IN THE MATTER OF THE CONSTRUCTION CONTRACTS (SECURITY OF PAYMENT) ACT

AND IN THE MATTER OF AN ADJUDICATION

BETWEEN

Applicant

and

Respondents

Determination 27.14.01

Robert Fenwick Elliott

Registered Adjudicator

20 October 2014

1. This is a determination pursuant to Part 3 of the Construction Contracts (Security of Payment) Act.

2. I hereby determine

a) Pursuant to section 38(1)(c)(i) of the Act, that the amount to be paid by the Respondents to the Applicant is $23,847.05, and that the date on or before which it must be paid is 31st October 2014.

b) Pursuant to section 38(1)(c)(ii) of the Act, that there is no security within the meaning of that provision.

c) Pursuant to section 38(1)(e) of the Act, that there is no information herein that is confidential within the meaning of that provision.

3. The information required by regulation 8 of the Construction Contracts (Security of Payment) Regulations is as follows:

a) My name is Robert James FENWICK ELLIOTT.
b) The applicant's name and contact details are H, represented by Michaela Powell, Powell & Co Legal, Units 2 & #, 54 Marina Boulevard, Cullen Bay, NT 0820.
c) The respondents' names and contact details are K, represented by Peggy Cheong, Hunt & Hunt Lawyers, Level 2 Carpentaria House, 13 Cavenagh Street, Darwin NT 0801.
d) The date of this determination is Monday 20th October 2014. The identification number is 27.14.01.

The Adjudication Process

4. I was appointed to adjudicate this dispute by Master Builders Northern Territory on Monday 22 September 2014. Previous to this time there had been an appointment of a previous adjudicator, Mr B. The Respondents objected to his appointment, and pursuant to a process that was effectively consensual, I was notified by the Applicant's solicitors on 23 September 2014 (that notice being copied both to the Respondents' solicitors and the Adjudication Registrar, and not challenged) that his appointment came to an end on 11 September 2014 pursuant to a disqualification notice served on 4 September 2014. I was therefore satisfied that it was appropriate for me to accept appointment in Mr B's place, and I gave notice of acceptance on 23 September 2014.

5. At all times during the dispute, the parties have each been represented by solicitors, the Applicant by Powell and Co Legal, and the Respondents by Hunt & Hunt.

6. Neither party has suggested any want of jurisdiction. Nevertheless, I have satisfied myself that I do have jurisdiction, in particular in light of the requirement of section 28 of the Act that written application for adjudication be prepared and served within 90 days after the dispute arises. By section 8 of the Act:

A payment dispute arises if:

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; 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.

7. By letter dated 26 May 2014, the Applicant made its Final Payment Claim for $105,610.19 excluding GST, and asserted in terms that this was a payment claim within the meaning of section 8 (Tab 31). I so find.

8. By letter dated 5 June 2014, the Applicant's solicitors recited that the Applicant's letter of 26 May had been sent by fax and post on that date (Tab 32). In their Response, the Respondents say that that Final Payment Claim was submitted "on or about" 26 May 2014. I accept that the Final Payment Claim was emailed and posted on 26 May 2014.

9. Clause 33 of the Contract contains express provision about service, as follows:

33 NOTICES

A notice is sufficiently given if delivered by hand, sent by prepaid post, sent by facsimile or left at an address appearing in the Particulars of Contract.

If a notice is posted it is deemed to have been received two (2) days after posting.

If a notice is transmitted by facsimile, it is deemed to have been received at the time stated on the sending party's facsimile confirmation.

10. That provision is facilitative, not mandatory, and so it is necessary also to consider section 25 of the Interpretation Act:

Service of documents

(1) A person may serve a document on an individual or body (the recipient):

(a) by giving it to:

(i) if the recipient is an individual – the recipient; or

(ii) if the recipient is a body – an executive officer of the body; or

(iii) in any case – a person authorised by the recipient to receive the document; or

(b) by sending it by prepaid post addressed to the recipient at the recipient's address; or

(c) by sending it to the recipient by fax; or

(d) by leaving it, addressed to the recipient, at the recipient's address with someone who appears to be at least 16 years old and appears to live or be employed there.

(2) A document served under subsection (1)(b) is taken to be served when it would have been delivered in the ordinary course of post.

(3) Subject to evidence to the contrary, a document served under subsection (1)(c) is taken to be served when it was sent to a current fax number of the recipient.

(4) A document served under subsection (1)(d) is taken to be served when it was left with the person mentioned in the subsection.

(5) This section has effect for the service of a document whether or not the word serve is used in the law providing for the service of the document.

(6) In this section:

"address", of a recipient, includes the latest home and business addresses of the recipient that are recorded for a law in force in the Territory.

"body" includes an incorporated body.

"document" includes a notice and any other thing that may be sent by a method mentioned in subsection (1).

"executive officer", of a body, means:

(a) for an Agency – the Chief Executive Officer of the Agency. or

(b) otherwise – a person (however described) who is concerned with, or participates in, the body's management.

11. That section also is facilitative, not mandatory.

12. Neither clause 33 not section 25 provide for service by email, and I find the effect of clause 33 and section 25, read together, is that the Final Payment Claim was made by email on 26 May 2014: whilst service by email is not provided for, neither is it prohibited. I have in mind the dictum of Hodgson JA in *Falgat Constructions Pty. Limited v. Equity Australia Corporation Pty. Limited* [2006] NSWCA 259:

> 58 In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty. Limited v. Leslie* [1996] NSWSC 314; (1996) 41 NSWLR 542; *Mohamed v. Farah* [2004] NSWSC 482 at [42]- [44]. In such a case, there has been service, provision and receipt.

13. Were I to find that the email had not been sent, I would have found that the Final Payment Claim was deemed made by post on 28 May 2014. In the event, in light of my other findings, nothing material turns on which of these dates is taken.

14. Clause 24(b) of the Contract calls for payment of the Final Stage payment within 5 days of written request. I find that an emailed request is a written request.

15. Part 2 of the Contract contains this definition of "Days":

"Days" includes Monday to Friday inclusive but excludes public holidays.

16. 31 May 2014 was a Saturday and 1 June 2014 was a Sunday. Accordingly, the payment claimed on 26 May was due (insofar as it was due at all) on Monday 2 June 2014. Accordingly, I do not accept the Applicant's solicitor's assertion in her letter of 5 June that the prescribed payment date was 31 May 2014.

17. Applying section 8 of the Act, a payment dispute thus arose on 2 June 2014. The last day for an adjudication application under section 28 was 2 June + 90 calendar days = 31 August 2014. I am informed by Master Builders Northern Territory that the adjudication application was served on them at approximately 4.00 pm on 29 August 2014, and thus in time. There has been no suggestion of want of service on the Respondents at that time (any time with a couple of days after that would in any event have been sufficient).

18. A further time limit is imposed by the Act where, as here, there has been a disqualification. Subsections 31(6A) and (6B) provide:

> (6A) If the appointment of an appointed adjudicator ends under subsection (6):
>
> (a) the applicant may make a further application for adjudication under section 28; and
>
> (b) in calculating the period within which the application may be made, the period from the date on which the previous application was served under section 28(1)(c) to the date on which the appointment ends is not counted.
>
> (6B) However if, as calculated under subsection (6A)(b), the applicant does not have at least 14 days to make the further application, the further application may be made within 14 days after the date on which the appointment ends.

19. The appointment of Mr B having ended on 1 September 2014, the Applicant thus had until that date plus 14 days i.e. 25 September 2104 to make further application, and it did so on 22 September 2014 and thus in time.

20. There is thus a sound basis for this adjudication process. It has proceeded as follows:

a) The Applicant made the Adjudication Application which I have considered in this determination on 22 September 2014. This is evidently not identical to the application that had previously been made. I have considered the former to the extent necessary to satisfy myself that is substantially the same as the original application. There is nothing in section 31(6A) of the Act to suggest that the "further application" thereby permitted must be identical to the original application, and there is no need for me consider whether there is any necessary implication that the further application must be substantially the same as the original application, since I find as a matter of fact that this one is such.
b) The Respondents made their Response on 6 October 2014. The Response was in letter form, and the Applicant has made the complaint – half-heartedly perhaps – that it lacked the necessary formality. I have ruled and now repeat that there is nothing in that complaint.

c) Having considered these documents, I made a request for Further Submissions under section 34(2)(a) of the Act, and set a deadline of midnight on 15 October 2014 for them. Both parties made Further Submissions. Pursuant to arrangements made, these were provided to me by email, and those made by the Applicant were about one hour late. Nothing at all of substance has turned on that *de minimis* lateness.

d) Since that time, the Applicant has emailed to me some further material. The Act, unlike its East Coast counterparts, does not expressly limit the materials which I may consider. Procedural fairness requires me to consider the substance of what the parties say, but it would be inconsistent with procedural fairness to allow one party to steal a march on the other by making late submissions to the prejudice of the other. In this case, the late submissions have had very little effect on my determination, and such effect has been marginally to the advantage of the Respondents.

21. The total volume of submission material I have considered amounts to about 4 lever arch files' worth. Some of it has been repetitive. Much of it has required careful arithmetical examination.

Reasons

22. The reasons for my determination are as follows.

Definitions

23. In these reasons:

The **Act** means the Construction Contracts (Security of Payment) Act (NT);

The **Adjudication Application** means that referred to at paragraph 20(a) above;

The **April 2014 Email** means the email of that date from the Respondents to the Applicant containing detailed comments on the variation claims made by the Applicant;

The **Contract** means the contract referred to at paragraph 24 below;

The **Further Submissions** means those referred to at paragraph 20(c) above.

The **Response** means that referred to at paragraph 20(b) above.

Tab means a tab in the Applicant's Adjudication Application.

Other terms bear the same meanings as in the Contract.

The Contract

24. It is common ground that that the payment dispute arises out of a construction contract in writing, a copy of which appears at Tab 1 of the Adjudication Application. The Contract is in a standard form issued by the Master Builders Northern Territory for Minor

Works. It is not dated, but it is common ground that it was signed on 12 December 2013[1]. It is described on its face as a lump sum contract, the amount payable under it is a lump sum contract price, and I find that it is a lump sum contract. Indeed, the whole of the payment scheme contained in the Contract is predicated on it being a lump sum arrangement.

25. In so finding, I have had regard to various suggestions by the Applicant that this was a cost reimbursable arrangement, as for example at paragraph 6.13 of the Adjudication Application and the email of 13 September 2013 at Tab 7, in which the Applicant wrote, "We have presented to do all the work for you at cost for you guys". The Applicant's applications for progress payments were in an unusual form – essentially in the nature of accounting documents – that suggest cost reimbursement. Similarly, I note that it was asserted quite recently, in the Applicant's solicitors' letter of 29 August (at Tab 39), that:

> Your clients have wholly misconstrued the nature of the contract between the parties. This is not a fixed price contract. It is a cost only contract based on a budget estimate.

26. However, the Applicants have elsewhere recognised – as they must - that this is a lump sum contract. There is no claim for rectification of the Contract, nor do I see any opportunity for such a claim.

27. It is evident that the Contract as signed does contain all the terms of the bargain: in particular, it fails to define the scope of the work. But there is nothing I have seen to suggest any oral or other supplemental terms which cut across the express written terms of the Contract. Indeed, insofar as there may have been an earlier expectation that the work would be done on a cost reimbursable basis, such earlier expectation was displaced by the Contract. Any possible doubt about this issue is dispelled by clause 32:

> TERMINATION OF ANY PREVIOUS CONTRACT
>
> This Contract replaces any earlier contract between the parties in respect of the Works.

28. It may well be (I make no finding in this regard) that the Applicant failed to understand the true nature of the Contract. But the Applicant is a builder, a member of the MBA, and proposed the form of Contract. There is no legal warrant for disregarding the terms of the Contract in order to fulfil any mistaken understanding of the contractual entitlements.

The Scope of the Contract Works

29. In general terms, there is little dispute as to the overall scope of the work: the Applicants already had three shipping containers on site which had been converted into "dongas", and the work involved the incorporation of these into a home, which included an existing structure. However, the detailed limits of the work covered by the lump sum are not agreed.

[1] Application #2.9, Response page 2

30. Part 1A of the Contract envisages Approved Plans and Specifications, but there were no such agreed documents identified in or attached to the Contract in this case.

31. In September 2013, there were proposals made by the Applicant as to the work, but it is clear that these early, and the early sketches in them, were largely overtaken by later events, including the work done by the Applicant under a Preliminary Services Agreement, which included design work, and as to which no dispute is before me.

32. At Tab 10 to the Adjudication Application, there are some drawings numbered 2/10 to 10/10; they are dated November 2013 and I accept, as identified by the Applicant in its Further Submissions, that these were drawn by R from *. It is common ground between the parties, and I find, that the work shown by these drawings is included in the scope of the work required by the Contract signed the following month.

33. Those drawings do not identify just how far the Applicant was to go. In its Further Submissions, the Applicant asserts that, "In effect, the Applicant was responsible for building the structural aspects of the property and the Respondents were to be responsible for the fit out of the property". I do not accept this formulation. At Variation 34, the Applicant gives credit of $8,595.18 for not painting the "internal of the containers"; to so give credit is to acknowledge that the Contract work did originally include that work. And gyprocking and painting the containers was plainly envisaged as part of the work in the Applicant's email of 13 September 2103 (Tab 7). But I do accept that this is not a contract whereby the Applicant was to do all the work needed to complete this project in its wider sense – there plainly elements such as "tidying up" the unsatisfactory kitchen and toilet elements of the containers that the Respondents had bought which were outside the scope of the Contract works.

34. This is not a form of contract which is subject to a measured Bill of Quantities or anything similar. Accordingly, it is subject to the usual principle that included within the scope of the contract work is everything that is indispensably necessary for the completion of the work. In the application of this formula, it is important to bear in mind that "the work" means the work which the Applicant was contractually obliged to due.

35. There is considerable dispute between the parties as to whether many of the claimed variations are within the scope of the original contract work. It will be convenient to consider each of these items on a case by case basis.

Scope Creep

36. The phenomenon of "scope creep" is well recognised in the construction industry. As works proceed, and a contractor undertakes the work which it has in fact undertaken, an owner sometimes wittingly or unwittingly assumes that that the contractor is obliged to do whatever building work the owner envisages as the project evolves, even as that work creeps well past the true extent of the contractor's obligations.

37. In this case, I must bear in mind that the Contract was not for all the work that this project required – in order to keep costs down, there was always intended be – and was – a division between work which the Applicant would do, and work which the Respondents

would do themselves. There is thus a considerable difference between this case, and the case of a house building contract where the contractor agrees to deliver the whole of the work on a turnkey basis.

38. There are signs in this case that some scope creep has infected the Respondents' approach in this case.

Contract Price

39. The Lump Sum stated in the Contract was $122,788.60 including GST. It is common ground that there are deductions to be made from this sum for the omission of the installation of a shade structure and some painting.

40. Appendices B2 and B3 of the Contract are struck through. Accordingly, there were neither Prime Cost Allowances nor Provisional Sum Allowances within the Contract Sum. Had there been such sums, it would have been open for the Applicant to substitute actual cost for such sums. But absent such sums, there is no provision for adjustment of the Contract price merely because the work actually cost more than had been allowed in the Contract sum.

41. The Contract overreaches an original intent by the Applicant to do this work on a cost basis. There are clear signs that this original intent has infected the Applicant's approach in this case.

The Contractual Regime as to Progress Payments

42. Clause 21(d) of the Contract provides for progress payment to be made in accordance with Item B1 of Appendix B "except for minor omissions which do not prevent the Works from progressing".

43. Appendix B1 sets out a table whereby various payments become due:

- The final payment of $3,683.65 is due at "Practical & final completion"
- Before that, $8,595.20 is due on "Painting internal containers". This item was never going to be reached, because that painting work was omitted from the Contract.
- Before that, $36,836.58 is due on "Services, internal linings". I find that "services" included electrical services.
- Previous items refer to structural work.

44. Overlaid on this regime is clause 23, which provides for the Final Stage, and clause 24, which provides for payment on Completion of Final Stage. The importance of these clause is such that I set them out in full:

> 23. COMPLETION OF FINAL STAGE
>
> (a) The Final Stage is complete when:
>
> (i) for Works which require an Occupancy Certificate - the stage when the Occupancy Certificate has been granted for the Works and a copy of the Occupancy Certificate has been given to the Owner; or

(ii) for Works that do not require an Occupancy Certificate — the stage when the Builder:

a. has made all relevant declarations required under the Act in relation to the Works and has provided the Owner a copy; and

b. has given the Owner a copy of all relevant certificates and documents required under the Act in relation to the Works.

For the purposes of this clause the Works do not include any labour or materials which are to be supplied or fixed by the Owner.

(b) When in the opinion of the Builder the Works have reached completion of the Final Stage, the Builder will give to the Owner notice in writing in accordance with Form 6 Appendix D.

(c) Within five (5) days of service of that notice the Owner must give to the Builder notice, in writing, of those things (if any) required by this Contract to be done to reach completion of the Final Stage.

(d) The Builder will as soon as possible do all those things necessary to complete the Final Stage and give to the Owner notice in writing on completing them.

(e) If the Owner does not give the notice in sub-Clause 23(c), the Works are deemed to have reached the Final Stage.

(f) If the Owner possesses or uses the Works or any part without the written agreement of the Builder, the date of the Final Stage is the date of possession or use, unless the Final Stage has already been reached.

(g) The Works are at the risk of the Owner on completion of the Final Stage or on the date of possession or use under sub-Clause 23(e). The Owner is responsible for insurance of the completed Works in either case.

24. PAYMENT ON COMPLETION OF FINAL STAGE

(a) On completion of the Final Stage, the Builder is entitled to receive the unpaid balance of the Contract Price together with any other money which is payable under this Contract.

(b) The amount due must be paid to the Builder within five (5) days of a written request which gives particulars of the claim.

(c) If the Builder does not receive payment in full by the due date, in addition to other rights it may have, the Builder is entitled to interest at the rate in Appendix A Item A15 on the shortfall.

(d) The Owner is not entitled to possession of the Works nor to receive the keys until payment to the Builder of all money due under this Contract.

(e) On such payment, the Builder will hand all keys and certificates to the Owner.

(f) The Owner is not entitled to withhold any money from the Builder for Works which are:

(i) deemed to be practically complete; and

(ii) which are minor in nature and can be properly corrected or rectified within the defects liability period.

45. I find that the effect of these clauses is as follows:

- That if the Final Stage of Completion is reached in accordance with the terms of clause 23, then the whole of the unpaid balance of the Contract Price *prima facie* becomes due, regardless of Appendix B1;
- That Clause 23(f) is in effect a deeming provision. If there is relevant possession or use, then Final Stage is treated as having been reached for the purpose of payment of the Contract Price even if the requirements of clause 23(a) have not been met;
- That Clause 23(f) does not however contain the clear express words which would be necessary to overreach the consequences of any breaches of clause 1. Accordingly, if Final Stage is treated as having been reached by reason of possession or use at a time when the works are materially incomplete or defective, then the Respondents remain entitled to a common law set-off in the nature of an abatement in respect of such incompleteness or defects;
- That the meaning of possession or use under clause 23(f) is subject to the *de minimis* rule, such that what is envisaged by the clause is meaningful possession or use of the works for their intended purpose;
- Likewise, that the reference in clause 23(f) to the works "or any part" is to be read subject to the *de minimis* rule. For the clause to be enlivened, the part of the works possessed or used must be more than minimal;
- That unless and until the Final Stage has been reached in accordance with the terms of clause 23, the Applicant's entitlement to the Contract price is governed by Appendix B1.

The Contractual Regime as to Variations

46. It will be necessary for me to refer to the contractual regime as to Variations, and the pricing thereof, and so for convenience I set out the terms of clause 15:

15. VARIATIONS

(a) This Contract may be varied by:

(i) extras or omissions;

(ii) additional Works;

(iii) changes in the character or quality of any material or work;

(iv) changes in the levels, lines, positions or dimensions of any part of the Works;

(v) extras or omissions associated with compliance with legislative provisions or any authority who has jurisdiction over the Works;

(vi) additional costs incurred caused by delays and extensions of time in clause13.

(b) This Contract can be varied only with the Builder's consent.

(c)

(i) Subject to clause 14(d)(i) if the Owner or the Builder requires variation to any part of this Contract, then a Variation Notice must be submitted before the variation is undertaken.

(ii) Upon receipt or delivery of the Variation Notice the Builder will within ten (10) days provide a Cost Variation Notice for the Owner's approval.

(iii) If within five (5) days the Owner does not respond to the Cost Variation Notice, then by default the cost of the variation is deemed to be accepted by the Owner.

(iv) If the Owner disputes the Cost Variation Notice the Owner must within five (5) days lodge a Notice of Dispute in accordance with clause 28.

(v) The Builder may require the Owner to produce evidence satisfactory to the Builder of the Owner's capacity to pay the proper cost of the variation before doing the Works.

(d) The Actual Cost of all reductions or omissions will be deducted from the Contract Price.

(e) The cost of all extra Works will be added to this Contract Price. Where a price for any variation has been agreed, it will be added to the next progress payment.

(f) Where a price has not been previously agreed, and the Builder must carry out the variation, the price will be the cost of the extra works plus the percentage specified in Item A18 Appendix A.

(g) In calculating the cost of extra work:

(i) the rates for labour are those applied by the Builder to the site at the time the variation is accepted by the Builder; and

(ii) the price for materials will be the cost to the Builder; and

(iii) where the works are done by a subcontractor, the amount properly charged by it is the extra cost.

(h) If the variation is more than 5% of the Contract Price, the Builder must apply for reassessment of the Residential Building Insurance cover and:

(i) if no Lending Authority is involved either party may within ten (10) days of service of the Variation Notice by written notice served on the other, terminate this Contract.

(ii) if a Lending Authority is involved then:

a. either party may terminate this Contract within seven (7) days of service of the notice of variation by written notice to the other party.

b. if neither party terminates this Contract then the Owner will at once apply to the Lending Authority for consent to proceed with this Contract and when such consent is given the Builder will and is authorised to proceed with this Contract. If the consent of the Lending Authority is not received within seven (7) days of the expiration of the seven (7) day period previously mentioned then either party may end this Contract by notice to the other party.

If this Contract is ended under Clause 15(h) the Builder is entitled to be paid the Actual Cost of Works, plus the percentage in Item A18 of Appendix A, up to the date of the Variation Notice.

The Issues

47. There are a variety of issues that I must determine in order to arrive at the required decision.

The Completion Issue

48. In my view, the first issue I must decide is what degree of completion was achieved by the Applicants.

49. The Applicant says that all of its work is complete save for final power and water connections. The Respondents say there is a longer list of outstanding work, such as refitting of showers screens, skirtings etc. (page 5 of their Further Submissions). I am not satisfied that all these items are the responsibility of the Applicant, but there is some work yet to be done on either view. Indeed, the fact that Applicant invoked the contractual right to suspend work under clause 22 of the Contract (and have done no work since) contains the implicit acknowledgement that there was work yet to do as at the time of the suspension.

50. However, if I find that the Respondents have possessed or used the Works or any part without the written agreement of the Builder, then the Final Stage is treated as having been reached, even if there are some outstanding works.

51. There is a conflict of evidence on this point. I have carefully considered the material before me, and concluded that, even in light of a *de minimis* factor, there has been some possession or use by the Respondents. The evidence suggests that the balcony has been used as a recreation area. It is common ground that there has been at least some use of the upstairs "shed" area. Indeed, so intimately connected is the Applicant's work with the rest of the property, it would be remarkable if there had been no possession or use at all of the Applicant's work.

52. Accordingly, whilst the works are not complete, yet for payment purposes the Final Stage entitling the Applicant to the Contract Price has been reached.

Abatement

53. However, that does not mean that I should ignore the Respondent's complaints about unfinished and/or defective works. For the reasons set out above, I find that the Respondents are entitled to a common law set-off (also sometimes known in the legal authorities as an abatement) in respect of these, and I deal with the quantification of this below.

Suspension

54. The Applicant has asserted a right to suspend the work pursuant to the express provisions of clause 22 of the Contract. That is by its nature a temporary measure. By their Further Submissions, both parties have confirmed that there has been no acceptance of any repudiatory conduct relied on, and so the executory obligation on the Applicant to complete the work remains outstanding. Given my findings, it is not necessary for me to decide whether that suspension was or was not justified.

Overview

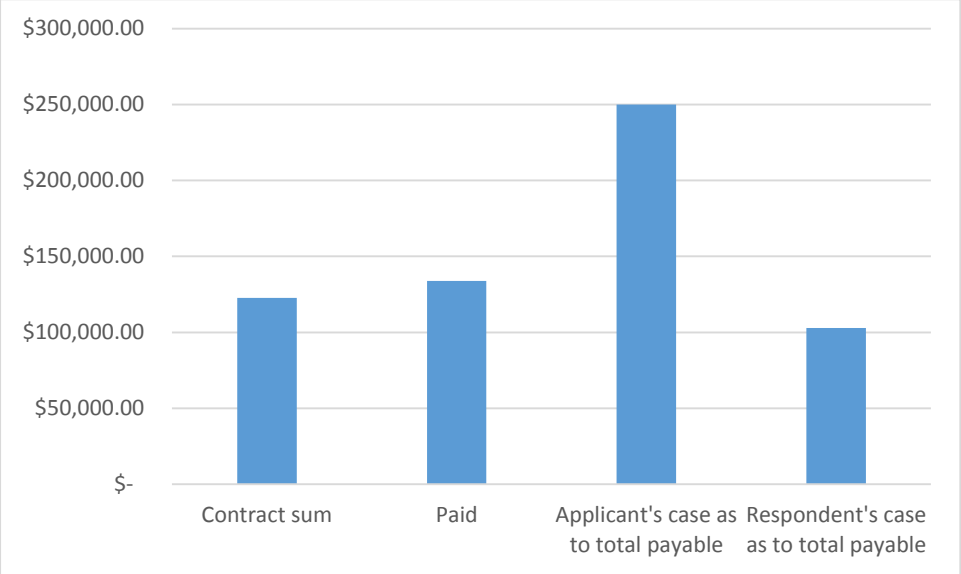
55. Before turning to detail, it is helpful to take an overview as to the lie of the land.

56. The parties are agreed that:

- The contract sum was $122,788.60;
- The amount paid to date is $133,794;
- There were some variations;
- There is some extent to which the Applicants did not finish the work.

57. However, there is considerable disagreement as to the end-out entitlement, which the Applicant puts at $249, 965.21 and which the Respondent puts at an overpayment of $44,058, of which $13,200 is for costs.

58. In graphic terms, therefore, the parties stand thus (leaving to one side claims for interest and costs):



59. By its Further Submissions, the Applicant has set out its actual costs (Attachment E) at $167,332.47 + GST. Of this, $7,225 + GST relates to the project management time of its principal, Mr R, but even taking that out of account, it seems evident that the actual disbursed cost of the work to the Applicant was far more than the Contract sum. But this of itself tells me little as to what is due, and nothing of itself as how much of the Applicant's loss is attributable to variations (for which it is entitled to be paid) and how much to an original underestimate as what the cost of the original Contract work was going to be (for which the Applicant is not entitled to be paid).

The Variations

60. Most of the difference between the parties lies in the area of variations and the applicant's claim to management time. It is necessary to consider these items one by one.

61. Before doing so, it will be helpful to explain my approach to a matter of common ground: that the detailed procedure in the Contract governing the ordering and valuation of variations was not followed by the parties.

62. The essence of the contractual scheme, as set out at paragraph 46 above, is to provide for variations to be clearly identified, and their cost to be anticipated and if possible agreed before they are executed. That did not happen here. The Respondents failed to submit written Variation Notices before the orally ordered variations were executed. The Applicant failed to deliver timeous Cost Variation Notices.

63. Both parties have proceeded on the basis that this breakdown of the contractual machinery does not mean that the Applicant is to be deprived of payment for what are in reality variations. They are right to do so, and there are numerous legal authorities including *Sudbrook Trading v. Eggleton*[2], *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*[3], *J F Finnegan v Sheffield*[4], *John Barker Construction Limited v London Portman Hotel Limited*[5], In *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd. and Another* [6], *Bernhard's Rugby Landscapes v Stockley Park*[7], *Rhodia Chirex v Laker Vent*[8], *Saloma Pty Ltd v Big Country Developments Pty Ltd*[9] and *Jezer Construction Group P/L and Ors v Lilischkies*[10] which demonstrate that law steps in in these circumstances and substitutes a reasonable machinery. What is reasonable is plainly a matter of fact in each case.

Variation 01 – New windows and sliding doors

64. There is no dispute about whether this was a variation; rather the dispute concerns the question of whether the Respondent is entitled to a 20% uplift under clauses 15(f) and Item A18 of Appendix A.

65. The variation originated on 17 September 2013, before the Contract was signed, when the Respondents asked for "windows in the reclad upstairs area and plus a good size glass sliding door opening out onto the balcony".

66. The Respondent replied by email on 13 January 2014 with the words "FYI – Additional windows quote". Attached was a quotation from a subcontractor, NTK Windows and Doors, for $7,000 for the windows and doors themselves plus $1,700 for bars, flyscreens and Amplimesh security, i.e. a total of $8,700 + GST, which is equivalent to $9,570 including GST.

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[2] [1983] 1 A.C. 444, HL
[3] [1982] HCA 53; (1982) 149 CLR 600
[4] (1988) 43 BLR 124
[5] (1996) CILL 1152
[6] [1984] 2 W.L.R. 676 (C.A.)
[7] Const LJ (1998) Vol 14 No 5
[8] (2004) Const LJ Vol 20 No 3
[9] [2006] NSWSC 652
[10] [2004] QSC 270

67. An email from the Respondents of 29 January contains a colour-coded exchange between the parties, including:

- **Applicant**: "That is correct the amount is $7000 plus $1700 for security plus GST equals $9570 as per the spreadsheet"…
- **Applicant**: "At this point of time we could only proceed with the following…Doors and Windows - $9570"…
- **Respondents**: "Please proceed"

68. Neither party submitted a Variation Notice before the variation was undertaken, as required by clause 15(c)(i). Neither did the Respondent, as required by clause 15(c)(ii) provide a Cost Variation Notice within the stipulated 10 days, which I find started to run on 29 January 2014, being the later of the date of the informal request and the date of the signing of Contract. Those 10 days excluded weekends, and so the Cost Variation Notice should have been given by 12 February 2014. The Applicant's purported Cost Variation Notice of 14 April 2014 (Tab 1 of Volume 3) is far too late to enliven the provisions of clauses 15(c)(iii) or (iv) of the Contract.

69. The effect of the later emails, however, was that the price was agreed within the meaning of clause 15(e).

70. Since the price was "previously agreed" there is no scope for the percentage uplift arrangement at clause 15(f) to apply.

71. I find that the agreed price for this variation was $8,700 + GST, and that prima facie that is the Applicant's entitlement for it.

72. The Respondents say, and I accept as a matter of fact on the basis of photographs taken shortly before or after abandonment of the work by the Applicants, that the work was not completed, in that the Applicant did not fit the external protection of "Bars & Flyscreen" identified in NTK's quotation of 11 January 2014, which described the work included in the variation. I also find that the Amplimesh was not provided. I deal with this appropriate adjustment under the heading of Incomplete and defective work at paragraph 216 below.

Variation 02 – Gyprock for upstairs shed.

73. The dispute here is as to quantum, and in particular, measure. In its narrative, at paragraph 6.23, the Applicant claims $3,783.46 for 141 m^2. But in its Variation Register (which founds the overall calculation of its claim) the figure is $6,520.26 including GST. The Respondents say it should be $2,628.80 for 40 m^2. There is no question but that this work was a variation. But which of these figures represents a proper valuation?

74. The Applicant's rate for its narrative claim works out at $46.24 m^{-2}. The Respondents' at a more generous $65.72 m^{-2}. It is the relevant square metreage which makes the dispute.

75. The Applicant has provided a number of tax invoices from suppliers, including a tax invoice from DPO of 31 January 2014 for $1,373,45, on which there is a manuscript annotation showing that the materials invoiced would cover an area of 141 m^2.

76. Drawing 5/10 suggests the shed is about 4 ½ m x 9 m, or about 27 m in perimeter. Of that, I presume that part of that would be taken up by windows and doors, so I reduce that to, say, 20m. Drawing 3/10 suggests that the average ceiling height is about 3m, such that the total external wall area to be lined was about 20 x 3 = 60 m^2. The Applicant's Variation Register also refers to a dividing wall, which would add about a dozen m^2 on each side. That would take the wall area up to about 75 m^2.

77. To this must be added the materials for the ceiling. Although it appears that the Respondents installed the ceiling gyprock themselves, the Applicant evidently supplied the materials. 4.5m x 9m = 40.5 m^2, takes the approximate total quantity of gyprock required to about 115 m^2. To this, some allowance must be added for wastage, since the gyprock sheets would inevitably need to be cut to suit the actual dimensions of the space.

78. Accordingly, the Applicant's claim for 141 m^2 is more persuasive that the Respondents' estimate of 40 m^2.

79. In their Form 5 notice of 4th April 2014, the Respondents say that the "indicated price" was $3,200. It is not clear if this is inclusive or exclusive of GST. That figure is supported by the following words in the email chain dated 29 January: "At this point of time we could only proceed with the following…Gyrock…$3,200 for upstairs... Please proceed"

80. The Respondent has not asserted that $3,200 as an agreed figure, and I find that it was not.

81. I allow this claim in the amount identified in the narrative, i.e. $3,783.46.

82. I should make it clear that this figure relates to the gyprocking itself, and not the framing out, as to which see paragraph 190 below.

Variation 03 – Deletion of Electrical Items

83. The parties are agreed that there should be a credit for the deletion of some fans and lighting. The dispute is as to quantum. The Applicant now says it should be $572 including GST; the Respondent says $2,500.

84. The touchstone is clause 15(d) – actual cost.

85. The Applicant relies on an email of 23 March 2014 from its subcontractor giving a credit of $572, being 4 wall fans at $121 and 2 light fittings at $44. However, this credit is merely for supply of the relevant items, and not for the site work involved. Accordingly, I do not accept this as a starting point for the valuation.

86. The Applicant's Form valued this credit at $1,311.09 on 14 April 2014, but says that this figure did not take account of an additional TV outlet.

87. I find that a reasonable retrospective estimate of actual cost was that $1,311.09 minus $50 + GST = $1,256.09 including GST.

Variation 04 – Electrical Upgrade

88. The parties are in dispute as to whether this item is a variation at all.

89. The basis of the Applicant's case is that its budget estimate of 13 September 2013 contained a provisional sum of $7,000, and that the actual invoiced cost of its subcontractor B & H Electrical eventually came it at much more than that. However, as noted at paragraph 40 above, the Contract as later agreed in December 2013 included no provisional sums, but was a lump sum contract.

90. There is no dispute that this work was necessary, but insofar as it was outside the Applicant's contemplation when pricing the work, it was nevertheless indispensably necessary work which was at the Applicant's risk.

91. I take into account that the Respondents signed a Form 5 for an "upgrade" on 4 April 2014, being after the work was done. It is likely that they made a mistake, induced by the Applicant, that electrical work was a provisional item. If so, it was a mistake of law, and there is nothing in that document or elsewhere which suggests any request for any change save to require what was indispensably necessary for the compliant completion of the Works.

92. Accordingly, I allow nothing for this item.

Variation 05 – Additional Concreting

93. It is not seriously in dispute that there is a variation here – more concreting was required than was in the original scope. What was in the original scope is obscure in the absence of relevant contract-annexed drawings, but it is clear from both the Variation Notice signed by the Respondents on 4 April 2014 and the emails that both parties have proceeded on the basis that there was a variation to increase the amount of concreting to be done between the original structure and the new structure. In particular, I note the Respondents' emailing, "I don't mind paying for the additional concrete" on 29 January 2014.

94. It is also common ground that variation was not to introduce something entirely new, but rather increase what was originally within the Contract scope. Both parties have treated the area as having doubled, such that one half of the cost is a variation.

95. The quantification has varied a number of times:

- An email exchange partially copied into Tab 5 of Volume 3 breaks down the estimated total cost – evidently before applying the credit – at $5,520.
- The Respondent's Form 5 Variation Notice of 4 April 2014 refers to an "indicated price" of $5,500 ÷ 2 = $2,750
- The Applicant's Form 3 Cost Variation Notice of 14 April puts the discounted value at $3,690.61
- The Applicant's Variation Costings suggest that the actual cost was $6,593, against which a credit of half - $3,296.50 has been applied and a 20% margin has been added, leading to a claim of $3,955.80 ex GST, which is equivalent to $4,351.38 including GST.
- The sum claimed at # 6.26 of the Adjudication Application is $4,395.38 including GST
- However, it is evident from the Scott Schedule analysis that the numerical amount actually included in the Applicant's claim is $4,351.38 including GST.

- The Applicant purports to provide supporting invoices, but these add up to about $1,400 short of the Variation Costings:

Variation 05 Supporting Invoices		Ex-GST	GST	Gross
Rural formwork	21/01/2014	$ 450.00		$ 450.00
Assure Concreting	19/01/2014	$ 495.00		$ 495.00
True North Concrete Solutions	29/01/2014	$ 500.00		$ 500.00
Territory Timber & Hardware	13/01/2014	$ 492.22		$ 541.44
Darwin Steel & Pipe	15/01/2014	$ 584.00	$ 58.40	$ 642.40
Hanson Construction Materials	20/01/2014	$ 2,120.00	$ 212.00	$ 2,332.00
Hanson Construction Materials	20/01/2014	$ 522.00	$ 52.20	$ 574.20
All Earth Industries	17/01/2014	$ 127.28	$ 12.72	$ 140.00
		$ 5,290.50		$ 5,675.04

- The Respondents value the work at just $550 including GST. But it is evident that their approach deals with an alleged lack of level, which I consider below.

96. Following the valuation rules in the Contract, the approach I take is to allow the actual costs as shown by the invoices, add 20% margin, allow one half and add GST, as follows:

Supported cost	$ 5,290.50
20% margin	$ 1,058.10
	$ 6,348.60
Credit half	-$ 3,174.30
	$ 3,174.30
GST	$ 317.43
Total	$ 3,491.73

Variation 06 – Container Cladding Materials

97. There is no dispute that this is a variation – the dispute is as to whether a price was pre-agreed.

98. The wording in question is set out in an email exchange leading to 29 January 2014, as follows:

> **Applicant**: Container cladding $3200
>
> **Respondents:** Is this a firm price for the container cladding including the necessary flashing?
>
> **Applicant:** Based on approx. 60 sheets @ 3.5 metres in length and at $13 per lineal (sic) metres this would cost approx. $2700 plus external flashings so approx. $3200. This is a retail price as when they gave these to me they didn't realise we were trade so if anything will come down by 30%.

99. It was apparently on the basis of this exchange that the variation proceeded.

100. I find that the email exchange constituted an agreement as to a maximum price for the materials for the variation within the meaning of clause 15(f) of $3,200 excluding GST. It was, or should have been, reasonably clear from the calculation provided that the $3,200 covered only materials, and not the fixing of them, as to which see variation 19 below.

101. In light of this finding, it is not necessary for to decide on the question of estoppel here. But I note that the same result would be obtained by that doctrine: the Applicant failed to provide a timeous Cost Variation Notice as required by clause 15(c) and is to be held to its representation that the materials element of price would "if anything" come down.

Variation 08 – Dividing wall

102. This is a small dispute about quantum. The Respondents have not provided me with any sufficient reason to disturb the Applicant's figure of $690 + GST = $759.

Variation 09 – New Sliding Door

103. Again this is a dispute about quantum.

104. The Applicant originally claimed $3,996.6 in its Form 3 Cost Variation Notice, but in the Adjudication Application, had reduced this to $1,354.32 supposedly because the door itself was in the event provided by the Respondent. I asked for further submissions on this point, and both parties now say that the door was in fact provided by the Applicant. Implicit in this is an assertion that the originally claimed figure is correct.

105. There is a dispute about the cost of the door itself. The difference between the Applicant's total claim and fix only claim is

Total claim	$ 3,996.60
Fix only claim	$ 1,354.32
	$ 2,642.28

106. Conversely, the Respondents say that they have received a quote for an exact replica door at $1,320. This is presumably $1,200 + GST.

107. Appendix E to the Applicant's Further Submissions does not help them: that contains a total supply cost from [window supplier] of $9,709.09, barely more than the amount of [the window supplier's] quote of $8,700 + GST relied on by the Applicant for the Variation 01 doors and windows.

108. There is a dispute about whether the Applicant provided the fly screen: both the photographs and the Applicant's answer to question 11 of my request for Further Submissions lead me to conclude that the Respondent's position is more credible. I deal with the appropriate credit for this at paragraph 216 below

109. There is also a dispute about the labour charge. The Respondents invite me to halve the Applicant's figure (Response page 12).

110. I find that there is no sufficient reason to interfere with the Applicant's figure as to labour, but that the Respondent's figure is more credible as to the actual cost of the door. Accordingly I allow (GST inclusive):

Labour as claimed	$	1,354.32
Supply	$	1,320.00
Margin of 20% on supply	$	264.00
	$	2,938.32

Variation 10 – Doors and windows in the shed

111. There is a dispute about whether this is a variation at all.

112. The Applicant says that they were not originally included in the budget estimate of 13 September 2013. It points to the request to include these windows and door later in September 2013.

113. However, as the Respondents point out, they are shown on the drawings referred to a paragraph 32 above:

- Drawing 2/10 shows a sliding door marked "SD1" and 4 windows marked "W1". It is clear that this plan is of the shed level, since the window shown marry up with the windows apparent at upstairs shed level in photograph "151314 overall view". Details of the sizes of these windows and the door are given by the Door and Window Schedule on that drawing;
- Similarly, drawing 3/10 shows the side windows at upstairs shed level;
- Drawing 8/10 contains typical door and window frame details;
- Drawing 10/10 contains some specification details for glazing.

114. Accordingly, I find that this work was not a variation to the original Contract scope.

Variation 11 – Balustrading

115. There is dispute about whether this is a variation.

116. The Applicant says that the original proposal was for glass balustrading, and this this was changed to timber balustrading.

117. As with the previous item, however, it is evident that the contracted scope of work was for timber; see drawing 3/10 and Detail "A" on 7/10 which refers to rods at 125 max centres – this can only be a reference to timber rods.

118. As such, I find that the eventual choice of timber balustrading was not a variation.

119. In light of this finding, it is not necessary for me to make any finding as to the comparative cost of glass and timber balustrading.

Variation 12 – Insulation to shed

120. The claim here is for $795.17 for Eco Therm insulation.

121. The parties are agreed that this was a statutory requirement. The essential question is, "Did the requirement arise out of the original Contract work, or the variation requiring internal lining of the upstairs shed?"

122. The point is finely balanced. But I have in mind that the original contract work did not require the Applicant to make the upstairs shed insulation compliant. That only came with the variation for internal lining of this area. Accordingly, I allow this item as claimed.

Variation 13 – Use of Battens

123. The dispute here arises out of an allegation that the Respondents took and used for their own purposes some surplus battens that were the property of the Applicant. The Respondents say they had permission for this, and dispute quantum.

124. The complaint might well sound in tort, or perhaps in a *quantum meruit* or a *quantum valebat*. But I find that this claim cannot be sustained under the construction contract, and in particular the matter cannot be brought within clause 15 as a variation to the Contract for the simple reason that it does not enliven any of the 6 elements of clause 15(a).

125. I note in passing that there might be some sort of broad equivalence between matters I reject against the Applicant and those I reject against the Respondents on this jurisdictional basis. But I make clear that this is no part of my reasoning, and I attempt no "judgment of Solomon" in this regard. I simply find that insofar as the claim is made under the Contract, it fails, and insofar as it is made outside the Contract, it is outwith my jurisdiction.

Variation 14 – Trenching

126. The claim here is for $712.80. The Applicant says that it required its plumbing contractor, who had an excavator on site, also to excavate the trench necessary for the electrical work.

127. I have no reason to doubt that that this was a variation to the plumbing subcontractor's work. Nor that it was a perfectly sensible way for the Applicant to procure its own head contract work. But neither of these factors comes even close to providing a foundation for a variation claim under the Contract.

128. Despite being invited to provide further submissions, the Applicant has provided no credible basis for suggesting any variation here.

129. In their Response, the Respondents have taken two positions. First they dispute the item. Secondly, they challenge the quantum. In their Further Submissions, they reiterate their first position, which is that this is not a variation at all.

130. I find for the Respondents on this item: there is no variation at all here under the Contract.

Variation 15 – Installation of Toilet Window

131. This is a dispute about quantum.

132. The Respondent failed timeously to provide a Cost Variation Notice, and so the dispute about how long the work took was not addressed promptly.

133. I find that the Respondents case that the work took 4 hours more plausible that the Applicant's case that it took 9 hours. I therefore allow 4/9th of the Applicant's claim of $594, i.e. $264 + GST.

Variation 16 – Removal of Container Screws

134. I find that this item was not a variation to the scope of the Contract.

Variation 17 – Removal of old ceilings

135. At Variation 20 below, I consider water damaged wall linings, and have found their repair not to be a variation. At Variation 27 below, I have concluded that floorboards fall into a different category, because no floor boarding work in the containers was part of the original Contract scope.

136. This item sits finely balanced between these two positions. After some hesitation, I find that this item was a variation to the scope of the Contract, for two reasons:

137. Page 17 of the April 2014 Email (relied on by the Applicant at Tab 8) shows that the Respondents relied on "[the Applicant] to advise us what was suitable to remain in situ". Those words suggest a contractual understanding that the existing ceiling could remain, and hence their replacement was not original Contract work.

138. Water damaged ceilings are by their nature dangerous, and a variation might well have been contemplated by both parties under clause 14 if it had not been requested by the Respondents. This factor leads me the likelihood that the Respondents did in fact request this variation.

139. I am not persuaded by the Respondents' case as the quantum of this item.

140. As to page 17 of the April 2014 Email, it might well be that the disposal of the damaged ceiling material involved the use of the same skip as was being used for other materials. I note that this point is not relied on at 13 of their Response.

141. It may well be that the Respondents volunteered their assistance in terms of disposing of rubbish throughout the job. That does not entitle the Respondents to refuse payment for this variation.

142. I allow this item at $1,720.77, the figure claimed.

Variation 18 – New Interior Doors

143. The Contract is unhelpful as to whether these were or were not within the original scope. I proceed upon the Respondent' apparent concession that they were not.

144. Again, the Applicant failed timeously to provide a Cost Variation Notice, and so the dispute about how long the work took was not addressed promptly. Neither has the Applicant provided any evidence of actual cost, such that its claim of $1,650 is unsupported.

145. However, the Respondents' figure of $560 cannot be right either, since it allows virtually nothing for fitting.

146. I accept the Respondents' statements that there were 7 doors, and that their cost at Bunnings was $79 per door. To 79 x 7 = $553 I add 7 x $50 = $350 + GST = $385 for fitting, i.e. a total of $938.

Variation 19 – Container Cladding Fixing

147. The Applicant claims $15,632.76 for the costs of fixing the material dealt with in variation 06 above, including battens and insulation. This is approximately 5 times the materials cost I have allowed. It was only by a slender margin that I have concluded that the maximum price given by the Applicant of $3,200 was for materials only. Yet again, the Applicant failed timeously to provide a Cost Variation Notice, and so the dispute about how long the work took was not addressed promptly. And again, the Applicant has provided no credible any evidence of actual cost, such that its claim is largely unsupported.

148. The Respondent says in its narrative (page 13) that the whole of this item should be disallowed, but in the Scott Schedule allows $3,200, this being in addition to the $3,200 conceded for item 06. Further, the Respondents have calculated a time of 3.33 hours claimed to fix each sheet, which appears excessive. They further point out that the windows would have needed fitting in any event.

149. The contractual machinery has plainly broken down here. Whilst that breakdown is largely the Applicant's fault for not following the clause 15 machinery properly, I find that there is also some fault of the Respondents in neither submitting a clear Variation Notice under 15(c)(i) before the variation as undertaken, nor in following up on the obvious point that the $3,200 can surely only have covered materials. Accordingly, the usual law consequence of breakdown of contractual machinery should step in so as to substitute a reasonable machinery. In this case, absent any cogent evidence of actual cost, I find that the

reasonable machinery requires an estimate of what would have been a reasonable expectation of an owner of the cost of fixing, and taking a broad brush, I find that that reasonable expectation would have been that the cost of fixing would have been no more than the cost of the materials themselves, i.e. $3,200 + GST.

Variation 20 – Repairing Damaged Gyprock in the Containers

150. This claim is for allegedly additional costs in repairing water damage to the existing gyprock lining in the containers.

151. The Contract is regrettably obscure as to precisely what the Applicant was to do in relation to the internal finish of the containers. I have in mind, however, the following pointers:

a) In their proposal of 2 September 2013 (Tab 3), the Applicants indicated its intention to undertake "a (sic) internal fit out of the containers";

b) In its email of 3 September 2013, the Applicant gave a guide price of $55 per sqm for wall linings;

c) In its proposal of 13 September 2013, the Applicant gave a price to undertake, inter alia, "fitting out the internal";

d) The exchange of emails on 29 January 2014 at item d (Tab 18) appears to predicated on the assumption that container gyprock was included in the Contract price;

e) The Respondents have asserted from an early stage that the work was part of the original scope of work; see e.g. the April 2014 Email at page 17;

f) The basis of the claim at paragraph 6.41 was that the existing gyprock became damaged during the wet season.

g) I sought Further Submissions as to when the water damage occurred, and in light of those submissions I am satisfied that the gyprock was in fact water damaged prior to the Contract being entered into.

152. Some construction contracts contain provisions whereby the contractor is entitled to additional payment if he encounters constructional difficulties which he did and could not reasonably have anticipated. This Contract does not contain such a provision. It is thus immaterial whether the Applicant did or did not have a reasonable opportunity to assess the extent of the work it was undertaking.

153. I find that this work was part of the original Contract scope.

Variation 21 – Lining and painting of Eaves

154. The Applicant claims the cost of lining and painting eaves of the upstairs and downstairs areas of the shed. The Respondent says the work was part of the original Contract scope.

155. Again, this is an item where the contractual machinery has broken down, but in this case I find:

- That the work was not indispensably necessary, and was not part of the original scope;
- That whilst there is no clear evidence of its being ordered as a variation, that inference is strong;
- That the Applicant has given credit for materials supplied by the Respondents;
- That at least some of the painting was done by the Applicant;
- That the sum claimed is a reasonable sum for the variation.

156. I accordingly allow this claim in full at $1,854.60

Variation 22 – Birdboard

157. There is a dispute here about whether this change was ever ordered by the Respondents, or, as the Respondents say, was simply volunteered by the Applicant or its operative.

158. This is not a case of breakdown of contractual machinery, since the purpose of the contractual machinery is to avoid disputes as to whether a particular change has or has not been required by the owner. It is incumbent on the Applicant either to

- Point to a compliant clause 15(c)(i) notice, or
- Show clear evidence that a variation was ordered in disregard of that procedure, such that the contractual procedure can be shown to have broken down.

159. In this case, the Applicant has done neither. I find that this was not a variation for which payment is due under the Contract.

Variation 23 – Shelving in Cupboard

160. This variation is objected to, but in reality, the dispute can only be about quantum.

161. The Respondent says that the materials were collected after a labourer had finished his work for the day. That may be so, but is not basis for denying liability in total. The photograph relied on by the Respondents does illustrate that the work was very minor, and the 9 hours labour claimed by the Applicant is excessive: it is simply not credible that an operative would have spent 9 hours on such a minor item.

162. I recalculate the Applicant's entitlement as follows:

Allowed hours		3
Rate	$	55.00
Labour	$	165.00
Materials	$	153.00
Net cost	$	318.00
Margin	$	63.60
Excl GST	$	381.60

GST	$	38.16
Incl GST	$	419.76

Variation 24 – Roof Flashings

163. This is a claim for $1,775.77 for roof flashings. The Respondents say these flashings were necessary because the flashings originally supplied by the Applicants were unusable.

164. I prefer the Respondents account of events, and do not allow this claim.

Variation 25 – Solid Blocking

165. This is a small claim - $653.40 – for the labour involved in solid blocking between the decking and dwelling. The Respondents challenge both liability and quantum, and have provided some photographs which show the work in question.

166. In their Response, the Respondents say this work was done without request by them, but at page 25 of their document of their April 2014 Email, they say that they were "there for the entire time these were installed".

167. There is little doubt but that this work made a neater finish, and I infer that as a matter of fact, the Respondents did ask for it to be done.

168. As to quantum, the Applicant claims 9 hours. The Respondents say it took "2 hours maximum". From an examination of the photographs, the likely true time taken is something between those estimates – I allow 5 hours, and recalculate the item as follows:

Allowed hours		5
Rate	$	55.00
Labour	$	275.00
Margin	$	55.00
Excl GST	$	330.00
GST	$	33.00
Incl GST	$	363.00

Variation 26 – Additional Soffit Lining

169. Again, there is dispute both as to liability and quantum for this item – the installation of a soffit lining.

170. As to liability, the Applicant says at paragraph 6.47 of the Adjudication Application that the work was requested by the Respondent. At page 15 of the Response, this assertion is not denied: rather, the Respondents say that this was part of the original scope of work.

171. I find that this work was not part of the original contract works, and I accept that Applicant's case that the work was requested by the Respondents. As with the previous item, there is little doubt but that this work led to a neater finish.

172. Although the 9 hours claimed might look a little high, it is not obviously so. The fixing of soffits is inevitably awkward work, and the need for some sort of working platform for 8 metres of work, measuring, cutting and fixing may well belie the relatively small surface area of the finished work. I allow the quantum claimed by the Applicant of $653.40.

Variation 27 – Replacement of floorboards

173. As with Variation 20, this work was necessary to address water damage in the containers.

174. There is however an important difference between this item and Variation 20: the Applicant's original scope of works did not include replacement of floorboards. Accordingly, this is not a case of a contracted item turning out to be more expensive to perform than the Applicant anticipated – it was a new item entirely.

175. I allow the Applicant's claim for this item.

Variation 28 – Steps to Container

176. This is a claim for $2,625.48 for two sets of short steps of just a few treads, one to the sliding door entrance to the containers, and one to the laundry door. It is common ground that the later were salvaged from another project. The former can be seen from the photographs to have been constructed of steel strings and hardwood treads.

177. The Applicant relies on its email of 13 January 2014, which identifies one of these stairs as "left to complete" with an estimated cost of $2,200. I derive no assistance from that email, since it does not distinguish between original contract work and extra work.

178. The Applicant also says that the stairs were "verbally requested" (paragraph 6.49 of the Adjudication Application). At page 15 of the Response, the Respondents do not deny this. The fact that the laundry steps were salvaged from another job renders it likely that there was some prior discussion about them. I find that both sets of steps were verbally requested.

179. The Respondent say that the work was part of the original contract work, and in particular that it was necessary to comply with legislation, the containers being set 450 mm off the ground. In my view, that point begs the question, which is not so much whether the stairs were necessary (they plainly were) but rather who was to be responsible for them. And so, again, the question arises because of the parties' failure to agree a clear scope of works.

180. The drawings, and in particular 3/10 and 9/10, show the stairs to the new balcony, but not these steps. I find that the contractual intention was that these steps were to be part of the work that the Respondents were to do, and that the Respondents' request that they be provided by the Applicant constituted a variation.

181. Respondents also say that the steps are neither complete nor secure. I deal with this assertion at paragraph 220 below.

182. I allow this claim in full.

Variation 29 – Repair of Rust Damaged Wall Studs

183. This is a claim for $2,183.28 for repairing wall studs to the kitchen, laundry and bathroom in the containers – the dispute is as to liability.

184. Whilst the task of lining the containers was part of the original contract scope, it is clear that the task of "sorting out" the wet areas was not. The Respondents had bought these containers – already purportedly converted into residential "dongas" - very cheaply, and it must have been very evident to both parties that some work was going to be necessary in order to bring the kitchen, laundry and bathroom areas up to scratch.

185. The Respondents say at page 15 of their Response that the Applicant was made aware of this rust on 6 November 2013 – this was before the Contract was entered into. In my view, this is irrelevant – the Applicant would also have been well aware of the poor state of the fittings in these areas. This work was simply not part of what the Applicant undertook as its work; rather it fell within the work which the Respondents envisaged doing themselves. To put the point another way: insofar as this work was indispensably necessary, it was indispensably necessary to the Respondents' work, not that of the Applicant's.

186. It is clear from the Respondents' April 2014 Email that there were discussions between the parties about using a sandblaster for this work (in the event, this proved to be insufficient). The irresistible inference is that this work was verbally requested by the Respondents.

187. I allow this claim in full.

Variation 30 – Additional Gyprocking for Showers Bases

188. This is a claim for $670.93 for "building up" around the shower to allow tiling.

189. There is no suggestion that this tiling was part of the Applicant's scope. Similar consideration arise as in the previous item.

190. I am satisfied that the Respondents requested this work, that is was outside the original Contract scope, and I allow it in full.

Variation 31 – Framing Out of Existing Shed

191. At Variation 02 above, I have considered the issue of gyprock lining for the upstairs shed, and found that that work was a variation (see paragraph 73 above).

192. It is obvious that the gyprock would need to fixed to something, and it could not possibly be fixed the walls of the shed as they were before these works. Indeed, before any sort of internal lining to the shed – gyprock or otherwise – would require the inside of the shed walls first to be framed out.

193. Further, whilst it appears that the Respondents undertook the ceiling lining themselves, framing would also be required for that. It is inconceivable that the arrangements in respect of that – which must have been oral because no relevant written material on it has been advanced by either party – can have been made in a vacuum.

194. Accordingly, I reject the Respondents' case at page 15 of the Response that they "never approved, nor agreed to same".

195. Much more meritorious is the Respondents' case that prior knowledge of the cost of the work would have influenced their decision as to whether to proceed with the change at all. But, as discussed above, it was the fault of both parties that the contractual regime was not followed, and the contract machinery have broken down, I must substitute a reasonable machinery.

196. Having regard to all of the circumstances, including the Further Submissions, the photographs, the evidence of actual cost and the value of this work to the Respondents, I find that the full sum claimed for this item should be allowed, namely $13,429.68.

Variation 32 – Tree Removal

197. The Applicant claims $2,310 for the removal of two trees. The Respondents say that this work was part of the original Contract scope, and also say that one of the trees was not fully removed.

198. One of these trees was in the way of the Applicant's work. In the email 16 September 2013 there was this exchange:

> **Respondents:** Will you remove the single existing tree currently in situ?
>
> **Applicant:** Yes we can remove.

199. Further, I find that the removal of that tree was indispensably necessary for the Applicant's work. It was thus part of the original scope, and not a variation.

200. The second tree is another matter. The Respondents acknowledge as much in their April 2013 Email, in the words, "2nd tree nominated by us". The removal of that second tree was, I find, a variation.

201. The Respondents also say in respect of that second tree "stump remaining fouling driveway". The photographs do not support that assertion. The removal of a tree might involve the removal of none, some or all of its root system. The latter would be more disruptive to a driveway that the former.

202. I allow half of the cost claimed, namely $1,155.

Variation 33 – Credit for Shade Structure

203. The parties are agreed that this should be a credit, and are almost entirely agreed as to quantum.

204. I prefer the Applicant's slightly more accurate figure of $5,054.50.

Variation 34 – Credit for Painting

205. The parties are agreed that the credit for this item should be $8,95.18. I so find.

Project Management Time

206. The Applicant claims management time under both clause 15(g) and 13 of the Contract (paragraph 1.6 of the Adjudication Application). What must be regarded as an alternative approach is set out at paragraph 6.13 – that this is not a lump sum contract but a cost reimbursable arrangement. The quantification of $37,325 + GST is set out at paragraph 6.15. This claim is hopeless on manifold bases.

207. Clause 15(g) contains absolutely no warrant for such a claim. It deals only with the cost of variations, and the scheme of the Contract is to allow the specified percentage on cost (in this case 20%). This percentage compensates for management time, and allows no room for any further addition.

208. In any event, the paragraph 6.15 calculation is a "total cost" calculation. This subset of global claims is a method of calculating variation or disruption claims which is almost always rejected, for the very good reason that it identifies no nexus between entitlement and claim. As Byrne J put it in *John Holland v Kvaerner* (12996) 82 BLR 83:

> The logic of such a claim is this:
>
> > (a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
> >
> > (b) the proprietor committed breaches of contract;
> >
> > (c) the actual reasonable cost of the work was a sum greater than the expected cost.
>
> The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated. For present purposes, ignore any adjustment that may have to be made for variations and extras. The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the contractor's cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not, for this reason, be ignored. The likelihood and nature of some extra cost flowing from the breaches of contract may be readily apparent from the nature of each of the breaches and a general understanding of its impact on the building project. It may also be apparent in what precise way this breach led to the extra cost. In most, if not all, cases, however, there is an intervening step relating the extra cost to the breach. For example, it may be that a breach means that work has to be redone, or that work takes longer to perform, or that its labour or material cost increases, or perhaps that there was extra cost due to disruption or loss of productivity. Again, in the given case this may be readily apparent but difficulties will arise for the parties and the tribunal of fact where the global nature of the claim involves the interaction of two or more of these intervening steps, particularly where they and their role are not, in terms, identified and explained. It is the second aspect of the unstated assumption, however, which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the

> breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.
>
> The global total, cost claim in this case is a further variant of such a claim…

209. Here (and making the necessary substitution of compensable event for breach), the Applicant has put forward no evidence for the first, third or fourth proposition. Indeed, that the claim includes cost allegedly incurred even before the Contract Work was formulated is very powerful evidence that the cost is not solely attributable to either variations or delay.

210. There plainly was delay. Item A13 of Appendix A of the Contract sets the Construction Period at 90 days, and the work took longer than that. But there is no evidence as to what delay was caused by what factor. Accordingly, there is no basis upon which I could find that any increased costs caused as a result of compensable delay under clause 13(d). The Applicant has not put forward any claim for extension of time, even a total time claim, and any such total time claim would in any event be subject to much the same objections as a total cost claim.

211. The basis stated at paragraph 6.13 (this is was a cost reimbursable arrangement) is unsustainable – I have found that this is a lump sum contract.

212. I further accept the Respondents' submission that there was no collateral agreement to pay any additional sum for management time.

213. Accordingly, I reject the management time claim in its entirety.

Incomplete and Defective Work

Specifically identifiable items

Final Power and Water Connections

214. It is common ground that the Applicant has not made the final electrical or water connections. Neither party has responded to my invitation to suggest a money value for incomplete or defective work.

215. The final connections should not themselves be substantial operations. Nevertheless, there is an inevitable degree of checking needed for the connection process. I allow an abatement of $2,000 for this item.

Security devices on Variation 01 doors and windows

216. I find that the Applicant did not fit security devices on doors and windows which were the subject of Variation 01. I find that the amount allowable is $1,700 + GST = $1,870, being the applicable element of the NTK quotation referred to at paragraph 66 above.

Screen for the Variation 10 door

217. I find that the Applicant did not fit the required screen to the Variation 10 sliding door. I find that the amount allowable is the same percentage – 19.5% - as was used for the Variation 01 security element ($1,700 of $8,700) applied to the allowed door cost of $1,320, i.e. $257.93.

Uneven concrete between the existing and the new structures

218. It is common ground that there is some unevenness in this concrete; the Applicant has agreed that this "needs attention" (Tab 5).

219. I allow $500.

Allegedly incomplete/insecure steps – Variation Item 28

220. The Respondents rely on photographs in support of their assertion that the steps to the container are incomplete and insecure, and could not pass an inspection.

221. In my view, this is a scope issue. I have found at paragraph 180 above that the original contractual intent was for these steps to be provided by the Respondents themselves. Similarly, I find that, insofar as they need to finished with some sort of short handrail or similar, that work is the responsibility of the Respondents, and the cost of doing so is not something that the Applicant has undertaken or charged for.

Other items

222. But for a very late submission by the Applicant, I would have taken a broad brush to other items that are incomplete or defective.

223. I reject the Respondents' figures of only 80% or 85% completeness. Those might well be good estimates of how much of the total work required is outstanding, but the balance is largely work which the Respondents left for themselves to do, and which has never been part of the Applicant's scope of work. Other than the above, the other items attributable to the Applicant would have suggested an incompleteness of the order of 1.5% of the Contract value.

224. However, by submission made by email on Saturday 18 October – just I was nearing completion of the writing of this determination, the Applicant provided a schedule valuing the work (including the specific items above) at $7,672.15. This figure is very close to, but slightly higher than, the figure upon which I would otherwise have alighted, and I adopt it, such that the "top up" figure for these other items is $3,044.22, being some 2% of the Contract value.

Sum due, Net of Interest and Costs

225. Pulling these many threads together, I find that the balance of the Contract price payable is $22,084.70, calculated as follows:

Contract sum			$ 122,788.60
Variations			
001	Supply (only) new windows and doors for the shipping containers compliant with certification requirements, including 2 x sliding doors and fly screens to suit new windows.	$ 9,570.00	
2	Supply and installation of gyprock to internal walls in upstairs rooms of shed,	$ 3,783.46	

	including dividing wall		
003	Credit for the deletion of internal and external fans x 4, deletion of 3 fluoro lights to balcony and 2 to patio area. Adjustment for addition of a TV outlet	-$ 1,256.09	
004	Electrical work to upstairs shed including power upgrades to meter box and mains supply and additional air-conditioner isolater	$ -	
005	Additional concrete to replace existing concrete	$ 3,491.73	
006	External cladding to containers - Iron materials only	$ 3,520.00	
7			
008	Addition of a dividing wall in upstairs shed, inclusive of labour & materials	$ 759.00	
009	Supply and installation of door to downstairs shed	$ 2,938.32	
10	Supply and install new windows including new sliding door to upstairs shed	$ -	
11	Materials and labour to cap handrail of balcony and stairs, including machining the handrail groove	$ -	
12	Supply of additional eco therm insulation to shed as a result of internal gyprocking	$ 795.17	
13	Cladding battens removed from site and used by Neil to clad the breezeway. This material belongs to the builder and approval was not sought prior.	$ -	
14	Trenching required for power upgrade	$ -	
15	Install window to existing toilet as requested by Rae	$ 290.40	
16	Remove existing gyprock screws from containers Previously this was to be completed by the client	$ -	
17	Remove and dispose of existing gyprock Previously client requested that this be left as they had intensions to reuse	$ 1,720.77	
18	Supply and install 5 new doors and door locks	$ 938.00	
19	Labour to clad and batten containers and installing eco therm insulation. This includes additional time to install windows, pack out external wall frames for cladding, time to drill in battens, etc.	$ 3,520.00	
20	Supply and install additional gyprock to container ceilings & bathroom walls. Removed as requested due to damage. Only 86sqm removed from ceilings as	$ -	

	some had been removed already		
21	Install linings to eaves to upstairs and downstairs of shed	$ 1,854.60	
22	Material and labour to install 42 lineal metres of birdboard to roof of containers as requested		
23	Supply and install new wardrobe shelving as requested	$ 419.76	
24	Supply and install flashings to the bottom of the cladding sheets on shed as instructed by Rae	$ -	
25	Labour to install solid blocking to between decking and shed	$ 363.00	
26	Labour to supply and Install the soffit to front of the shed, between deck and shed	$ 653.40	
27	Labour to supply and install floor sheeting to gaps between containers. Variation requested due to the discovery of damaged boards.	$ 986.04	
28	Materials and labour to construct new stairs at entrance of containers and side entrance to laundry as requested.	$ 2,625.48	
29	Materials and labour to repair rusted and damaged stud framing in kitchen, laundry and bathrooms. Requested by client due to their sandblaster not being sufficient.	$ 2,183.28	
30	Materials and labour to supply and install a second layer of gyprock to the bathrooms to accommodate tiling as requested	$ 670.93	
31	Materials and labour to frame out upstairs in preparation for gyprocking. This required that ceilings to be packed down, roof braces cut and windows to be framed out to make a double wall frame as per the clients request.	$ 13,429.68	
32	Tree removal	$ 1,155.00	
33	Credit for not installing the shade structure	-$ 5,054.50	
34	Credit for not painting the internal of the containers	-$ 8,595.18	
			$ 40,762.25
Project Management Time			$ -
			$ 163,550.85
Less paid			-$ 133,794.00
			$ 29,756.85
Remedial & rectification works			
	Final power and water connections		-$ 2,000.00
	Security on Variation 01 doors and		-$ 1,870.00

	windows		
	Screen for Variation 10 door		-$ 257.93
	Rectify concrete area		-$ 500.00
	Balance of sum conceded by Applicants		-$ 3,044.22
Balance of Contract Price Due			$ 22,084.70

Interest

226. The Applicant claims contractual interest at paragraphs 7.1 (Claim 2) and 8.1 of the Adjudication Application.

227. There is often a discretionary element to interest claims, but not so here. The effect of Clause 24(c) and Appendix A Item A15 of the Contract is that the Applicant is entitled to interest on the unpaid balance of the Contract Price from the due date at 20%, compounded with weekly rests.

228. I find that the unpaid balance of the Contract Price is $22,084.70 and the due date is 2 June 2014. Accordingly, the interest due is as follows:

	Principal	Interest
2/06/2014	$ 22,084.70	$ -
9/06/2014	$ 22,084.70	$ 84.94
16/06/2014	$ 22,169.64	$ 85.27
23/06/2014	$ 22,254.91	$ 85.60
30/06/2014	$ 22,340.51	$ 85.93
7/07/2014	$ 22,426.43	$ 86.26
14/07/2014	$ 22,512.69	$ 86.59
21/07/2014	$ 22,599.27	$ 86.92
28/07/2014	$ 22,686.19	$ 87.25
4/08/2014	$ 22,773.45	$ 87.59
11/08/2014	$ 22,861.04	$ 87.93
18/08/2014	$ 22,948.97	$ 88.27
25/08/2014	$ 23,037.23	$ 88.60
1/09/2014	$ 23,125.84	$ 88.95
8/09/2014	$ 23,214.78	$ 89.29
15/09/2014	$ 23,304.07	$ 89.63
22/09/2014	$ 23,393.70	$ 89.98
29/09/2014	$ 23,483.68	$ 90.32
6/10/2014	$ 23,574.00	$ 90.67
13/10/2014	$ 23,664.67	$ 91.02
20/10/2014	$ 23,755.69	$ 91.37
Total interest to 20/10/2104		$ 1,762.35

Other Complaints by the Respondents

229. From page 17 of Response, the Respondent has made various other complaints.

230. It is said that the Applicant has used harsh, aggressive and offensive language, and has unreasonably failed to mediate. Those matters do not affect my obligation to determine the matters I am required to determine under the Act.

231. Complaint is made about the Applicant's attendance at the property on 10 July 2014, when the Respondents were not present but their teenage son was. Perhaps those complaints sound in trespass – I make no finding at all about that – but they are outside my jurisdiction to consider.

232. At paragraph (a) on page 20, the Respondents complain about the Applicant having started work before a building permit was obtained, and reserve their right to further action if this prejudices their ability to obtain a certificate of occupancy. Such a right is inherent in the "pay now, argue later" nature of adjudication, and does not affect my determination.

233. A similar observation falls to be made about paragraphs (b) and (c).

234. I have taken account of the content of paragraph (d).

235. It is not necessary for me to decide on the validity of the suspension, as raised in paragraph (e).

236. As to paragraph (f), I have taken account of the need to complete the electrical works.

237. See above as to the complaint about access to the property on 10 July 2014 in paragraph (g).

238. As to paragraph (h), I agree that it was unfortunate for the Applicant to have made use of copies of the Respondents' signatures on the Form 3 documents. This did have the potential to mislead. But as it happens, I was not misled; it was clear to me at an early stage of my examination of the documents that the Respondents had not signed the Forms as later completed. I take account of the point in relation to costs.

239. As to paragraph (i) (we are now on page 21 of the Response) I do not take account of the mediation issue. The Applicant has a statutory right to adjudicate, regardless of any willingness or otherwise to mediate.

240. At Paragraphs (k) – (m) the Respondents complain of emotional and financial stress, and refer to the costs of hiring additional containers as temporary accommodation. Such stress is not to be doubted. But I do not find that the Respondents have made out a case that this is caused by the Applicant, not that it is a matter I can properly take into account. The question of allowing the Applicant back to complete the work has not been resolved and I find from the solicitor correspondence that it is "six of one and half a dozen of the other".

241. I have already dealt with the complaint about refusal to mediate at paragraph (n).

242. At pages 22 and 23 of the Response, the Respondents seek 12 items of relief, most of which are in the nature of claims for declarations. I have no power to make such declarations. I have dealt elsewhere with all the matters that are within my power.

Amount to be paid, and When

243. The amount to be paid is thus $23,847.05, calculated as follows:

Principal	$ 22,084.70
Interest	$ 1,762.35
	$ 23,847.05

244. The Contract allows 5 working days for payment. It is appropriate to allow a few days in addition to that to allow time for my costs to be paid. The said amount must be paid on or before 31st October 2014.

Costs of the Parties

245. The Applicant has succeeded in part, but a completion of the picture painted at paragraph 58 above illustrates that the result of this determination is rather closer to the Respondents' position that the Applicant's position:

246. The approach I should adopt in relation to the parties' costs is dictated by section 36(1) and (2):

> **Costs of parties to payment disputes**
>
> (1) The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute (including the costs the parties are liable to pay under section 46).
>
> (2) However, 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.

247. I do not find that there has been frivolous or vexatious conduct by either party.

248. However, there have been unfounded submissions by both parties, and so my discretion under section 36(2) is enlivened. I decline to exercise it so as to order either party to pay the other's costs, since both parties have succeeded in part and failed in part and there is nothing either in the result or the conduct of the parties sufficient to disturb the default position under section 36(1). Further, I have considered the conduct of the parties, and the way in which they have made their claims. That consideration reinforces my view that the default position – that each party should bear its own costs – is appropriate in this case.

The Costs of the Adjudication

249. Similar considerations apply in respect of my costs. The default position is set out at section 46(4) and (5):

> (4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.
>
> (5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

250. As between themselves, the parties should each bear my costs in equal shares.

Closing remarks

251. This is already a lengthy set of reasons, necessarily in light of the fact that the 3 dozen or so variation items that I have had to consider have each involved factual consideration unique to that item. In order to avoid these reasons being even lengthier, I have been sparing in my recitation of all the submissions and supporting material put before me in relation to each item, but instead focussed on what have seemed to me to be those that are most central. But I have considered all of the material put before me, and the parties should not assume that my not reciting any particular piece of submission of evidence means that I have overlooked it.

Robert Fenwick Elliott

20 October 2014