

Adjudicator's Determination
Pursuant to the
Construction Contracts (Security of Payment) Act 2004 (NT)

Applicant

and

Respondent

I, Nicholas Floreani, determine on 14 January 2019 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act (NT)* (**the Act**) that the Respondent must pay the Applicant an amount of \$152,921.31 (excluding GST) for Payment Claim 11 (Invoice #10587) issued to the Respondent on 13 September 2018, in relation to works completed under the contract in the period 21 July to 20 August 2018. The sum of \$152,921.31 (excluding GST) is payable 7 working days from the date of the determination.

There is nothing in the conduct or submissions of either party to attract the attention of section 36(2) of the Act.

Neither party has made submissions about the confidentiality of any information in this determination. I am satisfied that this determination does not deal with information of a confidential nature, the disclosure of which could damage the commercial interests of the parties. Pursuant to section 38(1)(e) of the Act, I determine that the determination is suitable for publication by the Registrar under section 54 of the Act.

Contact details:

Applicant:

[redacted]

Respondent:

[redacted]

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APPOINTMENT AS ADJUDICATOR

1. On 14 December 2018, the Applicant, [redacted] applied for an adjudication under section 27 of the *Construction Contracts (Security of Payments) Act 2004* (NT) (**Act**).
2. On 19 December 2018, I accepted an appointment by the Resolution Institute (Northern Territory Chapter) to determine the application.
3. The Resolution Institute is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, by reason of regulation 3 of the *Construction Contracts (Security of Payments) Amendment Regulations 2010*, as required by section 28(1)(c)(iii) of the Act.

DOCUMENTS RECEIVED BY ADJUDICATOR

4. I received and have considered the following documents:
 - 4.1. The Applicant's Application for Adjudication dated 14 December 2018 (**the Application**):
 - 4.1.1. Volume 1: Submissions, Statutory Declaration of [G] (**[G] Declaration**), Minor Works Contract, Relevant Correspondence and Project Day Worksheets;
 - 4.1.2. Volume 2: Payment Claim 11, Daily Site Diary, the Respondent's Site Instructions, Project Day Worksheets; Corporate Traveller Tax Invoices; and
 - 4.1.3. Volume 3: Authorities.
 - 4.2. The Respondent, [redacted] (**the Respondent**), has served a response to adjudication application which was comprised of:
 - 4.2.1. Response Submissions;

4.2.2. Statutory Declaration of [S] sworn 21 December 2018
(including annexures) (**[S] Declaration**); and

4.2.3. Authorities.

BACKGROUND

(a) The Parties

5. The Applicant is a construction company which provides construction and maintenance services.

6. The Respondent is a manufacturer of modular and transportable buildings.

(b) The Project and Contract

7. [*The head contractor*] engaged the Respondent to provide various modular buildings for the [*project details redacted*] Project for the [*principal details redacted*] in [*site details redacted*] (NT) (**the Project**).

8. On the 16 of October 2017, the Applicant and the Respondent entered in an agreement (Minor Works Contract), which required the Applicant to carry out associated construction works with respect to the Project providing labour and supervision for the installation of the modular buildings.¹ The initial contract sum was \$961,565.00 excluding GST (**contract**).

9. The Applicant submits that during the tender phase as part a review of the scope, the contract sum was varied to \$1,280,355.00 (ex GST).²

10. The [*G*] Declaration indicates that the original contract sum was intended to be \$1,280,355.00 (ex GST), but was unintentionally not amended in the formal instrument of agreement.³ The [*G*] Declaration further sets out that:

¹ Respondent's Response [5].

² [*G*] Statutory Declaration [13-15], [21-22], [86] and [91]

³ [*G*] Statutory Declaration [13].

- 10.1. on 5 October 2017, [MG] (Regional Manager, the Respondent) sent an email to [B] (Commercial Manager, Applicant) attaching “*the tender contract submission breakdown that will form part of the contract to assist with the drawdown profile and claimed amounts*”. The contract sum is stated as \$1,280,355.00;
 - 10.2. the amount of \$1,380,355.00 was listed as the price for the works in the letter from the Applicant to the Respondent dated 29 September 2017 and included at Annexure Part C of the Contract;
 - 10.3. in any event, on about 1 November 2017, the contract sum was formally increased to \$1,280,355.00 (ex GST) by the Respondent issuing a purchase order as follows: ⁴
 - 10.3.1. on 31 October 2017, [D] (Procurement Officer, the Respondent) sent an email advising that he would amend the purchase order to cover the contract value of \$1,280,355.00 (ex GST); and
 - 10.3.2. on 1 November 2017, a further email received from [D] attaching the new purchase order with a Contract.
11. The Respondent rejects the Applicant’s contention that the contract sum was varied from \$961,565 (excluding GST) to \$1,280,355 (excluding GST).⁵ The Respondent says that the purchase order to which the Applicant refers was an internal mechanism of its to facilitate processing of payments to its contractors. It says that the raising of a purchase order allows the Respondent to manage incoming invoices and keep track of its budget and capital expenditure for a

⁴ [G] Statutory Declaration [14].

⁵ Respondent’s Response [7-11].

project, or a particular contractor in general.⁶ The Respondent points to the Formal Instrument of Agreement in the contract, which specified the contract sum as \$961,565 (excluding GST and variations).⁷ The Respondent also points to the order of precedence in the contract which gives precedence to the Formal Instrument of Agreement.⁸

12. To the extent that the issue of the contract sum is relevant to the matters arising in this adjudication, which I agree with the Respondent it is not, I am not satisfied the contract sum was varied to \$1,280,355.00 (ex GST). I therefore find that the contract sum was \$961,565 (ex GST). However, I note, as the Respondent seems to accept, that the contract sum does not provide an absolute ceiling on what the Applicant is entitled to receive under the contract. The contract permits variations to be directed and paid for by the Respondent to the Applicant.

13. The works under the contract were in relation to the installation of modular buildings (and associated items) including specified plumbing and fit out work for the Project.⁹ the Respondent says that the Applicant's scope of work under the contract included:¹⁰

13.1. labour required for installation and complexing of modular buildings;

13.2. installation of suspended ceilings;

13.3. installation of steps, walkways and metal ramps;

13.4. installation of step and ramp handrails; and

⁶ Respondent's Response [8].

⁷ Respondent's Response [9].

⁸ Respondent's Response [10].

⁹ Submissions [20-23].

¹⁰ Respondent's Response [6].

- 13.5. other various items as described in the contract scope of works at the Project Site.
14. The Applicant says that the Respondent significantly varied the scope of work by issuing a number of Site Instructions (SIs) directing that specified works be performed on a day works basis. the Respondent does not dispute the Applicant's entitlement to any of the variations claimed by the Applicant is the adjudication and does not dispute that the site instructions issued are variation directions under clause 22.1 of the contract.¹¹

JURISDICTION

15. The Applicant says I have jurisdiction to determine the Adjudication Application. The Respondent does not expressly take issue with jurisdiction. In particular, the Respondent does not dispute:
- 15.1. the contract is a 'construction contract' under the Act¹² and in any event, I am satisfied that it is;
- 15.2. no arbitrator or court has made a finding about the dispute¹³ and in any event, I am satisfied of this; and
- 15.3. the matter is not too complex and there is sufficient time available to make a determination¹⁴ and in any event, I am satisfied of this.
16. I deal with the other jurisdictional matters below.

(a) Payment Claim

17. Section 4 of the Act defines a 'payment claim' as a claim made under a construction contract:

¹¹ Respondent's Response [111] and [S] Declaration [131] to [251].

¹² Respondent's Response [74].

¹³ Respondent's Response [97].

¹⁴ Respondent's Response [96].

- 17.1. by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
 - 17.2. 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.
18. The Applicant contends that Progress Claim 11 is a valid Payment Claim in accordance with s 4(a) of the Act, as it is:
 - 18.1. a claim by the Applicant;
 - 18.2. to the Respondent;
 - 18.3. for payment of an ‘amount’; and
 - 18.4. in relation to the Applicant’s performance of its obligations under the contract, being a construction contract.
19. The Applicant cites *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited and UGL Engineering Pty Limited and Neil Kirkpatrick* [2017] NTSC 1 as authority on the issue of the validity of “payment claims”, which it says stands for the principles that:
 - 19.1. an adjudicator has a duty to determine whether there is a “payment dispute” (this triggering the timeframe for making an application);
 - 19.2. for a “payment dispute” to arise there must be a valid “payment claim”;
 - 19.3. the validity of a payment claim is to be determined by reference to the contract – this involves looking at the terms of the contract and considering what purports to be a payment claim is capable of giving rise a liability to pay.

20. The Applicant notes that in *ABB Australia Pty Ltd*, the contract pre-condition to a valid progress claim, was that a security be provided (and it had not), which consequently made the progress claim invalid.
21. The Applicant referred to Justice Kelly remarks in *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor* [2011] NTCA 1 at [149], repeated in *ABB Australia Pty Ltd*:
- “So far as the adjudicator is concerned, in order to determine whether a payment dispute has arisen (and, and if so, when) he is required to determine what is presented to him as a payment claim complies with the requirements of the contract in question (or whether it is payable under the contract even if non-compliant, for example because of the absence of a prescribed notice of dispute.)”
22. The Applicant notes that under the contract there was no deemed rejection of a payment claim that had not been made in accordance with the Contract.¹⁵ The Applicant says that therefore under the implied provision 6 of the Act, when a payment claim is not made in accordance with the contract, the Respondent is obliged to issue a notice of dispute in the required form within 14 days of receipt, if it believed that the payment claim should be rejected.
23. The Applicant says that given that the Respondent has failed to issue a notice of dispute in the required form within 14 days it is obliged to pay the claim.¹⁶
24. The Applicant contends that the claim issued on 3 September 2018 should be seen as either a draft (i.e. not a valid payment claim) or that had been superseded by the revised claim on 13 September 2018.¹⁷
25. The Applicant also submits that the fact that Progress Claim 11 was not issued on 20th of the month does not invalidate the claim.

¹⁵ Submission [50]

¹⁶ Submission [51]

¹⁷ [G] Statutory Declaration [38-39]

26. The Respondent does not dispute the validity of Progress Claim 11.¹⁸ The Respondent says that the implied provision 6 in Division 5 of the Schedule to the Act does not apply because the contract does include written provisions (specifically clause 23.2 of the contract) dealing with responding to a claim and the timing of payment.
27. I accept the Respondent's submission that recourse to implied provision 6 in Division 5 is not permitted by section 20 of the Act in circumstances where the contract has provisions for dealing with responding to a claim and the timing of payment.
28. I also find, noting the Respondent's lack of dispute, that Progress Claim 11 is a valid payment claim in accordance with section 4 of the Act.

(b) Payment Dispute

29. The Applicant says that it has made 13 Progress Claims under the contract:
- 29.1. Progress Claims 1-6, 8 and 9 have been paid;
- 29.2. Progress Claims 7, 10, 11 (the subject of an adjudication application) and 12 have not been paid.
30. The Respondent confirms that it has paid the Progress Claim 9 and has agreed that it will pay Progress Claim 10 on 8 January 2019.¹⁹
31. The Respondent notes that this is the third consecutive adjudication application that has been filed by the Applicant. The earlier adjudication applications related to Payment Claims 9 and 10, which have since been resolved. The Respondent is critical of the Applicant not having made any submissions to

¹⁸ Respondent's Response[77].

¹⁹ Statutory Declaration of [S][123-127] and [224-237]

assist the adjudicator in relation to the impact of these earlier adjudication applications.²⁰

32. The subject of this adjudication is Progress Claim 11 which seeks payment of the sum of \$249,355.80 (ex GST). The claim is for contract work to the value of \$10,079.40 (ex GST) based on progress and work the subject of various Sis, to the value of \$249,355.80, by which the Applicant says it supplied labour and travel on a day works basis.²¹
33. The Applicant says that the payment dispute, the subject of this adjudication, arises due to the Respondent's failure to pay an amount of \$259,774.80 (ex GST) to it. The claim is said to relate to works undertaken under the contract in the period 21 July to 20 August 2018.
34. The Applicant says that Progress Claim 11 (Invoice #10587) was issued to the Respondent:
- 34.1. on 13 September 2018; or alternatively,
 - 34.2. when a first draft was issued on 3 September 2018, or alternatively,
 - 34.3. on the basis that it was deemed to have been received under clause 23.1 of the contract on 20 September 2018.²²
35. The Applicant contends that on 17 September 2018, the Respondent approved \$133,893.00 (ex GST) in respect of certain items claimed in Progress Claim 11 after substantiation was provided.²³ It says that despite the Respondent assessing that \$133,893.00 (ex GST) is payable under Progress Claim 11,²⁴ no payment has yet been made.²⁵

²⁰ Response [13] to [18].

²¹ [G] Statutory Declaration [26-30], Submissions [29].

²² Submissions pp.4-5.

²³ [G] Statutory Declaration [32] and Attachment [9].

²⁴ [G] Statutory Declaration [34] and Attachment [8].

²⁵ Submission [11].

36. The Applicant invites the adjudicator to find that the full amount claimed be awarded for performing the work, the subject of Progress Claim 11, for which it has claimed a reasonable amount pursuant to s 23.2(b) of the contract. As such, the Applicant says it is entitled to the full amount claimed, being \$259,435.21 plus GST (13 September 2018) or alternatively, \$259,774.80 plus GST (3 September 2018).²⁶
37. The Applicant says that the Respondent is deemed liable to pay under clause 23.2(b) of the contract. The Applicant says that it emailed the Respondent the daywork sheets and the amount assessed was based on these daywork sheets.²⁷ The Applicant says that the Respondent counter-signed the dayworks sheets and had access to hard copies of them at site.²⁸
38. The Applicant also says that on 26 September 2018, the Respondent indicated that it was withholding payment of Progress Claim 11 under subclause 24.2 of the contract.²⁹ Subclause 24.2 of the contract grants a right to withhold “*moneys certified due and payable*” until the Applicant has complied with subclause 24.1 of the contract. The Applicant says that this subclause is not relevant as no moneys were certified in respect of Progress Claim 11.³⁰
39. In any event, the Applicant says that on 28 September 2018, it provided a statutory declaration to evidence moneys due and payable to workers and subcontractors, which related to Progress Claim 11.³¹

²⁶ Submission [98]

²⁷ [G] Statutory Declaration [34-37] and Attachment [9]

²⁸ Submission [13]

²⁹ [G] Statutory Declaration [47], Letter dated 26 September 2018 (after payment was due under the Contract).

³⁰ Submission [109-110]

³¹ [G] Statutory Declaration [48]

40. The Respondent's position is that the Applicant is entitled, at most, to payment of \$152,921.31 (ex GST) based on the day-rates which the Applicant claims in relation to the variations.³² the Respondent says that the Applicant is entitled to \$Nil for the work under the contract claim and the \$152,921.31 is made up of the variation claims in Progress Claim 11, based on the rate of \$95 per hour.³³ The Respondent says it is willing to accept liability to this amount for which the Applicant has provided substantiation and which the Respondent has not previously paid the Applicant.³⁴ The Respondent expressly states that there is no dispute in relation the Applicant's entitlement to any of the variations claimed. The Respondent accepts that the SIs amount to directions for a variation under clause 22.1 of the contract.³⁵
41. Section 8 of the Act defines 'payment dispute' as a rejected payment claim or a wholly or partly disputed payment claim, or failure to pay the amount claimed within the period due under the contract, the amount not being paid in full.
42. A 'payment dispute' which meets the section 8 definition has arisen between the parties. In its Adjudication Response, the Respondent accepts that the Applicant is entitled to an amount of \$152,921.31 (ex GST), made up of the variation claims in Progress Claim 11. The amount which the Respondent accepts as payable is less than the amount claimed by the Applicant, which amounts to a section 8(a)(i) claim which has been 'rejected or wholly or partly disputed'.
43. I find that a section 8 'payment dispute' has arisen between the parties.

³² Respondent's Response [126]

³³ Respondent's Response [12].

³⁴ Respondent's Response [10].

³⁵ Statutory Declaration of [S] [131-251].

(c) **Adjudication Application**

44. Section 27 of Act provides that if a ‘payment dispute’ arises under a construction contract, any contracting party may apply for an adjudication determination to have the dispute adjudicated.
45. Section 28 of Act provides that to apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises *inter alia* prepare a written application for adjudication and serve it on each other party to the contract and a prescribed appointer.
46. The Applicant submits that there are various deadlines for applying for adjudication of Progress Claim 11 with the latest date being either 23 December 2018 (if the claim is determined to have been made on 13 September 2018), alternatively, 2 January 2019 (if the claim was made on 3 September 2018) or, alternatively, 8 February 2019 (with a deemed receipt date of 20 September 2018). The Applicant says that it does not matter which date is adopted, its Adjudication Application was brought within time.
47. The Applicant submits that an adjudication application was served on the Respondent personally and by email. The Respondent accepts that the application was properly served, but makes certain allegations at paragraphs 53 - 69 of the Response, which it submits are relevant to the question of costs.
48. The Respondent accepts that Progress Claim 11 was issued on 13 September 2018 for work up to and including 20 August 2018.³⁶ The Respondent also accepts that on any of the Applicant’s alternative arguments, its adjudication application is served well within time.³⁷

³⁶ Respondent’s Response[81].

³⁷ Respondent’s Response[83].

49. The Respondent says that the earliest that the Adjudication Application was due to be filed was 24 December 2018³⁸ and that the Respondent's behaviour in serving the Adjudication Application some 2 weeks early, together with the manner in which it was served, evidences an intention to place maximum pressure on the Respondent during the intervening Christmas period.³⁹ The Respondent's submission does not give rise to a jurisdictional issue, but rather it says that the adjudicator should take these matters into account when determining costs.⁴⁰
50. I am satisfied that the Adjudication Application was properly served within the time required by section 28 of Act.
51. I am further satisfied that the Adjudication Application is properly before me, complies with the requirements of time and form in the Act and I have jurisdiction to determine it.

MERITS OF THE ADJUDICATION APPLICATION

(a) Summary of Parties Positions

52. The Applicant says it has performed the works the subject of Progress Claim 11.⁴¹
53. It says the works were for contract works of \$10,079.40 (ex GST) and variation work valued at \$249,355.80 (ex GST) directed by the Respondent via SIs issued pursuant to clause 22.1 of the Contract.⁴²

³⁸ Respondent's Response [54].

³⁹ Respondent's Response [55].

⁴⁰ Respondent's Response [69].

⁴¹ Submissions [77].

⁴² [G] Statutory Declaration [26-30].

54. The Applicant says it has claimed for the work undertaken at the time of the claim in accordance with the contractual process.⁴³ It submits that the amounts assessed were based on the day-works and that it emailed the day-work sheets to the Respondent at the relevant time. It says that the Respondent countersigned the day-works sheets as well as having had access to hard copies of them at site in any event.⁴⁴
55. The Applicant submits that there was no requirement in the contract for it to provide any particular form of substantiation with its claim. It says that it has provided and included substantiation of the amount claimed in the form of site instructions, day-work sheets and a build-up of the labour rate.⁴⁵
56. The Applicant says that the Adjudicator is not bound to accept the Respondent's assessed amount of \$133,893.00 (ex GST) and can determine the evidentiary weight to be given to it pursuant to section 37 of the Act.
57. The Applicant relies:
- 57.1. on the amended contract sum of \$1,280,355 (ex GST) to support its contract claim of \$10,079.40; and
- 57.2. a rate of \$95 per hour as the rate to be paid for general labour under day-works.
58. The Respondent refers to the Applicant assertion that it had approved \$133,893.00 (excl GST) as being payable in respect of Progress Claim 11⁴⁶ and says the email relied on by the Applicant (an email from [S] to [A]) does not constitute an assessment of what it payable.⁴⁷ The Respondent says that the

⁴³ [G] Statutory Declaration [27].

⁴⁴ [G] Statutory Declaration [40].

⁴⁵ [G] Statutory Declaration [29-30].

⁴⁶ Respondent's Response [98] referring to Submission [81].

⁴⁷ Respondent's Response [99], Statutory declaration of [S] [63] to [75].

email was in fact, merely an interim step, following receipt of the Applicant's draft claim, in order to help the Applicant in providing supporting material. The Applicant says no amounts were certified or stated to be payable, the amounts written beside the claimed amounts were amounts [S] of the Respondent believed the Applicant should be able to substantiate (at the time) but were subject to the Applicant being able to provide substantiation by way of day work sheets.⁴⁸ It is unnecessary for me to resolve this issue one way or the other. As the Applicant correctly points out, even if [S's] email did amount to a certification, I am only required, pursuant to section 37(2)(b) of the Act, to give it the evidentiary weight which I consider appropriate and in the circumstances, where there is a contest between the parties as to the true nature of the assessment, I consider that the assessment is of limited evidentiary weight and I do not consider it probative to the issues which I am required to determine in this application. I therefore disregard the [S's] assessment.

59. I must make my own determination as to whether the Respondent is liable to make any payment to the Applicant and if so, the amount to be paid, pursuant to section 33(1)(b)(i) of the Act.
60. I note the Respondent's further submission that the doctrine of issue estoppel is likely to apply to adjudication under the Act. The authorities referred to by the Respondent are authorities under the 'East Coast Model' of Security of Payments Legislation. Generally, under the 'East Coast Model', adjudicators are bound by the valuations determined by previous adjudicators under the same construction contract. I have not been referred to any Northern Territory or

⁴⁸ Respondent's Response [99], Statutory declaration of [S] [63] to [75].

Western Australian authority which supports the application of the doctrine to adjudications under the ‘West Coast Model’ of Security of Payment Legislation.

61. In any event, it is unnecessary for me to determine whether I am bound to accept the rate of \$95 (as determined by Mr Perkins) as the applicable rate for day-works because both the Applicant and the Respondent agree that the applicable rate is \$95 per hour and I so find.

62. The Respondent says that it has undertaken its own assessment of the Applicant’s variation claim and notes that the Applicant has claimed on day-work sheets, the subject of the previous payment claims, for the following variations:

62.1. SI-48, the Applicant provided three day-work sheets; 387, 387 (repeated) and 408 that were submitted in support of the Applicant’s Progress Claim 9 and 10; and

62.2. SI-49, the Applicant provided four day-work sheets; 520, 524, 247 and 263, which were all submitted in support of the Applicant’ claim for Progress Claim 10.

63. The Respondent says that the Applicant is not entitled to make another claim on these day work sheets, as it would constitute a double recovery.

(b) Conclusion on Merits

64. Progress Claim 11 is comprised of a claim for work under the contract to the value of \$10,079.40 (ex GST) variation works the subject of various SIs, to the value of \$249,355.80.

65. I set out my determination as to each below.

(i) Work under the contract claim

66. I have already determined that the contract sum was \$961,561 and not \$1,280,355 as submitted by the Applicant. This conclusion at least partially undermines the Applicant's claim for work under the contract.
67. However, in addition, I have had regard to the relative lack of substantiation of the work under the contract claim in the Applicant's adjudication application as opposed to the evidentiary support provided by the Respondent for its assessment of the Applicant's claim.
68. I place considerable weight on the assessment of each of the aspects of the claim set out in the [S] Declaration, which I deal with below. I prefer to the evidence of [S] to that of [G] in relation to this aspect of the claim.

A. Supply labour to install 4 ramps including the handrails

69. The Applicant claim \$3,800.00 in respect to this item.
70. The [S] Declaration states in relation to this aspect of the claim that:
- 70.1. the works the subject of this item are in relation to the installation of four prefabricated access ramps.
- 70.2. originally, the Applicant's scope of work under this item required the Applicant to install prefabricated concrete ramps and steel handrails.
- 70.3. however, due to time constraints of not being able to get pre-fabricated ramps to site within the building time frame, a decision was made by the Respondent to change the ramp construction from pre-fabricated ramps to insitu mass poured concrete.
- 70.4. as a result of this change of design and installation, the Respondent advised the Applicant that its entitlement to payment for this change of works would be the subject of a new site instruction SI-41. Effectively,

the work in relation to this item was removed from the work under contract, but instead, reinstated as a new site instruction. The reason why it was removed from work under contract and re-issued as a site instruction is because the Respondent knew that the Applicant would be entitled to more than the work under contract sum for this item.

70.5. further, it was always understood between the Applicant and the Respondent that the Applicant were entitled to payment for this work, but its entitlement to claim the amounts owing were to be under SI-41, this is evident from the fact that the Applicant are claiming for amounts in relation to ramps and stairs in SI-41.

71. It follows from [S's] evidence that because the Applicant have claimed for a variation by way of SI- 41, which is assessed separately, by claiming as work under the contract as opposed to variation works, the Applicant is claiming twice.

72. On this basis, I determine that the Applicant is entitled to \$Nil for this aspect of the claim.

B. Supply of labour to install building skirting

73. The Applicant claims \$6,279.40 in relation to this item.

74. The [S] Declaration states in relation to this aspect of the claim that:

74.1. this item is in relation to work which was originally provided for under the Applicant's scope of work which required the Applicant to install building skirt barriers that prevent access underneath the accommodation buildings.

74.2. there are two types of skirting on this project internal skirting, which is included within the Applicant's scope of work and for which the

Respondent has paid the Applicant for previously and external skirting, which is this the subject of this item.

74.3. In relation to external skirting, this work was removed from the Applicant's scope of work because of complexity, labour and timing and the Respondent engaged [*another contractor*] to carry out this work. The Applicant never performed any work the subject of this item.

74.4. In relation to internal skirting, the Applicant has been paid for this work in full.

75. Based on my preference for the evidence of [S] and on the basis that the evidence of [S] suggests that either this work was either never undertaken by the Applicant or it is work for which the Applicant has already been paid, I determine that the amount which the Applicant is entitled to in relation to this aspect of the claim is \$Nil.

(ii) Variation Claims

76. As noted above, Progress Claim 11 is comprised of a claim for variation works the subject of various SIs, to the value of \$249,355.80.

77. In Progress Claim 11, the Applicant claims for a number of variations arising out of various SIs.

78. The Respondent disputes the Applicant's entitlement to variation works to the value of \$249,355.80 but accepts that the Applicant is entitled to an amount of \$152,921.31 (ex GST), made up of some, but not all of the variation claims in Progress Claim 11.

79. [S] in his Statutory Declaration is highly critical of the Applicant's alleged failures to reconcile their own supporting information and daily work sheets

in the Adjudication Application. [S] has performed his own reconciliation which he attaches to his Statutory Declaration and marks as PS-17. I have attached PS-17 to this adjudication determination and marked it as Attachment A.

80. I have reviewed the contents of PS-17 and [S's] evidence set out in the [S] Declaration. PS-17 (Attachment A) is a breakdown in tabular format detailing, in respect of the variation claims that the Respondent disputes:

80.1. the daily work sheets supplied that substantiate the total value of each of these claims, (as provided by the Applicant in its Adjudication Application);

80.2. daily work sheets relied on by the Applicant which fall outside the relevant claim period of 21 July 2018 to 20 August 2018;

80.3. the total of the hours supported by the daily work sheets provided during the relevant working progress claim period when multiplied by the \$95.00 per hour rate that both the Applicant and the Respondent accept as being applicable to these works; and

80.4. the total amount for each item in the Adjudication Application that the Respondent agrees it is liable to the Applicant.

81. In the body of [S] Declaration, [S] has identified a number of items claimed as variations which either:

81.1. the Applicant has claimed for but which fall outside the payment claim period; or

81.2. the Applicant has claimed for previously in the Second Adjudication.

82. [S] has then provided his assessment of the following variations claimed in Progress Claim 11:

- 82.1. Install Floor Decking to CFC Floors (SI-020)
 - 82.2. Provide Labour & Tools to Complete Construction of Module 1 To CFC Building (SI 022)
 - 82.3. Assembly of Furniture, Skirting and Install Mirrors to the Visitors Accommodation Buildings (SI-024)
 - 82.4. Adjust Door Location in GF-008 (SI-026)
 - 82.5. Installation of Handrails to Building Verandas (SI-027)
 - 82.6. Additional Mob and Demob Costs for SI Work (SI-029)
83. Having reviewed [S's] assessment, taking into account the substantiation provided by the Applicant in the Adjudication Application, I am satisfied that [S's] assessment of the Applicant's entitlement in relation to variation works as being valued in the amount of \$152,921.31 (ex GST) is accurate and fair.
84. I find that the Applicant is entitled to be paid the amount of \$152,921.31 (ex GST) in relation to the variation works aspect of Progress Claim 11.

COSTS

85. Pursuant to section 36(2) of the Act, if an appointed adjudicator is satisfied that 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.
86. The Applicant seeks a determination under s 36(2) of the Act, that the Respondent pay:
- 86.1. the adjudicator's costs of the adjudication in full; and

- 86.2. the Applicant's legal cost of preparing the application of which costs have been incurred at a capped amount of \$7,000.⁴⁹
87. The Applicant contends that that it has incurred the costs of the adjudication due to the Respondent's frivolous or vexatious conduct by stating it was 'entirely unreasonable for the Respondent to put the Claimant in a position whereby it was required to bring this Application'.
88. On the other hand, the Respondent says that the Applicant has not substantiated the claims (either factually or legally). The Respondent submits that 'something far greater is required in order to amount to frivolous or vexatious conduct'. It can only amount to frivolous or vexatious if it is commenced for a collateral purpose or so 'obviously untenable or manifestly groundless as to be utterly hopeless' or commenced with intent to 'annoy or embarrass' a person.
89. The Respondent says there is 'no basis upon which the Adjudicator could find the Respondent's conduct frivolous or vexatious and accordingly no basis upon which the Adjudicator should order the Respondent pay the Adjudicator's costs in full or the Claimant's legal costs'.
90. The Respondent notes that the Applicant's submissions on costs of the adjudication are the same as its submissions in the two previous adjudications and that ultimately there would have been no need for this adjudication application had the Applicant simply provided evidence substantiating its claims at the appropriate time.
91. The general position in relation to costs in adjudications pursuant to the Act, is that the parties must 'bear their own costs' in relation to the adjudication of the dispute pursuant to section 36(1) of the Act. However, under section 36(2) of

⁴⁹ See Invoice at Annexure 3.

the Act, an adjudicator has discretion to make determination on costs against a party, where satisfied that the other party has incurred costs of the adjudication because of ‘... frivolous or vexatious conduct on the part of, or unfounded submissions by ...’ the first mentioned party.

92. Both parties have had mixed success in this adjudication. The Applicant has claimed in excess of what I have determined it is entitled to. On the other hand, the Respondent has advanced a position in its adjudication response which was in excess of the amount that [S] originally assessed as payable.
93. I am not satisfied that the conduct or submissions of either party attracts the attention of section 36(2) of the Act. Each party should pay half of the adjudicator’s fees and should bear their own costs of the adjudication.

DETERMINATION

1. In accordance with section 38(1) of the Act, I determine that the amount to be paid by the respondents to the Applicant is \$152,921.31 (exclusive of GST).
2. The sum of \$152,921.31 (exclusive of GST) is payable within 7 working days of the date of this determination.
3. There is nothing in the conduct or submissions of either party to attract the attention of section 36(2) of the Act.
4. I draw the parties' attention to the slip rule in section 43(2) if I have made a miscalculation or other correctible error.

Dated: 14 January 2019



NICHOLAS FLOREANI
Registered Adjudicator