

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

BETWEEN:

Applicant

and

Respondent

REASONS FOR DECISION

1. On 12 October 2015 the Applicant served its Application dated 12 October 2015 on the Master Builders Northern Territory (“MBNT”) as prescribed appointer under the Act. The Respondent has confirmed it was also served a copy of the Application on 12 October 2015. By letter from MBNT dated 12 October 2015, I was appointed Adjudicator to determine the payment dispute between the parties and I collected the Application from MBNT’s offices on 13 October 2015.
2. On 15 October 2015 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment. In that letter, I also advised that, having read the Application, there were some issues on which I would seek further submissions from the parties.
3. On 22 October 2015 I received the Response by hand.
4. On 24 October 2015 I wrote to the parties requesting further submissions in relation to several issues as follows:

"Dear Mr Collins and Mr Maher,

I was served with the Response on 22 October 2015. Mr Collins would you kindly advise the date your client, the Applicant, was served with the Response.

As I previously indicated in my letter of 15 October 2015, and after attending to both the Application and the Response, there are several points on which I require further submissions from the parties under section 34(2)(a) of the Act.

Mr Collins for the Applicant

Would you please provide copies of all Progress Claims made to the Respondent contemporaneous with the Works, the payment date of each claim and any remittance advice notices for the payments.

The Respondent has raised two new matters not previously raised with the Applicant and I seek submissions in relation to these matters. Please ensure the submissions are strictly limited to these new matters:

- 1. There is no express assignment provision in the Contract, however the Respondent has raised an issue with respect to assignment and the use of a subcontractor in the Works; and*
- 2. A counterclaim for omission of Works from the Contract, namely bulkheads, has been made. Please provide your submissions in relation to this matter.*

Mr Maher for the Respondent

Would you please provide copies of all Progress Claim Schedules provided to the Applicant contemporaneous with the Works and any Statutory Declaration requests made under clause 13.1(c) of the Contract.

In relation to the ceiling access panels, the Applicant submits that the take-out price is \$100.00 per panel. The Respondent initially submitted a take-out price of \$190.00 per panel and then reduced that price to \$164.00 per panel.

Would both the Applicant and the Respondent provide further submissions on these panels together with any supporting evidence, preferably third party supplier evidence, upon which each seeks to rely to arrive at their respective positions.

I seek these submissions to ensure there is no denial of natural justice and each party has had every opportunity to provide further submissions on each of these matters and do so in line with the decision of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 at 42.

*I require the further submissions by **3:00pm CST on 28 October 2015.***

Thank you for your assistance....."

5. On 27 October 2015, and in time, I received submissions from the Respondent in relation to my questions, however the Applicant was not copied on the email sent to me by the Respondent. I confirmed receipt of the Respondent's submissions and requested they also copy the Applicant on any correspondence sent to me.

6. On 28 October 2015 the Applicant acknowledged the email I had sent to the Respondent and confirmed that the Response was served on the Applicant on 22 October 2015. Later that same day, 28 October 2015, the Applicant sought a short 2½ hour extension of time to make their further submissions due to medical issues. I granted additional time to both parties until 7:00pm CST 28 October 2015 to make their further submissions.
7. On 28 October 2015, and within the additional time granted, I received submissions from both the Applicant and the Respondent in relation to my questions.

Introduction

8. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to undertake building works comprising of suspended ceilings, insulated bulkheads and insulated and sound proof walls, access panels in the rooms, door frames and general plasterboard installation to [*property details redacted*] at the Respondent's site at [*site details redacted*] ("Contract").
9. The Applicant claims it is entitled to be paid its payment claim of \$76,948.30 (Including GST) for the Variations it had undertaken in the Contract, plus interest owing on that sum as provided by the implied provisions of Act.
10. The Respondent claims that the Payment Claim is not valid therefore no payment dispute may arise under the Act and the Application should therefore be dismissed.
11. In the alternative, and if the payment claim is found to be valid, the Respondent says that the Applicant is entitled to a reasonable sum of payment for its variations, however the Respondent claims that its counterclaims for omitted work under the Contract, when deducted from the Applicant's variation claim, shows a balance in favour of the Respondent and therefore nothing is payable to the Applicant.

12. The Respondent also reserves its rights to claim from the Applicant the remaining sum of its counterclaims.
13. The Respondent has not sought interest on the remaining counterclaim component of its claim.
14. Neither party has sought that an award of costs be made by the Adjudicator under s.36 of the Act.

Procedural Background

The Application

15. The Application is dated 12 October 2015 and comprises a general submission and 6 attachments. The attachments include the following:
 - (a) a copy of the undated quotation for the work under the contract;
 - (b) a copy of the letter of acceptance;
 - (c) a copy of the Applicant's payment claim;
 - (d) a notice of claim assessment by the Respondent; and
 - (e) a statutory declaration by [*the Applicant*] and three attachments.
16. The Applicant submitted the payment claim to the Respondent on 14 June 2015 in the sum of \$76,948.30 (including GST). The Respondent assessed the payment claim on 6 July 2015 as follows:
 - (a) part acceptance of the payment claim at \$22,766.00 (excluding GST);
 - (b) reduced payment of four items at \$19,565.30 (excluding GST);
 - (c) dispute of the remaining three items with no payment; and
 - (d) back-charge of \$12,540.00 (excluding GST) for omitting 66 access panels not installed into the Units.
17. The Respondent's assessment totalled \$32,770.43 (including GST).
18. The Application was served on 22 October 2015 and the Respondent has confirmed it was served with the Application on that date.

The Response

19. The Response is dated 22 October 2015 and comprises a general submission and 3 attachments. The attachments are:
 - (a) a schedule of variations from the Applicant's subcontractor, [*name redacted*], titled "[*redacted*] 1";
 - (b) a cost breakdown of the labour costs associated with the bulkhead and nib wall works to each level of the Project, titled "[*redacted*] 2"; and
 - (c) a series of drawings in the ceiling plan showing the location of the bulkhead for each level of the Project, titled "[*redacted*] 3".
20. The Response was served on 22 October 2015 and the Respondent has confirmed that it was served with the Response on that date.

Adjudicator's Jurisdiction and the Act

21. The following sections of the Act apply to the contract for the purposes of the Adjudicator's jurisdiction.
22. Section 4 of the Act – **Site in the Territory** – the site is a site located at [*address redacted*], Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.
23. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the contract documents at Attachment **Tab 1** of the Application. I am satisfied that the Contract is a construction contract for the purposes of the Act and the parties agree that they have entered into a construction contract.

24. Section 6 of the Act – **Construction Work** – the work is to undertake building works comprising of suspended ceilings, insulated bulkheads and insulated and sound proof walls, access panels in the rooms, door frames and general plasterboard installation [*building and site details redacted*] and s.6(1)(c) specifically provides for this type of building work. I am satisfied that the work is construction work for the purposes of the Act.
25. 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.”*
26. The Applicant served a claim by email on 16 June 2015 in the sum of \$76,948.30 (including GST). The Applicant submits that this claim was a payment claim correctly made under clause 13.1(b) “*Payment*”, of the Contract.
27. The Respondent assessed the payment claim on 6 July 2015, presumably under clause 13.1(c) “*Payment*”, of the Contract accepting some parts of the claim either in whole or in part and rejecting other parts of the claim. The Respondent also back-charged the Applicant for the omission of 66 ceiling access panels that were not installed into [*the building*]. Overall, the Respondent assessed the payment claim at a reduced sum of \$32,770.43 (including GST).
28. In its Response, however, the Respondent now says that the claim was invalid as it did not comply with the stipulations of clause 13.1(b) of the Contract in that it did not include the following requirements of that clause:

- “...*(i) the amount of the Lump Sum and other costs or amounts the Head Contractor [in the Contract, the Respondent] has agreed or determined are payable to the Subcontractor under the Subcontract;*
- (ii) details of the part of the Subcontract Works carried out in the period to which the payment claim relates;*
- (iii) the amount claimed by the Subcontractor for that part of the Subcontract Works completed;*
- (iv) any amounts previously paid; and*
- (v) the total claimed....”*

29. The Respondent argues that while the payment claim “...*contains some details of the part of the Subcontract Works to which the claim relates, the details are sparse and in the case of item 16.....completely unenlightening...*”. The Respondent also contends that while it responded to the payment claim on 6 July 2015, that is the Respondent’s assessment at the reduced claim sum of \$32,770.43 (including GST), that response cannot and does not validate an invalid payment claim.

30. I am not with the Respondent on these points. The payment claim is wholly for variational work carried out by the Applicant under the Contract and over and above that of the Contract Lump Sum. The **Attachment** [redacted] 2, to the Statutory Declaration of [name redacted] for the Applicant, shows an email of 7 April 2015 from the Respondent that states:

“...I have just confirmed with my director and he has advised me that all variation amounts will be paid once all the work has been completed onsite. This is standard practice with [the Respondent]....”

31. The Respondent's email response was in regard to some agitation from the Applicant on 2 April 2015 requesting payment for the variational work it had done in the Contract. Based on the Respondent's assessment of the payment claim, some two months later on 6 July 2015, the Respondent fully understood precisely what it was assessing and for what variational work the Applicant had done in the Contract.
32. The Respondent's comments were clear and unambiguous and where a variation claim was challenged and reduced in the assessment an alternative amount was advanced as the revised payment of that particular variation. Further, the detailed commentary relating to the omitted work relating to the 66 access panels not installed [redacted] was such that it could not be said that the Respondent did not fully understand precisely what was being claimed by the Applicant and being back-charged by the Respondent under the Contract.
33. **Both the Applicant and the Respondent argue that, in the alternative, the implied provisions of the Act in relation to the making of the payment claim apply. Section 4 of the Act is precise on this point in that a payment claim, in short, means by the contractor to the principal. The provisions of clause 13 "Payment" of the Contract are very clear in relation to making and responding to a payment claim for work done under the Contract. This issue was considered by Kelly J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor* [2011] NTCA 1 at [111] to [115] where Her Honour said:
- "[111] First, counsel for the respondent relied on the decision of Southwood J in Transcon as the basis for a submission that the adjudicator ought to have found that the 13 earlier invoices were valid payment claims, and that the payment dispute had therefore arisen more than 90 days before the application was lodged. This submission was based on par [66] and par [67] of Transcon in which Southwood J said:*

[66] It was the intention of the legislature that a valid payment claim must be of adequate particularity to enable a principal or head contractor to know the ambit of any potential application for a determination by an adjudicator under the Act if the claim is unpaid or disputed. To do so, a payment claim must contain sufficient detail to put the principal or head contractor on notice of the precise amount claimed and it must sufficiently identify the obligations said to have been performed under the contract to which the amount claimed relates. If a payment claim does not contain such detail the principal or head contractor cannot determine if the progress claim should be paid, part paid or disputed. It was the intention of the legislature that a principal or head contractor must be given a fair opportunity to determine whether to pay, part pay or dispute a payment claim.

[67] In my opinion the essential requirements of a valid payment claim are as follows:

- 1. The payment claim must be made pursuant to a construction contract and not some other contract;*
- 2. The payment claim must be in writing;*
- 3. The payment claim must be a bona fide claim and not a fraudulent claim;*
- 4. The payment claim must state the amount claimed;*
- 5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.*

[112] Counsel for the respondent submitted that the effect of this was that the adjudicator was faced with a two stage process. First he must ascertain whether what was produced to him as a payment claim fulfilled the criteria set out in Transcon. If so, the adjudicator was obliged to accept it as such and to embark upon a consideration of the application. It was only at the stage of considering the application on its merits that the adjudicator would turn to the contract to see if the purported payment claim complied with the requirements of the contract for a payment claim⁹⁵.

Footnote 95 Even if this were correct, it would not have assisted the respondent, as it was the summary invoice, not the 13 invoices in question, which was presented to the adjudicator for adjudication.

[113] There is nothing in the Act which gives support to that submission, or to the notion that the adjudicator should engage in a two stage process of that kind. The Act is quite clear. The question which the adjudicator must address is whether the application was made within 90 days of a payment dispute arising (s 28). To determine when a payment dispute arises, the adjudicator must look at when the amount claimed was due under the contract (s 8).

[114] The above submission takes the remarks of Southwood J in Transcon out of context. Those remarks were made in the course of rejecting a submission that for there to be a valid determination by an adjudicator, there must in fact have been a valid payment claim under the contract – ie. a submission that for the adjudicator to have jurisdiction, he must have got that question right. Southwood J rightly rejected that submission, and in par [66] and par [67], he was attempting to delineate an area beyond which an adjudicator would be failing to observe an essential pre-condition for the exercise of his power if he accepted something as a payment claim⁹⁶.

Footnote 96 This submission highlights the necessity of not confusing the question of what the adjudicator is obliged to do [which is fairly clearly set out in the Act] and the very different question of what kinds of error by an adjudicator will render a purported determination by an adjudicator a nullity, susceptible to review by the court.

[115] Those “requirements” would in any case be subject to the provisions of the actual contract between the parties, since s 8 of the Act provides that a payment dispute arises “when the amount claimed in a payment claim is due to be paid under the contract [and] the amount has not been paid in full or the claim has been rejected or wholly or partly disputed”; and a “payment claim” is defined (relevantly) as a claim made under a construction contract 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: s 4 of the Act.

34. The implied provisions in the making of a payment claim under s.19 of the Act and responding to a payment claim and time for payment under s.20 of the Act do not bite, as the Contract under clause 13 holds precise mechanisms for the making of and responding to payment claims.
35. The Applicant's payment claim for the variational work it had carried out in the Contract complies with clause 13(b) of the Contract. I am satisfied that the payment claim made by the Applicant was a valid payment claim made under the Contract. I am also satisfied that the Applicant's payment claim is a valid payment claim for the purposes of s.4 of the Act.
36. 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 partially 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.”*
37. The Applicant submits it made a valid Payment Claim on 16 June 2015 under clause 13(b) of the Contract. The Applicant submits that on 6 July 2015 the Respondent issued a Payment Statement under clause 13(c) of the Contract setting out:
- a. The Payment Claim to which it related;
 - b. The amount the Respondent the Applicant in relation to the Payment Claim; and
 - c. The reasons as to why the payment amount in the statement was less than the amount claimed.

38. The Applicant also submits that the Respondent was to pay the amount set out in the Payment Statement on or before 21 July 2015 and in accordance with clause 13(d) of the Contract and, as the Respondent did not pay that amount on or before the due date, a Payment Dispute for the purposes of the Act arose on 21 July 2015.
39. The Respondent submits that no valid Payment Claim has ever been made and hence no Payment Dispute has arisen. I have already dealt with the validity of the Payment Claim in paragraphs 25 to 35, above which requires no further explanation other than to say that the claim made by the Applicant is a valid Payment Claim made under the Contract and therefore valid for the purposes of the Act.
40. I am also not with the Applicant as to the commencement of the Payment Dispute for the purposes of s.8 of the Act.
41. The Payment Claim was lodged by the Applicant on 16 June 2015. The Respondent has confirmed that they received the claim by email on that date. The Respondent did not approve the claim in total and rejected several items on the claim. It could be said that a Payment Dispute commenced at the point of issue of the Payment Statement, however this could not be correct in the events of the meeting held on 8 July 2015 where the parties discussed and agreed on the reduced payment value of the Payment Claim and Payment Statement. A payment claim and payment certificate is not an uncommon process in a construction contract and is adopted to ensure an invoiced payment amount is accurate. This avoids the raising of credit notes for pre-invoiced claims where prior approval has not been given or agreement reached as to the amount of payment due under a contract. The payment claims put forward in the project by the Applicant, from the further submissions of the parties, shows an invoicing process based on a spreadsheet that establishes the quantum of agreed progress on the works. This also is not an uncommon process in a construction contract to establish accurate invoicing and payment between the parties to the contract.

42. In this matter the Payment Claim and Payment Statement were further assessed and revised by agreement between the parties such that a reduced amount of claim and statement had been agreed and approved at \$52,304.23 (including GST). The evidence provided by [the Applicant] confirms this and the Applicant subsequently invoiced the revised and agreed amount on 20 July 2015 by Tax Invoice No 337, dated 14 July 2015 (“Invoice 337”). The Respondent then emailed the Applicant on 21 July 2015 saying:

“...[name redacted] has been in contact with your contractors regarding the extra work and has been given information by them as to what you have charged [the Respondent] for and regarded as extras in the invoice you have issued. In relation to this, [name redacted] will require to review all information as mentioned above and upon his return he will be in contact with you to discuss in further detail...”.

It is unclear from this correspondence whether the Respondent is now disputing the agreed and reduced invoiced amount or whether there are issues of further and better particulars necessary to support Invoice 337 for the making of payment.

43. The date for payment of Invoice 337 when calculated is 3 August 2015, as required by clause 13(d) of the Contract. Invoice 337 was to be paid on or before 3 August 2015 and when payment was not made on or before that date, a Payment Dispute then arose on 4 August 2015, under s.8(a)(ii) of the Act. I am satisfied that there is a Payment Dispute for the purposes of the Act in which the Applicant has applied for an adjudication of the dispute under section 28 of the Act.
44. Section 28 of the Act – **Applying for Adjudication** – By reference to the Applicant’s documents of the Application dated 12 October 2015 served on MBNT under s.28(1)(c)(iii) of the Act on the same date, 12 October 2015.
45. Section 28(2) of the Act states:

“(2) The application must:

- (a) *be prepared in accordance with, and contain the information prescribed by, the Regulations;*
- (b) *state the details of or have attached to it:*
 - (i) *the construction contract involved or relevant extracts of it; and*
 - (ii) *any payment claim that has given rise to the payment dispute; and*
- (c) *state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.”*

46. Turning to the Application, it has been prepared in accordance with the s.28(2) requirements and contains the relevant information prescribed by Regulation 6.

47. I am satisfied that the Application was prepared and served on 12 October 2015 and within the prescribed time of 90 days after the dispute arose, under s.28(1) of the Act.

48. 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 the Regulations.

49. Section 29 of the Act – **Responding to Application for Adjudication** - By reference to the Respondent’s documents of the Response dated 22 October 2015, served on the Applicant under s.29(1)(a) and the Adjudicator under s.29(1)(b) of the Act on the same date, 22 October 2015.

50. Section 29(2) of the Act states:

“(2) The response must:

- (a) *be prepared in accordance with, and contain the information prescribed by, the Regulations; and*
- (b) *state the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and*

(c) *state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.*"

51. Turning to the Response, it has been prepared in accordance with the s.29(2) requirements and contains the relevant information prescribed by Regulation 7.
52. I am satisfied that the Response was prepared and served on 22 October 2015 and within the prescribed time of 10 working days, under s.29(1) of the Act, after being served with the Application for Adjudication.
53. I am satisfied that the Response is a valid Response for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and the Regulations.

Merits of the Claims

54. The claims made by the Applicant are as follows:
 - (a) A claim for 18 variations to the works in the Contract in the sum of \$69,953.00 (excluding GST);
 - (b) Interest owing on the sum of \$69,688.30 (including GST) under the implied provisions of the Act at the rate prescribed by s.85 of the *Supreme Court Act* from 20 July 2015 to the date of determination; and
 - (c) **The Applicant has also omitted works comprising 66 access panels not fitted to the Units in the complex in the sum of \$6,600.00 (excluding GST).
55. The counterclaims made by the Respondent are:
 - (a) A reduction of the 18 claimed variations to the sum of \$35,927.11 (excluding GST);
 - (b) Omitted works comprising 66 access panels not fitted to the Units in the complex in the sum of \$10,824.00 (excluding GST); and

(c) Omitted works comprising 1141 lineal metres of plasterboard bulkheads removed from the scope of work in the sum of \$91,280.00 (excluding GST).

56. The Respondent submits there is nothing to pay the Applicant and reserves its rights to claim the excess from the counterclaim from the Applicant.

Assignment under the contract and the risk held by the parties

57. Before I deal with each claim, the Respondent has argued that the Applicant assigned the work under the contract without the Respondent's approval and therefore the Respondent is entitled to have the work done at the invoiced price of the Applicant's subcontractor.

58. I do not agree with the Respondent on this issue. The Respondent's contract document holds no express assignment provisions and this provision may not be implied into the Contract as it may exclude specialised subcontractors used by the Applicant when fulfilling their obligations under the Contract. The Contract also holds no express provision requiring authorisation of subcontractors that may be engaged by the Applicant to undertake some of the work in the Contract.

59. Reading the Contract as a whole clearly shows that the Applicant is contracted to complete their obligations under the Contract and therefore holds the risk in the Contract to complete the work under the Contract.

60. At clause 13.2(b) "*Payment to Workers and Sub subcontractors*", the Applicant must provide a statutory declaration with each Payment Claim if required by the Respondent that: "...*all sub subcontractors have been paid all monies due and payable to them in respect of the Subcontract Works...*". This provision shows a general intent in the Contract to allow for subcontractors to be engaged and used by the Applicant when fulfilling their obligations under the Contract and the risk of those subcontractors lies with the Applicant.
61. The Respondent cannot ask the Applicant to hold the risk in the Contract, undertake additional work by variation to the Contract for the Respondent's convenience and benefit, and then further benefit from the Applicant by penalising and reducing the claim value submitted by the Applicant to the direct cost of the Applicant's subcontractor.
62. The Applicant has an entitlement to make a profit on any additional work it has done in the Contract for the benefit of the Respondent and the pricing of that work is to be agreed between the parties under clause 12 of the Contract.

The 18 variational claims in the Contract

Variation No. 1 - repairs to damaged steelwork on Levels 1, 2 and 3 of the complex.

63. The Applicant has claimed \$7,920.00 (excluding GST) for the additional work carried out. The Respondent has agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.
64. I award the Applicant the sum of \$7,920.00 (excluding GST) for this variation.

Variation No. 2 - repairs to damaged steelwork on Level 4 of the complex.

65. The Applicant has claimed \$2,306.00 (excluding GST) for the additional work carried out. The Respondent has agreed to the claimed sum at the meeting of 8 July 2015, however the Respondent has now changed its position and reduced the payment sum to \$1,360.00 (excluding GST) on the basis of the Applicant's subcontractor information.
66. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. On 8 July 2015 the parties agreed to the sum of \$2,306.00 (excluding GST) and I award the Applicant the sum of \$2,306.00 (excluding GST) for this variation.

Variation No. 3 - repairs to damaged steelwork on Levels 5, 6 and 7 of the complex.

67. The Applicant has claimed \$1,500.00 (excluding GST) for the additional work carried out. The Respondent rejected the claimed sum at the meeting of 8 July 2015 and also at paragraph 22 of the Response.
68. The Applicant has agreed to the claim rejection in the meeting of 8 July 2015, however the Applicant has now changed its position and recycled the claim sum of \$1,500.00 (excluding GST) on the basis of non-payment of the 8 July 2015 agreement and Invoice 337 by the Respondent.
69. I am not with the Applicant on this point. The parties on 8 July agreed to the rejection of the claim and the Applicant cannot now change its position due to non-payment of the reduced and agreed sum in Invoice 337. I determine this variation as rejected and is valued at \$0.00.

Variation No. 4 – remove and replace cornice for tiles to shower head height in Level 1 of the complex.

70. The Applicant has claimed \$1,149.00 (excluding GST) for the additional work carried out. The Respondent has agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

71. I award the Applicant the sum of \$1,149.00 (excluding GST) for this variation.

Variation No. 5 – remove and replace cornice for tiles to shower head height in Level 2 of the complex.

72. The Applicant has claimed \$594.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015, however the Respondent has now changed its position and has reduced the payment sum to \$540.00 (excluding GST) on the basis of the Applicant's subcontractor information.

73. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. On 8 July 2015 the parties agreed to the sum of \$594.00 (excluding GST) and I award the Applicant the sum of \$594.00 (excluding GST) for this variation.

Variation No. 6 – alter the plumbing clash with the doors in Level 2, Unit 5 and Level 3, Unit 5 of the complex.

74. The Applicant has claimed \$495.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015, however the Respondent has now changed its position and has reduced the payment sum to \$450.00 (excluding GST) on the basis of the Applicant's subcontractor information.

75. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. On 8 July 2015 the parties agreed to the sum of \$495.00 (excluding GST) and I award the Applicant the sum of \$495.00 (excluding GST) for this variation.

Variation No. 7 – replace water damaged ceilings to 3 Units on Level 3 and 1 Unit on Level 4 of the complex.

76. The Applicant has claimed \$5,650.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

77. I award the Applicant the sum of \$5,650.00 (excluding GST) for this variation.

Variation No. 8 – patching to the plasterboard for moved wiring on Levels 1, 2 and 3 of the complex.

78. The Applicant has claimed \$900.00 (excluding GST) for the additional work carried out. The Respondent has agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

79. I award the Applicant the sum of \$900.00 (excluding GST) for this variation.

Variation No. 9 – installation of a bulkhead to the ground floor tenancy of the complex.

80. The Applicant has claimed \$3,600.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015, however the Respondent has now changed its position and has reduced the payment sum to \$1,499.10 (excluding GST) on the basis of the Applicant's subcontractor information.

81. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. On 8 July 2015 the parties agreed to the sum of \$3,600.00 (excluding GST) and I award the Applicant the sum of \$3,600.00 (excluding GST) for this variation.

Variation No. 10 – installation of extra studs for support mounting of 6 x Hot Water Services to the complex.

82. The Applicant has claimed \$3,351.00 (excluding GST) for the additional work carried out. The Respondent agreed to pay one third of the claimed sum at the meeting of 8 July 2015 at \$1,105.30 (excluding GST), however the Respondent has now changed its position and has rejected the claim in its entirety on the basis of the Applicant's subcontractor information.

83. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. The Applicant may not have been invoiced by its subcontractor for the work, however the work had been done and the Applicant supplied resources for the work and carries any warranty risk on that work under the Contract. On 8 July 2015 the parties agreed to the sum of \$1,105.30 (excluding GST) and I award the Applicant the sum of \$1,105.30 (excluding GST) for this variation.

Variation No. 11 – additional Ritec setting not allowed for in the internal staircase (100m² x \$8:00) of the complex.

84. The Applicant has claimed \$800.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

85. I award the Applicant the sum of \$800.00 (excluding GST) for this variation.

Variation No. 12 – additional Ritec setting not allowed for in the fire corridors (242m² x \$8:00) of the complex.

86. The Applicant has claimed \$2,352.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015, however the Respondent has now changed its position and has rejected the claim in its entirety on the basis of the Applicant's initial quotation and scope of works. The Respondent now suggests the work forms part of the scope of work under the Contract.
87. I am not with the Respondent on this point and view the reasoning as opportunistic in an attempt at the last moment to set aside the claim. On 8 July 2015 the parties agreed to the sum of \$2,352.00 (excluding GST) and It could not be said that the Respondent was unaware of the scope of work they asked the Applicant to undertake in the Contract. The work was variational on 8 July 2015 and I accept that position from the parties. I award the Applicant the sum of \$2,352.00 (excluding GST) for this variation.

Variation No. 13 – additional Ritec setting not allowed for on the external walls (240m² x \$8:00) of the complex.

88. The Applicant has claimed \$1,920.00 (excluding GST) for the additional work carried out. The Respondent agreed to pay a reduced sum of the claimed sum at the meeting of 8 July 2015 at \$960.00 (excluding GST). This reduction was due to the coating only containing a "Tape and Base Coat" which reduced the rate to half rate.
89. The Respondent has now changed its position and has rejected the claim in its entirety on the basis of the Applicant's initial quotation and scope of works. The Respondent now suggests the work forms part of the scope of work under the Contract.
90. I am not with the Respondent on this point and view the reasoning as opportunistic in an attempt at the last moment to set aside the claim.

On 8 July 2015 the parties agreed to the sum of \$960.00 (excluding GST) and it could not be said that the Respondent was unaware of the scope of work they asked the Applicant to undertake in the Contract. The work was variational on 8 July 2015 and I accept that position from the parties. I award the Applicant the sum of \$960.00 (excluding GST) for this variation.

Variation No. 14 – installation of a bulkhead for bathroom vents on all Units in the complex.

91. The Applicant has claimed \$8,816.00 (excluding GST) for the additional work carried out. The Respondent agreed to pay a reduced sum of the claimed sum at the meeting of 8 July 2015 at \$7,500.00 (excluding GST), however the Respondent has now changed its position and has rejected the claim in its entirety on the basis of the Applicant's initial quotation and scope of works. The Respondent now suggests the work forms part of the scope of work under the Contract.
92. I am not with the Respondent on this point and view the reasoning as opportunistic in an attempt at the last moment to set aside the claim. On 8 July 2015 the parties agreed to the sum of \$7,500.00 (excluding GST) and It could not be said that the Respondent was unaware of the scope of work they asked the Applicant to undertake in the Contract. The work was variational on 8 July 2015 and I accept that position from the parties. I award the Applicant the sum of \$7,500.00 (excluding GST) for this variation.

Variation No. 15 – additional work for walls, nib-walls and bulkhead not shown on the plans at Tender for the complex.

93. The Applicant has claimed \$31,100.00 (excluding GST) for the additional work carried out. The Respondent has agreed to pay a reduced sum of the claimed sum at the meeting of 8 July 2015 at \$21,922.00 (excluding GST). This reduction was due to negotiations between the parties as to the degree of difficulty of the work carried out.

94. The Respondent has now changed its position and has reduced the claim further to \$10,939.01 (excluding GST) on the basis of the Applicant's subcontractor information.
95. I am not with the Respondent on this point for the reasons set out in paragraphs 58 to 62 above. The Applicant may have had the work carried out by its subcontractor, however the Applicant carries any warranty risk on that work under the Contract. On 8 July 2015 the parties agreed to the sum of \$21,922.00 (excluding GST) and I award the Applicant the sum of \$21,922.00 (excluding GST) for this variation.

Variation No. 16 – materials supplied for the variations to the complex.

96. The Applicant has claimed \$2,980.00 (excluding GST) for the additional materials it supplied for the variation work carried out. The Respondent rejected the claimed sum at the meeting of 8 July 2015 and also at paragraph 23 of the Response.
97. The Applicant has agreed to the claim rejection at the meeting of 8 July 2015, however the Applicant has now changed its position and has recycled the claim sum of \$2,980.00 (excluding GST) on the basis of non-payment of the 8 July 2015 agreement and Invoice 337 by the Respondent.
98. I am not with the Applicant on this point. On 8 July 2015 the parties agreed to the rejection of the claim and the Applicant cannot now change its position due to non-payment of the reduced and agreed sum in Invoice 337. I determine this variation as rejected and is valued at \$0.00.

Variation No. 17 – retro-fit the door frames into Ritec for the complex.

99. The Applicant has claimed \$520.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

100. I award the Applicant the sum of \$520.00 (excluding GST) for this variation.

Variation No. 18 – remove and replace water damage on Level 1 of the complex.

101. The Applicant has claimed \$600.00 (excluding GST) for the additional work carried out. The Respondent agreed to the claimed sum at the meeting of 8 July 2015 and also at paragraph 19 of the Response.

102. I award the Applicant the sum of \$600.00 (excluding GST) for this variation.

Counterclaim for Omission of Panels – the omission of 66 access panels not installed in the Units of the complex.

103. The parties agree that these works were omitted from the Contract, the issue to be considered in this omission is one of quantum. The Applicant has offered a take-out cost of \$6,600.00 (excluding GST) for the 66 access panels omitted from the Units, being a cost of \$100.00 (excluding GST) for each access panel.

104. The Respondent has claimed sum of \$12,824.00 (excluding GST) in the Payment Statement of 6 July 2015, being \$190.00 (excluding GST) for each panel. However, at the meeting of 8 July 2015, which is reflected in paragraph 25 of the Response, a take-out cost of \$164.00 (excluding GST) for each panel was agreed between the parties.

105. The parties had agreed to this cost at the meeting of 8 July 2015, however the Applicant has now changed its position to reinstate its original take-out cost of \$6,600.00 (excluding GST) on the basis of non-payment of the 8 July 2015 agreement and Invoice 337 by the Respondent.

106. I am not with the Applicant on this point. On 8 July 2015 the parties agreed to the take-out cost of \$10,824.00 (excluding GST) and the Applicant cannot now change its position due to non-payment of the reduced and agreed sum in Invoice 337.
107. I award the Respondent its counterclaim for omitted work in the sum of \$10,824.00 (excluding GST) for this variation.

Counterclaim for Omission of Bulkheads – the omission of 1141 lineal metres of bulkhead from the scope of works in the Tender for the complex.

108. The Respondent has claimed the sum of \$91,280.00 (exclusive of GST) for the omission of 1141 lineal metres of bulkhead it says were omitted from the scope of work in the Contract. In support, the Respondent has included at **Tab [redacted] 3** of the Response a series of drawings that show blue highlighted section on the plan where the bulkheads were omitted.
109. The Applicant was given an opportunity to address this issue in further submissions as the issue had not arisen prior to the receipt of the Response on 22 October 2015. The Applicant, in its further submissions, says that this is a non-issue as the Respondent removed the bulkheads shown in the plans in **Tab [redacted] 3** of the Response prior to the Applicant quoting the Tender. The Applicant also says that the Respondent omitted these bulkheads because they were feature bulkheads only and not double layer insulated bulkheads as was required in the kitchens.
110. Turning to the Applicant's quote at **Tab 1** of the Application, it can be seen that the only bulkheads quoted in the Tender were double layer with insulation and there is no allowance for single layer feature bulkheads in the Tender price.

111. I am not with the Respondent on this point and view the reasoning as opportunistic in an attempt at the last moment to set aside and reduce the Applicant's payment claim. Had this been a legitimate counterclaim, it would have been discussed with the Applicant in some detail at the meeting on 8 July 2015. There was no discussion between the parties in relation to this counterclaim and I can only conclude that the counterclaim for the bulkheads is ambit at best.
112. This is a serious matter during the making and paying of claims under a construction contract, particularly when claims made are found to have little or no veracity with no real likelihood of success other than to appear as large set-off claims aimed at reducing or setting aside a legitimate and agreed payment claim. I will deal with this issue further in costs of the Adjudication.
113. For ease of reference, set out in Table 1 below is summary of the variations and counterclaims from the Application and the Response and the sum Determined.

Table 1. Summary of Claims and Counterclaims in the Adjudication

| Claim | Description | Payment Claim | Response | Determination |
|-------|--|---------------|------------|---------------|
| 1 | Repairs to damaged steelwork level 1, 2 and 3 | \$7,920.00 | \$7,920.00 | \$7,920.00 |
| 2 | Repairs to steelwork level 4 | \$2,306.00 | \$1,360.00 | \$2,306.00 |
| 3 | Repairs to steelwork level 5, 6 and 7 | \$1,500.00 | \$0.00 | \$0.00 |
| 4 | Remove and replace cornice for tiles to shower head heights level 1 | \$1,149.00 | \$1,149.00 | \$1,149.00 |
| 5 | Remove and replace cornice for tiles to shower head heights level 2 | \$594.00 | \$540.00 | \$594.00 |
| 6 | Alter plumbing clash with doors Level 2, unit 5, and Level 3, unit 5 | \$495.00 | \$450.00 | \$495.00 |
| 7 | Replace water damaged ceiling to 3 units level 3 and 1 unit level 4 | \$5,650.00 | \$5,650.00 | \$5,650.00 |
| 8 | Patching moved wiring to levels 1, 2 and 3 | \$900.00 | \$900.00 | \$900.00 |
| 9 | Bulkhead to ground floor tenancy | \$3,600.00 | \$1,499.10 | \$3,600.00 |
| 10 | Extra studs per unit for HWS x 6 | \$3,351.00 | \$0.00 | \$1,105.30 |

| Claim | Description | Payment Claim | Response | Determination |
|---|--|--------------------|---------------------|---------------------|
| 11 | Ritec setting not allowed for internal staircase 100m ² x \$8.00 | \$800.00 | \$800.00 | \$800.00 |
| 12 | Ritec setting not allowed for fire corridors 294m ² x \$8.00 | \$2,352.00 | \$2,352.00 | \$2,352.00 |
| 13 | Ritec setting not allowed for external walls 240m ² x \$8.00 | \$1,920.00 | \$960.00 | \$960.00 |
| 14 | Bulkhead for bathroom vents all units | \$8,816.00 | \$7,500.00 | \$7,500.00 |
| 15 | Wardrobe, nib walls and bulkheads not on plan | \$31,100.00 | \$10,000.00 | \$21,922.00 |
| 16 | Materials for variations | \$2,980.00 | \$0.00 | \$0.00 |
| 17 | Retro-fit door frames into Ritec | \$520.00 | \$0.00 | \$520.00 |
| 18 | Remove and replace water damage to level 1 | \$600.00 | \$600.00 | \$600.00 |
| SUB-TOTAL Excluding GST | | \$76,553.00 | \$41,680.10 | \$62,853.30 |
| Omission of Works - Deduction for 66 access Panels | | -\$6,600.00 | -\$10,824.00 | -\$10,824.00 |
| Omission of Works - Deduction for 1141 metres of Bulkhead | | | -\$91,280.00 | \$0.00 |
| TOTAL | | \$69,953.00 | -\$60,423.90 | \$47,549.30 |
| GST | | \$6,995.30 | -\$6,042.39 | \$4,754.93 |
| TOTAL Including GST | | \$76,948.30 | -\$66,466.29 | \$52,304.23 |

114. I am satisfied that the Applicant's payment claim was validly made and that the Respondent's refusal to pay that claim on or before 3 August 2015 was not and could not be supported by any contractual entitlement to do so. In fact, I am of the view that the Respondent was and remains in breach of contract as there is no entitlement in the contract that could support, in the circumstances, the Respondent's failure to pay the Applicant's claim.

115. Accordingly, I award the Applicant payment of their claim in the sum of \$52,304.23 (including GST).

Interest on the claims

116. In reconciling the claims, the amount the Respondent is to pay the Applicant for the variations is \$47,549.30 (excluding GST).

117. There are no written contract terms in relation to interest in this 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 Division 6 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.....”

118. 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.”

119. The *Supreme Court Act* refers to the Rules. The Supreme Court Rules follow rule 39.06 of the Federal Court Rules and provides 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%, therefore the interest rate applicable to this contract is 8% per annum.

120. 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.

121. I award interest of \$979.65 on the sum of \$47,549.30 (excluding GST) from 4 August 2015, the date of due payment, to 5 November 2015 inclusive, the payment date of determination, pursuant to section 35 of the Act.

Costs

122. The normal starting position for costs of an adjudication is set out in section 36(1) of the Act and is that each party bear their own costs in relation to an adjudication.
123. 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.....”*
124. I have found that the Respondent made unfounded submissions, some of which were quite serious. However, the Respondent’s conduct in refusing to process the payment of the Applicant’s payment claim, when it had been agreed and invoiced on that agreed sum, was clearly vexatious.
125. The Respondent did not and never has provided any valid reasoning for not paying the claim when it had been agreed and, to date, has not paid the claim. The Respondent instead sought a further discount after it had reached agreement with the Applicant based on the information it had sourced from the Applicant’s subcontractor.
126. Payment of the agreed final contract sum was due, the variation work had been completed and the parties had agreed on the sum to be paid, and it was uncontentious between the parties on 8 July 2015, when agreement had been reached, that this sum was due to be paid. The Respondent held an obligation to promptly process the payment and notify the Applicant.
127. I find that the Respondent’s refusal to process and pay the Applicant’s payment claim when it had been agreed was vexatious conduct on the part of the Respondent.

128. The Applicant has clearly incurred additional costs in bringing an Application and the loss of cash flow into its business through the non-payment of its entitled claims under the Contract. I am satisfied that the Applicant has incurred costs of the adjudication because of vexatious conduct on the part of the Respondent.
129. I therefore find that the Respondent is to pay **100% of the costs** of the adjudication under section 36(2) of the Act.

Summary

130. 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 variation payment claim to stand in the sum of \$52,304.23 (including GST);
 - (g) Interest awarded in the sum of 979.65.
131. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **\$53,283.88 (including Interest and GST)**.
132. This sum is to be paid to the Applicant by The Respondent on or before **16 November 2015**.

Confidential Information

133. The following information is confidential for the purposes of section 38(1)(e) of the Act:

- (a) the identity of the parties;
- (b) the identity of the principal; and
- (c) the location and nature of the works.

DATED: 5 November 2015



Rod Perkins
Adjudicator No. 26