

Adjudicator's Determination

Pursuant to the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004

Adjudication 18-07-01

(Claimant)

And

(Respondent)

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that the Adjudicated Amount in respect to the Adjudication served 7 March 2007 is \$29,790.61 including GST.
2. The date payable is 24 February 2007 and no interest is due on amounts unpaid after that date.
3. The parties legal and preparation costs are not awarded
4. The Adjudicators costs are to be shared equally by the Claimant and the Respondent.

Appointment of Adjudicator

5. I was appointed as Adjudicator to determine this matter by direction from the Territory Construction Association 12 March 2007.
6. I accepted the adjudication application by discussion with the Territory Construction Association 12 March 2007 and the parties were notified that day.
7. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

Documents Regarded in Making the Determination

8. In making the determination I have had regard to the following.
 - 8.1 The provisions of the *Construction Contracts (Security of Payments) Act 2004*.
 - 8.2 Submission from the Claimant dated 7 March 2007 submitted with the Adjudication Application.
 - 8.3 The Adjudication Response dated 21 March 2007.
 - 8.4 Additional Adjudicator questions dated 26 March 2007.
 - 8.5 Claimant's response to questions dated 28 March 2007
 - 8.6 Respondent's response to questions dated 28 March 2007
 - 8.7 Claimant's comments on Respondent's answers dated 29 March 2007
 - 8.8 Respondent's comments on Claimant's answers to questions dated 29 March 2007.

Documents Set Aside

9. In making the determination I have set aside and not considered the unsolicited witness statement of the Respondent's Foreman submitted by the Claimant 28 March 2007. The submission does not relate to any specific queries directed to the Claimant and as such cannot be considered.
10. My request for further information included an opportunity for each party to respond to each other's submissions. For equity I have also set aside the specific comments and counter statements, provided by the Respondent, which relate to the Claimant's submission of the statement by the Respondent's Foreman.

Legislative Requirements

11. The Act at Section 33 requires that;

- (1) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –*
 - (a) *dismiss the application without making a determination of its merits if –*
 - (i) *the contract concerned is not a construction contract;*
 - (ii) *the application has not been prepared and served in accordance with section 28;*
 - (iii) *an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
 - (iv) *satisfied it is not possible to fairly make a determination –*
 - (A) *because of the complexity of the matter; or*
 - (B) *because the prescribed time or any extension of it is not sufficient for another reason; or*
 - (b) *otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine –*
 - (i) *the amount to be paid, or security to be returned, and any interest payable on it under section 35; and*
 - (ii) *the date on or before which the amount must be paid or the security must be returned.*
- (2) *If the application is not dismissed or determined under subsection (1) within the prescribed time, or any extension of it under section 34(3)(a), the application is taken to be dismissed when the time ends.*
- (3) *In this section – "prescribed time" means –*
 - (a) *if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or*
 - (b) *otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).*

The Adjudication Application

12. The adjudication application consists of the following documents;

- 12.1 Adjudication Application details;
- 12.2 Respondent's letter to Claimant dated 7 February 2007;
- 12.3 Payment Claim – Claimant's invoice No 52 dated 25 January 2007;
- 12.4 Attachments to the application which seek to support and clarify the claims.

Jurisdiction

13. The Act defines a “Construction Contract” at Section 5(1)(a);
 - (1) *A construction contract is a contract (whether or not in writing) under which a person (the "contractor") has one or more of the following obligations*
 - (a) *to carry out construction work;*
14. The Act defines “Construction Work” at Section 6(1)(c) to include;
 - (1) *Construction work is any of the following work on a site in the Territory:*
 - (c) *constructing the whole or a part of any civil works, or a building or structure, that forms or will form (whether permanently or not and whether or not in the Territory), part of land or the seabed (whether above or below it);*
15. The contract is for work on a site in the Northern Territory and is a contract undertaking construction work as defined in Section 6 of the Act. The contract was entered into 16 March 2006, after the commencement date of the Act and is therefore a construction contract according to the Act.
16. I have had no prior association with Claimant and no conflict of interest with that party to declare.
17. I have declared the detail of my prior association on both social and business levels with the Respondent. The parties have acknowledged the advice and my claim of no conflict of interest. The Claimant has advised no wish to contest my eligibility.
18. The Respondent’s letter to the Claimant dated 7 February 2007 is clear evidence of a ‘payment dispute’ between the parties as defined by the Act and is therefore a dispute within the jurisdiction of the Act.

Validity of Application

19. The Claimant has complied with the time requirements nominated in the Act.
 - 19.1 The Claimant lodged a payment claim with the Respondent dated 25 January 2007.
 - 19.2 The Respondent has replied with a claim rejection dated 7 February 2007.
 - 19.3 The Claimant has submitted the application for adjudication to the nominated appointer 7 March 2007 within the required 28 day period of the dispute arising.

- 19.4 The application was properly served on the Respondent and the Prescribed Appointer.
- 19.5 The application sufficiently includes all of the details as required by the Act.
20. The parties have provided no advice of the dispute being “subject of any other order, judgment or other finding”.
21. I determine the Adjudicator has clear jurisdiction to determine the dispute, the Application for Adjudication is valid and the determination must be made within 10 business days of the Respondent’s submission or COB 4 April 2007.

The Payment Claim

22. The payment claim is dated 25 January 2007. The amount claimed is \$52,580.00 inclusive of GST.
23. The details of the claim are:

Variations for work done until 15 January 2007.

1100 hours worked @ \$40 per hour	\$44,000
Material	\$3,840
10% GST	\$4,780
Total	\$52,580

The Claimant’s Supporting Documents

24. The Claimant’s supporting documents are:
- 24.1 Claimant’s letter to Prescribed Appointer dated 7 March 2007 referring the payment dispute to Adjudication.
- 24.2 Claimant’s letter to the Respondent dated 7 March 2007 notifying the dispute with the following attachments.
- 24.2.1 Attachment 1 – Respondent letter dated 7 February 2007
- 24.2.2 Attachment 1A - Bundle of photographs
- 24.2.3 Attachment 2 – Claimant’s quotation dated 20 October 2005
- 24.2.4 Attachment 2A – Minutes of Subcontractor Meeting No 12.
- 24.2.5 Attachment 3 – Site Instruction dated 9 September 2006.
- 24.2.6 Attachment 4 – Respondent Facsimiles dated 6 and 10 July 2006.
- 24.2.7 Attachment 4A – Respondent table of repainting costs.
- 24.2.8 Attachment 5 – Claimant’s Invoice 96
- 24.2.9 Attachment 6 – Claimant’s Invoice 52
- 24.2.10 Attachment 7 – Man hours running sheet
- 24.2.11 Attachment 8 – Claimant’s Invoice 54
- 24.2.12 Attachment 9 – Man-hours running sheet

- 24.2.13 Attachment 10 – Extract of Subcontractor Meeting Minutes
 - 24.2.14 Attachment 10A – Minutes of Subcontractor Meeting No 8
 - 24.2.15 Attachment 11 – Contra Charge list for Cleaning Subcontractor
- 24.3 The Claimant's supplementary submission dated 28 March 2007 in response to queries raised by the Adjudicator.
- 24.4 Statement by Cleaning Subcontractor dated 28 March 2007
- 24.5 Claimant's reply dated 29 March 2007 in response to Respondent's supplementary submission and attachments.

Response to Payment Claim

25. The Respondent vigorously defends its position arguing the claim is generally based on false premises. It is asserted there were serious concerns with the Claimant's performance in terms of both quality and programming throughout the course of the project. The Respondent says it was required to make a substantial ex-gratia payment in order to ensure the claimant remained on site. In the Respondent's view the Claimant has no payment entitlement with the amount owing offset by contra charges.

The Respondent's Supporting Documents

26. The Respondent's supporting documents are:
- 26.1 Respondent's letter to the Adjudicator dated 21 March 2007.
 - 26.2 Large folder of attachments to the 21 March letter which provide detailed responses to each element of the Claimant's submission.
 - 26.3 Signed Subcontract agreement between the Claimant and the Respondent.
 - 26.4 Respondent's supplementary submission dated 28 March 2007 in response to queries raised by the Adjudicator.
 - 26.5 Respondent's reply dated 29 March 2007 in response to the Claimant's supplementary submission.

Validity of the Response

27. The Respondent provided a response 21 March 2007, within 10 business days of receipt of the Claimant's submission.
- 27.1 The Response has been served properly to the Adjudicator and the Claimant.
 - 27.2 The Response includes all the details as required by the Act.
28. I determine the Response to be valid and have considered it in the determination.

Issues to be Determined

29. The initial scope of work relevant to the Claimant's tender price, upon which the Subcontract Agreement was established, is contested by the parties and determination is required on the status of painted balcony drains.
30. Both parties provided submissions concerning instructions and agreements relating to variations. It has to be determined which instructions and agreements constitute legitimate directions and agreements to perform additional work and hence are variations under the contract.
31. Both parties provide submissions concerning instructions and agreements relating to contra charges. It has to be determined which instructions and agreements constitute legitimate directions and agreements to the application of contra charges under the contract.
32. If it is determined that a variation or contra charge is required then the matter of quantum must be determined.
33. The due date for the payment of any legitimate claim is to be determined along with any interest due.
34. Liability for the costs of the adjudication is also to be determined.

Scope of Work under the Contract

35. The initial scope of work under the contract is a matter of consideration pertinent to this adjudication.
36. Schedule 8 of the Contract provides the full listing of relevant drawings. This list includes Drawing A 48 Rev A. The Claimant provided a copy of this drawing to counter the Respondent's assertion that the Claimant would have been aware of the balcony drain because the works were sufficiently advanced when the painting package was tendered. Drawing A 48 Rev A shows no indication of the drain as constructed on the balconies.
37. Schedule 10 Clause 6 of the Contract requires all incidental and sundry works not specifically referred or documented to be included in the scope of work.
38. I therefore determine that:
 - 38.1 The painted balcony drains were not included in the initial scope of work.
 - 38.2 The available uncontested evidence on this question includes the contract drawing schedule and the relevant drawing. No drain is indicated. I cannot accept the Respondent's reliance on Clause 6 as the element for draining a balcony could not be described as incidental or sundry. The drains must have been added

to the scope after the subcontract drawing list was compiled. If the drawing A 48 Rev A was not current at the time of tendering the painting subcontract then that omission is the responsibility of the Respondent. Hence I cannot accept the Respondent's claim that the painter should have been aware of the drain because he had the opportunity to inspect the site and did not need to rely totally upon the drawings to estimate his tender price.

Variations under the Contract

39. Variations in accordance with the contract are a matter of consideration pertinent to this adjudication.
40. Clause 20 of the Project Specific Trade Conditions of Contract states:
 "All notices, applications and requests to be given to the Subcontractor under the Contract shall be given in writing, and the Subcontractor shall not be entitled to rely upon any verbal notice, application or request, notwithstanding any arrangement to the contrary at any time."
41. Clause 10.2 of the contract -
 "The Subcontractor shall not vary the work under the contract except as directed by the Builder's Representative or approved in writing by the Builder's Representative."
 "If the subcontractor considers any direction is a Variation, then unless it is stated by the Builder to be a Variation, the Subcontractor shall notify the Builder's Representative within 3 days of the direction that the Subcontractor considers the direction to be a variation and in any event prior to commencing the work the Subcontractor considers to be a variation."
 "Notwithstanding any other clause of this subcontract, if the Subcontractor fails to notify the Builder strictly in accordance with this clause 10.2 then the Subcontractor shall be forever barred any claim arising out of or in connection with the direction."
42. From the submissions of both parties there is agreement to:
- | | | |
|------|---|-----------|
| 42.1 | Variation No 1 – Additional costs texture and repairs | \$150,000 |
| 42.2 | Variation No 2 – Repaint drummy walls | \$42,000 |
| 42.3 | Variation No 3 – Texture precast fence | \$1,000 |
43. The Respondent's letter dated 7 February 2007 has a table of Variations attached which is dated 6 February 2007. In addition to the three variations above this table also lists:
- | | | |
|------|---------------------------------------|---------|
| 43.1 | Variation No 4 – Repaint display unit | \$2,100 |
| 43.2 | Variation No 5 – Repaint 4 units | \$4,000 |

43.3	Variation No 6 – Repaint lift foyers	\$3,240
43.4	Variation No 7 – Repaint unit defects	\$1,240
43.5	Variation No 8 – Repaint 17 doors eased	\$1,500

44. I determine therefore that:

44.1 The Variations listed numbers 1 to 3 in the Respondents Variation list dated 6 February 2007 are Variations under the terms of the contract as both parties agree on these matters.

44.2 The Variations listed numbers 4 to 8 in the Respondents Variation list dated 6 February 2007 are Variations under the terms of the contract.

44.3 The Respondent's 6 February listing is apparently the first notification to the Claimant of these variations. Since the Claimant has not raised any specific objection in accordance with clause 10.2 then the items are taken to be agreed.

45. The Claimant presents two separate amounts (items 5 and 6 in the submission) as variation claims for hours signed off by site foremen in December and January. The total value of these invoices is \$61,070. The Claimant alleges the amounts cover additional work conducted at the request of the Respondent. The Respondent is adamant that the work was either the subject to variations already agreed or rectification of defects at the Claimant's expense.

46. I determine therefore that:

46.1 The Claimants claim is invalid under the terms of the contract and the amounts claimed do not constitute variations under the contract.

46.2 The Claimant has failed to produce any written direction from the Respondent that would satisfy the requirements of clause 10.2. There is no evidence of any written queries prepared by the Claimant seeking direction from the Respondent prior to execution of the work. I am satisfied that the Claimant's failure to adhere to these notification requirements effectively bars the Claimant from pursuing these claims as variations under the contract.

47. The Claimant seeks a variation for the painting of the gutters on the balconies of each of the units. I have determined above that these gutters are not included in the tendered scope of work. It appears however that painting of these gutters began very early in the contract when the sample units were painted. The wording on Site Instruction 58 dated 9 September 2006 for Variation No 1 valued at \$150,000 states "This instruction is for all works considered to be a variation to date and includes but is not limited to; Balcony work ... Any other painting work".

48. I determine therefore that:

48.1 The Claimant's claim is invalid under the terms of the contract and the amount claimed does not constitute a variation under the contract.

48.2 The Claimant has stated there was a verbal agreement made by the parties with respect to gutter painting and offsetting contra charges. The Respondent denies this claim. The Claimant has not separately elsewhere notified the Respondent of his position that the painting of the drains is a variation. I am satisfied that the claimant's failure to notify as per clause 10.2 effectively bars the Claimant from pursuing this claim as a variation under the contract. It could also be argued that the rider on Variation Order No 1 "for all works considered to be a variation to date" is sufficient to cover any variation claim to paint the gutters.

Contra Charges under the Contract

49. Contra charges in accordance with the contract are a matter of consideration pertinent to this adjudication.

50. As indicated in paragraph 39 above the contract requires all instructions to be in writing.

51. Clause 10.10 of the contract states;
"The Subcontractor shall keep the site and the works and equipment and vehicles clean and tidy." and;
"Notwithstanding the provisions of Clause 18, if the Subcontractor fails to comply with any obligation imposed on the Subcontractor by this clause 10.10, the Builder's Representative may, after the Builder's Representative has given reasonable notice in writing to the Subcontractor, have the work of cleaning and tidying up carried out by other persons and the reasonable cost incurred by the Builder in having the work so carried out may be recovered by the Builder as debt due from the Subcontractor to the builder."

52. Clause 10.42 of the contract states;
"If the Subcontractor fails to make good damage in accordance with the Builder's Representative's direction, the builder may rectify such damage or employ another party to rectify the damage and the builder shall be entitled to recover such cost of rectification from the Subcontractor as a debt due to the Builder."

53. Clause 15 Schedule 9 Trade conditions of contract state;
"Any damage to existing surfaces resulting from the Subcontractors work or workmen shall be made good by the Subcontractor. In the case of failure to comply with a written instruction to do so. The damage may be repaired by the Builder at the expense of the Subcontractor."

54. The Respondent's submission dated 21 March 200y includes the following list of contra charges:
- 54.1 Item 1 – Replace harness covered in paint and blast and repaint boom basket (8 August 2006) \$515.00
 - 54.2 Item 2 - Remove paint from boom lift basket (2 June 2006) \$250.00
 - 54.3 Item 3 - Replace light and ignition on lighting tower (31 May 2006) \$1,430.00
 - 54.4 Item 4 - Re-clean carpet in lift foyers (21 December 2006) \$2,240.00
 - 54.5 Item 5 - Re-clean paint from balconies (13 December 2006) \$1,330.00
 - 54.6 Item 6 – Re-clean excessive paint from balcony unit (14 December 2006) \$1,000.00
 - 54.7 Item 7 – Additional cleaning of carpet in lift foyers (5 February 2007) \$1,600.00
 - 54.8 Item 8 – Additional cleaning of paint from all surfaces (est. 1-11 November 2006) \$3,391.50
 - 54.9 Item 9 – Additional cleaning of paint from all surfaces (est. 28 October to 8 November 2006) \$8,250.75
 - 54.10 Item 10 – Quote to replace carpet in lift foyer (27 February 2007) \$3,820.00
 - 54.11 Item 11 – Replacement of glass to 4 units (7 December 2006) \$7,330.87
 - 54.12 Item 12 – Remove paint form handrails in one unit (date unclear) \$71.25
55. I determine therefore that;
- 55.1 Contra charge items listed numbers 1 to 3 in the Respondent's contra charge list are not valid contra charges under the terms of the contract.

- 55.2 The Respondent has produced detailed invoices of supplier charges for rectification of alleged damage however there is no evidence of prior written notification to the Claimant as required by the contract. The delay between incurring the costs and notifying the subcontractor is substantial. I am satisfied that the Respondent's failure to comply with written notification in accordance with the provisions of the contract is sufficient to relieve the Claimant from liability for the charges.
- 55.3 Contra charge items listed numbers 4 to 9 in the Respondents contra charge list are not valid contra charges under the terms of the contract.
- 55.4 The Respondent's submission to support all of the contra charges takes up a total of 31 pages. There is extensive provision of cost and invoice records. There are instructions to third parties to proceed with cleaning and rectification work. There is no record of any directions issued to the Claimant to rectify any specific matters. Elsewhere in the Respondent's documents there are occasional general references to poor site cleanliness and a need to improve performance in that regard. The Respondent claims it was regularly instructing the Claimant to keep the site clean and use protective sheets as needed. I am not satisfied that occasional written general comment on site cleanliness can be construed as fulfilling the particular requirements of the contract to specifically direct rectification. I am satisfied that the failure to specifically so direct is sufficient to relieve the Claimant from the liability for the charges.
- 55.5 Contra Charge item number 10 in the Respondent's contra charge list is a valid contra charge under the terms of the contract.
- 55.6 In his submission the claimant acknowledges his attempts to rectify and does not contest the assertion his painters caused the damage. I am satisfied the Respondent's letter of 7 February 2007 constitutes written notification of the intent to rectify at the Claimant's cost as required by the contract.
- 55.7 Contra charge item number 11 in the Respondent's contra charge list is not a valid contra charge under the terms of the contract.
- 55.8 The Respondent has produced invoices and quotes to justify the costs however there is again no written direction from the Respondent to the Claimant to rectify. In addition the Claimant has submitted a document which shows that another subcontractor is being contra charged by the Respondent for the same rectification work in the same units. The Respondent did not comment on this apparent dual claim in his submission. At the very least this creates the impression the Respondent is in fact uncertain as to which party caused the damage. Despite the Respondent's claims that the Claimant was observed cleaning the glass with metal scrapers there are no written directions. I am satisfied the Respondent's failure to provide written direction is sufficient to

relieve the Claimant from liability for the charges.

55.9 Contra charge item number 12 in the Respondent's contra charge list is not a valid contra charge under the terms of the contract.

55.10 As with the majority of the other items the Respondent has failed to produce any written direction to the Claimant to rectify. I am satisfied this failure is sufficient to relieve the Claimant from any liability for the charges.

Determination of Quantum

56. From the determinations at paragraph 44 the Respondent's list dated 6 February 2007 are variations under the contract. The Claimant has not disputed any of the figures presented which total \$205,080.00.
57. I therefore determine that the revised contract value as at 6 February 2007 is the value as let plus agreed variations or; $\$603,650.00 + \$205,080.00 = \$808,730.00$
58. From the determination at paragraph 55.5 replacement of the carpet in one of the lift foyers is the sole legitimate contra charge. The Claimant has not disputed the costs present by the Respondent.
59. I therefore determine that the total value of legitimate contra charges on the contract is \$3,820.00
60. The Recipient Created Tax Invoice for Progress Payment certificate No 13 can be represented as follows:

Original Subcontract Value	\$603,650.00
Variations	\$192,000.00
Revised Subcontract Value	<u>\$795,650.00</u>
Gross Value Certified	\$685,669.78
Less Retention	\$28,060.40
Net Value Certified	\$757,609.38
Less Previous Certified	\$745,887.28
Certified this payment	\$11,722.10
Less contra charges	\$0.00
Add GST 10%	<u>\$1,172.21</u>
This Payment	\$12,894.31

61. The Respondent has advised Practical Completion on the Head Contract was achieved 15 January 2007. This implies Practical Completion on the Painting Subcontract was achieved on the same date and any work proceeding beyond that date is rectification of minor defects and omissions. Hence after 15 January 2007 the Gross Certified Value of the Subcontract must equal the Revised Subcontract Value.

62. From the determinations made above and acknowledging that PPC 13 is signed as approved on 9 February 2007, I further determine that PPC 13 should have been certified as follows;

Original Subcontract Value	\$603,650.00
Variations	\$205,080.00
Revised Subcontract Value	<u>\$808,730.00</u>
Gross Value Certified	\$808,730.00
Less Retention (2.5% after CPC)	\$20,218.25
Net Value Certified	\$788,511.75
Less Previous Certified	\$745,887.28
Certified this payment	\$42,624.47
Less contra charges	\$3,820.00
Add GST 10%	<u>\$3,880.45</u>
This Payment	\$42,684.92

63. I determine the therefore that;

63.1 The claimant is entitled to be paid the difference between the Respondents PPC 13 valuation and the adjusted valuation at paragraph 62 above. That entitlement is \$29,790.61 GST inclusive or \$27,082.37 exclusive of GST.

Payment Due Date and Interest

64. The Respondent in his various submissions advises that payment terms on the contract are 30 days. The claim relates to the dispute arising from the Claimant's Invoice No 52 dated 25 January 2007.
65. I determine therefore that the due date for payment is 24 February 2007.
66. The Act at Clause 35 requires that payment of interest on overdue payments must be made in accordance with the contract.
67. Clause 14.4A of the conditions of contract states;
"No interest is payable on any payment that is not made at the time required by the subcontract"
68. I determine therefore that the Claimant has no entitlement to any interest payment for the Respondent's failure to pay the amount now determined as due for payment on 24 February 2007.

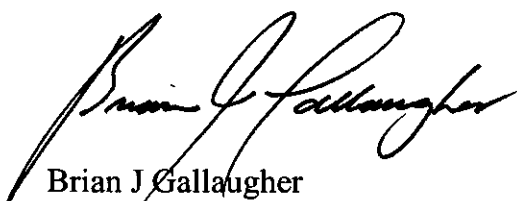
Costs

69. The Claimant's submission notifies the Respondent of the intent to pursue legal costs.

70. The Respondent seeks costs from the Claimant in the amount of \$8,475.00
71. Clause 36 (1) of the Act requires the parties to bear their own costs.
72. Clause 36 (2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.
73. I therefore determine that;
- 73.1 The parties legal and preparation costs are not awarded and are to be borne by the Parties.
- 73.2 The Adjudicators costs are to be shared equally by the parties.
- 73.3 I am satisfied that the conduct of the parties has not been frivolous or vexatious. Each submission had some merit and hence the submissions were not unfounded.

Conclusion

74. As instructed I have proceeded with the adjudication and concluded as follows:
- 74.1 For the reasons set out in the adjudication, I determine the Adjudicated Amount is \$29,790.61 including GST.
- 74.2 The date payable is 24 February 2007 and no interest is due on amounts unpaid after that date.
- 74.3 The parties legal and preparation costs are not awarded.
- 74.4 The Adjudicators costs are to be shared equally by the Claimant and the Respondent.



Brian J Gallagher
NT Registered Adjudicator No 18.
4 April 2007