Determination 26.15.01

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

BETWEEN:

(“**Applicant**”)

and

(“**Respondent**”)

REASONS FOR DECISION

1. On 4 December 2014 I was appointed adjudicator to determine a payment dispute between the Applicant and the Respondent by the Housing Industry Association Northern Territory (“**HIA**”) as prescribed Appointer under the Act. I also received the application documents and a letter of appointment from HIA that same day, 4 December 2014.

2. On 11 December 2014 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I sought submissions should either party object to the appointment and I also invited the parties to provide details of when they say the Application was served. I requested submissions on both matters by 2:00pm CST on Tuesday, 16 December 2014.

3. On 12 December 2014 the Applicant confirmed that the Application was served on the Respondent on 8 December 2014. On 12 December 2014 I also received an email from the Respondent, which did not confirm service of the Application but which included a summary of events of the dispute and a closing line which read *“Thank you and look forward to hearing your client’s response to this”*. As I

was most concerned with the Respondent's email, I immediately telephoned the Respondent and then the Applicant to clarify my role as Adjudicator in the payment dispute and also suggested to each of them that they may wish to seek legal advice should they consider it necessary.

4. On 13 December 2014 I wrote to the parties confirming and again clarifying my role as the appointed Adjudicator to determine the payment dispute and confirming that I was not a representative, legal or otherwise, of either party. I again raised the question as to when the Application was served and sought any objections to my appointment. I confirmed that any submissions on the two matters were due on or before 2:00pm CST on Tuesday 16 December 2014.

5. On 15 December 2014 the Respondent confirmed that the Application had been served on 8 December 2014. The Respondent, later that same day 15 December 2014, telephoned me in relation to the clarification of my role as Adjudicator and raised a verbal objection to the overall adjudication process, however did not raise any objection to my acting as the Adjudicator. I requested that the Respondent submit any objections to me in writing. I also immediately informed the content of the Respondent's telephone call to me to the Applicant and requested that the Applicant submit any objections to me in writing.

6. On 18 December 2014 I wrote to the parties confirming receipt of the submissions and that it was uncontroversial between the parties that the Application had been served on 8 December 2014 and that any Response would therefore be due, under section 29 of the Act, on or before 22 December 2014. I informed the parties that I had received no objections in writing from them as part of the submissions. I did, however, confirm the Respondent's verbal objection of 15 December 2014, to the adjudication process and stated that:

> *"While this is not an objection to my acting as Adjudicator or for a conflict of interest, I will allow a further period, until 2:00pm CST on Friday, 19 December 2014 for any possible objections to be fully ventilated."*

I also stated that:

> *"This additional period is provided to the parties to ensure that I have not denied natural justice to either party to this payment dispute and do so in line with the reasoning of Barr J in Hall Contracting Pty Ltd v Macmahon Contractors & Anor [2014] NTSC 20.*

7. On 19 December 2014 I was served the Response by hand, however the covering document provided no indication of service of the Response on the Applicant.

8. On 22 December 2014 I received an email from the Respondent confirming service, however again there was no indication that the Response had been served on the Applicant and the Applicant did not confirm service of the Response. That same day, 22 December 2014, I wrote to the parties and requested the Applicant confirm when they were served with the Response. The Applicant confirmed that it had also been served with the Response on 19 December 2014.

9. Having attended to both the Application and Response, and due to the numerous issues and the requirement to seek further submissions on the matter, I wrote to the Construction Contracts Registrar on 22 December 2014 and sought additional time in which to make my decision under section 34(3)(a) of the Act. On that same day, 22 December 2014, the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 9 January 2015 to determine the dispute. There were no objections received from the parties.

10. On 5 January 2015 I sought further submissions from the parties on 12 questions as follows:

> *"I have carried out a detailed reading of the Application and the Response in the above matter and there are several questions on which I require further submissions.*
>
> *These submissions are requested under the provisions of section 34(2)(a) of the Construction Contracts (Security of Payments) Act and are to be provided by **4:00pm CST, Tuesday 6 January 2015**.*

There are twelve (12) questions as follows:

1. *What was the date of completion of the works, that is the date of Practical Completion?*

2. *Have the Electrical Compliance Certificates been issued to the authority with copies to the Respondent?*

3. *Have the Variational Works ("VO") been carried out and completed?*

4. *Were the VOs quoted to the Respondent?*

5. *Who gave authority to proceed with the VOs on site?*

6. *There are eight (8) VOs claimed. Is each of the VOs approved or rejected and if they are rejected on what basis or grounds?*

7. *How was the accommodation and meals provided in [the project location] under the Contract and who provided each component?*

8. *The date of commencement of the Contract was 9 July 2013, assuming the completion was on or about 2 October 2014, giving a fifteen (15) month contract duration. The Applicant is being asked to provide receipts for meals for last 89 days, that is the last 3 months of the Contract, were there any receipts provided for meals for the prior 12 months of the Contract?*

9. *If meal receipts were provided in the first 12 months of the Contract, what was the daily average spend?*

10. *Has retention been attempted in the Contract prior to the notice date of 28 August 2014?*

11. *Who was the Site Manager in [the project location] and was he regularly on site in attendance to the works?*

12. *Please provide copies of the first 11 Progress Claims. Scanned and attached by email with be acceptable."*

11. I received an email from the Respondent on the afternoon of 5 January 2015 advising that they were currently "*down south*" until the 26 January 2015 and as all the information was in their offices in Darwin the Respondent requested until Tuesday 27 January 2015 to properly respond. Shortly after receiving the Respondent's request I was contacted by the Applicant who raised an objection with extending time for the further submissions to the end of the month. Later that same afternoon, 5 January 2015, I wrote to the parties advising that the Applicant had an objection and also advised that I had already sought and received an extension for making my determination up to and including 9 January 2015 as follows:

> *"….Since receiving your email below requesting an extension for the further submissions, I have been contacted by the Applicant who has an objection to this matter extending to the end of the month.*
>
> *I have requested the Applicant put their objections in writing to me as soon as possible so that I may fully consider them.*
>
> *As the situation stands, I have already sought and have been granted an extension from the Construction Registrar until 9 January 2015 in which to make my determination under section 34(3) of the Act.*
>
> *If I grant an extension to the Respondent in which to make their further submissions, it would also require a further extension of time in which to hand down my determination being granted by the Construction Registrar.*
>
> *Once I have received the Applicant's written objections, I will consider the matter carefully and advise the parties of my decision.*
>
> *In so doing, I will keep in mind the determination of Barr J in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20……"*

12. On 6 January 2015 I received the written objections from the Applicant who argued that the Respondent had had adequate time in which to raise objections to the Applicant's claims and that the Respondent ought not be given additional time for its further submissions. I also received an email response from the Respondent that same day, 6 January 2015, which did not deal specifically with the objection raised by the Applicant but continued to set out events and general argument relating to the overall dispute.

13. Having considered the Respondent's request for additional time to make submissions and the Applicant's objection to that request, I wrote to the Construction Registrar on 6 January 2015 and sought a second extension in which to make my determination as follows:

> *"Dear Mr Riley,*
>
> *I refer to the above matter which was due for determination on 9 January 2015.*
>
> *I had previously requested and had been granted an extension to this date to make my determination.*
>
> *The issue for me is that both parties are unrepresented, the issues of the matter are numerous, including eight variations and adducing the relevant evidence upon which to make an informed determination has required submissions from the parties.*
>
> *I have had to be very cautious to ensure each party is not disadvantaged and that*

> *every opportunity has been given to make further submissions as the matter fully unfolds. I have done this in line with the recent Hall Contracting decision of Justice Barr.*
>
> *The Respondent has requested extended time in which to make their further submissions and the Applicant has objected to any such extension. I am mindful of s.3 and s.26 of the Act, however It would be unreasonable to deny the parties some additional time in which to make further submissions.*
>
> *As such, I request a further extension in making my determination up to and including 19 January 2015. I anticipate closing the books on submissions on or about 14 January 2015.*
>
> *Thank you for your consideration of this request and I look forward to your earliest response."*

14. The Construction Registrar responded granting the further extension under section 34(3) within which to make my determination.

15. On 6 January 2015 I also received part of the Respondent's further submissions. The Respondent in providing those submissions stated:

> *"As mentioned I am currently down south but I will attempt to answer what I can and will provide more details when I return back to Darwin."*

16. Attendance to the responses provided by the Respondent showed that all but two of the questions had been answered with sound detail and knowledge of the events of the dispute and the two questions not answered generally related to information that the Applicant would be better placed to provide.

17. On 7 January 2015 I wrote to the parties and advised them that I had again sought and received further time under section 34(3) in which to make my determination and to assist the parties with their submissions. I enclosed a detailed Scott Schedule that would enable the Applicant and the Respondent to clearly set out and finalise their respective positions on each of the 12 questions posed. Included in the Scott Schedule was the information already received from the Applicant and the Respondent on each question and, to ensure procedural fairness, I further extended the time in which the parties were to provide their submissions until 4:00pm CST Friday 9 January 2015 as follows:

> *"Dear Ms [A] and Mr [B],*
>
> *I have sought and have been granted by the Construction Registrar a further extension of time under section 34(3) of the Act in which to make my determination in this matter. The date for my determination is now reset at 19 January 2015.*
>
> *While you have already answered several of the various questions I have asked relating to the above dispute, the Respondent has also requested additional time in which to fully prepare their submissions.*
>
> *The Applicant has raised an objection to the additional time request by the Respondent which was up to and inclusive of 27 January 2015. The Applicant has argued that the Respondent has already had ample time within which to prepare their submissions. I am inclined to agree with the Applicant in part.*
>
> *In so doing, I am mindful of section 3 and section 26 of the Act that require me to determine the dispute fairly and as rapidly, informally and inexpensively as possible as well as the decision of Justice Barr in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 to make sure there is no denial of natural justice and that all opportunity is provided to the parties to make submissions on the matter.*
>
> *To ensure procedural fairness to both parties I will allow an extension to both parties to make further submissions on the questions I have asked and to assist the parties I have prepared a Scott Schedule which sets out the Applicant's and Respondent's responses to date.*
>
> *I have included the schedule in both native and pdf formats and request the parties provide me their further submissions by* ***4:00pm CST Friday, 9 January 2015****.*
>
> *It is important that each question is answered as I have a specific reason for asking each question and to date several questions have not been answered and I would remind the parties that I can only prepare my determination on the basis of the information I have before me.*
>
> *Please Note: it is likely that I will also ask for further submissions in this matter to try to consolidate and narrow the issues that presently exist between the parties particularly in relation to the variations.*
>
> *Thank you in advance and I look forward to your response."*

18. Later that day, 7 January 2015, I received an email from the Respondent indicating that they did not understand the adjudication process, they requested I send them material relating to the variations from the Application and that the reason for their attendance down south was for leave and a family illness as follows:

> *"Hi Rodney*
>
> *I don't understand this whole process and you speak legal jargon and not plain English I thought I had done everything requested.*
>
> *[The Applicant] original just sent through invoices he was claiming and I responded*

why we have not paid so far because we were waiting for a break down for variations that he was claiming. This is going back from October. He never even attempted to do anything and any correspondence he sent was legal claims and payment claims even though [Mr C] tried to call him and emailed him and I had sent 2 emails requesting information.

After we received his application for adjudicator I responded to why we are not paying.

So from this why are you not asking for [the Applicant] to provide a breakdown as this is the whole issue.

As I have mentioned before I am down south until the 25th of January i here for both leave and mother's medical issue that she has and I can provide evidence for this if needed.

I don't not have any of my paperwork with me so I can not respond properly so can you please send me through [the Applicant's] variations as I have no info.

Please respond"

19. On 8 January 2015 I received another email from the Respondent again requesting I send them materials from the Application that related to the variations in the payment dispute. The Respondent also indicated that they were on annual leave in Sydney and could not respond properly until they returned to Darwin as follows:

"Hi Rodney

As per my email yesterday can you please send me through [the Applicant's] variations as without that I can not respond properly as I have no information with me as I have explained all my information is at the office.

I then need to send the variations to my brother who is on annual leave in Sydney as he needs to work on them as well

Can u please send through by 12Pm today so we can meet your deadline of the 9th

Thank you
[Ms A]"

20. On 8 January 2015 I wrote to the parties and again advised them that I was appointed as the Adjudicator to adjudicate the payment dispute and could not provide advice or materials to either party and that I was independent and impartial as the Adjudicator of the dispute. I again suggested that the parties seek legal advice or assistance if they considered it necessary. I also indicated to them that the Scott Schedule did not seek information relating to the variations

in the payment dispute and that I would be seeking specific submissions in relation to the variations. My email is as follows:

> *"Dear Ms [A] and Mr [B],*
>
> *I need to again stress to both parties that I have been appointed to adjudicate the payment dispute and I cannot give the parties advice on their case nor can I provide materials to one party or the other. I remain independent and impartial as the Adjudicator of the dispute and I would again request that the parties respect this position.*
>
> *This is a legal process that can have legal outcomes and, as I have also previously suggested, the parties should seek some legal advice or assistance if necessary.*
>
> *Mr [B], would you kindly send a further copy of your variation claims to the Respondent to assist the process of further submissions in this matter.*
>
> *I would otherwise strongly suggest you both read my questions carefully as I have not yet asked for comments on each individual variation.*
>
> *As I have previously indicated, I will send through a separate Scott Schedule in relation to the variations seeking the information that I need.*
>
> *Thank you for your assistance in this matter."*

21. On 9 January 2015 I received further submissions from the Respondent in relation to the 12 questions asked and the Scott Schedule. In their response the Respondent indicated that there were various counter claims and that it was their position that there were no variations in the contract. I received no further submissions from the Applicant.

22. On 14 January 2015 I wrote to the parties and included two Scott Schedules which related to the Applicant's variation claims in the payment dispute. The first Scott Schedule invited the Applicant to provide a detailed breakdown of each of the variation claims. The second Scott Schedule invited the Respondent to set out their position in relation to the variations claimed by the Applicant. I invited the parties to provide their further submissions by 4:00pm CST, Friday 16 January 2015.

23. On 15 January 2015 I received the Applicant's further submissions.

24. On 16 January 2015 I received a full set of project plans from the Applicant and I immediately requested the Respondent to confirm that the drawings were true and correct.

25. On 16 January 2015 I received the Respondent's further submissions which included their counterclaims and confirmation that the drawings provided by the Applicant were correct.

26. Early on the morning of 19 January 2015 I received a further submission from the Applicant addressing several of the issues raised by the Respondent in relation to the variation claims and rejection of the Respondent's counterclaims.

27. While I had intended to allow further submissions from the Applicant on the new matters raised by the Respondent, I had not yet called for these submissions. To ensure procedural fairness, I wrote to the parties that morning, 19 January 2015, and indicated to the Respondent that they would have an opportunity to respond to any new matters raised by the Applicant as follows:

> *"Dear [Ms A] and [Mr B],*
>
> *I did not call for further submissions from the parties, however [Mr B of the Applicant] has requested a response be considered to the information provided by the Respondent on Friday, 16 January 2015.*
>
> *In so doing, [Mr B] has raised new issues on which the Respondent should have an opportunity to respond.*
>
> *Accordingly, I will allow the Respondent until 2:00pm CST today 19 January 2015 in which to address the new issues only that the Applicant has raised. From that time the shutters will be closed and I will likely require this evening to then finish my determination.*
>
> *Should the Respondent raise any new issues I will not take these into consideration as both parties have now had ample time to put forward their respective position.*
>
> *I thank you for your assistance in this matter."*

28. I allowed the Respondent until 2:00pm CST that day, that is 19 January 2015, to make their further submissions on the new matters raised by the Applicant. I also advised that:

> *"From that time the shutters will be closed and I will likely require this evening to then finish my determination."*

29. On 19 January 2015, and within time, the Respondent provided their further submissions to the new matters raised by the Applicant earlier that day.

Introduction

30. This adjudication arises out of a contract in which the Applicant agreed with the Respondent to carry out the electrical installation on a set of units being constructed by the Respondent at [the project site] in the Northern Territory.

31. The Applicant claims it is entitled to be paid its Payment Claim, dated 4 November 2014, in the sum of $45,473.78 (including GST). The Applicant's claim components comprise:

    (a) Progress Claim No. 12 in the contract - $30,667.78 (including GST); and

    (b) Variations completed in the contract - $14,806.00 (including GST).

32. The Applicant does not seek interest or costs of the Adjudication.

33. The Respondent disputes the claim on the basis that the Applicant:

    (a) sent through variations to the works without any discussion or approval;

    (b) failed to provide breakdowns of the variations when requested; and

(b) failed to provide food receipts when requested.

34. The Respondent has counterclaimed in the sum of $17,678.23 (including GST) for work it says was not completed by the Applicant and the associated costs that have been directly incurred by the Respondent as a result of the Applicant's failure to undertake that work.

35. The Respondent does not seek interest or costs of the Adjudication.

Procedural Background

The Application

36. The Application is dated 4 December 2014 and comprises six tabs which, *inter alia*, include:

(a) a copy of the construction contract;

(b) a copy of the payment claim; and

(c) supporting evidence and email correspondence between the parties relied upon in the general submission.

37. The Payment Claim was submitted to the Respondent on 4 November 2014 in the sum of $45,473.78 (including GST) and the Respondent did not pay the claim in whole or in part.

38. The Application was served pursuant to section 28 of the Act.

The Response

39. The Response is dated 19 December 2014 and comprises a general submission and seven attachments identified as "Attachment A" through to "Attachment G". The attachments, *inter alia*, include:

(a) a copy of the construction contract;

(b) a copy of the payment claim from the Applicant; and

(c) supporting evidence and email correspondence between the parties relied upon in the general submission.

40. The Response was served pursuant to section 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 at [*site details omitted*] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

43. Section 6 of the Act – **Construction Work** – the work is an electrical installation into a set of units being constructed by the Respondent and section 6(1)(d) of the Act specifically provides for this type of work. I am satisfied that the work is construction work for the purposes of the Act.

44. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract. The contract comprises two quotes from the Applicant both dated 14 June 2013, one for [*each of the two lots comprising the project site*], and a Purchase Order 0993 from the Respondent dated 9 July 2013. There are limited written terms in the contract found on the quotations and the purchase order and these generally relate to the scope of work. The agreed contract value is a lump sum of $190,322.00 (including GST) divided into Stage 1 for [*the first lot*] in the lump sum of $102,080.00 (including GST) and Stage 2 for [*the second lot*] in the lump sum of $88,242.00 (including GST).

45. There are no written terms between the parties that prescribe the making of payment claims, responding to payment claims, the entitlement and payment of such claims, variations, Interest, ownership of goods, insolvency and retention. The Implied Provisions of sections 16 to 24 and the Schedule of Implied Provisions of the Act (“Schedule”) therefore apply to this contract.

46. I am satisfied that the contract is a construction contract for the purposes of the Act and the Implied Provisions of the Act operate as written terms and are implied into the contract.

47. 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.”*

48. The Applicant has made a payment claim on 4 November 2014 in the sum of $45,437.78 (including GST) which includes two invoices as follows:

    (a) Tax Invoice “#[*project site*] 12” dated 18 September 2014 in the lump sum of $14,806.00 (including GST) for variational works carried out in the contract; and

    (b) Tax Invoice “#[*project site*] 12” dated 2 October 2014 in the lump sum of $30,667.78 (including GST) for the final payment due in the contract.

49. Both tax invoices had previously been submitted for payment to the Respondent and there is an issue for me to consider as to whether the payment claim of 4 November 2014, which contained both invoices, is a repeat claim.

50. The issue of repeat claims in the form of tax invoices arose in *A J Lucas Operations Pty Ltd v Mac-Attack Hire Pty Ltd* [2009] NTCA 4 where a hire company simply recycled its old invoices into new invoices and made repeat claims on the respondent in that matter. Southwood J, when considering the first of five findings that were errors of law, found at 45:

> *"As to the first finding, the relevant payment claims were each of the original tax invoices rendered by the first respondent from time to time during the hire of the earthmoving equipment and either rejected, partly disputed, disputed, partly unpaid or unpaid by the appellant. The original invoices were payment claims made under the construction contract and they are the payment claims which gave rise to the payment disputes. They are the payment claims to which s 8 of the Act refers. The document described as Tax Invoice No 1461 which was attached to the application did not describe those payment claims. Instead, that document reformulated the first respondent's payment claim for the total amount outstanding under all previously rendered invoices. It made a repeat claim for payment for the performance of obligations under the construction contract which had already been invoiced. The application did not comply with the requirements of s 28(2)(b)(ii) of the Act."*

51. It is clear from the email correspondence between the parties that the Applicant had rendered each tax invoice to the Respondent prior to 4 November 2014, being the date when it made its payment claim, and the issue for me to consider is whether those tax invoices were compliant payment claims made under the contract.

52. The making of a payment claim under the contract in this matter falls under the Implied Provisions of the Act. The Schedule at Division 4 sets out the requirements for "*Making claims for payment*" and this is the requirement in the contract. It is clear that each tax invoice rendered prior to 4 November 2014 did not comply with section 5(1) of Division 4 of the Schedule as they were not signed and section 5(1)(h) stipulates that each payment claim "*be signed by the claimant….*". The section 5 requirements are mandatory requirements and not just facilitatory, as section 5(1) reads: "*A payment claim under this contract **must** …….*[emphasis added]".

53. In relation to the contract, the Court in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 considered the question of whether objective non-compliance with contract stipulations had the practical effect that no relevant payment claim had been made under the contract. Olsson J at [250] and [251] said:

> *"[250] The issue to be addressed in this case in considering such a question was whether objective non-compliance with the contract stipulations, pre- requisite to the raising of valid payment claims in respect of the six unpaid invoices, had the practical effect that no relevant payment claims, within the meaning of the statute, had been presented to GRD prior to receipt of the SI and, thus, no payment disputes had previously been generated in respect of them. I consider that the inevitable conclusion must be that this was the situation.*
>
> *[251] To borrow an expression employed by Mr Wyvill SC, the invoices simply did not pass the requisite threshold test to constitute payment claims of the type envisaged by the statute, because, being non-compliant with clause 12.2(d) of the Subcontract, they were not, relevantly, payment claims under that construction contract, as envisaged by the statute….."*

54. I am of the view that the two tax invoices rendered by the Applicant to the Respondent as payment claims did not pass the threshold test to constitute payment claims of the type envisaged by the statute and subsequently were not payment claims under this construction contract.

55. The documents that form the payment claim made by the Applicant on 4 November 2014 contain the two previous tax invoices, however that claim also contains detailed information of the quotations, the purchase order and reconciled details of prior payments as well as a signed covering letter which clearly sets out that the claim is a "*Payment Claim*" under the Act and that payment is required"

> *"…within 28 days after receiving the payment claim…"*

56. I am satisfied that the payment claim made by the Applicant on 4 November 2014 is a progress payment claim for the purposes of the contract and a valid payment claim for the purposes of the Act.

57. Section 8 of the Act - **Payment Dispute** – states:

> *"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."*

58. The Applicant made a valid payment claim on 4 November 2014 in the sum of $45,437.78 (including GST). There were two invoices in the claim as follows:

    (a) Tax Invoice "#[*project site*] 12" dated 18 September 2014 in the lump sum of $14,806.00 (including GST) for variational works carried out in the contract; and

    (b) Tax Invoice "#[*project site*] 12" dated 2 October 2014 in the lump sum of $30,667.78 (including GST) for the final payment due in the contract.

59. On 4 November 2014 the Respondent sent an email to the Applicant, which has been included as "Attachment F" in the Response, stating:

> *"Hi [Mr B]*
>
> *As per our emails sent on 13th of October and also yesterday we are STILL WAITING for you to provide the requested information.*
>
> *We are not proceeding until we receive this information so the sooner you provide it the sooner we can finalise it.*

Variations needs to be discussed prior to any being completed and so we need detailed breakdown.
This was also mentioned in your own quotation breakdown which I have attached.
[Ms A]
[The Respondent}…………"

60. Subsequent to that email and to the date of this determination, the Respondent has not paid the Applicant any part of its payment claim.

61. The issue of when a payment dispute commenced under section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 where Barr J at [20] and [21 said:

> *"[20] In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.*
>
> *[21] The construction I favour is the one which more accurately reflects the actual text of s 8(a). Further, it provides clarity and certainty in relation to the start date for the 90-day limitation period specified in s 28 of the Act for making an application for adjudication, and avoids the possible mischief that a "payment dispute" might arise, without a party being aware, as a result of (what is subsequently characterized as) the rejection or partial dispute of that party's payment claim before the due date for payment of that claim under the contract."*

62. The Applicant served its payment claim on 4 November 2014 and the Respondent, under section 6(2) of the Schedule was obligated to:

> *"(a) within 14 days after receiving the payment claim:*
> *(i) give the claimant a notice of dispute; and*
> *(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*

> *(b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim."*

63. On 4 November 2014 the Respondent notified the Applicant it would not be "proceeding" with the payment claim. I am of the view that this meant that the Respondent would neither assess nor pay the payment claim, in whole or part, until it received the information it sought on the variations and food receipts. Effectively, the notice provided to the Applicant was a notice of dispute in relation to the payment claim. However, a careful reading of the email and the contractual requirements implied by the Schedule at section 6(3), which are mandatory and not just facilitatory, the notice fails the requisite threshold test to constitute a dispute notice under the contract as contemplated by the Act.

64. Notwithstanding the Respondent's failure to correctly notify the Applicant of a disputed payment claim under the contract terms, in section 6 of the Schedule, the time for payment continued to run for 28 days up to and inclusive of 2 December 2014 as found in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 per Barr J at [20 and [21].

65. When the Respondent did not pay the Applicant its payment claim on or before 2 December 2014, a payment dispute then arose on 3 December 2014 that would trigger the making of an application for adjudication under section 28 of the Act.

66. I am satisfied that there is a payment dispute for the purposes of section 8 of the Act in which the Applicant has applied for an adjudication of the payment dispute under section 28 of the Act.

67. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant's documents and its further submissions, the Application is dated 4 December 2014 and was served on the Appointer HIA on 4 December 2014. The Application was served on the Respondent on 8 December 2014.

68. The Application contains the relevant information prescribed by section 28(2) of the Act and regulation 6 of the *Construction Contracts (Security of Payments) Regulations* ("**Regulations**").

69. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and the Regulations.

70. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent's documents and its further submissions, the Response is dated 19 December 2014 and was served the Applicant and the Adjudicator on 19 December 2014.

71. The Response contains the relevant information prescribed by section 29(2) of the Act and regulation 7 of the Regulations.

72. 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 the Regulations.

73. 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 Claims

74. The claims made by the Applicant in the Application are as follows:

    (a) Invoice #[*project site*] 12 dated 18 September 2014 – Additional and Variations to [project site] Development ("Applicant's Variation") - $14,806.00 (including GST); and

(b) Invoice #[*project site*] 12 dated 2 October 2014 – Final Progress Payment of Contract, Supply of Fluorescent Light Fittings and Meals and Accommodation during the Contract 89 Days ("Applicant's Progress Claim") - $30,667.78 (including GST).

75. The Applicant's Variation comprised eight individual components as follows:

(i) Unit 2 - Gyprock installed prior to electrical wiring commencing - $2,170.00 (excluding GST) ("Variation 1");

(ii) Temporary Builders power board and Test and Tag electrical appliances on site for Worksafe Inspection - $1,450.00 (excluding GST) ("Variation 2");

(iii) Test and Tag and Repair electrical leads and drills for site audit by Worksafe - $360.00 (excluding GST) ("Variation 3");

(iv) Incoming Underground Mains to both lots, supply and install underground conduit and electrical mains to PAWA service pole from meter panel - $3,000.00 (excluding GST) ("Variation 4");

(v) Supply and Installation of Telstra Pits with incoming conduit and draw rope. Supply cover gasket and concrete lid to pit and supply pipe glands for communications works - $1,100.00 (excluding GST) ("Variation 5");

(vi) Supply of 50mm and 32mm conduit for irrigation. Electrical wiring for GPO and bin light. Supply and install 2 weatherproof double GPOs to gateposts of both driveways. Install bin enclosure lights supplied. Supply and Install 2 Photocells for the automatic operation of the bin lights. Roll 6mm earth cable for communications phone system and Roll 20mm corrugated, crimps and fittings for Air-conditioning - $3,170.00 (excluding GST) ("Variation 6");

(vii) Disconnect and remove Temporary power from the front pole to Building 3. Repair underground Telstra pipes damaged by excavator [*the second lot*] – $310.00 (excluding GST) (“Variation 7”); and

(viii) Isolators and cabling for Air-conditioning - $1,900.00 (excluding GST) (“Variation 8”).

76. The Applicant’s Variation of $13,460.00 plus $1,346.00 GST totalled **$14,806.00 (including GST).**

77. The Applicant’s Progress Claim comprised three individual components as follows:

(i) Final Progress payment of the contract – $22,322.00 (excluding GST) (“Part 1”);

(ii) Supply of Fluorescent light fittings for carports [*the second lot*] - $217.80 (excluding GST) (“Part 2”); and

(iii) Meals and Accommodation duration of contract 89 days @ $60 per day - $5,340.00 (excluding GST) (“Part 3”).

78. The Applicant’s Progress Claim of $27,879.80 plus $2,787.98 GST totalled **$30,667.78 (including GST)**.

79. The Respondent in its further submissions lodged a counter claim which comprised five individual components as follows:

(i) Installation of Telstra earthing and connection boxes, Invoice from DJ Hogan - $3,421.10 (including GST) (“Counter Claim 1”);

(ii) Hire of Generator and running costs for 10 days – $1,745.00 (including GST) ("Counter Claim 2");

(iii) Supply of labour for installation of conduits for mains and Telstra as directed by [*the Applicant*] on 20 December 2013 – [*the first lot*] 3 men @ 10hrs - $3,600.00 (including GST), 14 January 2014 – [*the second lot*] 3 men @ 10hrs - $3,600.00 (including GST) and Blocking of Wall penetrations – total time spent 8hrs - $960.00 (including GST). A total of $8,160.00 (including GST) ("Counter Claim 3");

(iv) Gyprock costings as per attached letter from [name and address omitted] - $3,600.00 (including GST) ("Counter Claim 4"); and

(v) Electrical wiring faults – Invoiced from [*name omitted*] - $752.13 (including GST) ("Counter Claim 5").

80. The Respondent's counter claim of $16,071.12 plus $1,607.11 GST totalled **$17,678.23 (including GST).**

<u>The Applicant's Progress Claim</u>

Part 1 – The Final Progress Payment of $24,554.20 (including GST)

81. It is uncontroversial between the parties that this sum is due and is to be paid in the contract.

82. Under the terms of the contract, implied from the Act, this part of the claim was to have been paid by the Respondent on or before 2 December 2014. The Respondent, by its own admission on 4 November 2014, refused to process the claim for payment until the Applicant provided details of variational claims in the contract and meal receipts.

83. The Respondent held an obligation under the terms of the contract to make part payment of the amount due and owing and not in dispute. The Respondent has tendered no evidence whatsoever to support its position of withholding payment of the final progress payment to the Applicant in the lump sum contract.

84. I find the Respondent's failure to make payment to be in breach of the contract terms. I also find the Respondent's conduct in notifying and refusing to process the payment to the Applicant to be vexatious, particularly given that the Respondent fully understood it had to pay for the works the Applicant had done in the lump sum contract.

85. I award this claim in the sum of $24,554.20 (including GST) to the Applicant.

Part 2 – Supply of the Fluorescent Light Fittings for the Carport at [the first lot] in the sum of $239.58 (including GST)

86. It is uncontroversial between the parties that this sum is due and is to be paid in the contract.

87. By attendance to the Applicant's quotation dated 14 June 2013, that was provided to the Respondent and accepted by the Respondent with its Purchase Order 0993 dated 9 July 2013, the *"…supply of light fittings and extractor fans...*" was not included in the lump sum price.

88. I award this claim in the sum of $239.58 (including GST) to the Applicant.

Part 3 – Meals and Accommodation 89 days @ $60 per day - $5,874.00 (including GST)

89. The Applicant's quotation dated 14 June 2013 expressly states that *"…Accommodation and meals provided by [name omitted]…"*. That is, the Respondent was to provide all meals and accommodation. The Respondent's purchase order of 9 July 2013 also states *"…Accommodation & food to be supplied by [the Respondent]…"*.

90. To clarify this issue I requested further submissions from the parties on the following questions:

> *"…7. How was the accommodation and meals provided in [the project location] under the Contract and who provided each component?*
>
> *8. The date of commencement of the Contract was 9 July 2013, assuming the completion was on or about 2 October 2014, giving a fifteen (15) month contract duration. The Applicant is being asked to provide receipts for meals for last 89 days, that is the last 3 Months of the Contract, were there any receipts provided for meals for the prior 12 months of the Contract?*
>
> *9. If meal receipts were provided in the first 12 months of the Contract, what was the daily average spend?...."*

91. On these questions the Applicant submitted that the contract was completed on 23 July 2014, no food receipts were provided and that the food receipts were not requested until after the contract was completed.

92. The Respondent's further submissions were that "*No receipts were provided throughout the project*". However, the Respondent also provided detailed clarification on the accommodation as follows:

> *"....We provided the accommodation and meals – we had three properties for our workers and all food was taken care by us. [Mr B] chose to stay at a friend's place – with food [Mr C of the Respondent] said for [Mr B] to provide food receipts – This is in the information I provided dated back in October where [Mr C] emailed [Mr B] to provide food receipts….."*.

93. It is clear the Respondent provided the accommodation and meals as they had undertaken to do under the contract and these were made available to the Applicant at no cost. It is also not contested by the Applicant that the Applicant did not use the accommodation and meals provided by the Respondent but sought to claim its accommodation and meals at another facility as a variation in the contract.

94. The Respondent did not agree to this alternative arrangement, however following receipt of the Applicant's variation submission the Respondent sought receipts for the food component of the variation. The Applicant did not and has never provided this information, despite being given ample opportunity and time to do so. The Applicant was also provided an opportunity in its further submissions to provide any information or evidence in relation to its meals and accommodation in the contract, but did not do so.

95. I find that the meals and accommodation claim in Part 3 is without merit. The Respondent provided the meals and accommodation as it was required to do in the contract and the Applicant chose to live somewhere else. There can be no claim in such circumstances under the contract and the Applicant has sought to make a claim when it is not entitled to claim for a resource already provided by the Respondent. I find that the Applicant has made this claim on an unfounded basis.

96. I am satisfied that the Applicant's claim fails for lack of evidence and I find that it is an unfounded claim.

The Applicant's Variations

Variation 1 – Access and Additional Time taken to install wiring due to Gyprock Ceilings being installed - $2,387.00 (including GST)

97. The Applicant submits that it only had limited access to the ceiling area of the units owing to the progress of the ceiling installer installing the Gyprock ceilings in advance of the wiring installation.

98. The Respondent submits that this was not the case and that the Applicant, in its view, had already installed the wiring in the ceiling space. The Respondent tendered an open letter from its ceiling installer, [*name omitted*], who confirmed that the Respondent spoke with the Applicant on 6 January 2014 prior to commencing the ceiling installation.

99. [*The ceiling installer*] then confirmed that:

> *"…..around the 15th/16th of January the electrician, [Mr B], arrived on the job site. [Mr B] them informed me that he had not run the main's wires from the power box in the hallway through the hallway & lounge room ceilings and down the brickwork to the ground floor. There were also missing fan wires in both Unit 1 and Unit 2 and the entire main bedroom down light wires were in the incorrect places in Unit 3……".*

100. It is clear from this evidence that the Applicant had commenced the electrical installation on all three units prior to 6 January 2014. It was only on or about 15 to 16 January 2014 when the ceiling was almost complete that the Applicant advised that its scope of work had not been fully completed in the ceiling space. The Respondent was then required to cut holes in the ceiling so that the Applicant's works could be completed.

101. The Applicant held an obligation to ensure it was aware of the progress of the works at all material times and, as there is no schedule or programme in the contract, progress and the Applicant's obligation to progress the work under contract would be based on reasonable time under the contract.

102. The claim the Applicant has made in Variation 1 is for delay and disruption of its works. First, the installation of the main supply wiring and fan wiring necessitated holes being cut in the already installed ceilings to allow the wiring to be completed. Second, the progress of the installation was then much slower due to the restricted access. There is no doubt that this portion of the work has likely taken the Applicant longer to complete.

103. The issue in this matter is not the Applicant's slow progress or that it had not installed all the wiring prior to the ceilings being installed. The Applicant held an obligation to ensure it progressed its scope of work in a reasonable time so that the Respondent would not be delayed. The contract commenced on 9 July 2013 and Practical Completion ("PC") was on or about 23 July 2014, a contract of roughly 12 months' duration, and there was ample time to install the wiring in the ceiling space. The Applicant clearly failed to install all the wiring into the ceiling

space of units 1, 2 and 3 in the upstairs section and cannot now claim for the additional time taken due to its failure to progress the scope of work in a reasonable time.

104. I am satisfied that the Applicant's Variation 1 claim fails as the delay claimed in that variation was of its own making.

Variation 2 – Install Additional Site Power Box and Test and Tag Tools and Extension Leads - $1,595.00 (including GST)

105. The Applicant submits that it was required to supply and install an additional site power box and wiring for safety purposes when operating the forklifts and excavators on site. The Applicant also submits that it carried out testing and tagging of site tooling and extension leads in anticipation of a Worksafe inspection.

106. The Respondent has confirmed that the work had been carried out, however in its further submissions, in the Scott Schedule provided, indicated that the variation was *"…Pending more clarification required…".*

107. I am required by section 26 of the Act to *"…determine the dispute fairly and as rapidly, informally and inexpensively as possible….".* Failure by the parties during the adjudication to either accept or reject a claim makes this process very difficult indeed and necessitates the Adjudicator to make an objective decision based upon experience and the evidence submitted by the parties to ensure a clean break in the dispute.

108. Given that the work has been completed and it is not part of the scope of work as set out in the drawings, the only issue for me to determine is whether or not the variational claim made by the Applicant is fair and reasonable. The Applicant has claimed $490.00 (excluding GST) in materials and $960.00 (excluding GST) in labour for the work it has done. While the materials component is reasonable,

the labour component equates to a little over 12 hours of labour at a rate provided by the Applicant of $86.00 per hour (including GST).

109. I find that the materials component of this variation at $490.00 (excluding GST) to be reasonable and accept that component of the claim, however the labour component of the claim is excessive given the limited amount of work necessary to be done. I find that the labour component of the claim is to be reduced to 4 hours in the sum of $312.73 (excluding GST).

110. I am satisfied that the Applicant's Variation 2 claim stands in the sum of $883.00 (including GST) and I award that sum to the Applicant.

Variation 3 – Test and Tag of Tools, Extension Leads and Repair of Faulty Leads for NT Worksafe Audit - $396.00 (including GST)

111. The Respondent has confirmed that the work had been carried out, however in its further submissions, in the Scott Schedule provided, indicated that the variation was *"…Pending more clarification required…".*

112. Again, I am required by section 26 of the Act to *"…determine the dispute fairly and as rapidly, informally and inexpensively as possible….".* Failure by the parties during the adjudication to either accept or reject a claim makes this process very difficult indeed and necessitates the Adjudicator to make an objective decision based upon experience and the evidence submitted by the parties to ensure a clean break in the dispute.

113. Given that the work has been completed and it is not part of the scope of work as set out in the drawings, the only issue for me to determine is whether or not the variational claim made by the Applicant is fair and reasonable. The Applicant has claimed labour only of $360.00 (excluding GST) for the work it has done which equates to 4.6 hours of labour at a rate provided by the Applicant of $86.00 per hour (including GST).

114. I find that the labour time claimed is excessive given the limited amount of work necessary to be done. I find that the labour component of the claim is to be reduced to 3 hours in the sum of $234.55 (excluding GST).

115. I am satisfied that the Applicant's Variation 3 claim stands in the sum of $258.00 (including GST) and I award that sum to the Applicant.

Variation 4 – Supply and Install Incoming Mains for both Properties from the Authority Supply Pole - $3,300.00 (including GST)

116. The Respondent has confirmed that the work had been carried out and in its further submissions, in the Scott Schedule provided, approved the materials component of the claim and then requested a breakdown of the travel and labour components of the claim.

117. As I have previously reasoned at [107] above, failure by the parties during the adjudication to either accept or reject a claim necessitates the Adjudicator to make an objective decision based upon experience and the evidence submitted by the parties to ensure a clean break in the dispute.

118. It is uncontroversial that the work has been done and the Respondent has accepted the materials component of the claim in the sum of $1,800.00 (excluding GST). The only issue for me to determine is whether or not the labour and travel components of the variational claim made by the Applicant are fair and reasonable.

119. The travel and labour components of the claim are in the sum of $1,200.00 (excluding GST) and the details provided in the Applicant's further, and unsolicited, submissions of 19 January 2015 show that this equates to 13 hours of labour and approximately 2.4 hours of travel and meetings in relation to the variational works. The travel component of the claim is unfounded as any travel and overhead expenses are a component of the labour rates and any additional travel expenses would be considered as a 'double dip' claim. In any event, the

Applicant ought to have included an allowance in its original quotation of 14 June 2013 for any such meetings and travel, particularly in Darwin where the meetings were held. The discussions centred around design of the incoming supply to the building site and the associated connections to the Power Authority supply. I find that the Applicant's travel component of Variation 4 fails on the basis that this component of the variation formed part of the scope of work in the contract.

120. The labour component of the claim is 13 hours to install the underground incoming mains supply between the main metre box and the Authority supply pole. It is unlikely that it would take any more than one day to do these works, particularly given that the Respondent carried out the trenching excavation and backfill works. I find the labour time to be excessive for this variation and it is reduced to 10 hours in the sum of $782.82 (excluding GST).

121. I am satisfied that the Applicant's Variation 4 claim stands in the sum of $2,841.10 (including GST) and I award that sum to the Applicant.

Variation 5 – Supply of Telstra Pits and Conduit for both Properties [lot numbers redacted] - $1,210.00 (including GST)

122. The Respondent submits that the pits were supplied by the Applicant but were installed by the Respondent. The Respondent has provided no additional evidence that could establish this claim, but has agreed to the material component of the claim in the sum of $700.00 (excluding GST).

123. The Applicant submits that it supplied, pre-drilled each pit for conduits and supplied those conduits, NBN glands and drawstrings and installed the two Telstra Pits, one at each property. The Applicant also submits that the pit at [*the first lot*] was installed on Tuesday 20 May 2014 and the pit at [*the second lot*] was installed on Wednesday 28 May 2014.

124. The Respondent was provided an opportunity to make further submissions on this issue, however did not tender any additional evidence that could establish and verify the submission that it installed the Telstra pits.

125. It is uncontroversial that the work has been done and the Respondent has accepted the materials component of the claim in the sum of $700.00 (excluding GST). The only issue for me to determine is whether or not the labour and travel components of the variational claim made by the Applicant are fair and reasonable.

126. On a balance of probabilities, I find that the Applicant supplied and installed the Telstra pits for the NBN installation at both properties, [*lot numbers redacted*]. However, as previously reasoned at paragraph [119], the travel component of the claim is unfounded. The labour component of this variation is 4 hours in the sum of $312.73 (excluding GST) and this would be a reasonable time to prepare and install the two pits.

127. I am satisfied that the Applicant's Variation 5 claim stands in the sum of $1,114.00 (including GST) and I award that sum to the Applicant.

Variation 6 – Supply of Lighting, Weatherproof GPOs and Day/Night Sensors to the Gate and Bin Areas for both Properties [lot numbers redacted] - $3,487.00 (including GST)

128. The Applicant submits that it was required to supply and install lighting with day/night sensors to the bin areas and weatherproof power outlets to the entrance gates of the properties.

129. The Respondent confirmed that the work had been carried out and in its further submissions, in the Scott Schedule provided, approved the materials component of the claim and then requested a breakdown of the labour component of the claim and rejected the travel component of the claim.

130. The Applicant in its further submissions of 19 January 2015 confirmed an error in the breakdown of its costs in that the $580.00 (excluding GST) was incorrectly referenced as "Travel $580.00" and was meant to be "Material $580.00".

131. It is uncontroversial that the work has been done and the Respondent has accepted the materials component of the claim in the sum of $590.00 (excluding GST). This appears to be a typographical error by the Respondent and should read $580.00 as per the claim made and later corrected by the Applicant. I will allow the sum of $580.00 (excluding GST) for materials in this variation. The only issue for me to determine is whether or not the labour component of the variational claim made by the Applicant is fair and reasonable.

132. On a balance of probabilities, I find that the Applicant supplied and installed the lighting and power outlets at both properties, [*lot numbers redacted*]. The labour component of this variation is claimed to be 33 hours in the sum of $2,000.00 (excluding GST). I am of the view that the hours claimed are excessive and that it would be extraordinary for a fully qualified electrician to take over three days, at 10 working hours per day, to install some lighting and power outlets in a semi domestic installation. I find that the labour component for this type of installation would be 8 hours, that is 4 hours per property, with the total labour allowance calculated in the sum of $625.45 (excluding GST) and this would be a reasonable time to install lighting to the bin areas and power outlets at the entry gates of both properties.

133. I am satisfied that the Applicant's Variation 6 claim stands in the sum of $1,326.00 (including GST) and I award that sum to the Applicant.

Variation 7 – Disconnect and Remove the Temporary Power Site Box from the Main Supply and Repair Excavator Damaged Conduits in Driveway - $341.00 (including GST)

134. The Applicant has claimed for the work in the sum of $310.00 (excluding GST) and the Respondent, in its submissions of 16 January 2015 as set out in the Scott Schedule, has accepted this claim.

135. I award the Applicant's Variation 7 claim in the sum of $341.00 (including GST).

Variation 8 – Supply of Materials including Isolators and Cable for the Air-conditioning Installers - $2,090.00 (including GST)

136. The Applicant has claimed for the work in the sum of $1,900.00 (excluding GST) and the Respondent, in its submissions of 16 January 2015 as set out in the Scott Schedule, has accepted this claim.

137. I award the Applicant's Variation 8 claim in the sum of $2,090.00 (including GST).

The Respondent's Counter Claims

Counter Claim 1 – Installation of Telstra Earthing Network Connection Boxes - $3,421.10 (including GST)

138. The Respondent submits that it has undertaken the installation of the Telstra earthing network connection boxes and that this work that was meant to be part of the scope of work the Applicant held in the contract.

139. The Applicant submits that the communication works were never part of the scope of work in the contract and were not part of the work quoted to the Respondent for [*the 2 lots*] on 14 June 2013.

140. The Respondent has included as evidence a Tax Invoice 6828 from [*the phone installer*] for the installation of their telephone and data system at the two properties. On that invoice there are several highlighted items that are meant to

relate to work the Applicant was to have carried out as part of its scope of work under the contract.

141. A careful reading of the Applicant's quotation and attendance to the drawings show that there are layout drawings for power and communications, however the scope of the communications works does not form part of the quotation that was accepted by the Respondent on 9 July 2013. The only component set out in the Applicant's quote that relates to the communications works is installation of *"…Pull cords for incoming Telecommunications….."* from the electrical sub-mains to each unit. A careful reading of [*the phone installer's*] invoice shows that they were contracted to install the data and Telstra phone points at both properties.

142. I am of the view that the installation of the communication earthing network boxes did not form part of the Applicant's scope of work and that the Respondent, an experienced and competent building contractor, would have known this, particularly given that the Respondent contracted the data and communications work for both properties. It is also clear that the Respondent and [*the phone installer*] discussed this work on 17 June 2013 at a site meeting as indicated in the first line entry of [*the phone installer's*] invoice.

143. I find the Respondent's Counter Claim 1 to be unfounded. It would appear that the Respondent has attempted to represent invoiced work it had contracted with another contractor to be part of the Applicant's scope of work in an attempt to satisfy a counter claim in the contract. This is a serious issue and one I will deal with in relation to costs.

144. I find that the Respondent's Counter Claim 1 is unfounded and fails.

Counter Claim 2 – Hire of a 12.5KVA Generator for 10 days Running Costs at - $1,745.00 (including GST)

145. The Respondent submits that it had to hire a 12.5KVA generator because the Applicant was contracted to provide temporary power to the site and did not submit the paperwork to the Supply Authority due to the loss of the Applicant's contractor's license. The Respondent has claimed for the delay of the 10 days this has caused to its project.

146. The Applicant submits that the hire of the generator is not at its cost in the contract.

147. The issue in this matter is that there is no schedule or program, there is no date of PC, it is unclear if project activities were concurrent, there is no critical path for the work and activities appear to have been undertaken when access was available to each of the trades. It was the Respondent's obligation to plan and notify how and when access was available when the particular trade works could be carried out, particularly if the Respondent had wanted to hold its contractors to strict timings in the contract. The Respondent did not provide these items and it is unlikely that either party could satisfactorily mount a delay claim with any degree of success in such circumstances.

148. I find that the Respondent's Counter Claim 2 for 10 days of delay and the associated generator hire costs to fail on an evidential basis.

Counter Claim 3 – Supply of Labour for the Installation of Conduits for Mains and Telstra totalling 68 hours - $8,160.00 (including GST).

149. The Respondent submits that it provided 68 hours of labour to the Applicant to assist in installing the main electrical conduits and the Telstra, data and communications, conduits.

150. The Applicant rejects this claim and says that it was directed by the Respondent, at the commencement of the contract, not to bring labour to site as there was insufficient accommodation and there was an adequate number of people to

assist on site. There is no further evidence submitted from either party that would assist in clarifying this matter.

151. When considering the Applicant's scope of work and variations to that scope of work, it is clear that labour is required for this work and, in particular, the Applicant was to some extent assisted by the Respondent. The issue for me to consider is whether or not 68 hours of labour at $120.00 per hour (including GST) is a fair and reasonable cost for this assistance.

152. I am of the view that the claim is grossly inflated. The unskilled general labour hourly rate in construction in the Northern Territory is between $45.00 to $65.00 per hour (including GST) and this would also account for overheads and profit. The minimum unskilled general labour rate set out on the Fair Work website is much lower. The unskilled general labour rate of $120.00 per hour claimed by the Respondent cannot be supported. I am of the view that a rate of $55.00 per hour would be quite generous and fair for any labour support provided by the Respondent to the Applicant. The issue I must now consider is whether or not 68 hours is fair and reasonable given the Applicant's scope of work.

153. The conduit labour assistance comprises 3 men for 10 hours each on 20 December 2014 and again on 14 January 2015, being 60 hours of labour assistance over 2 days. This would calculate to an actual working day of over 12 hours as 7:00am to 7:00pm would safely yield at or about 9 productive hours of work. I find the Respondent's claim to be excessive and allow a total of 20 hours of labour assistance as fair and reasonable for the assistance in the Applicant's scope of work and variations. The Applicant cannot have it both ways by claiming and being paid its scope and variations for work done where there was some assistance form the Respondent in completing the scope and variations.

154. Turning to the *"…Blocking of wall penetrations…"* component of this claim. I am of the view that this claim component is unfounded. This is a builder's scope of work and an experienced and competent builder such as the Respondent would or ought to know that wall finishing both internally and externally for general

services penetrations falls to the plasterers and, in turn, to the painters on final completion of the surfaces.

155. I award the Respondent's Counter Claim 3 in the sum of $1,100.00 (including GST).

Counter Claim 4 – Gyprock Costing from Ceiling Contractor - $3,600.00 (including GST).

156. The Respondent submits that it incurred a cost of $3,600.00 (including GST) for delays as a result of additional work done by the ceiling installer. The ceiling installer was required to cut access points into the ceiling for the Applicant after the ceilings had been installed in the upstairs Units 1, 2 and 3.

157. The Applicant submits that Unit 2 had the ceiling installed in early December 2013 and that ceiling work only commenced in early January 2014.

158. The Respondent has included, as evidence, a letter from its ceiling installer, [*name and address omitted*], which sets out the sequence of events for the installation of the ceilings and the incomplete electrical wiring. In that letter [*the ceiling installer*] states in relation to the additional access points cut into the already installed ceilings:

> *"….The back tracking to cut down sheets and re patch the work was a loss of materials and wasted time, for me and my assistant, and this I wore at my own expense…."*

[*The ceiling installer*] goes on to say:

> *"….As* [the Respondent]*, and I had initially discussed a total, all inclusive figure to be paid progressively, I honoured this payment arrangement with [the Respondent]; despite incurring many extra labour hours, accommodating an assistant for longer than anticipated and some loss of materials, all owing to the incorrect and/or incompletion of electrical wiring in a timely and efficient manner. In doing so I had left myself out of pocket to the amount of $3,600…."*

159. I accept the evidence of [*the ceiling installer*]. He has nothing to gain by providing this information and his evidence is clear and straightforward. The

issue for me in this evidence is that [*the ceiling installer*] has accepted the costs of the delays and the additional work of patching the access holes cut into the already installed ceiling in the sum of $3,600. [*The ceiling installer*] honoured the agreement he had with the Respondent and he says *"….this I wore at my own expense….*". It is therefore of serious concern that the Respondent has attempted to claim for this cost as a counter claim on the Applicant in such circumstances.

160. I find that the Respondent's Counter Claim 4 is unfounded and fails.

Counter Claim 5 – Electrical Wiring Faults in the Air-conditioning - $752.13 (including GST)

161. The Respondent submits that the air-conditioning units were installed and completed and only testing was to be carried out, however this could not be completed as the main power isolating switches had not been installed and there were electrical faults.

162. The Applicant submits that it did not install the air-conditioning units and that this was done by another contractor. The Applicant says that it only supplied the isolating switches and power to each isolating switch and that the connection of each air-conditioning unit to the isolating switch was carried out by the air-conditioning contractor.

163. The Respondent has included as evidence a Tax Invoice 1275 from [*the airconditioning installer*] the electrical, air-conditioning and refrigeration contractors for the repair of six air-conditioning units in the sum of $752.13 (including GST). Provided on that invoice is a fault analysis from the technician who attended site and reads:

> *"…..found wiring to living room air conditioner from isolator to outdoor unit was incorrect, active conductor was connected to the earth terminal. Immediately fixed problem and contacted builder of all 12 apartments to gain access and check all electrical components of installed air conditioners to ensure units were wired correctly. [Mr C] [the Respondent] arrived and asked us to check all other units, all up found Six units wired up wrong. Fixed wiring on all units*

and test all working ok…"

164. Leaving aside the fact that the Respondent failed to give the Applicant an opportunity to attend to the fault and establish whether or not the fault was with the work the Applicant had carried out in the contract, the electrical fault found was in the wiring between the isolating switch installed by the Applicant and the outdoor unit. That is, the external condensing unit and compressor section of the air-conditioning system. This wiring was part of the air-conditioning installation carried out by the air-conditioning contractors and not the Applicant.

165. Notwithstanding that [*the airconditioning installer's*] technician, [*Mr D*], in his report on the fault, identified that the wiring fault was found in the air-conditioning and not the main supply wiring, an issue in this matter is that an active supply was found connected to an earth and this is a very serious safety issue. I find it highly improbable indeed that the Applicant, who would have conducted earth leakage testing of the electrical installation prior to sending the completion certificate to the Supply Authority, has caused an active supply to be connected to an earth.

166. It is also of concern that the Respondent, an experienced and competent builder who had at the time been in attendance at site and directed [*the airconditioning installer's*] technician to check all the air-conditioning units, then attempted to claim the costs as a defect in the Applicant's work when clearly the fault lay with the Respondent's air-conditioning contractor.

167. I find that the Respondent's Counter Claim 5 is unfounded and fails.

Interest on the claims

168. In reconciling the claims, the amount the Respondent is to pay the Applicant is $32,546.88 (including GST).

169. There are no written contract terms in relation to interest in this contract and therefore the implied provisions of the Act are implied and form the contract terms applicable to the amount of interest to be paid to the Applicant. Interest on overdue payments is set out in section 7 of the Schedule and states:

> *" (1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.*
>
> *(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.*
>
> *(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time……"*

170. The rate of interest prescribed by regulation 9 of the Regulations is:

> *"….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act."*

171. The *Supreme Court Act* refers to the Rules. The *Supreme Court Rules* follow rule 39.06 of the *Federal Court Rules* and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate is currently 2.5%, therefore the interest rate applicable to this contract is 8.5% per annum.

172. 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.

173. I award interest of $523.67 on the sum of $29,558.07 (excluding GST) from 3 December 2014, the date of due payment, to 16 February 2015, the payment date of determination, pursuant to section 35 of the Act.

Summary

174. 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) Part 1, the Final Progress Payment to stand in the sum of $24,554.20 (including GST);

(g) Part 2, the Light Fittings supplied for the Carport to stand in the sum of $239.58 (including GST);

(h) Part 3, the Meals and Accommodation claim to fail;

(i) Variation 1 to fail;

(j) Variation 2 to stand in the sum of $883.00 (including GST);

(k) Variation 3 to stand in the sum of $258.00 (including GST);

(l) Variation 4 to stand in the sum of $2,841.10 (including GST);

(m) Variation 5 to stand in the sum of $1,114.00 (including GST);

(n) Variation 6 to stand in the sum of $1,326.00 (including GST);

(o) Variation 7 to stand in the sum of $341.00 (including GST);

(p) Variation 8 to stand in the sum of $2,090.00 (including GST);

(q) Counter Claim 1 to fail;

(r) Counter Claim 2 to fail;

(s) Counter Claim 3 to stand in the sum of $1,100.00 (including GST);

(t) Counter Claim 4 to fail;

(u) Counter Claim 5 to fail; and

(v) Interest awarded in the sum of $523.67.

175. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **$33,070.55 (including GST)**.

176. This sum is to be paid to the Applicant by the Respondent on or before **16 February 2015**.

Costs

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

178. 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….."*

179. I have found that both the Applicant and the Respondent made unfounded submissions, some of which were quite serious. However, the Respondent's conduct (and by their own admission) in refusing to process the Applicant's payment claim, until it provided further information relating to variations and meal receipts, was clearly vexatious.

180. The Respondent did not and never has provided any valid reasoning for not processing the claim and, to date, has not processed or paid the claim. The payment of the final contract sum was due, the contracted work had been completed, that is PC, and it was uncontentious between the parties that this sum was due to be paid on or before 2 December 2014. The Respondent held an obligation to promptly process the claim, notify the Applicant of a dispute and then pay the amount of the claim that was not disputed.

181. I find that the Respondent's refusal to process and pay that part of the Applicant's payment claim that was not disputed was vexatious conduct on the part of the Respondent.

182. The Applicant has clearly incurred additional costs of bringing an Application and the loss of cash flow into its business through the non-payment of its entitled claims under the contract. I am satisfied that the Applicant has incurred costs of the adjudication because of vexatious conduct on the part of the Respondent.

183. I therefore find that the Respondent is to pay 75% of the costs of the adjudication and the Applicant the remaining 25% of the costs of the adjudication under section 36(2) of the Act.

Confidential Information

184. The following information is confidential:

    (a) the identity of the parties;

    (b) the identity of the principal; and

    (c) the location and nature of the works.

DATED: 19 January 2015

Rod Perkins
Adjudicator No. 26