

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

BETWEEN:

[Redacted] ("**Applicant**")

and

[Redacted] ("**Respondent**")

### **REASONS FOR DECISION**

1. On 26 May 2023 I was appointed Adjudicator by the Law Society Northern Territory ("LSNT") as prescribed Appointer under the Act to determine two payment disputes between the Applicant and the Respondent. There were two separate Applications both dated 22 May 2023 and the parties agreed to me determining both Applications as each payment dispute arose under the same Contract and the nature of each dispute was quite similar. I received a Letter of Appointment and both Applications by email from LSNT on 26 May 2023.
2. Both parties are legally represented: for the Applicant, Mr Paul Maher of Maher Raumteen Solicitors, and for the Respondent, Mr Patrick Cozens of Cozens Johansen Lawyers, hereinafter referred to as the Applicant and the Respondent respectively.
3. On 1 June 2023 I wrote to the parties in relation to both Applications advising my appointment and declared no conflict of interest in the matter.

4. For jurisdictional clarity and consistency, in my letter of 1 June 2023 I requested that the parties confirm the date and method of service of the Applications on the Respondent. I confirmed that, on the basis of service of both the Applications on 22 May 2023, by my calculation each Response would be due on or before 12 June 2023. I requested that the parties let me know immediately if that was not the case.
5. In my letter of 1 June 2023 I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a Dropbox© accessible by all parties to the adjudication, should it be necessary, and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act 2000*. I requested that the parties confirm in writing their acceptance or otherwise of the electronic service process by 3:00pm CST on Tuesday, 6 June 2023.
6. On the morning of 6 June 2023 I received an email from the Applicant, copied to the Respondent, advising that both Applications had been served on the Respondent's registered offices on 25 May 2023. The Applicant also confirmed that the Respondent had additionally sent him an email on 24 May 2023 confirming receipt of both Applications on 24 May 2023. The Applicant had no objections to the electronic service of both Responses.
7. Later that same morning 6 June 2023 I received an email from the Respondent confirming the 24 May 2023 as the date of service of both Applications on the Respondent and that there were no objections to the service of both Response documents electronically.
8. There was some further email to and fro with the parties in relation to the calculation of the due date for service of both Responses, due to a public holiday falling within the response time, however the parties confirmed and agreed that the due date for service of both Response was on or before 15 June 2023.

9. On 15 June 2023 and within time the Respondent served both Responses, including several attachments with each Response, on both the Applicant and the Adjudicator as required by the Act.
10. On 27 June 2023 after considering the material before me, I wrote to the parties requesting further submissions under s.34(2) of the Act on some questions that I had in relation to the Application and Response as follows:

*"I have read both the Application and Response, including the various attachments provided with the documents, for both payment disputes and there are some questions on which I request further submissions.*

*While each dispute is being adjudicated and determined separately, I will address both payment disputes in this letter as the content and nature of each payment dispute is similar and has arisen under the same construction contract.*

*The request for further submissions relates to the following questions:*

***Payment Dispute – Progress Payment Claim 10***

1. *The Superintendent issued a progress certificate evidencing the Superintendent's assessment of Payment Claim 10 on 15 February 2023. Did the Superintendent issue that progress certificate to both the Principal and the Contractor as required by clause 37.7 of the Contract?*
2. *If so, would the Respondent please provide a copy of the transmittal correspondence.*
3. *Did the Principal raise any payment issues in relation to the progress certificate with the Superintendent after release of the progress certificate to the Contractor? If so what were those issues and how did the Superintendent address those issues.*
4. *Under clause 37.2(d) relating to Tax Invoices (noting there are duplicate subclauses 37.2(a) and 37.2(b) in the Contract), the Superintendent at any time after issuing a progress certificate may issue a further certificate to correct any errors in any previous certificate. Did the Superintendent raise any further certificates to the progress certificate for progress claim 10?*

5. *If so, would the Respondent please provide a copy of the transmittal correspondence and any further certificates.*
6. *It is also noted that the amount withheld by the Principal from progress claim 10 was paid to the Contractor on 14 June 2023 by immediate “Osco” payment, the day before serving the Response. Technically there is no further payment dispute to adjudicate under s.8 of the Construction Contracts (Security of Payments) Act 2004 (Act). Would the Applicant and the Respondent please provide submissions in relation to this issue and withdrawal of the Application under s.28A of the Act as it relates to interest and costs?*

***Payment Dispute – Progress Payment Claim 12***

1. *The Superintendent issued a progress certificate evidencing the Superintendent’s assessment of Payment Claim 12 on 28 April 2023. Did the Superintendent issue that progress certificate to both the Principal and the Contractor as required by clause 37.7 of the Contract?*
2. *If so, would the Respondent please provide a copy of the transmittal correspondence.*
3. *Did the Principal raise any payment issues in relation to the progress certificate with the Superintendent after release of the progress certificate to the Contractor? If so what were those issues and how did the Superintendent address those issues.*
4. *Under clause 37.2(d) relating to Tax Invoices (noting there are duplicate subclauses 37.2(a) and 37.2(b) in the Contract), the Superintendent at any time after issuing a progress certificate may issue a further certificate to correct any errors in any previous certificate. Did the Superintendent raise any further certificates to the progress certificate for progress claim 12?*
5. *If so, would the Respondent please provide a copy of the transmittal correspondence and any further certificates.*

*Please provide these submissions on or before **11:00am ACST Monday, 3 July 2023.***

### ***Additional Time for Adjudication***

*Given that both determinations are due on or before 29 June 2023 and that there are some complex issues to address by way of further submissions in relation to the adjudication of both payment disputes, I will request additional time from the Construction Registrar under s.34(3) of the Act to complete the determinations of both payment disputes.*

*Should there be any objections in this regard, I will accept submissions from the parties up to **1:00pm ACST Wednesday, 28 June 2023.***

*I otherwise thank you for your continued support in these adjudications.”*

11. There were no objections from the parties and on 28 June 2023 I wrote to the Construction Registrar seeking an extension of time within which to make my determination as follows:

*“Dear Registrar,*

*I refer to the above Adjudications. There are two payment disputes PC10 and PC12 and the parties have consented to me adjudicating both disputes as they fall under the same construction contract and are similar in nature.*

*Both Responses were served on 15 June 2023 and within time and each party is represented, Mr Maher for the Applicant and Mr Cozens for the Respondent.*

*The construction contract is a Superintendent administered modified AS 4000-1997 contract (Squire Patton Boggs) and there are some complex issues that need to be explained about how the Superintendent dealt with the certification of each payment claim and whether or not PC10 remains available for adjudication as payment was made by the Principal on 14 June 2023, the day before the Response was served.*

*I have requested further submissions under s.34(2) of the Act and have given the parties until 11:00am ACST on 3 July 2023 as set out in the **attached** letter to the parties [being my letter of 27 June 2023].*

*I also sought objections to extending time in the Adjudications to finalise both determinations and did not received any objections from the parties in that regard.*

*To enable me to consider the additional material in the submissions, I request an extension of time under s.34(3) up to and inclusive of 14 July 2023 to make both determinations.”*

12. On 29 June 2023 the Construction Registrar granted the additional time for the determinations of each payment dispute to 14 July 2023.
13. That same day 29 June 2023 I wrote to the parties advising them of the extension of time for determination as follows:

*“Dear Mr Maher and Mr Cozens*

*I have sought and been granted an extension of time from the Construction Registrar within which to make the determinations for the payment disputes of PC10 and PC12.*

*The extension has been granted to 14 July 2023 inclusive.*

*I otherwise look forward to receiving your respective submission on or before 3 July 2023”.*

14. On 30 June 2023 I received an email from the Respondent seeking an extension until 5:00pm on 3 July 2023 to provide their submissions due to end of financial year last minute matters. The Applicant confirmed by email shortly thereafter that there were no objections provided I grant the same time to the Applicant.
15. Later on 30 June 2023 I wrote to the parties advising that the time for submissions was extended to 5:00pm on 3 July 2023.
16. On 3 July 2023 I received the further submissions from both the Applicant and the Respondent to the questions I had raised with each Application and Response.

17. There were also some additional follow-up documents provided by both parties that had been inadvertently omitted as attachments during the email transmission of the further submissions. There were no objections from either the Applicant or the Respondent to the provision of or receipt of those documents and I have accepted those documents as part of the adjudication for each payment dispute.
18. I confirmed receipt of the further submissions from the parties on 3 July 2023.

### ***Background of the Dispute***

19. This Adjudication arises out of a commercial building contract in the form of a modified Australian Standard - AS4000-1997, pursuant to which the Applicant agreed with the Respondent to undertake the refurbishment of the Applicant's building known as [redacted] located at [redacted] in the Northern Territory of Australia (**the Contract**).
20. This Adjudication relates to the second of two Applications made by the Applicant and is strictly limited to the material provided by the Applicant and the Respondent to the payment dispute arising from Progress Claim 10 (**PC10**) made under the Contract on 31 January 2023.
21. The Applicant's claim in PC10 was for progress of the Works performed under the Contract during late December 2022 and January 2023 in the sum of **\$103,544.44 (excluding GST)**.
22. The Contract is a Superintendent managed and administered contract on behalf of the Applicant or "*Principal*" as set out in the Contract, and is performed by a third-party specialising in project management, [name redacted] (**Superintendent**).
23. On 15 February 2023 the Superintended reviewed PC10 and issued a "*Payment Advice Notice*" as a "*progress certificate*" dated 15 February 2023, as required by the Contract, certifying a payment in the sum of **\$103,544.44 (excluding GST)**.

24. On 16 February 2023 the Applicant issued its Tax Invoice No. INV-00001561 dated 16 February April 2023 (**Invoice 1561**) for the certified amount of \$103,544.44 (excluding GST) or \$113,898.88 (including GST). Payment was then due on or before 23 February 2023.
25. On 23 February 2023 the Respondent paid the sum of \$96,961.59 (including GST), withholding the sum of \$16,937.29 (including GST) as damages which were set-off against PC10 for minor defects in the plumbing work that had been performed by the Applicant under the Contract.
26. On 23 February 2023 the Applicant contacted the Superintendent by email enquiring as to why the certified progress claim had been underpaid. The Superintendent responded on 2 March 2023 advising that they had recommended payment of the shortfall be made.
27. On 14 June 2023, one day before the Response was due, the Respondent paid the shortfall amount of \$16,937.29 (including GST) of the certified PC10.
28. The Respondent then served its Response on 15 June 2023 seeking dismissal of the Application and costs in the sum of \$5,000 (excluding GST) and the costs of the adjudication being the Adjudicator's costs payable by the Applicant.
29. In its Application dated 22 May 2023 the Applicant seeks the balance of the certified progress claim, which was paid after the Application was served, plus interest at 5% per annum under the terms of the Contract.
30. The Applicant also seeks its costs of the Adjudication in the sum of \$4,500 (excluding GST) plus the Adjudicator's costs payable by the Respondent.
31. The Respondent seeks dismissal of the Application and its costs in the sum of \$5,000.00 (excluding GST) plus the Adjudicator's costs payable by the Applicant.
32. The Respondent says that interest is not payable.



33. I raised the issue of the payment one day before the service of the Response and that technically there was no further payment dispute to adjudicate as follows:

*“....6. It is also noted that the amount withheld by the Principal from progress claim 10 was paid to the Contractor on 14 June 2023 by immediate “Osco” payment, the day before serving the Response. Technically there is no further payment dispute to adjudicate under s.8 of the Construction Contracts (Security of Payments) Act 2004 (Act). Would the Applicant and the Respondent please provide submissions in relation to this issue and withdrawal of the Application under s.28A of the Act as it relates to interest and costs?....”*

34. In the further submissions to this question, both the Applicant and the Respondent sought continuation of the Adjudication as it related to costs and interest sought by the Applicant.
35. The Applicant submits that s.33 of the Act does not require the Adjudicator to determine a payment claim, but rather it requires the Adjudicator to determine an Application and that payment does not terminate the Adjudicator’s powers to determine the balance of the Application for interest due and costs.
36. The Respondent says that the Applicant ought to have withdrawn the Application as soon as payment was made on 14 June 2023.
37. The Respondent also submits that interest is not available to the Applicant because the Respondent was “...*the Principal* [Respondent] *was justified in withholding payment of PC10 until the Contractor* [Applicant] *had completed the work* [being defect rectification work on the drains]...”.
38. The Respondent says that the Applicant’s failure to withdraw the Application when payment was made by the Respondent has caused the Respondent to incur additional and unnecessary costs which the Respondent seeks to recover through the Adjudication.

## ***Procedural Background***

### The Application

39. The Application for PC10 is dated 22 May 2023 and comprises a general submission and 5 annexures with exhibits in each annexure. The annexures, *inter alia*, include:

- (a) a copy of the Contract;
- (b) a copy of the Applicant's Progress Claim 10.
- (c) A copy of the Superintendent's Payment Advice Notice;
- (d) A copy of the Applicant's Invoice 1561; and
- (e) supporting email correspondence between the parties relied upon in the general submission.

22. The Applicant's claim was submitted to the Respondent on 31 January 2023.

23. The Application was served on 22 May 2023 pursuant to s.28 of the Act.

### The Response

24. The Response is dated 15 June 2023 and comprises a general submission and a bundle of attached documents. There is no reference to these attached documents in the general submission. The attachment documents, *inter alia*, include:

- (a) Reports and photographs of the drainage inspections carried out on the building;
- (b) Minutes of meetings;
- (c) The Westpac payment advice remittance of 14 June 2023; and
- (d) additional email correspondence between the parties relied upon in the general submission.

25. The Response was served on 15 June 2023 pursuant to s.29 of the Act.

***Adjudicator's Jurisdiction and the Act***

26. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
27. Section 4 of the Act – **Site in the Territory** – the site is a building site at [redacted] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.
28. Section 5 of the Act - **Construction Contract** - the Contract is a modified and amended AS4000-1997 (incorporating Amendment Nos 1, 2 & 3) and is used for commercial building work in the Northern Territory. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the Contract. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s.5 of the Act.
29. Section 6 of the Act – **Construction Work** – the work is the refurbishment of the Applicant's building known as [redacted] located at [redacted] in the Northern Territory of Australia. It is uncontroversial between the parties that the work is construction work and falls within the provisions of s.6 of the Act. I am satisfied that the work is construction work for the purposes of the Act.
30. 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.”*
31. It is uncontroversial between the parties that PC10 is a progress payment claim made under the Contract and was certified by the Superintendent in a Payment

Advice Notice on 15 February 2023, relevantly a *progress certificate* under the Contract.

32. I am satisfied that the Applicant's progress payment claim, PC10, made on 31 January 2023 complies with the stipulations of the Contract for the making of a claim for payment for work done and is therefore a valid payment claim for the purposes of s.4 of the Act.
33. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
  - “(a) a payment claim has been made under a contract and either:
    - (i) the claim has been rejected or wholly or partly disputed; or
    - (ii) when the amount claimed is due to be paid, the amount has not been paid in full; or
  - (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
  - (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”
34. The Applicant made a valid payment claim on 31 January 2023 which was subsequently certified by the Superintendent on 15 February 2023. The Applicant then raised Invoice 1561 for payment of the certified progress payment claim PC10 on 16 February 2023.
35. That Invoice 1561, in the certified sum of \$103,544.44 (excluding GST), was due for payment on or before 23 February 2023 and when the amount claimed was due to be paid the Respondent part paid Invoice 1561 in the sum of \$96,961.59 (including GST).
36. The Superintendent, when contacted by the Applicant on 23 February 2023 advised on 2 March 2023 that “...We acknowledge your report of the underpayment and confirm we have taken this up with the Client [the Respondent] and recommend a payment in respect of the shortfall be made...”.

37. The payment claim PC10, sent to the Respondent on 31 January 2023, is a valid payment claim and was certified by the Superintendent under the terms of the Contract and lodged for payment on or before 23 February 2023. When the Respondent failed to pay the certified payment claim in full on 23 February 2023 a payment dispute commenced on 24 February 2023.
38. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 24 February 2023 under section 8(a)(ii) of the Act.
39. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 22 May 2023, served on the Respondent and the Prescribed Appointer LSNT on 24 May 2023. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.
40. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 15 June 2023, served on the Applicant and the Adjudicator on 15 June 2023. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.
41. Section 33 of the Act – **Adjudicator's functions** – Within the prescribed time or any extension to that time, the Adjudicator must either dismiss the Application without making a determination or determine on a balance of probabilities whether any party to the payment dispute is liable to make a payment for:
  - (i) return of security or retention.
  - (ii) interest payable under the Contract or s.35 of the Act.
  - (iii) an amount of liquidated damages, if applicable.

42. The function of the Adjudicator is to make a determination, if possible, on the merits of the Application with payment or otherwise of an amount determined through reference to the terms of the construction contract or such other terms as the Act may import into the construction contract.
43. Despite payment by the Respondent of the withheld amount just prior to the service of the Response, both the Applicant and the Respondent in their further submissions sought the continuation of the Adjudication as it related to costs and interest.
44. Having now considered the relevant sections of the Act and the Regulations and, following attendance to the documents of the Application, the Response and the further submissions from the parties, I find that I have jurisdiction to determine the merits of the Application and payment dispute between the Applicant and the Respondent.

### ***Merits of the Claim***

45. The Respondent has paid sum of \$16,937.29 (including GST) on 14 June 2023 and has then served a Response to the Application on 15 June 2023 seeking costs of the Adjudication. The Applicant also seeks costs of the Adjudication and interest on the withheld sum, which would be up to 14 June 2023. Both parties have requested a continuation of the Adjudication to determine the issues of costs and interest.
46. In order to determine the issues of costs and interest it is important to first establish the merits of the claim PC10 and how the terms of the construction contract deal with the making of and payment of a progress payment claim.

### **The Claim**

47. The progress payment claim PC10, made by the Applicant was a normal monthly progress payment claim for the months of late December 2022 and January 2023 and was made under clause 37 of the Contract. The progress claim PC10 was for progress work performed under the Contract in the sum of **\$103,544.44 (excluding GST)**

48. There is an accompanying spreadsheet with PC10 which sets out on a percentage complete basis a 'rolling claim' for progress of the Works under the Contract. The spreadsheet separates the original scope of work into various line items and then a series of variations are included as a separate page of the spreadsheet to that original scope of work.
49. The Superintendent has similarly assessed PC10 using those line items and variations in its certification of the payment claim in the Payment Advice Notice dated 15 February 2023, relevantly a *progress certificate* under the Contract.
50. On 23 February 2023 when the payment was due the Respondent short paid PC10 by \$16,937.29 (including GST).
51. The Respondent admits that it withheld the sum but did so because of minor defects in the plumbing work performed by the Applicant under the Contract.
52. The Superintendent advised the Respondent on 2 March 2023 to pay the shortfall of PC10 as it was a certified claim. The Respondent, however, maintained a position of an entitlement to withhold the certified sum of \$15,397.54 (excluding GST) against the works performed by the Applicant.
53. It is particularly difficult to follow the Respondent's position in this Adjudication as there are no references made in the Response itself to each piece of evidence provided to support the statements made by the Respondent in the Response. There is simply a bundle of documents attached to the Response where it appears the Adjudicator is, in effect, expected to interrogate those documents and choose whichever item of evidence is necessary in order to support and make out the Respondent's case. This made the overall adjudication of this claim much more difficult and time consuming.
54. The Superintendent was acting with the full authority and appointment of the Respondent under the Contract when certifying PC10 for payment and did not issue any further certificate that would deduct or entitle the Respondent to withhold any payment from the progress certificate.

### The Superintendent

55. The Contract is a Superintendent managed and administered Contract and the Superintendent is a third-party professional project management firm which specialises in the management and administration of construction contracts.
56. The Superintendent is appointed by the Respondent to manage and administer all functions of the Contract and under clause 20 of the Contract the Superintendent is to “.... *fulfill all aspects of the role and functions reasonably in good faith...*” on the Respondent’s behalf.
57. Once the Superintendent acting for and on behalf of the Respondent has certified a payment claim, it is to be paid in the sum certified without deduction. If there is a deduction, that deduction forms part of the certification and the Respondent under clause 37.2(b) may determine how much of the certified deduction to impose on the Applicant in order to provide an auditable trail of payment to the Applicant. Once the claim is certified, there are no provisions in the Contract, other than clause 37.2(d), that provide for the Superintendent to issue a further certificate that would allow the Respondent to deduct further payment from the certified claim.
58. I requested further submissions from the parties on the question as to whether the Superintendent issued any corrective certificates to PC10. There was no further Payment Advice Notice issued by the Superintendent and the *progress certificate* for PC10 remained due for payment in the total sum of \$103,544.44 (excluding GST).

### The Payment Claim Process under the Contract

59. The process of making, assessing and paying a progress payment claim is clearly set out in clause 37 of the Contract where:
  - (a) The Applicant (*Contractor*) shall claim each month to the Superintendent for the progress of the Works under the Contract (clause 37.1);



- (b) The Superintendent shall, within 14 days of receiving the progress claim, assess the claim and issue a *progress certificate* evidencing the payment and retention to the Applicant and Respondent (*Principal*) (clause 37.2);
  - (c) Within 7 days after receiving the certificate, the Applicant shall issue a tax invoice to the Respondent for the amount shown on the certificate (clause 37.2(b); and
  - (d) The Respondent shall make payment within 7 days of receiving the tax invoice (clause 37.2(b).
60. There are no provisions in clause 37 for the Respondent to simply withhold payment to the Applicant for variations yet to be agreed or alleged defects in the work performed. That assessment is a direct function of the Superintendent at the time of the assessment and was to have been calculated at the time of the assessment under clause 37.2 of the Contract. There were no deductions certified to withhold payment under the *progress certificate* issued by the Superintendent.
61. Clause 37.2(d) provides for “*payment on account only*” and adjustments to a progress certificate in the event of errors by the issue of a further progress certificate for the same progress claim.
62. As set out at [58] above, I sought further submissions from the parties as to any further certificates in relation to PC10 and the Respondent submitted that there was no further Payment Advice Notice issued by the Superintendent.

#### Defects and Retention under the Contract

63. There is a process under clause 35 of the Contract to account for defects in the Works under the Contract. The defect liability period under the Contract is 12 months and commences on the date of practical completion at 4:00pm.
64. The Superintendent may then direct the Applicant to rectify all defects existing at the date of practical completion and may direct how and when the

rectification is to be carried out so as to cause as little inconvenience as possible to the occupants of the building.

65. There is a security retention under clause 5 of the Contract which guarantees performance by the Applicant of the defect liability period to the Respondent under the Contract and the Respondent has recourse to that security in the event of a performance failure by the Applicant.
66. It is not for the Respondent to attempt to override the Superintendent's progress certificate and withhold payment of a progress claim to satisfy defects or yet to be agreed variations in the Works under the Contract. The agreed variations are clearly set out in each progress payment claim.
67. A security is held under the Contract by the Respondent for the defect liability purpose and the Superintendent, as professional project managers, would have a defect register or list that would be provided to the Applicant at the point of practical completion of the Works under the Contract.
68. Had the Respondent requested the Superintendent to issue a further progress certificate in the form of a Payment Advice Notice with a withheld amount for the costs of third-party correction the defective issues of construction waste in the drains, the Contract terms would have been satisfied and the withholding legitimate.
69. The Respondent, however, went against the Superintendent's certification under the Contract and had no entitlement to do so under the Contract. The Respondent failed to follow the process set out in the Contract and as a result I am not with the Respondent in this Adjudication.

***Interest on the claim***

75. The amount the Respondent withheld and eventually paid on 14 June 2023 to the Applicant is \$16,937.29 (including GST) or \$15,397.54 (excluding GST).

76. The certified payment was due on 23 February 2023 and the withheld sum at [75] above was withheld from 24 February 2023 to 13 June 2023, a total of 111 days.
77. The Contract at clause 39.7(a)(iv) and Item 30 of the Part A schedule provides for interest on late payments at the rate of 5% per annum.
78. 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.
79. I award interest of **\$234.13** on the sum of **\$15,397.54 (excluding GST)** from 23 February 2023, the date of due payment, to 14 June 2023, the date of payment of the withheld sum, pursuant to section 35 of the Act. The payment of GST is only applicable on the sum of **\$15,397.54 (excluding GST)**.

### ***Summary***

80. In summary of the material findings, I determine:
  - (a) The contract to be a construction contract under the Act;
  - (b) The work to be construction work under the Act;
  - (c) The site to be a site in the Northern Territory under the Act;
  - (d) The claim to be a valid payment claim under the Act;
  - (e) The dispute to be a payment dispute under the Act;
  - (f) The Application to be a valid application under the Act;
  - (g) The Response to be a valid response under the Act;
  - (h) The withheld sum of payment of the Applicant's PC10 was late paid by 111 days;
  - (i) Interest on the unpaid sum for the 111 days is calculated at \$234.13.

81. I determine that the amount to be paid by the Respondent to the Applicant in relation to the interest on PC10 under the Contract is **\$234.13**.
82. This sum is to be paid to the Applicant by the Respondent on or before **28 July 2023**.

### **Costs**

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

84. 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...”*

85. I have not found either the Application or the Response without merit and I do not consider either the Applicant's conduct in bringing the Application or the Respondent's conduct in Response to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.
86. The test for determining whether a proceeding is vexatious is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

*“1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*

*2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

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

*as to be utterly hopeless.”*

87. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.
88. I therefore make no decision under s.36(2) of the Act.
89. The Respondent has, however caused the Applicant unnecessary additional costs in relation to the adjudication of the dispute under s.36(1) of the Act.
90. The Respondent's in its further submissions confirmed that:  
  

*“....While the Superintendent issued a notice of Practical Completion dated the 14 June 2023 (but Practical Completion taken to have been completed on 2 June 2023) [the same date as the Respondent's payment and one day before serving the Response].....the Contractor is yet to make a final claim for the Superintendent to assess....”*
91. It is clear from this statement that the Respondent was fully aware of the requirements of payment of a certified claim under the terms of the Contract and that at the point of Practical Completion the defects liability under the Contract commenced whereby the Superintendent then commenced the rectification process of all defects under the Contract.
92. It is also clear that the Respondent knew that certified progress payment claims were payment on account only under the Contract and that the Applicant had yet to submit a final payment claim under clause 37.4 of the Contract for the Superintendent's assessment and *“all other claims”* under the Contract.
93. In so doing the Respondent has caused the Applicant unnecessary additional cost in the Adjudication, particularly given that the Respondent knew that Practical Completion was to have been on 2 June 2023 yet continued in the Adjudication.

94. I determine that the Respondent pay the entire costs of the Adjudication under s.46(4) of the Act.

***Confidential Information***

95. The following information is confidential:

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

***Closing Remarks***

96. This is already a lengthy set of reasons, necessarily in light of the fact that the claim and several arguments I have had to consider each involved factual consideration unique to that item. I have focused on what have seemed to me to be those submissions that are most central. But I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked any material in this adjudication.

DATED: 14 July 2023



Rod Perkins  
Adjudicator No. 26