58. The Respondent submits that there were no extensions of time granted under the Contract and that the Applicant is not entitled to an extension of time because it has not:

(a) complied with the stipulations of the Contract for an extension of time to be granted; and

(b) reached completion of the work under the Contract by the Date for Practical Completion in the Contract.

The Applicant's claims

59. In reaching its position the Applicant says that the Respondent is not able to strictly impose the terms of the Contract to reject late claims for additional time because:

(i) there was an established course of conduct and the Respondent is therefore estopped from insisting on strict compliance with contractual timeframes and notification requirements;

(ii) by its conduct, the Respondent waived any entitlement to rely on time bars and notification requirements;

(iii) the time bar provisions of the Contract, to the extent that they operate as a condition precedent to payment under the Act, have no effect; and

(iv) the Applicant substantively complied with the notification requirements of the Contract such that the Respondent was fully aware of the circumstances giving rise to the claims for time and delay costs.

60. I am not with the Applicant on any of its points.

Estoppel

61. The Applicant has argued the seminal case of *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513 later referred to by the High Court in *Commonwealth v Verwayen* [1990] HCA 39 as the central principle of estoppel by conduct in that the law will not permit an unconscionable departure by one party from the subject matter of an assumption, when there has been performance in circumstances where that performance would act to the detriment of the party who had performed on the assumption.

62. The Applicant says that it had assumed that the Respondent would not reject their claims on the basis of notification failure and/or time bars, but rather assess the Applicant's claims on their merit where they had previously assessed claims made out of time or without proper notice.

63. The Applicant also says that it carried out the works on the assumption that it would be awarded variations, extensions of time and or delay costs where the Respondent directed a variation or delayed the Applicant and where the Applicant had not strictly complied with the timeframes in the Contract.

64. The Respondent submits that it is entirely appropriate to insist on compliance with the Contract and that it has an entitlement to rely on the contractual requirements for notification under the Contract. The Respondent says that it is not estopped from relying on the contractual timeframes and notification requirements.

65. To establish a case based upon the principles of equitable estoppel, the party relying on the estoppel, in this case the Applicant, is required to establish that there was a sufficient clear and unambiguous representation, in this instance, that the notices would not be required and that the time bars would not be enforced in the Contract.

66. The Respondent has undertaken a full elemental submission of the components of equitable estoppel and on each of the six elements submits that the Applicant has failed to make out that element as follows:

    (a) Element 1 - *Assumed or Expectation.* It must be established that an assumption that a particular legal relationship existed or would exist, other than the agreed contractual process for notice and timeframes. The representation must be clear and unambiguous. The Applicant's argument has not satisfied this criteria. There are no indications throughout the evidence of this dispute that the Respondent no longer wanted the Applicant to comply with the Contract. Similarly, there are no site instructions or directions in the evidence from either party that could or would make a case that a departure from the agreed contractual process had taken place by variation of the Contract.

(b) Element 2 - *Inducement.* It must be established that the Respondent encouraged or induced the Applicant to act or adopt the assumption. The Applicant's argument has not satisfied this criteria. The evidence of the Application and the Response holds no indication that there was any inducement of the Applicant to depart from the terms of the Contract. The Applicant, under clause 14.2 of the Contract, expressly accepted "….*the risk of all delays to the carrying out of the work from any cause and will not be entitled to any extension… except that if all the following have occurred*….". The Applicant was bound under the Contract to comply with "**all**" the requirements for the grant of an extension of time, one of which was timely notice of the delaying events when they commenced and when they ceased to effect the critical path for construction. The Contract is express in this respect and, as the Respondent has argued, there was no representation made that would encourage the Applicant to abandon the contractual timeframes and notice requirements of the Contract.

(c) Element 3 - *Reliance.* It must be established that the Applicant acted or refrained from acting, in reliance on the assumption. In establishing the reliance the Applicant must establish that the reliance was reasonable in the circumstances and, while there are examples where variations have been assessed out of time, there is no evidence to suggest the Respondent no longer wanted the Applicant to be bound by the Contract. It is entirely at the discretion of the Respondent, under clause 15 of the Contract, to accept and assess variations given out of time under clause 15.7 of the Contract. The Applicant accepted the full risk of having "*…no Claim arising from the variation unless within 5 days after the direction or approval…*" the Respondent is notified in writing. As it is, neither party has followed the Contract when dealing with a variation to the Contract.

(d) Element 4 - *Knowledge or Intent.* It must be established that the Respondent knew or intended that the Applicant would act or refrain from acting on the assumption that the notice and timeframe provisions of the Contract were no longer required to be complied with. There is nothing in the evidence of the Application or the Response to suggest that the Respondent no longer required the Applicant to comply with the Contract notice and timeframe conditions. The evidence shows that the Respondent reserved it rights and, due to the Respondent being in a lump sum contracting relationship in the Head Contract, it relied heavily on timely notification of any variations to the Contract.

(e) Element 5 - *Detriment*. It must be established that the Applicant would suffer detriment if the Respondent were allowed to depart from or not fulfill the assumption. While undertaking a variation in the Contract without the proper notice jeopardises any Claim for payment under clause 15.7 of the Contract, the assumption that this notice is no longer required or has been made redundant is not supported by the evidence of the Application or Response documents. It seems that the Respondent has selectively accepted and assessed certain variations and not others and I will deal with this issue when dealing with the variations in dispute.

(f) Element 6 - *Failure to avoid Detriment*. It must be established that the Respondent failed to act to avoid the Applicant suffering detriment. This does not compel the Respondent to act in a way that is inconsistent with the Contract, nor does it allow the Applicant to avoid its obligations under the Contract to provide timely notice of events in the Contract. The Respondent in its Payment Schedule Assessments clearly set out the reasons that a variation was either accepted in whole or in part or not at all and from this assessment the Applicant clearly understood that the stipulations of the Contract would be upheld. The Applicant’s argument has not satisfied this criteria.

67. The evidence does not support the Applicant's claim that there was an assumption between the parties to depart from the terms of the Contract when giving notice or relying on timeframes for particular events in the Contract. Whilst having no jurisdiction in equity, I cannot accept that there is any claim in estoppel that would prevent the Respondent insisting on compliance with the notice and timeframes in the Contract.

68. The issues of estoppel and reliance upon the assumption arose in *CMA Assetts Pty Ltd (formerly known as CMA Contracting Pty Ltd) v John Holland Pty Ltd [No 6]* [2015] WASC 217 at 380 to 385 where Allanson J said:

> "*…[380] To establish a conventional estoppel as pleaded, CMA must establish that:*
>
> *1 The parties proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption). Relevantly, for present purposes, the common assumption may be as to 'private legal rights' including a common assumption as to the effect of contracts or agreements.*
>
> *2 Each party had, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.*
>
> *3 That acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.*
>
> *4 CMA was entitled to act and has, as John Holland knew or intended, acted in reliance upon the assumption being regarded as true and binding.*
>
> *5 CMA would suffer detriment if John Holland were allowed to resile or depart from the assumption.*
>
> *6 In all the circumstances it would be unconscionable to allow John Holland to resile or depart from the assumption.*
>
> *See National Westminster Finance NZ Ltd v National Bank of NZ Ltd [1996] 1 NZLR 548, 550 as applied by GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2003] FCA 50; (2003) 128 FCR 1 [426]; Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd [2008] WASCA 119; (2008) 66 ACSR 594 [164].*
>
> *[381] The evidence does not support the claim that there was any common assumption between the parties.*

[382] First, on the evidence which I have outlined above, I am satisfied that there was no common assumption that the parties had dispensed with the need for a Construction Programme. John Holland requested one. Mr Khalil prepared successive revisions of the initial programme between May 2006 and November 2006. In particular, Mr Clarke, in providing the programme dated 26 May 2006, referred to it as a program 'as required under clause 10.2 of our agreement'. And on 26 September 2006, Mr Clarke referred to the programme he had sent in an email on July 25 as 'adequate formal advice of the revised schedule' (V4/1200). Following the change in methodology from heavy lift to blasting, the parties discussed the need for the programme to 'reflect revised methodology and be broken down into a blow by blow detail' (V4/1119).

[383] Second, John Holland on several occasions wrote to CMA regarding progress measure against program milestones. In particular, John Holland gave notices of unsatisfactory progress, referring to specific milestones, in October and again in November 2006. In November 2006, CMA requested John Holland to 'confirm the date/revision of the approved construction programme' since there had been a number of programs submitted (V4/1266). John Holland replied identifying the program of 4 August.

[384] Third, the process followed by both parties in relation to CMA's claim for an extension of time as a result of delay in movement of the shiploader is entirely inconsistent with the shared assumption alleged.

[385] For these reasons, I do not accept the claim in estoppel…."

69. Similarly, in this dispute the evidence does not support the claim that there was any common assumption between the parties and on that basis any claim in estoppel must fail.

Waiver

70. The Applicant has submitted that there was a course of conduct throughout the performance of the Contract that amounts to a waiver of the Respondent's rights to apply the contractual stipulations of timely notification of events in the Contract.

71. The Applicant refers to the Respondent's acceptance and assessment of select variations in the Contract as unequivocal acts evidencing a waiver of contractual compliance by the Applicant when notifying and submitting its claims under the Contract.

72. There is also an express waiver in the Contract at clause 22(g) which states:

> "*…(**Waivers**) a party shall not be taken to have waived a Right under or in connection with the Subcontract unless it expressly does so in writing and a waiver of a Right at any time shall not be taken as a Waiver of the Right when it arises at any other time…*".

73. In support of its submission, the Applicant submits that in *Pacific Brands Sports & Leisure Pty Ltd and Ors v Underworks Pty Ltd* (2006) FCAFC 40 at [114] and [115]6 it was held by Finn and Sandberg JJ that 'no waiver' clauses will not operate where an estoppel by conduct was proven to exist.

74. I am not with the Applicant on any of its points. As set out in paragraphs 65 to 68 above there is no common assumption between the parties and therefore there is no basis for estoppel.

75. The Respondent has provided an elemental analysis of waiver in its submissions and says that because the Applicant has failed to show estoppel by conduct by the Respondent when performing the Contract there can be no waiver, as follows:

    (a) Element 1 - *Legal Right*. The Respondent has an entitlement to a legal right in the Contract. By attendance to the various contractual clauses relating to the condition precedent to a claim for a variation or additional time due to acts of prevention, it is uncontroversial that the Respondent has an entitlement to a legal right to insist that these conditions precedent be fulfilled prior to the Applicant being successful in its claim.

    (b) Element 2 - *Abandonment of the Right or Alternative Process.* It must be shown that the Respondent unequivocally abandoned its rights to

rely on contractual compliance with timeframes and notifications of claims by the Applicant or has, by its conduct, imposed an alternative process inconsistent with the Contract when accepting and assessing claims made out of time by the Applicant. The evidence of the Application and the Response shows some variational claims being assessed and accepted when made out of time by the Applicant, however on each occasion the Respondent's assessment maintained its rights under the Contract. It is entirely at the discretion of the Respondent whether to accept and assess a claim made out of time under the Contract. The Contract expressly prevents claims that do not fulfill the conditions precedent to the making of the claim.

75. The Respondent submits that it has not waived the contractual timeframes and notification requirements of the Contract and that any assessment and acceptance of claims made out of time by the Applicant is at the discretion of the Respondent.

76. There is an express term at clause 22(g) of the Contract that requires waiver to be in writing agreed between the parties and there is no evidence in the documents of the Application and the Response that the Respondent waived its rights under the Contract. There is also no evidence to support a claim that there was a common assumption between the parties that would give rise to an estoppel and, absent an estoppel, there can be no waiver.

The Act and Time Bars

77. The Applicant submits that contractual time bars cannot operate so as to prevent a payment under the Act. In reaching its position, the Applicant says that s.10 of the Act operates to prevent the notification and timeframe conditions precedent in the Contract, because those conditions precedent operate to exclude, modify or restrict the operation of the Act in relation to payment for value of the work done.

78. The Respondent submits that the notice provisions of the Contract must be followed when making a claim for payment and, if the conditions precedent to a claim for payment are not met, there is no entitlement to payment.

79. I agree with the Respondent on this point.

80. The requirement to make a payment claim consistent with the provisions of s.4 of the Act must first comply with the stipulations of the Contract. If the terms of the Contract have not been fulfilled, the claim cannot be a proper payment claim for the purposes of the Act.

81. This issue was determined in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [250] to [252] where Olsson AJ said:

> *"….[250] The issue to be addressed in this case in considering such a question was whether objective non-compliance with the contract stipulations, pre-requisite to the raising of valid payment claims in respect of the six unpaid invoices, had the practical effect that no relevant payment claims, within the meaning of the statute, had been presented to GRD prior to receipt of the SI and, thus, no payment disputes had previously been generated in respect of them. I consider that the inevitable conclusion must be that this was the situation.*
>
> *[251] To borrow an expression employed by Mr Wyvill SC, the invoices simply did not pass the requisite threshold test to constitute payment claims of the type envisaged by the statute, because, being non-compliant with clause 12.2(d) of the Subcontract, they were not, relevantly, payment claims under that construction contract[115], as envisaged by the statute. The "jurisdictional fact"[116] upon the presence of which the jurisdiction of the adjudicator was conditioned, was therefore clearly demonstrated in relation to the payment dispute arising from the delivery of the SI and the non-payment of the monies claimed in it.*
>
> *[252] The essential thrust of Mr Wyvill's submissions in that regard, as I have earlier outlined them, is compelling. They should be upheld…."*

82. The requirement to strictly comply with the stipulations of the construction contract under which the payment claim is being made is an essential requirement for compliance with s.4 of the Act, and s.10 has no work to do in setting aside terms which must be complied with for the proper making of a claim for payment under the construction contract.

Aware of the Claims

83. The Applicant submits that it had substantively complied with the notice and timeframe requirements of the Contract such that the Respondent was aware of the substance of the Applicant's claims.

84. The Respondent says that the Applicant's statement that it substantially complied with the Contract is irrelevant. The Respondent also says that the requirement for timely notice of a claim under a construction contract will be strictly enforced by the Court.

85. In reaching its position, the Respondent has relied upon *CMA Assetts Pty Ltd (formerly known as CMA Contracting Pty Ltd) v John Holland Pty Ltd [No 6]* [2015] WASC 217 at [432] where Allanson J said:

> *"[432]….. In the context of the detailed provisions in cl 10, and in particular cl 10.13 under which compliance with the notice requirements of cl 10.12 is a condition precedent to any entitlement to an extension of time,* ***I can see no basis within the terms of the contract to limit John Holland's discretion in the manner sought*** [Respondent's emphasis]. *The court is being asked to dispense with specific and detailed provisions to which the parties agreed.* ***While John Holland may choose to exercise its discretion, notwithstanding failure by the Subcontractor to comply with cl 10.12, the court does not have that discretion*** [Respondent's emphasis]*…."*

86. I agree with the Respondent on this point. The Courts are reticent to act to set aside or step in between parties to a contract and will insist on strict compliance with conditions precedent to payment that the parties agreed in the contract. This is of particular significance in construction contracts.

The Expert Reports

87. The Applicant has submitted an expert as planned to as built critical path analysis report (the "E3 Report") and the Respondent has submitted a similar expert as planned to as built analysis report (the "Hill Report") that shows how the various delaying events impacted the critical path of construction.

88. The Applicant's report shows the Program Gantt Chart being impacted by 104 days of additional time necessary to complete the Works due to delays by the Respondent, whereas the Respondent's report shows 0 days of additional time necessary to complete the Works as the events of delay are wholly concurrent with other critical path activities as the Works were progressed.

89. The Applicant has claimed 89 days of additional time with PC extended from 22 December 2015 to 19 March 2016. The Applicant also claims delay costs of $820,857.00 for the additional time spent in the Contract and the sum of $924,284.83 for recovery of LDs wrongfully deducted from the March Certificate by the Respondent.

90. The Applicant says that it was delayed by 8 clear delay events that have caused delays that should see the date for PC move along an extended critical path for construction some 104 days to 4 April 2016. The Applicant has chosen to only claim for 89 days in its Application for Adjudication.

91. The Respondent says that the Applicant has no entitlement to any extension of time in the Contract because it has not complied with the conditions precedent to the grant of additional time to carry out the Works.

92. The Respondent's expert report shows that there were 8 clear delay events, however those events did not touch the critical path for construction to cause an extension of time necessary to construct the Works. The report shows that the delaying events were wholly concurrent with Works activities and were scheduled in such a manner that the Applicant ought to have made the scheduled Date for PC in the Contract of 22 December 2016. The Date of PC granted by the Respondent was 7 April 2016 some 107 days later.

93. The Respondent also says that the Applicant did not submit an extension of time request for each of the various delaying events in accordance with the Contract, but chose to combine the eight delaying events and then submitted them as one extension of time claim a few days after it physically completed the Works on 19 March 2016. The Applicant then took several weeks to

complete and provide the necessary document deliverables under the Contract to enable the grant of a PC Certificate. The Respondent issued the PC Certificate by letter on 8 April 2016.

94. The Respondent has rejected the Applicant's extension of time request dated 26 March 2016 on the grounds that the Applicant has:

(a) failed to comply with the notification and timeframes in bringing their claim for an extension of time under the Contract;

(b) not followed the terms of the Contract and has combined the delaying events into one claim for extension of time under the Contract; and

(c) no claim for any additional time in the Contract because on a properly progressed analysis there has been no impact to the critical path for construction under the Contract.

95. In reaching these conclusions the Respondent has relied on the Contract and the Hill Report rather than the E3 Report.

96. It is unnecessary to deal with points (a) and (b), the failure of the Applicant to comply with the notice and timeframes in the Contract, as these issues have already been considered in paragraphs 57 to 86 above.

The E3 Report

97. The Applicant's report is a critical path analysis of the as planned to as built delay impact on the baseline schedule dated 10 July 2015, which was approved for construction by the Respondent on 11 September 2015. The Applicant has considered the eight delaying events in terms of critical path impact, concurrency and overall impact to the end date of PC in the Contract. The Applicant's analysis is set out in Table 1.

No.	Description	Delay Days
1	Access	52
2	NOD 41 - Uninstalled Equipment	20
3	NOD 32 - Termination Area	0
4	NOD 42 - Tags	0

5	NOD 44 - Earth Studs	0
6	NOD 49 - Terminations	0
7	Design Revision	0
8	Commissioning	32
TOTAL		**104**

Table 1.

98. The Applicant says that the impact to the Date for PC in the Contract, as a result of the delaying events after their concurrency has been considered and the overall effect on the approved baseline schedule, results in the date for PC in the Contract extending to 4 April 2016.

The Hill Report

99. The Respondent has disagreed with the findings of the E3 Report and the Hill Report has found that there is no additional time necessary to construct the Works and the delays are a direct result of either late start of the work on various critical path activities or poor productivity when constructing the Works in the Contract.

100. The Respondent considered the eight delaying events put forward by the Applicant and considered them in terms of the as planned to as built programs submitted by the Applicant contemporaneous with the Works. A critical path analysis of the delay in the Works was conducted against each updated program contemporaneous with the conduct of the Works resulting in a combined delay of 28 hours to the delay events in the Works.

101. The Respondent says that the issue in the E3 Report is that it fails to consider the Works progress at the time of the delaying event and the actual critical path activities. The Respondent's analysis is set out in Table 2.

No.	Description	Event Start	Event Finish	EOT days	Claim days	Actual days
1	Access	14-Sep-15	14-Dec-15	35	52	0
2	NOD 41 - Uninstalled Equipment	11-Dec-15	18-Mar-16	89	20	0
3	NOD 32 - Termination Area	26-Nov-15	26-Jan-16	51	0	0
4	NOD 42 - Tags	12-Dec-15	6-Jan-16	27	0	0

5	NOD 44 - Earth Studs	18-Dec-15	6-Jan-16	27	0	0
6	NOD 49 - Terminations	19-Dec-15	1-Jan-16	22	0	0
7	Design Revision	28-Oct-15	14-Feb-16	89	0	0
8	Commissioning	11-Jan-16	18-Mar-16	89	32	0
TOTAL					**104**	**0**

Table 2.

102. It has already been determined above that the Applicant did not comply with the notice and timeframe provisions of the Contract when submitting its claim for an extension of time in the Contract. The Applicant did not consider the impact to the critical path of construction by the delaying event at the time it occurred and did not then submit an extension of time request at or about the time the event finished. Instead, the Applicant waited until it had completed the Works and then submitted a claim for some additional time in the Contract based on the combination of delaying events that it says occurred sometime earlier when the Works were being constructed.

103. I do not support the Applicant's approach. Notwithstanding the contractual dilemmas this approach can cause, it is also crucial in lump sum construction contracts, particularly where the relationship is lump sum to lump sum up the contracting chain, to fully inform the head contractor or the employer of precisely the effects the delay is having or could have on the project and the claims associated with those events. Without this timely information, the employer cannot manage and budget for potential cost overrun and the head contractor cannot promptly comply with its contractual obligations to receive some additional time from the employer to complete the project.

104. I am satisfied that the Applicant's claim must fail on the evidence and that Claim 1, the EOT 007 claim for extension of time and delay costs of $820,857.00 (excluding GST) falls. The Applicant failed to comply with the Contract and did not notify the Respondent of its claim in accordance with the Contract.

Claim 6 - Liquidated Damages under the Contract – $935,066.52 (excluding GST).

105. The Respondent has maintained the Date for PC in the Contract of 22 December 2015. The approved Baseline Schedule submitted by the Applicant shows it completing the Works on 21 December 2015, however the Applicant did not physically complete the Works until 19 March 2016 and then the Contract deliverables until 7 April 2016, the Date of PC under the Contract.

106. The Respondent has applied LDs in the sum of $935,066.52 (excluding GST), under item 39 of the Schedule, at a rate of $20,000 per day. This LD liability is then capped in the Contract under item 40 of the Schedule to 15% of the Subcontract Sum.

107. The Respondent claimed 107 delay days and at $20,000 per day and this amounts to $2.14M in total. However, item 40 of the Schedule steps in to limit the LD liability to 15% of the Subcontract Sum. The Subcontract Sum at item 2 of the Schedule is $4,996.428.00 (excluding GST) and, by definition, is adjusted from time to time by clause 1.1 of the Contract. The Respondent has calculated the Subcontract sum at 7 April 2016 to be $6,233,776.80 (excluding GST) which calculates to a LD liability of $935,066.52 (excluding GST).

108. I am not convinced that the Respondent has acted entirely properly in seeking its damages and, while I have no jurisdiction in equity, I consider the Date of PC in the Contract to have been a little earlier than 7 April 2016.

109. It is a requirement under clause 8 of the Contract for the Superintendent to act impartially and in a fair, reasonable and honest manner when, among other things, administering the Contract. This concept has also been established by precedent in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211. That decision has, however, caused some controversy and the preferred method of delay analysis is through objective review of the event impact on the critical path for construction and then delays apportionment against the culpable party. This

process provides a clear picture as to whether or not it is necessary to extend time in the contract.

110. I am of the view that the Respondent (Superintendent) did not attend to the events of the Applicant's document deliverables in a timely manner or properly under the Contract. The Applicant provided the substantive deliverables under the Contract on and before 21 March 2016, however the Respondent wrote to the Applicant on 22 March 2016, following a request for PC, stating that *"….construction verification documentation and as-built drawings have not been submitted to Contractor…."*. The Respondent also stated that the Deed of Release (the "Deed") was required in the form set out in the Contract.

111. The Applicant provided the Deed to the Respondent on 22 March 2016. The Respondent again wrote to the Applicant on 23 March 2016 rejecting the Deed on the basis of the form and terms of the Deed being unacceptable to the Respondent (Superintendent). The reasons given were wholly administrative and not consistent with the requirements of clause 8 of the Contract. It was entirely acceptable and appropriate to grant the Applicant provisional PC subject to delivery of the administrative documents of the Contract that would satisfy PC under the Contract.

112. In its action, the Respondent helped itself to LDs in circumstances where it would likely fail the test of the equitable doctrine of "clean hands" when seeking a remedy in damages. An Adjudicator has no jurisdiction in equity, however it is well established and uncontroversial between the parties that an Arbitrator or Adjudicator may step into the shoes of an administrator as set out in *Transgrid & Ors v Siemens Ltd & Ors* [2004] NSWCA 395 and in *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2) Supreme Court of Victoria, Unreported 14 December 2006*, BC 200610448, in which Osborn J's decision followed that of Victorian Chief Justice Warren in *Kane Constructions v Sopov* (2006) 22 BCL 92, that this can be to extend time in the Contract.

113. On this basis, I reset time in the Contract for the Date of PC at 22 March 2016, the date on which the Respondent ought to have granted PC in the Contract.

114. This will have no effect on the LDs applied in the Contract, but it will amend the date for completion of the Defects Liability set out at Item 5 of the Schedule of the Contract.

115. I am satisfied on the evidence that the Respondent's application of Liquidated Damages is appropriate and stands as Claim 6 for Liquidated Damages under the Contract in the sum of $935,066.52 (excluding GST). The Date of Practical Completion is reset to 22 March 2016.

Claim 2 - Wrongful deduction of liquidated damages - $924,284.83 (excluding GST)

116. On the evidence and the reasoning above, the Applicant's claim for the wrongful deduction of liquidated damages must fail as Claim 2 for wrongful deduction of liquidated damages in the sum of $924,284.83 (excluding GST). There can be no claim for the wrongful application of damages as the application of liquidated damages was an entirely appropriate claim by the Respondent made properly under the Contract.

Claim 3 - VQ-005 - Variation between IFT and IFC documents revision 2 cable schedules and I&E lists - $1,209,049.67 (excluding GST)

117. The Applicant has claimed a variation in the Contract for changes the Respondent made to the cable schedules and instrument and equipment lists when issuing the Issued For Construction ("IFC") documents.

118. The Contract is a lump sum contract that the Applicant had priced from a set of earlier documents Issued For Tender ("IFT"). The Applicant says that following execution of the Contract the Respondent issued two revisions of the IFC documents, Revision 0 on 22 July 2015 and then further changes to the cabling schedule in Revision 1 on 16 October 2015. The Respondent generally agrees that it changed the IFT documents in two steps, the first by several dated changes around June and July 2015 (Revision 0) and the next

step on 12 October 2015. Despite some discrepancy as to precisely when these changes were issued, both parties agree that the IFT documents were changed by two later revisions Revision 0 in June 2015 and Revision 1 in October 2015.

119. Based on these changes, the Applicant raised two variations, the first VQ-005 for the Revision 0 changes and the second VQ – 028 for the Revision 1 changes.

120. For the purposes of the March Claim the two variations were combined and claimed as VQ-005 and the Respondent has accepted and assessed VQ-005 in the combined form in the March Certificate.

121. It is uncontroversial between the parties that the issue in dispute is in the quantum only. The Applicant claims $1,894,178.60 (excluding GST) for VQ-005 (VQ-005 and VQ-028 combined) and the Respondent has assessed the claim at $685,128.93 (excluding GST).

122. Throughout the history of this variation the Applicant has made numerous evaluations of the quantum, ranging from the initial valuation of a little over $3M to the March Claim of a little over $2.34M, and then settling on a revised claim of $1,894,178.60 (excluding GST). The Respondent has confirmed this claim sum in its Response. The difference between the Applicant's claim sum and the Respondent's assessment sum is $1,209,049.67 (excluding GST) which is claimed by the Applicant in this Adjudication.

123. The variation VQ-005 claim is made up of eight components of claim as follows:

(a) Component 1 - Cable Lengths - $254,184.29 (excluding GST);

(b) Component 2 - Rates - $448,094.12 (excluding GST);

(c) Component 3 - Vendor Cables – $49,114.94 (excluding GST);

(d) Component 4 - Access Equipment (Working at Heights) - $352,525.50 (excluding GST);

(e) Component 5 - Cable Supports - $84,033.25 (excluding GST);

(f) Component 6 - Instrumentation - $2,794.52 (excluding GST);

(g) Component 7 - Quality Assurance - $12,933.00 (excluding GST); and

(h) Component 8 - Copper Price - $5,370.05 (excluding GST),

a total value of claim of $1,209,049.67 (excluding GST).

Component 1 – Cable Lengths a claim of $254,184.29 (excluding GST)

124. The Applicant says that the two revisions caused over 500 changes across approximately 900 drawings, which made the assessment extremely difficult. Attendance to the spreadsheets that document the changes shows these to be complex and detailed.

125. The Applicant has relied on the cable pull records from the Site, which clearly establish the quantum of cable actually used in the Works. On the basis of those records the Applicant submits that it supplied and ran an additional 7,136 metres of cable into the Works. The additional cable quantum assessment was calculated from the 'pull sheets' completed on Site by the Applicant's personnel, which recorded the amount of cable that was actually installed. The data from the pull sheets was then copied into the spreadsheets that documented the changes arising from the Revision 0 and Revision 1 documentation.

126. The Respondent has relied on a report prepared for the Response by Hill International (the "Quantum Report"). The Quantum Report has assessed the addition or deletion of cable lengths for VQ-005 on a comparative basis using the as installed information on a like for like basis to establish the quantum of cable length for the variation.

127. I do not agree with the Respondent on this component of the claim. As this is a lump sum contract and the risk apportioned in the Contract is held by the Applicant for the quantum of supplied and installed cable, it is therefore entirely reasonable to use the IFT documentation, which was used to assess and estimate the initial price for the Works, to compare with the revised documentation of Revision 0 and Revision 1 to calculate the revised price for the change to the Works. As it was, the Applicant used the actual cable lengths installed from the site records.

128. The Contract holds no precise mechanism for actually calculating the quantum of change between what was agreed in the "Subcontract Sum" and what has been added or deleted in the Contract, other than by variation agreement between the parties. The Respondent has provided a like for like assessment, whereas the Applicant has actually assessed the change on a comparative basis between the IFT information and the actual installed cables from the pull sheets. I prefer this method.

129. I am satisfied that the Applicant's claim for the additional cable it supplied and installed into the Works stands in the sum of $254,184.29 (excluding GST) and I award this component of the claim to the Applicant.

Component 2 – Rates a claim of $448,094.12 (excluding GST)

130. The Applicant submits that the rates applied to the additional 7,136 metres of cable are firstly through the use of the "Rates" in the Contract and then, where they cannot be applied, a fair value against its supply and install costs.

131. The Respondent relies on the Quantum Report and submits that there should be a reduction in the "Subcontract Sum" for the additional cable in the sum of -$78,961.79 (excluding GST). The Quantum Report has assessed the price change from "…*built up the rates based on contemporaneous data provided by other tenderers for this project and cross referenced with data from its internal 'price book', including from first principles for the installation rate*…".

132. The Applicant and the Respondent argue the rates generally on an example of 48-core fibre optic cable supply and install values. The Applicant has used the nearest comparative rate per metre in the Contract of 10 pair 1.5 mm2 SWA DEKORON instrument cable of $89.39 to supply and $478.29 to install and then applied that rate per metre to the 48-core fibre optic cable for pricing. The Contract has "TBA" as the pricing for the 48-core fibre optic cable.

133. The Respondent has priced the 48-core fibre optic cable at $33.19 per metre installed based on 16 man days or 4 men for 4 days to install which it considers sufficient to install the 598 metres of cable.

134. I do not agree with the Respondent's assessment.

135. It is of concern that the Contract did not have an agreed value for fibre optic cable, particularly when there was a clear scope component in the Works. It is also entirely reasonable for the Applicant to use the nearest rate in the Contract for a cable valuation of similar cable and scope. The Rates in the Contract were not built on a cost plus basis of valuation but rather a lump sum risk basis of valuation with that risk being the Applicant's to manage.

136. I am satisfied that the Applicant's claim for the additional cable it supplied and installed into the Works stands in the sum of $448,094.12 (excluding GST) and I award this component of the claim to the Applicant.

<u>Component 3 – Vendor Cables a claim of $49,114.94 (excluding GST)</u>

137. The Applicant submits that it was not required to install vendor cabling [*redacted*] under the scope of the Works in the Contract. The wiring [*redacted*] is dedicated specialised wiring and is to be supplied and installed by the Respondent and does not form part of the Contract.

138. The Respondent submits that the wiring scope [*redacted*] was included in the Tender as part of the cable schedules and was later deleted by the Revision 0 cable deductions. As such the Respondent submits that it is entitled to a deduction in the sum of -$50,365.45 (excluding GST) for the wiring because it formed part of the Contract and was not installed by the Applicant.

139. The Part F, Scope of Work in the Contract at clause 1.1(pp) states that:

> *"…The work shall include, but not be limited to:*
>
> *…(pp) Supply, installation, termination and testing of all LV, ELV, control, earthing and fibre optic cables as nominated on the cable schedules. The Subcontractor is responsible for the installation of cables nominated as vendor supplied unless specifically nominated otherwise. Where an inconsistency exists in the cable schedule, the supply, installation and termination of the cable shall be deemed to be included in the Subcontract Sum and the Subcontractor shall not be entitled to any additional costs as a result of the supply, installation and/or termination of the cable(s)…."*.

140. The Respondent says that the cables in question were not nominated as vendor supplied and/or installed in the IFT cable schedule and were subsequently deleted in the IFC Revision 0 cable schedule. As such, there is to be a deduction of -$50,356.45 (excluding GST) from the Subcontract Sum.

141. I agree with the Respondent in this component of claim.

142. The Contract is clear that within the scope of the Contract "…*The Subcontractor is responsible for the installation of cables nominated as vendor supplied unless specifically nominated otherwise…."*. The responsibility of the Applicant is drawn from the cable schedules when assessing what is to be included or excluded in its tendered price for the scope of work. The Applicant accepted the risk in the lump sum contract it had tendered for, and when the vendor cables were deleted in the Revision 0 cable schedules a deduction would arise in the Subcontract Sum.

143. I am satisfied that the Applicant's component claim of $49,114.94 (excluding GST) falls and that the Respondent is entitled to a deduction of -$50,356.45 (excluding GST) for the removal of the fire and hydraulic cabling from the scope of work in the Contract. I award this deduction to the Respondent.

Component 4 – Access Equipment (Working at Heights) a claim of $352,525.50 (excluding GST)

144. The Applicant submits that, due to cable changes arising from the Revision 0 and Revision 1 IFC documentation, it was required to install additional cabling while Working at Heights using elevated work platforms.

145. The Applicant's claim component is set out in three parts as follows:

(a) Hire cost of the EWP's for 61days - $61,805.60 (excluding GST);

(b) Safety and emergency spotters for 61 days - $272,560.20 (excluding GST); and

(c) Cable support work - $17,159.70 (excluding GST),

a total claim component of $352,525.50 (excluding GST).

146. The Applicant says that the work is calculated on the basis of the installation of the additional 7,136 metres of cable over a period of 61 days in the Contract.

147. The Respondent submits that there were some changes arising in variation VQ-005 which required additional cable to be installed at heights, however the claim made by the Applicant is not a fair value. The Respondent has relied upon the Quantum Report to assess the value at $28,653.96 (excluding GST). The Quantum Report has assessed from the drawings and its 3D model that there was an additional quantum of 1,146.25 metres of cable installed at height and based the cable installation on a rate of 0.2 metres installed per hour.

148. The parties have agreed that the rate of hire for the EWP is $23.44 per hour.

149. The Respondent has assessed the spotters for the EWP safety and emergency at the Trade Assistant (“TA”) rate of $86.30 per hour under the schedule of ‘On Site Works’ in the Contract.

150. I agree with the Respondent in its assessment of the components of this claim, however I do not support the Respondent’s calculations.

151. The Applicant has over-claimed by using the total amount of additional cable to be supplied and installed at 7,136 metres. There is no evidence advanced by the Applicant that the entire additional cable quantum is to be installed working at heights. The Respondent has calculated from the drawings and its 3D model the amount of cable to be installed at heights to be 1,146.25 metres and I accept this quantum.

152. The Applicant has used the Contract On Site Rate for a Safety Representative of $101.55 per hour as a safety and emergency spotter. It is wholly unnecessary and generally not appropriate to have a Safety Representative as a spotter for an EWP. A TA is entirely appropriate as a safety and emergency spotter for an EWP following a small amount of operational and response training. I agree with the Respondent in the use of the TA rate in the Contract as a fair and reasonable rate for this component of the claim.

153. The Respondent has not challenged the quantum of ‘cable support work’ as this is set out in the “Working at Height’ documents and is $17,159.70 (excluding GST). I have accepted the Applicant’s calculation of this component of the claim.

154. The calculation of Component 4 a claim for Working at Heights on VQ005 is set out in Table 3.

Working at Heights	Metres	Rate/hr	Total Hrs
Cable	1146.25	0.2	229.25
Calculation of Component 4 - Working at Heights			
Item	**Qty**	**Rate**	**Sub-total**
EWP	4	23.44	$21,494.48
Spotters	4	86.3	$79,137.10
Cable Support Work	1	1	$17,159.70
TOTAL			**$117,791.28**

Table 3.

155. I am satisfied that the Applicant's claim for Access Equipment working at heights stands in the sum of $117,791.28 (excluding GST) and I award this component of the claim to the Applicant.

Component 5 – Cable Supports a claim of $84,033.25 (excluding GST)

156. The Applicant has claimed for the supply and installation of cable supports comprising cable ladders and conduit for the additional 'profibus' cable to be supplied and installed to the Instruments under variation VQ-005.

157. The Applicant has calculated the additional cable supports by allowing 3 metres of cable per instrument and a rates build up for an additional 500 metres of conduit. The Applicant's claim components are $46,470.85 (excluding GST) for the 'profibus' conduit and $37,562.40 (excluding GST) for the instrumentation conduit.

158. The Respondent has submitted that the cost of the conduits should be included in the cable rates under the Contract. I do not agree with the Respondent on this point. There are expressly defined Rates in the Contract for cable ladders and conduits, which are to be used for any additional cable ladder and conduit installed into the Works under the Contract.

159. The Respondent also submits that the allowance length [*redacted*] is not reasonable and should be reduced [by ⅓] for the pricing of this component of the claim. The Respondent has advanced no further evidence either in its Response or the Quantum Report to support this assumption. Looking at the Applicant's calculations for this component of claim, it is entirely reasonable to use [*the Applicant's length*]. No doubt, there would be some conduit runs that are less than [*the Applicant's length*] and some that are more however, on balance, [*the Applicant's length*] is a reasonable conduit allowance for the additional work in this component of claim for variation VQ-005.

160. I am satisfied that the Applicant's claim for the additional Cable Supports stands in the sum of $84,033.25 (excluding GST) and I award this component of the claim to the Applicant.

Component 6 – Instrumentation a claim of $2,794.52 (excluding GST)

161. The Applicant says that it did not make any allowance in its Tender for the installation of [*redacted*]. The Applicant also contends that the scope of work, Part F, "Work and Supply Exclusions at clause (m) and clause (t) exclude work related to the cabling for instrumentation. The Applicant has claimed the sum of $2,794.52 (excluding GST) as a claim against the Respondent's deduction of -$2,794.52 (excluding GST) for the instrumentation installation into the switch rooms.

162. The Respondent submits that the IFT I&E List specifically identified the equipment that the Applicant was to install [*redacted*] under the Contract.

163. I do not agree with the Applicant on this point.

164. The Contract at Part F, clause 1.9(t) says:

"…Cabling internal [redacted] specifically nominated as vendor installed…".

165. The cabling of the items listed on the I&E List specifically say that the Applicant is to install the items such as [*redacted*] for [*redacted*]. It is within the scope of the Works for the Applicant to install these items and they were not installed. As such, a deduction from the 'Subcontract Sum' would arise under the Contract.

166. I am satisfied that the Applicant's claim for [*redacted*] installation falls and the Respondent's claim for a deduction of the sum of -$2,794.52 (excluding GST) stands. I award the deduction to the Respondent.

Component 7 – Quality Assurance a claim of $12,933.00 (excluding GST)

167. The Applicant has claimed the sum of $12,933.00 (excluding GST) for the additional Quality Assurance Testing ("QA") it had to perform for the additional cabling that arose in variation VQ-005. The Applicant has calculated this component of the claim on the basis of 135 hours at the rate of $95.80 per hour, the rate of an electrician in Part H, Schedule 2 of the Contract.

168. The Respondent submits that the QA testing must be done as part of cable installation so as to not vitiate the Australian Standard AS3000 requirements. The Respondent also submits that this testing forms an integral part of the cable installation under Part H, Schedule 1 of the Contract and therefore there can be no claim for the additional QA as it is wholly contained within the rates.

169. I am not with the Applicant on this component of claim.

170. The preamble terms of Part H, "Prices and Rates" in the Contract at clause (3) states:

> *"…(3) The Subcontract Sum shall be deemed to include for the cost of the whole of the works described in the Subcontract, services and other incidentals associated with, or necessary for the execution of the work described and the performance of the obligations of the Subcontractor under the Subcontract, whether specifically mentioned or not within this Schedule…".*

171. The testing of cables is contained in the installation work and is generally done on a point-to-point basis at the time of the installation. The rates in the Contract for the installation of cable were clearly intended to include this component of work and the Contract has made provision under Part H, Prices and Rates, for the inclusion of this component of work into the rates in the Contract.

172. I am satisfied that the Applicant's claim for Quality Assurance testing of the additional cables falls.

Component 8 – Copper Price a claim of $5,370.05 (excluding GST)

173. The Applicant submits Part H, Schedule 2 of the Contract contains the rate of AUD$8,250.00 per tonne for copper which was the rate it used to calculate its pricing and supply from its cable supplier. The Applicant has claimed the sum of $5,370.05 (excluding GST) for the additional copper based cabling required by the variation VQ-005.

174. The Respondent contends that the rates are subject to rise and fall and, as such, there should be an adjustment for the procurement of the additional cable in the variation VQ-005. The Respondent says that the adjustment should be -$43,251.22 (excluding GST) for the fall in the copper price between July and August 2015.

175. I am not with the Respondent on this point.

176. The Applicant locked in the supplier copper price at the time of tender to ensure the risk in the lump sum contract could be properly managed (converting a variable cost to a fixed cost). Cabling purchased during the Contract period would be sourced at that rate and the copper price would not affect the price of stock held cable by the supplier as that cable would have been purchased at the time of the higher rate. This method of cable supply is consistent with a lump sum contract and is used to manage the supply risk in the Contract.

177. I am satisfied that the Applicant's component claim of $5,370.05 (excluding GST) stands and that the Respondent's deduction of -$43,251.22 (excluding GST) falls. I award this component of claim to the Applicant.

178. Reconciling the components of claim for the variation VQ-005 as follows:

(a) Component 1 - Cable Lengths - $254,184.29 (excluding GST);

(b) Component 2 - Rates - $448,094.12 (excluding GST);

(c) Component 3 - Vendor Cables – -$50,356.45 (excluding GST);

(d) Component 4 - Access Equipment (Working at Heights) - $117,791.28 (excluding GST);

(e) Component 5 - Cable Supports - $84,033.25 (excluding GST);

(f) Component 6 - Instrumentation - -$2,794.52 (excluding GST);

(g) Component 7 - Quality Assurance - $Nil; and

(h) Component 8 - Copper Price - $5,370.05 (excluding GST),

a total value of claim of $856,322.02 (excluding GST).

179. In relation to the variation VQ-005, I award the sum of $856,322.02 (excluding GST), as determined under each of the eight components of the claim in paragraphs 117 to 178 above.

Claim 4 - VQ-131 - Variation for ST-803 [*redacted*]- $16,177.90 (excluding GST)

180. The Applicant has claimed a variation in the Contract for changes it says the Respondent directed to the [*equipment details redacted*]. The Applicant has claimed $16,177.90 (excluding GST) for the addition of [*equipment details redacted*]. Generally, [*equipment details redacted*] were not installed [*redacted*] inside the buildings and the installation of the [*equipment details redacted*] was designed to be installed vertically rather than horizontally as directed by the Respondent and then installed by the Applicant.

181. The Respondent submits that the variation VQ-131 should be valued at 'Nil' because the Applicant has no contractual entitlement to be paid the amount claimed. The Respondent has based its rejection of VQ-131 on two grounds:

(a) the cost associated with the installation of the cable tray covers is not a variation because it was requested for the Applicant's convenience; and

(b) if the cost is a variation under the Contract, it is time barred by clause 15.7, the notification timeframe for a variation under the Contract.

182. I am not with the Respondent on this issue.

183. Both parties have not fully complied with the requirements to vary the Contract. The obligations fall to both parties when directing a variation in the Contract, unlike the requirements of timely notification imposed solely on the Applicant for a grant of an extension of time in the Contract. There is no evidence advanced by the Respondent that the Respondent's Superintendent Representatives and their Limits of Authority were properly notified to the Applicant under clause 8.4 of the Contract. The Respondent's Electrical Supervisor and Electrical Engineer both directed variation work to the Applicant in circumstances where they held no power under the Contract to give those directions.

184. When directing the variation in the Contract the Respondent gave that direction in writing and the Applicant gave full and immediate effect to the additional work under clause 15.6 of the Contract. The notification requirements of clause 15.7 seek to avoid the claim by imposing a 5 day notice requirement "….*after the direction or approval is given*...." on the Applicant of its price and any additional time necessary to complete the variation in the Contract. As it is wholly unclear as to whether or not the Respondent (Superintendent) has actually and properly exercised the power given to a Superintendent or Superintendent Representative under the Contract, the Respondent cannot now insist on strict compliance by the

Applicant with the stipulations of the Contract to avoid a claim for additional work properly done.

185. The Respondent ought to have fully understood that it was directing a variation to the Works under the Contract. The Respondent has full and competent knowledge of the Works under the Contract. The Respondent prepared the scope of the Works and the Respondent was in full management control of the Site at all material times the Works were being constructed. The Respondent did not comply with the Contract when it directed the variation to the Contract.

186. I am satisfied that the Applicant's claim for VQ-131 for the [*equipment details redacted*] installed to ST-803 stands in the sum of **$16,177.90 (excluding GST).**

Claim 5 - VQ-107 - Variation for delays to HV access - $3,429.60 (excluding GST)

187. The Applicant has claimed a variation in the Contract for delays it incurred when seeking permitted access to the CH100 high voltage equipment in mid-January 2016.

188. The Applicant submits that it is entitled to a variation under the Contract because the equipment was existing equipment on the Site and because the High Voltage team was delayed by permit access in completing that component of the Works under the Contract.

189. The Respondent submits that the variation VQ-107 should be valued at 'Nil' because the Applicant has no contractual entitlement to be paid the amount claimed and is time barred by clause 15.7, the notification timeframe for a variation under the Contract.

190. I do not agree with either the Applicant or the Respondent in this issue.

191. Delays should be dealt with under the additional time provisions of clause 14 of the Contract using the appropriate mechanisms contained in that clause for the grant of additional time due to delaying or disruptive events when constructing the Works under the Contract.

192. I am satisfied that the Applicant's claim for delays in accessing the CH100 high voltage equipment falls.

Reconciliation of the Claims

193. The claims of the Application for Adjudication are reconciled at Table 4 below together with the March Certificate provided to the Applicant and confirmed by the Respondent.

Claims of the Adjudication			
Claim Component	**Applicant**	**Respondent**	**Determined**
Claim 1 - EOT 007 - Delay Costs	$820,857.00	$0.00	$0.00
Claim 2 - Wrongful LDs Deduction	$924,284.83	$0.00	$0.00
Claim 3 - VQ-005 IFT to IFC Changes	$1,209,049.67	$0.00	$856,322.02
Claim 4 - VQ-131 [*redacted*]	$16,177.90	$0.00	$16,177.90
Claim 5 VQ-107 - HV Access	$3,429.60	$0.00	$0.00
Claim 6 - LDs Applied	$0.00	($935,066.52)	($935,066.52)
Sub-total	**$2,973,799.00**	**($935,066.52)**	**($62,566.60)**
March Claim and Certificate		$924,284.83	$924,284.83
TOTAL		**($10,781.69)**	**$861,718.23**

Table 4.

194. The adjudicated March Claim reconciles to a payment to the Applicant of **$861,718.23 (excluding GST).**

Interest on the Claims

195. In reconciling the March Claim and the March Certificate with the Claims of the Adjudication, the amount the Respondent is to pay the Applicant is $861,718.23 (excluding GST).

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

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

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

> *"….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act...".*

198. The *Supreme Court Act* refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provide that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate is currently 2.0%, therefore the interest rate applicable to this contract is 8.0% per annum. The parties agree that this is the applicable interest rate.

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

200. I award interest of **$16,010.07** on the sum of **$861,718.23 (excluding GST)** from 27 April 2016, the date of due payment, to 20 July 2016, the date of determination, pursuant to section 35 of the Act.

Summary

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

(a) The contract to be a construction contract under the Act;

(b) The work to be construction work under the Act;

(c) The site to be a site in the Northern Territory under the Act;

(d) The claim to be a valid payment claim under the Act;

(e) The dispute to be a payment dispute under the Act;

(f) The Application to be a valid application under the Act;

(g) The Response to be a valid response under the Act;

(e) Claim 1 - EOT 007 - claim for extension of time and delay costs to fall;

(f) Claim 2 - Wrongful deduction of liquidated damages to fall;

(g) Claim 3 - VQ-005 - Variation between IFT and IFC documents revision 2 cable schedules and I&E lists to stand in the sum of $856,322.02 (excluding GST);

(h) Claim 4 - VQ-131 - Variation for ST-803 [*redacted*] to stand in the sum of $16,177.90 (excluding GST);

(i) Claim 5 - VQ-107 - Variation for delays to HV access to fall;

(j) Claim 6 - Liquidated Damages under the Contract to stand in the sum of $935,066.52 (excluding GST); and

(k) Interest on the Claims in the sum of $16,010.07.

202. Reconciling the March Claim and March Certificate against the material findings I determine that the amount to be paid by the Respondent to the Applicant in relation to the March Claim is **$877,728.30 (excluding GST)**.

The payment of GST is only applicable to the sum of **$861,718.23 (excluding GST)**.

203. This sum is to be paid to the Applicant by the Respondent on or before **10 August 2016**.

Costs

204. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.

205. The Act at section 36(2) gives Adjudicators discretion to award costs:

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

206. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

207. The test for determining whether a proceeding is vexatious is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

> *"1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

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

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

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

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

Confidential Information

211. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location of the works.

DATED: 20 July 2016

Rod Perkins
Adjudicator No. 26