Determination 26.15.07

IN THE MATTER of an Adjudication

pursuant to the Construction Contracts

(Security of Payments) Act (“**Act**”)

BETWEEN:

(“**Applicant**”)

and

(“**Respondent**”)

**REASONS FOR DECISION**

1. On 10 November 2015 I was appointed adjudicator to determine a payment dispute between the Applicant and the Respondent by the Master Builders Northern Territory (“**MBNT**”) as prescribed Appointer under the Act. I received a Letter of Appointment on 10 November 2015 and I collected the application documents from the MBNT offices on 11 November 2015.
2. On 14 November 2015 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 by 2:00pm CST on Wednesday, 18 November 2015. I also advised the parties that, having read the Application dated 6 November 2015, which was served on MBNT on 6 November 2015, there were some issues on which I would be seeking further submissions and that I would write to the parties in respect of those submissions once I had received the Response. By calculation from the date of service of the Application on 6 November 2015, the Response, if any, was due on or before 20 November 2015.
3. On 15 November 2015 the Respondent sent me an email indicating that the disputed matter was before the Northern Territory Civil and Administrative Tribunal (“NTCAT”) who had experienced people to evaluate the whole of the issues rather than the one issue that the Applicant had raised and that this was in line with the contractual dispute resolution process. The Respondent had also appeared to not fully understand my role as adjudicator in the matter as follows:

*“Dear Mr Perkins,*

*The issue that has been raised by [the Applicant] is only one issue that is currently with NTCAT. The contracts are clear on the way disputes should be addressed and it would seem that it is their intention to address only one issue and not the whole of the issues.*

*NTCAT have experienced people to evaluate the whole of the issues that have been raised in regards to the contracts, it appears [the Applicant] want[s] to by-pass the dispute process and employ your services; my preference is to use the process outlined in the contracts.*

*Regards*

*[the Respondent]”*

1. On that same day, 15 November 2015, I wrote to the parties, addressing my email to [the Respondent], as follows:

*“Dear [Respondent],*

*Thank you for your prompt response below.*

*It appears, however, that you have misunderstood my role in this matter.  I have been appointed as Adjudicator by a Registered Appointer under the Construction Contracts (Security of Payments) Act (“Act”) to hear this dispute and will do so in accordance with the Act and based on the evidence put before me.*

*This process must continue in accordance with the strict timelines set out the Act, irrespective of any dispute resolution provisions in your contract or any other arrangements you may have made.*

*The process of Adjudication is a legal one with legal consequences and, in the context of your email, I can only strongly suggest that you may wish to obtain legal advice in respect of this matter.”*

1. The Respondent did not serve a Response on or before 20 November 2015 and I commenced writing my determination based upon the information contained in the Application.
2. On 27 November 2015 I wrote to the parties asking them if they had any objections in continuing with the adjudication given that proceedings had commenced in the NACAT. In the event that the adjudication process did continue, I also sought answers to several questions that I had after reading the Application. The content of that email is as follows:

*“Dear Mr. [B] and [Respondent],*

*I confirm that I have not received a Response to the Application for adjudication of the above payment dispute, pursuant to s.29 of the Construction Contracts (Security of Payments) Act (“Act”) other than an email from the Respondent on 15 November 2015 which suggested that all the issues were not addressed in the Application and that NTCAT, I assume to be the Northern Territory Civil and Administrative Tribunal, is better equipped to hear the dispute.*

*In this respect, I draw the parties attention to s.47 of the Act, in particular s.47(2) which states:*

*“(2) If other proceedings are started in relation to a payment dispute that is being adjudicated under this Part, the adjudication must proceed despite the proceedings* ***unless all of the parties, in writing***[emphasis added]*, require the appointed adjudicator to discontinue the adjudication.”*

*The question that falls from this is “Do you wish me to discontinue the adjudication?”.  I will require your response or objections, if any, in writing by* ***4:00pm CST on 30 November 2015****.*

*In the meantime, I will proceed to determine the dispute on the material in the Application.*

*To this end, I have several questions for the parties on which I require further submissions under s.34(2) of the Act and in line with His Honour Justice Barr's decision in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor [2014] NTSC 20 at 42 and to ensure there is no denial of natural justice.*

*1. On what date was the Application served on the Respondent and how was it served;*

*2. Occupancy appears to have occurred on 8 October 2015, was the building at or about finally complete at this stage of construction such that an Occupancy Permit could be sought;*

*3. The emails at "Annex X” refer to an email letter or two emails from the Respondent on 2 November 2015 containing some photos and an explanation of some of the issues between the parties.  Could you please provide those emails and photos.*

*4. The Application suggests a take out price for the rear door security screen plus installation.  Could the Applicant please provide a price for those items as suggested in the Application at paragraph 7(c) and email at Annexure X of 3 November 2015.*

*5. I will contact Mr. [LB] direct in relation to his statement and the meeting held on site, could you please advise the date of that meeting and the subsequent meeting as set out in Mr. [SC]’s statement.  I may also wish to contact Mr. [SC] in relation to his statement, depending upon the answers provided to these questions.*

*All responses are to be provided by* ***4:00pm CST on 30 November 2015****.*

*I thank you for your assistance.”*

1. On that same day, 27 November 2015, I contacted Mr. [LB] in relation to the evidence he had given in his Statutory Declaration at Annexure “Y” of the Application. I found Mr. [LB] to be credible and he confirmed, during my interview, the statements he had made in his statutory declaration.
2. Later that same day, 27 November 2015, I received an email from the Respondent which had attached to it the documents the Respondent had sent to the NTCAT and indicating that there were multiple issues as follows:

*“Please find attached the information provided to NTCAT, which shows that there are far more issues than what Pivotal have raised.*

*If you require any further information please advise.*

*Regards*

*[the Respondent]”*

1. On the evening of 27 November 2015 I responded to the parties in relation to the material sent by the Respondent earlier that day advising that the material appeared to be submission material to the NTCAT and contained documents that more appropriately ought to have been part of a Response to the Application. I requested the information be forwarded to the Applicant as the Respondent had not copied the Applicant on the email sent to me. As there was no Response to the Application, I advised the parties that I could only consider the material in the Application and any information that formed part of the further submissions to the questions I earlier put to the parties. The content of that email is as follows:

*“Dear [Respondent],*

*Thank you for your prompt response below and for the email which followed that response at 6:43pm today which contained several photographs.  I request that you please forward both those emails to the Applicant as soon as possible.*

*It appears that the information you have provided in those emails was apparently the content of an application to the Northern Territory Civil and Administrative Tribunal and that many of the documents provided may be information that ought to have been part of a Response to the Application for Adjudication.*

*As no Response to the Application in the above matter was prepared and served pursuant to s.29 of the Construction Contracts (Security of Payments) Act, I can only consider the information in the Application and any information that forms part of the further submissions to the specific questions I have asked of the parties.*

*I refer the parties back to those questions set out in my email of earlier today and I request the parties limit their submissions to answering those questions.  I again ask that the parties ensure they copy each other on any information sent to me as the Adjudicator.*

*The further submissions are required by 4:00pm CST on Monday, 30 November 2015.*

*Thank you for your assistance in this matter.”*

1. On 28 November 2015 I received a further email from the Respondent, again not copied to the Applicant, which suggested that the Respondent had misunderstood my correspondence and provided a detailed explanation and included as attachments three emails sent between the Applicant and the Respondent during the project. The Respondent also advised that he had made a payment to the Applicant of $10,278.87 on 9 November 2015, presumably including GST. The content of that email is as follows:

*“Dear Mr Perkins,*

*It appears that there has been some misinterpretation of your emails. Your email dated 14 November addressed to the applicant and I had an attachment regarding you being appointed as Adjudicator and asked if there was any objections.*

*The email asked for a response, I took this to mean a response to the question of you being appointed as Adjudicator, you could not be asking the applicant to respond to their application.*

*After now re-reading the email and not the attachment it appears that it was responding to the applicant, when it states:*

*Thank you for your assistance and once I receive the Response, if any, I will contact you in relation to some questions that I have, both procedural and factual, regarding the Adjudication.*

*I reach this conclusion because I had not given you any assistance.*

*When your email stated:*

*I will contact you in relation to some questions that I have, both procedural and factual, regarding the Adjudication.*

*I took this to mean that I would be given the opportunity to counter the claim made by the applicant and answer some questions.*

*When I read your email yesterday stating that there had been no response other than what I had interpreted as being solely a response to your appointment I re-read your email which I still interpret as being related to your appointment because you did not need the applicant to respond to their own application.*

*Yesterday’s email states all responses to be by 4pm 30 November, it does not limit the response to the questions raised, yet this is what you appear to be saying.*

*On the basis that there has been a misinterpretation of your emails and to permit a counter claim, time should be allowed to make my claim and address the inaccuracies in the claim made by the applicant.*

*I counter that claims made by [SC] and[LB] that I was happy with the materials provided for use as a Driveways. I also attach an email from the applicant claiming for works completed, when they were clearly not completed.*

*It should be noted that the Roads were included as Civil works which was part of claim 2 and was totally paid as being complete.*

*After receiving the quote from [a screen provider] for the security screen I deducted that amount and the costs that had been claimed but not agreed and made a payment to [the Applicant] of $10,278.87 on 9 November 2015.*

*The questions that are still in dispute are:*

*Whether the material used for the Roads/ Driveways is a suitable material for the purpose?*

*Was the cost of the Roads/ Driveways included in the contract price for Lot [A]?*

*Was the cost of the Roads/ Driveways included in the contract price for Lot [B]?*

*[the Respondent]”*

1. On that same day, 28 November 2015, I responded to the parties directing them, under s.34(6) of the Act, to copy each other on all correspondence sent to me throughout the adjudication. A copy of that email is as follows:

*“Dear [Respondent] and Mr. [B],*

*I have requested that each party in this matter copy the other on all correspondence sent to me.*

*I note that [the Respondent] has consistently ignored my request in this respect and I therefore now direct that the parties, pursuant to s.34(6) of the Construction Contracts (Security of Payments) Act (“Act”), copy each other on all correspondence sent to me during the course of the Adjudication.*

*In relation to [the Respondent’s] email to me of today below:*

*It is not for an Adjudicator to argue with the parties in relation to their understanding or otherwise of the Adjudication process under the Act.  It is also not for an Adjudicator to provide the parties legal advice.*

*On 15 November 2015 I indicated to the parties that there were strict timelines under the Act and that [the Respondent] may wish to obtain legal advice in respect of this matter.*

*I did not receive a Response pursuant to s.29 of the Act on or before the date the Response was due, that is on or before 20 November 2015, and any material submitted after that date cannot be considered by the Adjudicator, as the 10 working day timeframe set out in s.29 of the Act is mandatory.*

*This means that any material, other than further submissions requested by the Adjudicator, is out of time under the provisions of the Act.*

*I have, however, asked for further submissions under s.34(2) of the Act in relation to several questions and I have set a deadline for those submissions, being* ***4.00pm CST on 30 November 2015****, pursuant to s.34(2)(a) of the Act.*

*I have also reserved the right to call for further submissions depending on the answers received to my questions.*

*Thank you for your assistance.”*

1. On 29 November 2015 I received another email from the Respondent, this time copied to the Applicant, seeking an extension of time within which to make its further submissions, indicating that the Respondent had been unwell. However, in that email, the Respondent also sought to raise further the issue with the driveway material as follows:

*“Dear Mr Perkins,*

*Due to the fact that I have been unwell for the last 2 weeks I have been unable to meet the deadline. I have therefore requested an extension of time to respond to this claim.*

*I have provided a copy of a quote from [the screen supplier] for the missing security door. The fees charged for deliver etc that had not been agreed also need to be deducted. When the deductions for fees that have not been agreed are deducted the house has been paid for, which leaves the point of contention the material used for the Driveways.*

*The emails already supplied show that I was not happy with the Driveways which differs from the version of events from [SC] and [LB]. I have also supplied photographs of the metal material from the surface of the driveways which is an unsuitable for the purpose.*

*If an extension of time is not permitted within the Act, please advise.*

*Regards*

*[the Respondent]”*

1. That same day, 29 November 2015, I responded to the parties again reiterating the strict mandatory timelines prescribed under the Act for the making of an application, responding to the application and the conduct of the adjudication and suggested the parties focus on the questions on which I sought further submissions, as follows:

*“Dear [Respondent] and Mr. [B],*

*As previously advised, there are strict time lines prescribed under the Construction Contracts (Security of Payments) Act (“Act”) for the making of an application, responding to the application and the conduct of the adjudication.  These strict time lines are mandatory as the Act uses the word “must”.  There is no discretion available to an adjudicator to relieve either the applicant or the respondent of compliance with these strict time lines.*

*I have previously suggested that if there is any difficulty with the process under the Act you should seek legal advice.*

*I would again urge the parties to focus on the questions on which I have requested further submissions.*

*Thank you for your assistance.”*

1. On 30 November 2015, and within time, I received the Applicant’s submissions to my questions. In that email the Applicant requested I continue with the adjudication and advised that it had not been notified by the NTCAT in relation to the commencement of any proceedings, as follows:

*“Dear Mr Perkins,*

*In response to your email and for the avoidance of doubt, we request that you please proceed with the adjudication. Whilst the correspondence issued by [the Respondent] appears to be complied for submission to NTCAT, we have not been notified of the commencement of any other proceedings in relation to this adjudication, or any other matters with the respondent.”*

1. I received no submissions from the Respondent in relation to my questions.
2. On 2 December 2015, having read the Applicant’s further submissions, I wrote to the parties with some additional questions as follows:

*“Dear Mr [B] and [Respondent],*

*Having now read the further submissions provided by the Applicant to the questions I have asked the parties, I note that the Application was served on the Respondent by mail on 13 November 2015.  The Respondent has not provided any further submissions to the questions I have asked.*

*In relation to service in this matter, the Construction Contracts (Security of Payments) Act (“Act”) at s.28 requires an Applicant to serve an application for adjudication on each party to the contract, in this instance the Respondent, and on a prescribed appointer.  Transmittal by email, however, does not constitute service.*

*The method of service by post falls under s.25 of the Interpretation Act which provides that service by mail is taken to be served when it would have been delivered in the ordinary course of the post.  The transmittal advice from Australia Post provided by the Applicant indicates receipt of the documents by the Respondent on 13 November 2015.   This means that a Response under s.29 of the Act was due within 10 working days of that date, that is****on or before 27 November 2015*** *and not on or before 20 November 2015 as originally thought, as the Respondent did not confirm when the Application was actually received.*

*The bundle of documents provided by the Respondent by two emails to me on 27 November 2015 were represented as documents submitted in another action with the Northern Territory Civil and Administrative Tribunal and could not be considered to be a Response under s.29 of the Act as they were not served on the Applicant.*

*I had not requested any further submissions from the parties at that stage of the Adjudication, however the bundle of documents has been provided to me as evidence to consider in this Adjudication.*

*I cannot dismiss the evidence in the bundle of documents and under s.34 of the Act, when read in conjunction with the decision of Southwood J in M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor [2014] NTSC 25 at 42 and the decision of Barrr J in Hall Contracting Pty Ltd v McMahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42, I must take into consideration any such evidence to ensure procedural fairness is afforded to the Respondent, who submitted the bundle of documents, and to ensure natural justice has been afforded to both parties in this matter.*

*I have already requested that the Respondent send these documents to the Applicant, as the Applicant was not a copy addressee on the emails to me.  It is not yet clear to me if the Respondent has complied with this request and, in this regard, I request that the Respondent confirm that the bundle of documents has been provided to the Applicant.*

*I request the Respondent provide confirmation by* ***2:00pm CST on Thursday, 3 December 2015****.*

*Given also that these documents constitute new material, I invite the Applicant to make further submissions on any new matter raised in the documents by the Respondent.*

*I request the Applicant provide these submissions by* ***2:00pm CST on Friday, 4 December 2015****.*

*Thank you for your assistance.”*

1. On 3 December 2015 I received an email from the Respondent setting out further issues with a security door and the foreign material collected from the driveway as well as raising an allegation that I had provided material to the Applicant that was not provided to the Respondent. The email is as follows:

*“Dear Mr Perkins,*

*The fact that the Applicant in his response to your questions dated 30 November 2015, stated that:*

*Whilst the correspondence issued by [the Respondent] appears to be complied for submission to NCAT, we have not been notified of the commencement of any other proceedings in relation to this adjudication, or any other matters with the respondent.*

*and*

*Whilst acknowledging your correspondence regarding additional information, in light of recent email from [the Respondent] and the information that has come apparent through this process, I can confirm that a payment was received on 9th November 2015 for $10,278.87 which [the Respondent] has indicated was made by him. Until forwarded the correspondence from yourself on Friday, we were not aware this payment was in relation to this project, and have no indication how this payment amount has been calculated. Payment was received without reference or remittance. Our accounts department had been in the process of requesting further information from the bank in relation to the transaction. This ambiguous action is typical of [the Respondent] throughout our dealings.*

*His response would indicate that he had a copy of what had been sent to you, or was aware of what had been sent to you.*

*In light of your request to send the Applicant the information I provided to you, I request that you provide me with all communications that have taken place between you and the Applicant.*

*The Applicant has confirmed that $10,278.87 was received before the documents were served. For the Applicant to claim he was unaware of who had paid the sum after weeks of it being in their account is unbelievable. If there was any doubt, the BSB is obtainable from most search engines.*

*I had previously advised [the Applicant] that I would deduct the cost of the security door that had been claimed but not done and I would deduct the sums claimed as being Variations, which had not been agreed. The claim for interest on late payments had not been substantiated, or complied with the Contract.*

*The only Variation that [the Applicant] has is in relation to the reconstituted concrete driveway. [The Applicant] had a fiduciary duty to ensure the material used was suitable for the purpose. The pieces of reinforced steel bars, screws and other metal objects in the mix is not what had been agreed; reconstituted concrete had been agreed.  The works claimed by the Applicant are not the works that been agreed, the claimed works where provided by [LB] for [the Applicant]. [The Applicant] had a fiduciary duty of care to me to ensure that the material used, was what had been agreed and suitable for its intended use. [The Applicant] failed its obligations and now want to claim for work that had has not met the standards required.*

*The claim by the Applicant is vexatious and the Applicant should meet the full cost of the process.*

*I will email the information to the Applicant before 2pm today.*

*Regards*

*[the Respondent]”*

1. That same day, 3 December 2015, the Respondent sent several further emails to the Applicant, with a confirmation copy to me, transmitting information that the Respondent had not previously copied to the Applicant.
2. On 4 December 2015, and within time, I received the Applicant’s further submissions, set out in a detailed letter, to the question I had asked in relation to service of the Application and the additional documents provided by the Respondent. The Applicant submitted that the Application was served correctly on 6 November 2015 by email under the provisions of the *Electronic Transactions (Northern Territory) Act*. The Applicant also provided detailed information to each email that had been sent by the Respondent during the Adjudication. Some of the Applicant’s submissions confirmed the events submitted by the Respondent while others did not and the Applicant provided clarifying commentary where the parties did not agree on the events of the dispute.
3. On 5 December 2015 I received another email from the Respondent continuing to submit further material and additional argument, which added nothing of substance to the arguments the Respondent had previously raised in its earlier submissions. The Respondent also continued its allegation in relation to providing material to the parties as follows:

*“It is noted that you have not responded to my request that you provide me with any communications that you have had with the Applicant. The Applicant responded to the “bundle” of material that I had sent to you before your deadline of re-sending the material; the purpose of the exercise is interesting.*

*The Applicant knows that a Variation Notice (contract page 39 Form 5)* ***must*** *be submitted before a variation is undertaken. The Applicant demonstrates his knowledge of this fact when he sent the Variation/PC & PS Sum Breakdown, in the column headed Date of Variation Claim it is empty.*

*After a Variation Notice is issued the Builder* ***will*** *within 10 days provide a Cost Variation Notice (contract page 37 Appendix D Form 3) for the Owners approval.*

*The claims for the Variation/PC & PS Sum Breakdown and Interest Payments for late payments, which are disputed, have not met the conditions of the contract.*

*The Applicant did not want to reduce the Final Claim by deducting the omission and the additions that had not been agreed therefore I contacted the supplier of the omission and deducted the amount from the written quote. I further deducted the Variation/PC & PS Sum Breakdown and Interest Payments that had not met the conditions in the contract. The amount of $10,278.87 was paid to the builder on 9 November, this amount has been acknowledged as being received by the builder.*

*An agreement was made that recycled concrete would be used for the Driveways on Lot [A] and Lot [B]. The agreement was made with the builder, who has obligations to ensure that the material is suitable for the work.*

*I will employ an engineer to report on the material used and the construction of the Road/Driveway for both Lot [A] and Lot [B].*

*Please find attached pictures of yesterday’s Driveway”*

1. Later that same day, 5 December 2015, I wrote to the parties requesting them to refrain from sending me any further unsolicited material unless I requested further submissions and I initially addressed the allegation made by the Respondent in relation to my communications with the parties, as follows:

*“Dear [Respondent]and Mr. [B],*

*I did not request the further information sent to me this morning from the Respondent and I request that the parties refrain from sending any further unsolicited material.  I have asked specific questions and have set deadlines for the parties by which to respond to those questions.  I note that the Respondent did not answer my questions.*

*I have put the material received this morning to one side and will not consider it in making my determination.  That material does not appear, in any event, to add anything of substance to the argument by either party.*

*In relation to the inference by the Respondent that I have had separate communications with the Applicant, without copying the Respondent,  my communications have at all times been and will continue to be to both parties in this matter.*

*I again request that you carefully read and follow my directions in this matter and pay particular attention to sections 34(1)(b), 34(5) and 34(6) of the Construction Contracts (Security of Payments) Act.*

*If I have any further questions in this matter, I will let the parties know.”*

1. On 8 December 2015 I wrote to the parties advising an extension of time to make my determination, I asked questions on two particular issues and addressed in detail the Respondent’s allegation of my communication with the parties, as follows:

*“Dear Mr. [B] and [Respondent],*

*Following on from the further submissions of 4 December 2015 and my email of 5 December 2015, I confirm that the Registrar has consented to an extension of time in which to make my determination up to and inclusive of 11 December 2015.*

*There are two matters I now wish to raise with the parties:*

*(1) Documents forwarded on 27 November 2015 purportedly as part of the adjudication process*

*Let me be very clear.  I did not forward material for the parties to rely upon as part of the adjudication process.  The material I returned to the parties, which comprised a bundle of documents sent to me by the Respondent as part of another action, were returned to the parties to confirm what I required the Respondent to send to the Applicant.  The Respondent did not send the Applicant all those documents and throughout the adjudication process has attempted to confuse and not comply with the procedure I have set in this adjudication.*

*That said, each of the parties in this adjudication now has all the evidence and, in this respect, I again draw the parties’ attention to s.34(1)(b) and s.34(6) of the Construction Contracts (Security of Payments) Act (“the Act”).*

*The Act, unlike its East Coast counterparts, does not expressly limit the materials which I may consider.  Procedural fairness requires me to consider the substance of what the parties say, but it would be inconsistent with procedural fairness to allow one party to steal a march on the other by making late submissions to the prejudice of the other.*

*In this matter the late submissions by the Respondent have had very little effect on my determination.*

*(2) The Electronic Transactions (Northern Territory) Act (“the ET Act”)*

*The Applicant, in its further submissions of 4 December 2015, argues that the Application was served on the “applicant” (I took this to mean the Respondent) by email and was served under the provisions of the ET Act.  As the service of an application forms a mandatory function of the adjudication process, I require further information from the parties in relation to their argument for service by electronic means.*

*My questions are as follows:*

*(a) precisely which section of the ET Act is relied upon for service of the Application; and*

*(b) what case law, if any, is there in relation to the service of an application as required by the Act?*

*I require these submissions by* ***5.00pm Wednesday 9 December 2015****.*

*Please note, after I have received these further and final submissions, the shutters will close.  Please ensure that you stick to the two questions asked above as I will not accept any additional material outside the scope of those questions.*

*Thank you for your assistance.”*

1. On 9 December 2015, and within time, I received submissions from both the Applicant and the Respondent to my questions. Later that same day, 9 December 2015, I wrote to the parties confirming the receipt of their further submissions and advised them that *“…the shutters for any further submissions are now closed…”.* There were no further submissions from the parties.

***Introduction***

1. The Applicant and the Respondent entered into a series of contracts in which the Applicant was to construct four houses (3 x 3 bedroom and 1 x 4 bedroom) and three independent units (3 x 3 bedroom) on four adjoining [redacted] lots of land at [redacted] in the Northern Territory.
2. This adjudication arises out of the contract in which the Applicant agreed with the Respondent to build the four bedroom house on one of the adjoining [redacted] blocks of land, [redacted] in the Northern Territory. This contract was entered into on 18 February 2015.
3. The Applicant claims it is entitled to be paid its Progress Claim Number 8 (the Final Stage Claim), dated 14 October 2015, in the sum of $14,444.15 (including GST) and its Variation Number 4022-1 Claim, dated 31 August 2015, in the sum of $14,243.42 (including GST). The Applicant’s Payment Claim components comprise:

(a) Progress Claim No. 8, dated 14 October 2015, for the Final Stage in the contract - $14,444.15 (including GST);

(b) Variation No. 4022-1, dated 31 August 2015, for the driveway variation in the contract - $14,243.42 (including GST); and

(c) Interest on past progress claims in the sum of $858.39.

1. The Applicant also seeks interest on the payment claim as set out in the contract and its costs of the Adjudication.
2. The Respondent disputes the Payment Claim on the basis that the Applicant:

(a) has not used a suitable material for the construction of the driveway though Lot [B] as required by the contract;

(b) has not completed the contract, to the final stage, due to the security door missing from the rear entry to the house; and

(b) claimed for the driveway material delivery when it was not agreed to in the variation.

1. The Respondent has counterclaimed in the sum of $972.00 (including GST) for work it says was not completed by the Applicant, the rear security door, as a result of the Applicant’s failure to undertake that work.
2. The Respondent has also raised the issue of whether the driveway costs were to have been included in the contract price by the Applicant and therefore are not variation costs to the contract.
3. The Respondent does not seek interest or costs of the Adjudication.
4. On 9 December 2015 the Respondent made a payment of $10,278.87 (including GST) after deduction of sums it says were not agreed in the contract.
5. The Applicant has confirmed receipt of this payment but says it has been unable to reconcile the payment due to a lack of supporting information from the Respondent.

***Procedural Background***

The Application

1. The Application is dated 6 November 2015 and comprises six tabs which, *inter alia*, include:
2. a copy of the construction contract;
3. a copy of the payment claim and variation claim; and
4. supporting evidence, photos, plans and email correspondence between the parties relied upon in the general submission; and
5. two Statements, one from Mr. [LB] and the other from Mr. [SC].
6. The Payment Claim was submitted to the Respondent on 6 November 2015 in the sum of $29,545.69 (including GST).
7. The Respondent part paid the claim on 9 December 2015 in the sum of $10,278.87 (including GST).
8. The Application was served pursuant to section 28 of the Act.

The Response

1. The Respondent did not submit a Response, however on 27 November 2015 submitted a bundle of documents to several questions on which I had sought further submissions from the parties under section 34(2) of the Act.
2. That material comprised information from another application made by the Respondent to the Northern Territory Civil and Administration Tribunal (“NTCAT”) and includes:
3. a general submission;
4. a copy of the construction program;
5. a copy of the Applicant’s quotation;
6. a quote from a security screen manufacturer; and
7. supporting evidence and email correspondence between the parties relied upon in the general submission.
8. There was no Response served pursuant to section 29 of the Act.

***Adjudicator’s Jurisdiction and the Act***

1. The following sections of the Act apply to the contract for the purposes of the Adjudicator’s jurisdiction.
2. Section 4 of the Act – **Site in the Territory** – the site is at Lot [B] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.
3. Section 6 of the Act – **Construction Work** – the work is the construction of a four bedroom home by the Applicant Builder and section 6(1)(c) 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.
4. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the contract documents, a MBNT Residential Building Contract, which contains Special Conditions of contract and the Applicant’s quotation, specifications and schedules and the building plans. The parties agree that they entered into a construction contract.
5. The agreed contract value is a lump sum of $500,500.00 (including GST) and is divided into eight Progress Payment Stages at Appendix B of the contract documents.
6. The Implied Provisions of sections 16 to 24 and the Schedule of Implied Provisions of the Act therefore do not apply to this contract.
7. I am satisfied that the contract is a construction contract for the purposes of the Act and the Implied Provisions of the Act are not implied into the contract.
8. 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.”*

1. The Applicant has made a payment claim on 6 November 2015 in the sum of $29,545.96 (including GST) comprising five tax invoices as follows:
2. Tax Invoice No. 4022.06B dated 31 August 2015 in the lump sum of $14,243.42 (including GST) for the driveway variation works, Variation No. 4022-1, carried out in the contract;
3. Tax Invoice No. 4022.08 dated 14 October 2015 in the lump sum of $14,444.15 (including GST) for the final stage progress payment, Progress Claim No. 8, due in the contract;
4. Tax Invoice No. 4022.05(1) dated 8 October 2015 in the lump sum of $54.85 (including GST) for interest accrued on the late payment of Progress Claim No. 5 due in the contract;
5. Tax Invoice No. 4022.07(1) dated 8 October 2015 in the lump sum of $460.73 (including GST) for interest accrued on the late payment of Progress Claim No. 7 due in the contract; and
6. Tax Invoice No. 4022.01(1) dated 8 October 2015 in the lump sum of $342.81 (including GST) for interest accrued on the late payment of Progress Claim No. 1 due in the contract.
7. There are three contractual components to the Applicant’s payment claim:
8. The first component of claim is the final stage progress payment, Progress Claim No. 8;
9. The second component of claim is the driveway variation works, Variation No. 4022-1; and
10. The third component of claim is the three (3) interest claims for late payment of previous Progress Claims Nos. 1, 5 and 7.

*Progress Claim No. 8 – Tax Invoice 4022.08 dated 14 October 2015*

The making of a valid progress payment claim under the contract generally arises under clause 21(b) which requires an invoiced claim accompanied by a declaration that the work has been completed, as follows:

*“****21. PROGRESS PAYMENT***

*(a) The* ***Contract Price*** *must be paid to the* ***Builder****……*

*(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 (41HF(1) Building Act).*

*(c) The* ***Owner*** *will pay the progress payments to the* ***Builder*** *within ……..”*

1. However, should the claim be for the “Final Stage”, that is the stage when the building works are practically complete and require an “Occupancy Permit” under the *Building Act* so that the house may be occupied, then the Builder (the Applicant) is to give the Owner (the Respondent), under clause 23 of the contract, a copy of the Occupancy Permit and a notice of completion of the final stage as follows:

*“****23. COMPLETION OF THE FINAL STAGE***

1. *The Final Stage is complete when:*
2. *for* ***Works*** *which require an* ***Occupancy Certificate*** *– the stage when the* ***Occupancy Certificate*** *has been granted for the Works and a copy of the Occupancy Certificate has been given to the Owner; or*
3. *for Works that do not require an Occupancy Certificate – the stage when the Builder:*
4. *has made all relevant declarations required under the Act in relation to the Works and has provided the Owner a copy; and*
5. *has given the Owner a copy of all relevant certificates and documents required under the Act in relation to the Works.*

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

1. *When in the opinion of the Builder the Works have reached completion of the Final Stage, the Builder will give to the Owner notice in writing in accordance with Form 6 Appendix D.*
2. *Within five (5) days of service of that notice the Owner must give to the Builder notice, in writing, of those things (if any) required by the Contract to be done to reach completion of the Final Stage.*
3. *The Builder will as soon as possible do all things necessary to complete the Final Stage and give to the Owner notice in writing on completing them.*
4. *If the Owner does not give the notice in sub-Clause 23(c), the Works are deemed to have reached the Final Stage.*
5. *If the Owner possesses or uses the Works or any part without the written agreement of the Builder, the date of the Final Stage is the date of possession or use, unless the Final Stage has already been reached.*
6. *The Works are at the risk of the Owner on completion of the Final Stage or on the date of possession or use.”*
7. Prior to completion of the Final Stage, should the Owner use or possess the “Works”, generally defined in the contract as the building works, without the written permission of the Builder (the Applicant), then the contract under clause 23(f) provides for the Final Stage completion and any carry-over work still to be completed in the Works transfers into the defects and liability period of the contract, which is also prescribed under the consumer guarantees of the *Building Act*. The date of the Final Stage is taken to be the date of possession or use by the Owner which then triggers the Final Payment provisions of the contract.
8. Once the Owner uses or possesses the Works before they are completed and the date of the Final Stage established, then clause 24 of the contract commences to operate and entitles the Builder (the Applicant):

*“….to receive the unpaid balance of the Contract Price together with any other money which is payable under this Contract…”*

1. The Applicant says that the Respondent possessed and used the house on 8 October 2015 without written permission from the Applicant and that as such the date of the Final Stage is established. On 27 November 2015 I asked the parties for further submissions if the actual completion of the building work coincided with the possession by the Respondent on 8 October 2015. The Applicant confirmed that the final inspection of the building had, in fact, taken place two days earlier on 6 October 2015 and any defects found in that inspection were rectified by 9 October 2015. The Occupancy Permit was then issued on 12 October 2015. The Respondent did not provide any further submissions to the questions I had asked the parties on 27 November 2015.
2. By attendance to the Progress Claim No. 8 at Annexure “E” of the Application it is evident that the Applicant has provided the written notice of completion of the final stage by the Builder dated 14 October 2015. The Applicant has then invoiced on Tax Invoice No. 4022.08 for the Final Stage of the Works, together with comprehensive supporting supplier invoices on 14 October 2015, with the due date for payment of that invoice as 21 October 2015.
3. I am satisfied that Tax Invoice 4022.08, the first component of the payment claim, made as Progress Claim No. 8 on 14 October 2015, is a progress payment claim for the purposes of the contract and a valid payment claim for the purposes of the Act.

*Variation Claim No. 4022-01 – Tax Invoice 4022.06B dated 31 August 2015*

1. The variational work for the driveway, Tax Invoice No. 4022.06B, was invoiced on 31 August 2015, sometime earlier than Progress Claim No. 8 which was dated 14 October 2015, however under clause 15(e) of the contract the Respondent was not obliged to pay for the variation until payment of the next progress claim was due:

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

1. The next progress claim was Progress Claim No. 7 submitted on 3 September 2015 which was due for payment on or before 10 September 2015. A copy of this progress claim is at Appendix “G” of the Application. While the earlier timing of this claim might influence the date a payment dispute may commence, it does not influence the validity of the claim for a variation carried out under the contract.
2. I am satisfied that Tax Invoice 4022.06B, the second component of the payment claim, made as Variation Claim No. 4022-1 on 31 August 2015, is a variation payment claim for the purposes of the contract and a valid payment claim for the purposes of the Act.

*Interest Claims – Tax Invoices 4022.01(1), 4022.05(1) and 4022.07(1) all dated 8 October 2015*

1. The interest claims are for the interest accrued on earlier progress payment claims made by the Applicant under the contract. The period of late payment ranges from one day in Progress Claim No. 5 to twenty five days in Progress Claim No. 1. The interest on late payment of a progress claim falls under clause 21(f) of the contract, which states:

*“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 on the overdue amount at the rate in Item A15 of Appendix A.”*

1. There is no express rate agreed between the parties to the contract at A15 of Appendix A of the contract, however there is a default Annual Rate of 20% in the contract in the event that no rate has been agreed. The rate of 20% would therefore apply in this contract to all overdue payments of progress claims made under the contract.
2. I am satisfied that Tax Invoices 4022.01(1), 4022.05(1) and 4022.07(1), the third component of the payment claim, made as Interest Claims on 8 October 2015, are claims for interest on overdue amounts of past progress claims for the purposes of the contract and valid payment claims for the purposes of the Act.
3. Having now considered all three components of the payment claim in this adjudication, I am satisfied that the payment claim made by the Applicant on 6 November 2015 is a valid payment claim for the purposes of the contract and a valid payment claim for the purposes of the Act.
4. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

*“(a) a payment claim has been made under a contract and either:*

*(i) the claim has been rejected or wholly or partially disputed; or*

*(ii) when the amount claimed is due to be paid, the amount has not been paid in full; or*

*(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*

*(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”*

1. The Applicant made a valid payment claim on 6 November 2015 in the sum of $29,545.96 (including GST). The claim comprised five invoices as follows:
2. Tax Invoice No. 4022.06B dated 31 August 2015 in the sum of $14,243.42 (including GST) for Variation 4022-1, due for payment as part of Progress Claim No. 7 on or before 10 September 2015 as set out on the invoice;
3. Tax Invoice No. 4022.08 dated 14 October 2015 in the sum of $14,444.15 (including GST) for Progress Claim No. 8 due for payment on or before 21 October 2015, as set out on the invoice;
4. Tax Invoice No. 4022.05(1) dated 8 October 2015 in the sum of $54.85 (including GST) for interest on the late payment of Progress Claim No. 5, due for payment on or before 19 October 2015, as set out on the invoice;
5. Tax Invoice No. 4022.07(1) dated 8 October 2015 in the sum of $460.73 (including GST) for interest on the late payment of Progress Claim No. 7, due for payment on or before 19 October 2015, as set out on the invoice; and
6. Tax Invoice No. 4022.01(1) dated 8 October 2015 in the sum of $342.81 (including GST) for interest on the late payment of Progress Claim No. 1, due for payment on or before 19 October 2015, as set out on the invoice.
7. The Respondent did not pay any of the claims on or before the due dates that were clearly set out on each respective invoice.
8. Under the provisions of the contract, the various tax invoiced payment claims were to be paid as follows:
9. Tax Invoice No. 4022.06B dated 31 August 2015 for Variation No. 4022-1, was to paid as part of Progress Claim No. 7 on or before **10 September 2015**;
10. Tax Invoice No. 4022.08 dated 14 October 2015 for Progress Claim No. 7, the Final Claim was to be paid on or before **19 October 2015**;
11. Tax Invoice No. 4022.05(1) dated 8 October 2015 for interest on the late payment of Progress Claim No. 5, due for payment with Progress Claim No. 8, the Final Stage Claim, on or before **19 October 2015**;
12. Tax Invoice No. 4022.07(1) dated 8 October 2015 for interest on the late payment of Progress Claim No. 7, due for payment with Progress Claim No. 8, the Final Stage Claim, on or before **19 October 2015**; and
13. Tax Invoice No. 4022.01(1) dated 8 October 2015 for interest on the late payment of Progress Claim No. 1, due for payment with Progress Claim No. 8, the Final Stage Claim, on or before **19 October 2015**.
14. When the Respondent did not pay the Applicant its payment claim for Variation No. 4022-1 on or before 10 September 2015, a payment dispute for that part of the claim then arose on 11 September 2015 that would trigger the making of an application for adjudication under section 28 of the Act.
15. When the Respondent did not pay the Applicant its payment claim for Progress Claim No. 8, that is the Final Stage Claim that included the Interest Claim, on or before 19 October 2015, a payment dispute for that part of the claim then arose on 20 October 2015 that would trigger the making of an application for adjudication under section 28 of the Act.
16. On 28 November 2015 and after the commencement of this adjudication, the Respondent confirmed to me by email that a payment had been made to the Applicant of $10,278.87 (including GST) on 9 November 2015 in relation to the Applicant’s claims. The Respondent also confirmed that the remainder of the claims were still in dispute.
17. Notwithstanding this payment and the confirmation from the Respondent of the dispute, a payment dispute under section 8 of the Act commenced much earlier on 11 September 2015 for the Variation Claim and on 20 October 2015 for the Progress and Interest Claims.
18. 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.
19. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents and its further submissions, the Application is dated 6 November 2015 and was served on the Appointer MBNT on 6 November 2015. The Application was also sent by email and post to the Respondent on 6 November 2015.
20. In the further submissions from the parties of 30 November 2015, the Applicant enclosed a transmittal advice from Australia Post that showed that the Respondent had not collected the Application until 13 November 2015, that is 7 days after it had been posted.
21. The issue that arose in this is that service of the Application under section 28 of the Act is mandatory as it uses the word *“must”*:

*“….a party to the contract* ***must***[emphasis added]*, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b):*

*(a) prepare a written application for adjudication; and*

*(b) serve it on each other party to the contract…….”*

1. On 2 December 2015 I raised this issue with the parties and called for further submissions pointing out that the method of service by post falls under section 25 of the *Interpretation Act*, which provides that service by mail is taken to be served when it would have been delivered in the ordinary course of the post. As the Respondent has no postal service other than a post box at Coolalinga in the Northern Territory, receipt by post would be when the Respondent had collected the mail. This had been confirmed by the Applicant’s Australia Post transmittal advice.
2. In its further submissions the Applicant argued that service could be made under the provisions of the *Electronic Transactions (Northern Territory) Act* (“*ET Act*”). The Applicant referred to the *ET Act* as follows:

Section 4(1)(a):

*“…for the purposes of a law of the Territory, a transaction is not invalid because it took place by means of one or more electronic communications….”*

Section 4(1)(b):

*“….the following requirements imposed under a law of the Territory may generally be met in electronic form:*

*(i)……*

*(ii)…...*

*(iii) a requirement to produce a document;*

*(iv)……”*

Section 8(4):

*“….This section applies to a requirement or permission to give information whether the expression give, send, or serve, or any other expression is used…..”*

The Applicant says that the requirement to ‘serve’ the document has been met in accordance with section 8(4) of the *ET Act*.

1. The Respondent argued that the provisions of the *ET Act* would not apply to ‘personal service’ as the *Electronic Transactions (Northern Territory) Regulations*, in particular regulation 4, has exempted personal service by electronic means.
2. The Applicant addressed this exemption in its further submissions saying that the regulation does not exempt the use of *ET Act* as the *Interpretation Act* does not require the Application to be served personally.
3. I am not with the Applicant on this issue. The requirement for service of the Application under the Act is mandatory and must be served on the Respondent and the Appointer, in this instance the MBNT. A failure to satisfy those requirements would see an application fail the threshold requirements of section 33(1)(a)(ii) of the Act and would ultimately cause a dismissal.
4. Section 25 of the *Interpretation Act* provides for service on individuals or on a body. An individual is defined in section 17 of the *Interpretation Act* as follows:

“….***individual*** means a natural person…”

Section 25 continues to prescribe the method of service as:

1. *A person may serve a document on an individual or body (the* ***recipient****):*
2. *by giving it to:*

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

*(ii)…*

*(iii) in any case – a person authorised by the recipient to receive the document….”*

1. Alternatively, service may be carried out by post, by fax or by leaving at the address of the recipient with someone who appears to be over 16 years of age and appears to live at the address. There is no provision for service electronically and as, in this case, service is to be carried out on an individual, service by post would satisfy the requirements for service of the Application. The Respondent did not have a service address, only a post office box, and it is my view that service of the Application was completed at the time the Respondent collected the Application from the post box on 13 November 2015.
2. 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”).
3. 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.
4. Section 29 of the Act – **Responding to Application for Adjudication** – The Respondent did not prepare and serve a Response to the Application.
5. The Respondent did, however, provide a bundle of documents that appeared to be part of another action. The bundle of documents was provided by the Respondent by way of two emails to me on 27 November 2015, and was represented as documents submitted in another action with the NTCAT and could not be considered to be a Response under s.29 of the Act as they were not served on the Applicant.
6. I had not requested any further submissions from the parties at that stage of the Adjudication, however the bundle of documents has been provided to me as evidence to consider in this Adjudication. I cannot dismiss the evidence in the bundle of documents and under section 34 of the Act, when read in conjunction with the decision of Southwood J in *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 at 42 and the decision of Barrr J in *Hall Contracting Pty Ltd v McMahon Contractors Pty Ltd and Anor*[2014] NTSC 20 at 42, I must take into consideration any such evidence to ensure procedural fairness is afforded to the Respondent, who submitted the bundle of documents, and to ensure natural justice has been afforded to both parties in this matter.
7. On that same day, 27 November 2015, I directed the Respondent to send the documents to the Applicant with a copy to me, which the Respondent did in part. I can only consider the documents sent to the Applicant which in any event formed the substantive basis of the Respondent’s submissions.
8. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the bundle of documents from the Respondent, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

***Merits of the Claims***

1. The claims made by the Applicant in the Application are as follows:
2. Variation 4022-1 – Tax Invoice No. 4022.06B in the sum of **$14,243.42 (including GST)**, for the driveway variational works;
3. Progress Claim No. 8 - Tax Invoice No. 4022.08 in the sum of **$14,444.15 (including GST)**, for Progress Claim No. 8 (The Final Stage Claim); and
4. Interest Claims – Tax Invoices No’s. 4022.01(1), 4022.05(1) and 4022.07(1) in the total sum of **$858.39 (including GST)**, for the interest on the late payment of prior progress claims.

The Applicant says that there is no valid reason for the Respondent to withhold payment of these claims as the work has been completed and the claims due for payment of that work.

1. The Respondent in its further submissions made a counterclaim for the Applicant not installing the security screen door to the rear of the house.
2. The Respondent also made mention of the delivery charges for the driveway material being excessive but did not counterclaim or quantify any counterclaim in relation to those charges.
3. The Respondent disputes the recycled concrete driveway material saying that it does not meet a reasonable standard as it contains foreign metallic material and is not a suitable material for the driveways of the property. The Respondent has also raised the issue as to whether the cost of the driveway material was included in the contract price.
4. The Respondent’s counterclaim is the sum of **$972.00 (including GST)**, for the rear security screen door of the house.
5. On 28 November 2015 the Respondent advised that a payment of $10,278.87 (including GST) had been made to the Applicant on 9 November 2015 and the Respondent says it was calculated as follows:

*“After receiving the quote from [the screen provider] for the security screen I deducted that amount and the costs that had been claimed but not agreed and made payment to [the Applicant] of $10,278.87 on 9 November 2015.”*

There are no calculations for the Respondent’s deductions and it is wholly unclear as to how the sum of $10,278.87 (including GST) was arrived at.

The Applicant’s Progress Claim No. 8 (The Final Stage Claim)

*Component 1 - The Final Progress Payment of $14,444.15 (including GST)*

1. It appears that the Respondent has part paid this claim in the sum of $10,278.87 (including GST) after deducting what it considers are costs claimed but not agreed and the counterclaim for the rear security screen door.
2. The Applicant in its further submissions of 30 November 2015 says that it attempted to finalise the security screen door to the property, but the Respondent had refused access to site. As an alternative, the Applicant submits that a sum of $989.00 (including GST) on the Applicant’s [screen provider] Quote No. 53503 of 5 October 2015, be deducted from the contract price to finalise the screen security door issue and settle payment of Progress Claim No. 8, the Final Stage Claim in the contract.
3. 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 Progress Claim No.8, the Final Stage Claim payment, to the Applicant in the lump sum contract.
4. I find the Respondent’s failure to make payment of the Progress Claim No.8, the Final Stage Claim, to be in breach of the contract terms, particularly clauses 23 and 24 relating to the final stage and payment of that stage, as the Respondent admitted it took over and occupied the house on 8 October 2015.
5. I also find the Respondent’s conduct in notifying the occupancy and the refusal to process the payment to the Applicant on the basis of a screen door 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.
6. There are broad consumer guarantees prescribed in section 54 of the *Building Act* and the Respondent by its extract submissions in the bundle of documents to the NTCAT showed that it fully understood these guarantees.
7. I award this claim in the sum of **$3,193.28 (including GST)** to the Applicant being the claim sum minus the sum deducted by the Respondent’s counterclaim [screen provider] Quote No. 5429, dated 5 November 2015, for $972.00 (including GST) and the part payment made by the Respondent of $10,278.87 (including GST).

*Component 2 – The Driveway Variation of $14,243.42 (including GST)*

1. It is uncontroversial between the parties that this variation was carried out in the contract. The Applicant submitted a revised quotation and variation advice for the work on 31 July 2015 and on that same day the Respondent sent an email agreeing to the variation if the driveway was five (5) metres wide, which the Applicant confirmed it was, by return email.
2. The variation was then carried out by the Applicant and, once completed, the Respondent refused payment on several grounds as follows:
3. the variation document was not signed and as such the variation was not to be carried out in the contract;
4. the recycled concrete material was uneven in size and contained foreign material, such as plastic and metal objects, and was not fit for purpose;
5. the driveway did not follow the planned path; and
6. the driveway formed part of the contract and was to be concrete.
7. The Applicant has rejected each of the above grounds on the basis that the Respondent was fully informed about the recycled concrete driveway product at the several meetings that took place on site. A quote for the driveway was originally submitted by the Applicant on 29 July 2015 and was then revised, with the inclusion of the 5 metre driveway width, on 31 July 2015, together with a variation advice. The Respondent accepted the quote by email on 31 July 2015 and the work was done by the Applicant’s subcontractor, Mr. [LB].
8. After reading the statement of Mr. [LB] at Annexure “Y” of the Application, I interviewed Mr. [LB] on 27 November 2015 and found him to be both forthright and credible. Mr. [LB] advised that the Respondent had met with him on site in late July 2015 and that the Respondent was fully informed of the recycled concrete material that was to be used for the driveway of the property. He also advised that he had offered the Respondent an inspection of another site where the material had been installed as a driveway, however the Respondent did not inspect that site as he had fully understood the composition of recycled concrete material to be used as a driveway material on his property.
9. I raised the location of the driveway with Mr. [LB] and he advised that he had installed driveways to two adjacent properties for the Respondent, being Lot [B], the subject of this contract, and Lot [A] which was for another similar building contract the Respondent held with the Applicant. Mr. [LB] advised that the location of the driveways were installed as requested by the Respondent to ensure water drained properly from the properties and that he had personally undertaken that work to ensure this was achieved.
10. In turning to the Applicant’s Specifications and Schedules contained in the Respondent’s bundle of documents of 27 November 2015, it can be seen at Item 22 “External Works” that:

*“22(a)(iv) “Creation of gravel access roads and turning areas using onsite materials, roads will be formed, graded and rolled to provide a suitable rural access…”*

1. This clearly shows that the driveways for the Respondent’s property specified as graded gravel roads of a suitable rural standard and not concrete driveways as the Respondent suggests.
2. While neither party has correctly followed the variation process set out in the contract, I find that the driveway was nonetheless a variation in the contract. The quotation, variation advice and acceptance process undertaken by the parties prior to the work being done is acceptable and valid for the purposes of varying a construction contract. It could not be said that either party was unaware of what they were doing when they undertook to vary the contract.
3. The Respondent chose the recycled concrete material and agreed to the material being used on the driveway. The Applicant installed the driveway and invoiced for payment for the work it had done. I am of the view that the Respondent was also made aware that as this material was recycled it might contain some foreign material other than concrete.
4. I find that the variation for the driveway stands and I award the Variation 4022-1 Claim in the sum of **$14,243.42 (including GST)** to the Applicant.

*Component 3 – The Interest Claim of $858.39 (including GST)*

1. The Applicant has claimed interest on three past progress claims that were not paid by the date due in the contract.
2. The contract is express at clause 21 in relation to the payment of progress claims as follows:

*“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.”*

1. The timely processing of a builder’s claims in a construction contract is paramount to ensure cash flow in the contract is maintained. The Act at section 3 prescribes that notion as an objective by *“…facilitating timely payments between parties to construction contract…”*. Failure to make such payments within the required period not only jeopardises the ability of a builder to continue in the construction contract but, in turn, attempts to defeat the object of the Act.
2. The late payments in this contract give rise to an entitlement for the Applicant to interest at the agreed rate under the contract. No rate was entered at A15 of Appendix A in the contract, as the rate of interest due under clause 21(f) and, as such, the default provision bites, that is, *“if nothing stated, 20%”*. The interest rate in the contract is therefore 20%.
3. It could be considered that the Applicant, due to the lateness of its claim for interest or failure to duly notify the Respondent of an intention to claim interest, did not afford the Respondent a reasonable opportunity to make good on the payments. I find that this could not be the case with this contract as all progress payments are payments on account as clause 21(e) states:

*“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.”*

1. There are also Special Conditions (“SC”) of contract, in particular SC1, that entitles the Respondent to withhold an amount of $5,000.00 from the final payment:

*“…until such time as the earliest of:*

*(a) The defects identified and agreed to by the Builder at hand-over of the works to the Owner have been completed, or*

*(b) 30 days have passed since hand-over of the works to the Owner.”*

1. The Respondent occupied the house on 8 October 2015 and in so doing triggered the contractual completion of the Final Stage and in turn the due payment of that stage within five days of the occupancy. The contract is express in this respect at clauses 23 and 24. It is unlikely that the Respondent’s withholding entitlement could be enlivened in such circumstances.
2. The “withholding amount” appears to be a retention in the contract for the agreement and rectification of the identified defects in the house. The house was inspected by the Certifier on 6 October 2015 and all defects identified during that inspection were rectified by the Applicant on or before 9 October 2015. The Respondent was also present at that inspection and was aware of the defects identified. As at the date of this Adjudication it is well past the 30 day limit in clause SC1(b) and as such the ability of the Respondent to hold any retention for defect rectification would fail.
3. Further, section 54 of the *Building Act* provides broad consumer guarantees in relation to residential building work for one year for non-structural defects and six years for structural defects.
4. I find that the interest claim made by the Applicant in its Tax Invoices Nos. 4022.01(1), 4022.05(1) and 4022.07(1) in the total sum of **$858.39 (including GST)** to be valid and I award that claim to the Applicant.

***Interest on the claims***

1. In reconciling the claims, the amount the Respondent is to pay the Applicant is $18,295.09 (including GST).
2. The terms of the contract are express in that clause 21(f) and clause 24(c) entitle the Applicant to interest on all overdue and unpaid sums from the due date to the date of payment. The rate of interest is set at 20%, the default rate in the contract as there is no agreed rate set at Item A15 of Appendix A of the contract.
3. 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.
4. I award interest of $849.75 pursuant to section 35 of the Act on the various exclusive GST sums for the applicable dates of non payment as follows:



***Costs***

1. The normal starting position for costs of an adjudication is set out in section 36(1) of the Act and is that each party bears their own costs in relation to an adjudication.
2. The Act at section 36(2) gives Adjudicators the 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…..”*

1. I have found that the Respondent made unfounded submissions, some of which were quite serious. However, the Respondent’s conduct in refusing to process payment of the Applicant’s progress claim for the final stage, when the Respondent took ownership and occupied the house, when the work had been done and finalised and when the final inspection had been carried out and the work invoiced on that agreed contract sum, was clearly vexatious.
2. The Respondent did not and never has provided any valid reasoning for not paying the progress claim for the final stage in the contract, when it had clearly been an agreed sum under the contract. Instead, the Respondent sought to link the final stage payment in the contract with a relatively insignificant issue of a security screen door not installed at the rear of the house, in circumstances where the Respondent had refused the Applicant access to site to fit the door. It was only after the Applicant brought an application for adjudication of its payment claim that the Respondent processed and part paid the progress claim for the final stage in the contract.
3. Payment of the agreed final contract sum was also due, the variation work had been completed and the Respondent held an obligation to promptly process the payment of that variation or notify the Applicant of any disputed sums and the reasons for that dispute. The Respondent simply withheld the entire amount of payment due in the contract in an apparent attempt to force an outcome advantageous for the Respondent. Further, the Respondent’s reasons for failing to pay for the progress claim and the variation were wholly unfounded and could not be sustained.
4. I find that the Respondent’s refusal to process and pay the Applicant’s payment claim when it had been an agreed lump sum contract and an agreed variation to that contract, and with the work having been done and the Respondent enjoying the benefit of that work, was vexatious conduct on the part of the Respondent.
5. The Applicant has clearly incurred additional costs in bringing an Application and the loss of cash flow into its business through the non-payment of its entitled claims under the contract. I am satisfied that the Applicant has incurred costs of the adjudication unnecessarily because of vexatious conduct on the part of the Respondent.
6. I therefore find that the Respondent is to pay **100% of the costs** of the adjudication under section 36(2) of the Act.

***Summary***

1. In summary of the material findings, I determine:
2. The contract to be a construction contract under the Act;
3. The work to be construction work under the Act;
4. The site to be a site in the Northern Territory under the Act;
5. The claim to be a valid payment claim under the Act;
6. The dispute to be a payment dispute under the Act;
7. Component 1, the Final Stage Progress Claim No. 8, to stand in the sum of $3,193.28 (including GST);
8. Component 2, the Variation No. 4022-1 for the driveway, to stand in the sum of $14,243.42 (including GST);
9. Component 3, the Interest Claim, to stand in the sum of $858.39 (including GST);
10. The Counter Claim for the security screen door to stand in the sum of $972.00 (including GST) and be deducted from Progress Claim No. 8 for the Final Stage;
11. Interest awarded in the sum of $849.75.
12. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **$19,144.84 which sum includes a GST component of $1,663.19 only.**
13. This sum is to be paid to the Applicant by the Respondent on or before **8 January 2016**.

***Confidential Information***

1. The following information is confidential:
2. the identity of the parties; and
3. the location and nature of the works.

DATED: 11 December 2015



Rod Perkins

Adjudicator No. 26