Determination 26.18.03

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

BETWEEN:

("**Applicant**")

and

("**Respondent**")

REASONS FOR DECISION

1. On 17 October 2018 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Law Society Northern Territory ("LSNT") as prescribed Appointer under the Act. I received a Letter of Appointment on 17 October 2018 and I collected the application documents from the LSNT offices on 18 October 2018.

2. On 20 October 2018 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions until 2:00pm CST on Wednesday, 24 October 2018, should either party object to the appointment. There were no objections to my appointment.

3. In my letter of 20 October 2018 I requested that the parties confirm the date and method of service of the Application on the Respondent for jurisdictional clarity and consistency. I confirmed that on the basis of service of the Application on 12 October 2018, which is the date the Application was made, by my calculation the Response would be due on or before 26 October 2018. I requested that the parties let me know immediately if that was not the case.

4. In my letter of 20 October 2018 I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act*. I requested the parties confirm in writing their acceptance or otherwise of the electronic service process by 2:00pm CST on Wednesday, 24 October 2018.

5. On 22 October 2018 the Respondent sent me an email advising that the Application had been served on the Respondent's Registered Offices on Monday, 15 October 2018, that by their calculation the Response was due on or before 29 October 2018 and that they had no objections to the service of the Response documents electronically.

6. That same day, 22 October 2018, the Applicant sent me an email advising that the Application was served on the LSNT and the Respondent's Registered Offices at 13:25 on Friday, 12 October 2018 and that the Applicant could, if necessary, provide a statutory declaration in that regard. Shortly after the Respondent confirmed that a statutory declaration was unnecessary and that:

> *"……We will arrange for the response to be served on Friday…."*.

7. Later on 22 October 2018 the Applicant confirmed that there were no objections to service of the Response by electronic means.

8. On 25 October 2018 I wrote to the parties confirming my telephone discussion with each of them as follows:

> *"….I confirm my recent telephone discussion with each of you in relation to the following:*
>
> *1. I have been appointed to undertake a further adjudication;*
>
> *2. that adjudication is entirely unrelated to the above matter and has no bearing whatsoever on the above matter;*
>
> *3. for confidentiality, I have not identified any of the parties, the site or the construction contract relating to that adjudication;*

4. I confirm that both the Applicant and the Respondent has no objection, and consent to my undertaking that adjudication at the same time as the above matter.

I confirm that the above requirements follow the provisions of the Construction Contracts (Security of Payments) Act s.34(3)(c) as determined in the decision of The Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30.

I thank you for your continued assistance……"

9. On 26 October 2018 and within time the Respondent served the Response, including the attachments and list of authorities.

10. On 2 November 2018 I wrote to the parties requesting further submissions under s.34(2) of the Act on some questions that I had in relation to the Application and Response as follows:

"…..I confirm receipt of the Response documents on 26 October 2018 and within time under s.29 of the Construction Contracts (Security of Payments) Act (the Act).

Having read the documents of the Application and the Response there are several questions on which I would invite the parties to make further submissions under s.34(2) of the Act.

1. Following demolition work on the Site, it appears sampling of the Site for asbestos contamination was undertaken on 15 March 2018 and it also appears that discussions took place prior to taking these samples and having them assessed in an NATA Accredited facility.

The Northern Trade Solutions quotation of 19 March 2018 provides a schedule of rates to undertake 'Asbestos Removal' from the Site but does not mention a soil removal quantum of an estimated 90-100 tonnes from the Site.

That quantum appears to have been recommended by the Applicant to the Respondent, presumably to render the site free of asbestos and available for further construction of the units.

Would both parties please provide further submissions as to how that estimate quantum arose and what, if any, discussions took place between the parties in relation to the amount of soil material that would be necessarily removed from the Site and dumped?

2. *Following the Site meeting of 21 March 2018, which included the NT WorkSafe Inspector, Mr Prichard, an Inspection Report Number 201887800003 was issued which set out the proposed methodology of removal.*

   Would both parties please provide further submissions in relation to that meeting, the proposed methodology for dealing with the contamination and any additional re-evaluation of the Site for contamination?

3. *Both parties appear to be silent on clause 14 of the Contract, particularly in relation to necessary Works that may be considered by the Contract under clause14(d).*

   Would both parties please provide further submissions in relation to clause 14 of the Contract and the validity of that clause in relation to the asbestos removal from the Site?

I request that the parties provide any further submissions on or before ***5.00pmCST on Friday 9 November 2018****.*

In calling for further submissions, I follow the reasoning of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42 and, in particular, His Honour's conclusions at 42.

In the meantime, I will seek a short extension from the Construction Registrar to consider this new material and will advise the new date by which my determination will be handed down.

I thank you for your continued assistance in this matter….."

11. These questions formed my "*Request for Further Submissions No. 1*".

12. That same day 2 November 2018, I further wrote to the parties in relation to the counter-claim the Respondent had raised in the Response as follows:

"…..The Respondent has made a counterclaim of set-off at common law in the Response for alleged contractual breaches by the Applicant.

In the Adjudication the Applicant has not had an opportunity to respond to these allegations. To ensure natural justice for both parties, I invite the Applicant to make further submissions on the set-off claims put forward by the Respondent and for the Respondent to make further submissions on any new matters raised by the Applicant.

I invite the parties to make further submissions under s.34(2) of the Construction Contracts (Security of Payments) Act (the Act).

When making these submissions, I request the Applicant strictly limits its submissions to the set-off claims made by the Respondent and that the Respondent strictly limits its submissions only to new matters, if any, raised by the Applicant.

*I request that the Applicant provide any further submissions to the counterclaims raised by the Respondent in its Response by **5.00pm CST on Wednesday 7 November 2018** and that the Respondent provide any submissions in response to new matters raised by the Applicant by **5.00pm CST on Monday 12 November 2018.***

As I have previously indicated, in calling for further submissions, I follow the reasoning of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42 and, in particular, His Honour's conclusions at 42.

I will seek a short extension from the Construction Registrar to consider this new material and will advise the new date by which my determination will be handed down.

I thank you for your continued assistance in this matter….."

13. These questions formed my "*Request for Further Submissions No. 2*".

14. On 5 November 2018 I wrote to the Construction Registrar seeking an extension of time within which to make my determination as follows:

"…..Dear Registrar,

I refer to the above matter.

There are several questions on which I have asked the parties to make further submissions and the Respondent has also raised counterclaims in the Response on which the Applicant has not had an opportunity to consider and respond.

Accordingly, I have sought further submissions under s.34(2) from the parties in relation to both the questions (Submission No.1) and the counterclaim (Submission No.2) and have given them each a deadline within which to provide me their submissions.

The date for the Respondent's submissions and the Applicant's submissions on any new matters raised is beyond the current date for the determination of 9 November 2018.

I therefore respectfully request an extension of time under s.34(3)(a) up to and inclusive of 23 November 2018 within which to make my determination.

Thank you for your consideration of this request and I look forward to your earliest response….."

15. That same day 5 November 2018, the Construction Registrar granted the additional time for the determination to 23 November 2018.

16. On 7 November 2018 the Applicant provided the further submissions in relation to the Respondent's counterclaim set out in the Response.

17. On the morning of 9 November 2018 the Applicant sent me an email advising that its telephone and internet services were down and that the further submissions may have to be hand delivered in hard copy. I responded that same morning to the parties and extended the time for the further submissions to **2:00pm on Monday, 12 November 2018**. Both the Applicant and the Respondent confirmed the extended due date later that same morning.

18. Later that day 9 November 2018 I wrote to the parties confirming the extended due date for the determination, that was granted by the Construction Registrar under s.34(3)(a) of the Act, to now be 23 November 2018. There were no objections from the parties to the extension of time for the determination.

19. On 12 November 2018 I received the Respondent's further submissions closely followed by the Applicant's further submissions on the questions I had asked.

20. At 3:17pm on 12 November 2018 the Applicant sent me an email with an additional statutory declaration which addressed the first two questions I had asked the parties.

21. The Respondent then sent me an email taking issue with the lateness of the Applicant's final part submission, as I had set a deadline for the further submissions at 2:00pm on Monday, 12 November 2018. The Applicant apologized and indicated it did not notice the deadline and that, in any event, had not received the statutory declaration until after the 2:00pm deadline.

22. Later that same day, 12 November 2018, I received an email from the Respondent advising that it no longer wished to pursue the counterclaim and would not be serving further submissions in response to the Applicant's submissions.

23. On the morning of 13 November 2018 at 8:26am I wrote to the parties in relation to the Applicant's late submissions as follows:

> *"…..In reading the Statutory Declaration of Ms Allen, it has been made in a professional capacity as an NT Worksafe Licensed Assessor and there appears to be nothing in the content that would prejudice the Respondent.*
>
> *However, to ensure procedural fairness I invite the Respondent to make comment on the content of Ms Allen's Statutory Declaration.*
>
> *I request that the Respondent provide any comments in the form of further submissions under s.34(2) of the Act on or before 2.00pm CST Today 13 November 2018.*

In calling for these comments I again follow the reasoning of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42 and, in particular, His Honour's conclusions at 42.

Thank you for your continued assistance in this matter….."

24. That afternoon of 13 November 2018, and within time, I received the Respondent's additional submissions in relation to the Applicant's statutory declaration.

25. Later that day 13 November 2018 I again wrote to the parties confirming that I have sufficient information to make my determination and that the shutters were now closed.

Introduction

26. This Adjudication arises out of a residential building contract pursuant to which the Applicant agreed with the Respondent to demolish the existing structures that were on the building site and to build four two-bedroom units and two three-bedroom units at [*site address redacted*], Darwin in the Northern Territory of Australia (**the Contract**).

27. The Applicant claims that it is entitled to be paid its claim dated 3 July 2018 for a variation to the Contract to remove 465.26 tonnes of asbestos contaminated soil from the site, including machinery supply, in the sum of **$326,450.77 (excluding GST)**.

28. The Applicant seeks interest on its claim at the rate of 20.0% per annum compounded weekly in accordance with the Contract.

29. The Applicant seeks costs of the adjudication fixed in the sum of **$5,000.00**.

30. The Respondent submits that the Applicant's claim is not a valid claim within the meaning of the Act or, in the alternative, the claim should be for a much lesser amount as the material approved for removal from the site was only in the order of 90-100 tonnes. The Respondent submits that the cost for removal

of that amount of contaminated soil should have been $55,000.00 to $65,000.00 for a flat rate of $384.00 per tonne.

31. The Respondent also says that amount payable to the Applicant for the contaminated soil removal should be the agreed amount minus the Respondent's counterclaim, which has been calculated with multiple variants and alternatives for the quantum of the claim. The Respondent has since advised it will not be pursuing its counterclaim.

32. The Respondent submits that the Application has not been prepared and served in accordance with s.28 of the Act.

33. The Respondent seeks costs of the adjudication or, alternatively, some of the costs incurred in relation to the Adjudication.

34. The Respondent has acknowledged that any amount determined as payable to the Applicant would attract interest.

35. The Respondent seeks to have the Application dismissed.

Procedural Background

<u>The Application</u>

36. The Application is dated 12 October 2018 and comprises a general submission and 14 attachments with numerous exhibits in each attachment. The attachments, inter alia, include:

    (a) a copy of the Contract;

    (b) a copy of the Applicant's claim Invoice No. 00001611; and

    (c) supporting evidence, including statutory declarations, a spreadsheet report of the claim, expert reports, photographs, and email correspondence between the parties relied upon in the general submission.

37. The Applicant's claim was submitted to the Respondent on 3 July 2018.

38. The Application was served on 12 October 2018 pursuant to s.28 of the Act.

The Response

39. The Response is dated 26 October 2018 and comprises a general submission and 7 annexures with exhibits in each annexure. The attachments, *inter alia*, include:

(a) a Statutory Declaration from the Respondent;

(b) a detailed Environmental Report on the site with NATA Laboratory Test Results; and

(c) additional supporting evidence, including photographs, tax invoices and email correspondence between the parties relied upon in the general submission.

40. The Response was served on 26 October 2018 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

41. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

42. Section 4 of the Act – **Site in the Territory** – the site is a building site at [Darwin *site address redacted*] the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.

43. Section 5 of the Act - **Construction Contract** - the Contract is a Master Builders Residential Building Contract (edition February 2013) and is used for residential building work in the Northern Territory. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the Contract. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.

44. Section 6 of the Act – **Construction Work** – the work is to demolish existing structures on the building site and to construct four two-bedroom units and two three-bedroom units on the building site. That work falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.

45. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

> *"(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or*
>
> *(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract."*

46. In its submissions the Applicant says that it made a valid payment claim that has been "….*calculated in accordance with clause 15(f) of the contract*…." and that "….*tax invoice #1611 was a valid payment claim for the purposes of the Act*….". The Applicant contends that the payment claim is in the form of Tax Invoice No. 00001611 and is a compliant claim under the Contract which fulfils the payment claim requirements of s.4 of the Act.

47. The Respondent submits that the Applicant's payment claim is invalid as it "…..*has not been submitted in accordance with Clause 15 of the Contract*…." And, as such, is not a valid payment claim within the meaning of the Act. The Respondent says that the payment claim does not comply with clause 15(c)(i) of the Contract so as to cause a payment dispute.

48. The Respondent also says that the Applicant failed to comply with the provisions of clause 14(d)(i) of the Contract prior to undertaking the variation to remove the contaminated soil from the building site and in so doing has not complied with the terms of the Contract before undertaking the variation to remove the contaminated soil from the building site.

Making a payment claim under the Contract

49. The terms for the making of a claim for payment under the Contract are set out in clause 21 of the Contract which states:

> *"…..**21. PROGRESS PAYMENT***
>
> *(a) The **Contract Price** must be paid to the **Builder** as set out in Item A7 of Appendix A.*
>
> *(b) The **Builder** must give the **Owner** an invoice to claim for each progress claim which must also be accompanied by a declaration by the **Builder** that the work to which the invoice relates has been completed (41 HF(1) Building Act).*
>
> *(c) The **Owner** will pay the progress payments to the **Builder** within the period stated in Item A11 of Appendix A, or, if not stated, within seven (7) days of the date the claim is submitted to the **Owner**.*
>
> *(d) Progress Payments will be paid in accordance with Item B1 of Appendix B, except for minor omissions which do not prevent the **Works** from progressing.*
>
> *(e) A progress payment to the **Builder** is not proof or admission that any particular **Works** has been executed in accordance with the **Approved Plans** and **Specifications** but only as payment on account.*
>
> *(f) If the **Builder** does not receive a progress payment by the due date, in addition to any other rights it may have, the **Builder** is entitled to interest or the overdue amount at the rate in Item A15 of Appendix A…..".*

50. When making a claim for payment the claimant "*Builder*" is to issue "*an invoice*" to claim for each progress claim, with a declaration that the work, the subject of that invoice, has been carried out.

51. The claim for the removal of the asbestos contaminated soil on the building site is a variation to the Contract under clause 15 and where the price for the variation has been previously agreed "…."*it will be added to the next progress payment*….". Contract clause 15(e).

52. Where the price has not been previously agreed, but the variation must be carried out, the price "…*will be the cost of the extra works*…." plus the "*Builder's Margin*" agreed in the schedule of the contract document. Contract clause15(f).

53. The Applicant at paragraph 12 of the Application states that "…*It was not possible to agree a fixed price in advance for this variation, as the extent of the contamination, and therefore the volume of soil which would be required to be removed, was at that time unknown*…".

54. The Respondent at paragraph 2.15 of the Response states that "…..*It is clear on the basis of the email sent on 19 March 2018 and the discussions held between the parties on 21 March* [sic] *that a price was agreed*….".

55. In considering these statements it is evident that a price was agreed between the parties for the variation. Attendance to Attachment "B" of the Application shows the email from the Applicant to the Respondent dated 19 March 2018 which has attached to that email a series of soil sampling reports from the site and the quotation from the Respondent's licensed asbestos removalist. The quotation shows rates for each component of the work on either an hourly or daily basis such that the value of the work can be easily calculated.

56. The Respondent does not dispute that a price was agreed between the parties and did not raise an issue with the quotation it was provided; the issue argued by the Respondent is in the quantum of soil removal from the site. That is a matter for the merits of this determination and I deal with that later in my decision.

57. The jurisdictional issue for the Applicant's claim is whether the payment claim has been validly made under the Contract.

58. The Respondent also says that the payment claim does not strictly comply with the stipulations of the Contract in order for it to be a payment claim recognised by the Contract to give rise to a liability on the part of the Respondent to pay.

59. In reaching this conclusion, the Respondent relies on the case of *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1 (**ABB Australia**) at 30 which compels an adjudicator to first determine "…..*whether the contractor has made a claim under the contract for payment of an amount in relation to the performance by the contractor of its obligations under the contract*…." and to then look to the terms of the construction contract and ask "….*whether what purports to be a payment claim is capable of giving rise to a liability on the part of the principal to pay*…..".

60. The Respondent has also referred to the decision of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 (**K & J Burns**) at 238 in relation to a payment claim's strict compliance with the contract terms in order to give rise to a payment dispute. The Respondent states at paragraph 2.39 of the Response that "….*As the above excerpt indicates, strict compliance is required with the mandatory provisions in a construction contract in order to give rise to a payment dispute under section 8 of the Act*….".

61. The compliance requirements of a payment claim with a construction contract and the interpretation of the terms in relation to the Act is more relevantly expressed by Olsson J in K & J Burns at paras 242 to 244:

> *"[242] ……a term that simply stipulated for claims to be lodged on the 25th of each month for payment by some prescribed subsequent date, could possibly be construed as meaning that any claim lodged after that date might not be paid until the following payment cycle, dependent on when the claim was lodged in relation to a prescribed payment deadline. It all depends on the precise wording of the claim prescription.*
>
> *[243] If, in fact, a prescription is so strict in its terms that non-compliance might result in very serious disadvantage to a claimant, there is no real anomaly in such a scenario, because that result would be what the parties specifically*

contracted for. Objective compliance is not infrequently what commercial contracts are expressly designed to require and achieve.

[244] How that could fairly be said to undermine the relevant statutory scheme is impossible to perceive. In any event, an adjudicator would be bound to determine liability to make payments strictly in accordance with the contract. He or she would not be entitled, under the statute, simply to drive a coach and four through express contractual stipulations.

62. An adjudicator cannot overlook or avoid the construction contract through the use of the Act, however as Her Honour Justice Kelly sets out in ABB Australia an adjudicator must first establish if the contractor has made a claim under the construction contract for performance of its obligations and then establish if the claim meets the requirements of the construction contract to give rise to an obligation by the principal to make a payment.

63. The Applicant has made a claim for the variation that was agreed between the parties. The rate for that variation has also been agreed between the parties. The payment claim made by the Applicant is in the form of an invoice setting out the work done by the Applicant under the Contract and that is what is required under the stipulations of the Contract for the making of a payment claim. The requirement for the variation to be claimed at the next progress payment under clause 15(e) is irrelevant as the work under the Contract at this early stage is entirely related to preparation of the site in order to build the proposed units and the issue of quantum of the variation will be dealt with in the merits of the determination.

64. Attendance to the Attachment "L" of the Application, Tax Invoice No. 00001611 dated 3 July 2018 (**the Invoice**), which was sent to the Respondent on 4 July 2018, shows that the payment claim complies with the terms of clause 21(b) as a valid claim for a payment to be made by the Respondent for work that has been done by the Applicant under the Contract.

65. I am satisfied that the Applicant's payment claim made on 4 July 2018 complies with the stipulations of the Contract for the making of a claim for payment for work done and is therefore a valid payment claim for the purposes of s.4 of the Act.

66. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

> *"(a) a payment claim has been made under a contract and either:*
>
> *(i) the claim has been rejected or wholly or partly disputed; or*
>
> *(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*
>
> *(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
>
> *(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned."*

67. The Applicant made a valid payment claim on 4 July 2018 in the form of Tax Invoice No. 00001611 for the provision of variational Works in the Contract.

68. The Contract at clause 21(c) provides for payment of a valid payment claim "….*within the period stated in Item A11 of Appendix A, or, if not stated, within seven (7) days of the date the claim is submitted to the* ***Owner***…..". Appendix A, Item A11 shows payments are to be made within "…*14 Days*…".

69. The definition of "*Days*" is found in the Contract at Part 2 – Definitions and states:

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

70. The payment claim was sent to the Respondent on 4 July 2018 and, by calculation, payment was due on or before 24 July 2018. From the evidence, the Respondent has neither made any payment nor served a written notice of dispute under clause 28 Dispute Resolution and in compliance with clause 33 Notices of the Contract.

71. I am of the view that the variation payment claim was not paid by the Respondent on or before 24 July 2018 and a payment dispute commenced the next day on 25 July 2018.

72. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 25 July 2018 under section 8(a)(ii) of the Act.

73. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 12 October 2018, served on the Respondent and the Prescribed Appointer LSNT on 12 October 2018. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

74. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 26 October 2018, served on the Applicant and the Adjudicator on 26 October 2018. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.

75. Having now considered the relevant sections of the Act and the Regulations and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claim

76. The claim made by the Applicant in the Application for a variation to the Contract to remove 465.26 tonnes of asbestos contaminated soil from the site, including machinery supply, in the sum of **$326,450.77 (excluding GST)**.

77. The Applicant has identified this variation to the Contract as “Variation 3” and it includes the following components:

1. The soil removal work conducted by the Applicant's licensed asbestos removalist - **$268,570.24 (excluding GST)**;

2. The Applicant's wet hire of an Excavator - **$15,300.00 (excluding GST)**; and

3. The "Builders Margin" set out in Item A18 of Appendix A of the Contract - **$42,580.53 (excluding GST)**.

A total claim of **$326,450.77 (excluding GST)**.

78. I deal with the total claim below.

<u>Variation 3 a claim for removal of 465.26 tonnes of asbestos contaminated site material in the sum of - $326,450.77 (excluding GST)</u>

79. The Applicant submits that the Respondent provided an instruction by email on 21 March 2018 to remove the asbestos fragments and the contaminated soil from the building site.

80. The Applicant also submits that it was not possible to agree on a fixed price in advance for the variation as the extent of the contamination was, at that time, unknown.

81. The Respondent submits that on the basis of the email of 19 March 2018 and the discussions held on site on 21 March 2018 a price was agreed between the parties for the removal of the contaminated material.

82. The Respondent also submits that this price only extended to the estimated 90-100 tonnes of material that was discussed and agreed by the parties.

83. The issue in this matter is one of quantum, however before I deal with that issue the Respondent has also raised the argument that the Applicant did not strictly comply with the Contract terms in its administration of the Contract in relation to the variational agreement.

84. Looking at the terms of the Contract, neither party has fully complied with the terms in administering a variation to the Contract.

The process of variation under the MBNT Contract

85. The Contract clause 15 governs contract variations under the MBNT contract document. This is the 2013 plain English version for residential building work carried out in the Northern Territory and is written and distributed by the Master Builders Northern Territory. The contract document also includes and references certain statutory provisions under the *Building Act and Regulations*.

86. The Contract can only be varied with the Applicant's consent. Contract clause 15(b).

87. The process to follow for variation is set out in Contract clause 15(c) and is governed by clause 14(d)(i) which states:

> *"…..(d) (i) The **Builder** need not give the notice under Clause 14(b) **Works** to be carried out is, in the opinion of the **Builder**, urgently necessary to prevent damage to the **Works** or to any property or to prevent injury to any*
>
> *(ii) the **Builder** will give to the **Owner** written notice as soon as practicable after the **Works** have been the reasons justifying why no Variation Notice was given under Clause 14(b)…."*

88. From the correspondence of 19 march 2018 and the site meeting on 21 March 2018, both parties had full knowledge that a variation to remove the contaminated material was required to the Contract. Contract clause 14(d)(i) has no part to play in Variation 3.

89. The process that was to be followed by the parties is confined to Contract clause15(c) which states:

> *"….(b) (i) Subject to clause 14(d)(i) if the Owner or the 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 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

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

(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…..".

90. The Variation Notice is a "Form 5" which is at Appendix D of the Contract and initiates the variation request by either the "Builder" or the "Owner" under the Contract. The Applicant identified that there was contaminated material on the site and it was the Respondent's obligation under the Contract to raise a Variation Notice requesting the variation to the Contract. From the evidence of the Application and the Response, there is no Variation Notice and I can only conclude that one was not raised.

91. A Cost Variation Notice is a Form 3 which is also at Appendix D of the Contract and is submitted by the "Builder" with the relevant pricing and associated information for the "Owner's" approval. There is a signature block on the bottom of the form for both parties which confirms the agreement and the Contract is varied accordingly. From the evidence of the Application and the Response, there is no Cost Variation Notice and I can only conclude that one was not raised.

92. The parties did, however, agree to a variation to the Contract and agreed to the price of that variation. The email of 19 March 2018 sent by the Applicant to the Respondent held the relevant pricing information and the meeting of 21 March 2018 on the building site, which was also attended by the licensed asbestos removalist and the WorkSafe inspector, clearly identified the scope of the work to be carried out.

93. Neither party has followed the administrative processes of the Contract, however the parties have deviated from that process, have agreed to vary the Contract and have done so by their conduct.

94. The only question now left open is one of quantum of the variation.

Quantum of contaminated material to be removed from the Building Site

95. The WorkSafe Inspection Report No. 201887800003 dated 22 March 2018 at Attachment "C" of the Application sets out the details of the "*Inspection Details*" and states that "…..*Proposed methodology was discussed and agreed upon, with provision for re-evaluation as dictated by the progressive variations in conditions likely to be encountered*…". This approach was discussed and agreed between the parties on 21 March 2018 while on the building site.

96. From that report and the further submissions from the Applicant on the questions I had asked the parties in this regard, it is clear that the initial estimate of 90-100 tonnes of contaminated material, provided to the Respondent by email on 19 March 2018, did not contemplate or contain the full extent of the contamination of the building site.

97. The Applicant's further submissions contained a statutory declaration from the licensed asbestos removalist which stated that when he initially called to the building site on or about 15 March 2018 "….*an area of perhaps 300sqm in the middle of the land nearest the street was left uncovered so that it could be observed*…" as demolition rubble "….*covered about 2/3rd of the centre part of the land*….". The licensed asbestos removalist at paragraph 16 of his statutory declaration then states "….*By the time we met on 21 March the stockpiles of building debris had been removed off the remainder of the centre part of the*

lot, so we were able to inspect the surface which had not been available for inspection on 15 March. It was obvious that the surface was littered with asbestos. I explained to [the Applicant] *and* [the Respondent] *that it was possible the whole area would also have to be excavated and the soil removed*…. ".

98. The Respondent's further submissions confirm the estimate of 19 March 2018 and the meeting on the building site on 21 March 2018, but state that the only approval given on 21 March 2018 was for the removal of 90-100 tonnes of the contaminated material.

99. The Respondent in his statutory declaration also states at paragraph 16 that "…..*At no point did either* [the Applicant] *or* [the licensed asbestos removalist] *discuss with me the possibility of a larger quantity of soil being removed*….".

100. I am not with the Respondent on this point.

101. The WorkSafe inspector's report clearly identifies a methodology that is consistent with the licensed asbestos removalist's staged approach to clearing the building site of the contaminated material.

102. Further, the Respondent appears to be an experienced developer who, according to the Applicant, "….*has over several decades developed numerous properties*…", and would have or ought to have known that once removal of asbestos contaminated material commences on a building site, the site must be given a clearance that the contamination is no longer present or is at an acceptable level. Once that process commences the amount of material to be removed is entirely dependent upon continued sampling until an acceptable level can be reached. It is very difficult indeed to predict with any real degree of accuracy the quantum of material that would need to be removed. By attendance to the site plan in Attachment "G" of the Application the Respondent would have known, by experience, that the area to be excavated of the contaminated material would yield much more than the initially estimated 90-100 tonnes of material.

Capping of the building site with clean fill

103. The Respondent has also argued that, based on advice from the Northern Territory Environmental Protection Agency (**the EPA**), "..…*capping the site would be sufficient to manage any risk caused by asbestos*….".

104. While capping and the non-disturbance may satisfy the EPA requirements and the recommendations of the Environmental Report provided by the Respondent, it completely overlooks the requirement for development of the block with units which contain services such as water, sewer, power and communications, all of which are underground to varying depths to 600mm. The excavation to date is only 500mm and it is reasonable to expect that these services may need to be modified or dug up for fault throughout their life. On each such occasion the capping would be damaged and the asbestos contamination disturbed with the possibility of exposure to humans. Logically this could not, in the circumstances, be a viable option for the developer.

105. The Applicant has claimed for the contaminated material it excavated, removed and disposed from the building site. The licensed asbestos removalist's quotation for this work was provided to the Respondent on 19 March 2018 and, following a site meeting on 21 March 2018, the Respondent directed the Applicant to remove the contaminated material from the building site as had been agreed.

106. I am of the view that the earlier estimation of 90-100 tonnes of material made on 19 March 2018 with limited information was an underestimation of the extent of the contamination area and when the parties attended on site on 21 March 2018 that estimation was abandoned and the proposal presented by the licensed asbestos removalist was adopted. This has also been confirmed by the WorkSafe inspector.

107. I award the sum of **$326,450.77 (excluding GST)** for the removal of 465.26 tonnes of asbestos contaminated soil from the building site, wet hire of the excavator and the margin applicable to the Contract.

Interest on the claim

108. The amount the Respondent is to pay the Applicant is $326,450.77 (excluding GST).

109. The Contract at clause 21(f) and Item A15 of Appendix A provides for interest on late payments at the rate of 20% Annual Interest Rate adjusted weekly compounding.

110. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an interest amount awarded in a determination under Goods and Services Tax Determination 2003/01.

111. I award interest of **$22,397.33** on the sum of $326,450.77 (excluding GST) as set out in Table 1. below.

112. Interest is calculated from 25 July 2018, the date of the payment dispute and the overdue payment, to 23 November 2018, the date of determination, a total of 17.2857 weeks, pursuant to section 35 of the Act.

Contract Interest Rate 20%			
No of Weeks	**Principal**	**Annual Interest**	**Weekly Interest**
1	$ 326,450.77	$ 65,290.15	$ 1,255.58
2	$ 327,706.35	$ 65,541.27	$ 1,260.41
3	$ 328,966.76	$ 65,793.35	$ 1,265.26
4	$ 330,232.02	$ 66,046.40	$ 1,270.12
5	$ 331,502.14	$ 66,300.43	$ 1,275.01
6	$ 332,777.15	$ 66,555.43	$ 1,279.91
7	$ 334,057.06	$ 66,811.41	$ 1,284.83
8	$ 335,341.89	$ 67,068.38	$ 1,289.78
9	$ 336,631.67	$ 67,326.33	$ 1,294.74
10	$ 337,926.41	$ 67,585.28	$ 1,299.72
11	$ 339,226.12	$ 67,845.22	$ 1,304.72
12	$ 340,530.84	$ 68,106.17	$ 1,309.73
13	$ 341,840.57	$ 68,368.11	$ 1,314.77
14	$ 343,155.35	$ 68,631.07	$ 1,319.83

15	$ 344,475.17	$ 68,895.03	$ 1,324.90
16	$ 345,800.08	$ 69,160.02	$ 1,330.00
17	$ 347,130.08	$ 69,426.02	$ 1,335.12
18 @ 0.2857wks	$ 348,465.19	$ 69,693.04	$ 382.91
TOTAL INTEREST			**$ 22,397.33**

Table 1.

113. The payment of GST is only applicable on the sum of $326,450.77 (excluding GST).

Summary

114. In summary of the material findings, I determine:

(a) The contract to be a construction contract under the Act;

(b) The work to be construction work under the Act;

(c) The site to be a site in the Northern Territory under the Act;

(d) The claim to be a valid payment claim under the Act;

(e) The dispute to be a payment dispute under the Act;

(f) The Application to be a valid application under the Act;

(g) The Response to be a valid response under the Act;

(h) The Applicant's claim to stand in the sum of $326,450.77 (excluding GST); and

(i) Interest on the unpaid sum of $22,397.33.

115. I determine that the amount to be paid by the Respondent to the Applicant in relation to the Variation 3 claim, plus interest under the Contract, is **$348,848.10 (excluding GST)**.

116. This sum is to be paid to the Applicant by the Respondent on or before **7 December 2018**.

Costs

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

118. The Act at section 36(2) gives Adjudicators discretion to award costs:

> *"…if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs…".*

119. I have not found either the Application or the Response without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

120. The test for determining whether a proceeding is vexatious is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

> *"1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."*

121. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.

122. I make no decision under s.36(2) of the Act.

123. I determine that the parties bear their own legal costs under s.36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under s.46(4) of the Act.

Confidential Information

124. The following information is confidential:
    (a) the identity of the parties;
    (b) the identity of the principal; and
    (c) the location of the works.

Closing Remarks

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

DATED: 23 November 2018

Rod Perkins
Adjudicator No. 26