## **Determination No: 01.16.01**

## **ADJUDICATION**

**UNDER THE**

**NORTHERN TERRITORY OF AUSTRALIA**

**Construction Contracts (Security of Payments) Act**

**IN THE MATTER BETWEEN:**

**(Applicant)**

**AND**

**(Respondent)**

**BY**

**John P Fisher (Adjudicator)**

**5 November 2016**

#### Adjudicator NT Reg No. 001

**DETAILS OF PARTIES**

**The Applicant**

**[redacted]**

**Represented by:**

Bowden McCormack Lawyers and Advisors

Suite 4, Level 1 Northgate Plaza

101 Mitchell St

Darwin

NT 0800

Tel: (08) 8941 6355

Fax: (08) 8941 6366

Attn: Tammy Wong Email: tammy@bowden-mccormack.com.au

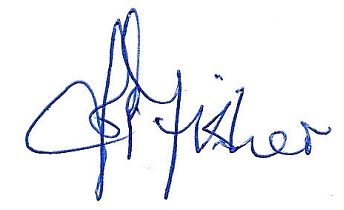
**The Respondent:**

**[redacted]**

**ADJUDICATOR’S DETERMINATION**

I, John Patrick Fisher, the appointed adjudicator, determine that for the reasons set out in Schedule A to this determination:

1. The respondent shall pay to the applicant the amount of $24,090.00 inclusive of GST in respect of the payment claim.
2. In addition the respondent shall pay to the applicant interest of $413.23.
3. Each party shall bear its own costs and the costs of the adjudication shall be shared equally between the parties. The costs of the adjudication are set out in Schedule B.
4. If any amount arising from items (i) to (iii) above is outstanding after 12 November 2016 then the respondent shall pay interest on the outstanding amount at the rate of 7.75% per annum until it is paid.
5. The matters that are confidential and not suitable for publication are set out in Schedule B.



John Fisher

Registered Adjudicator 001

5 November 2016

**SCHEDULE A**

**REASONS**

**INTRODUCTION**

1. The applicant, [*name redacted*] (“applicant”), entered into a contract with the respondent to construct ceilings and walls for [*respondent’s name redacted*] (“respondent”) at [*site details redacted*] NT.
2. On 13 July 2016 the applicant invoiced the respondent for an amount of $29,480 inclusive of GST. (All financial figures within this adjudication are stated inclusive of GST unless otherwise noted.)
3. The respondent did not pay the applicant and a payment dispute arose. On 13 October 2016 the applicant applied to Law Society NT to appoint an adjudicator to adjudicate the payment dispute under the provisions of the *Construction Contracts (Security of Payments) Act*. (“Act”)

1. On 21 October 2016 the respondent paid an amount of $5,390.00 to the applicant stating that he was entitled to set off the difference between the claimed amount and the amount paid.
2. The applicant denies that the respondent is entitled to set off any amount. Therefore there remains an amount in dispute between the parties of $24,090.

**APPOINTMENT OF THE ADJUDICATOR**

1. On 20 October 2016 I, John Patrick Fisher, an adjudicator registered in Northern Territory, was appointed as the adjudicator by the Law Society NT.
2. I considered that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute had arisen or in any party to the contract. On 25 October 2016 I wrote to the parties confirming that I saw no conflict of interest as described in s31 of the Act. Neither party raised any objection to my appointment.

**SUBMISSIONS FROM THE PARTIES**

1. Following appointment, I received from Law Society NT a single bundle of A4 documents prepared by the applicant containing:
2. The applicant’s submissions
3. The statutory declarations of [A] and [*the applicant*]
4. A quotation for the works
5. Copies of two invoices, nos. 420 and 420A.
6. Various email correspondence.
7. On 27 October 2016, I received the response by email, to which was attached a single page letter in submission.
8. On 28 October 2016 I received by email a short unsolicited reply from the applicant which amongst other matters confirmed that the applicant had received a cheque from the respondent for the amount of $5,390.

**JURISDICTION**

1. The adjudicator must dismiss an application without making a determination on the merits, in the following circumstances:
2. If there is no *“payment claim”* as defined in s4 of the Act or if there is no *“payment dispute”* as defined in s8.
3. In accordance with s33(1)(a)(i), if the contract concerned is not a *“construction contract”* as defined in the Act.
4. In accordance with s33(1)(a)(ii), if the application has not been prepared and served in accordance with section 28 of the Act.
5. In accordance with s33(1)(a)(iii), if an arbitrator or other person or court or other body makes an order, judgement or other finding about the dispute that is the subject of the application.
6. In accordance with s33(1)(a)(iv), if the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time and any extension thereof is insufficient.
7. If none of these circumstances apply then the adjudicator must determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment and, if so, the amount of the payment and the date by when it must be paid.
8. The applicant submitted a reply on 28 October 2016, which I have no need to take into account since the swift nature of the adjudication process does not permit a response unless the adjudicator seeks further information. Nevertheless it is appropriate to answer it since the matter raised goes to my jurisdiction. The applicant contends that the adjudicator has no jurisdiction to determine the value of the counterclaim because the 90 day period in respect of those claims has expired and the respondent has not initiated a claim under the Act with respect to those claims in time. I do not accept the contention. The respondent has not made any application, only a response, in which he raises the defence of set off. The Act places no time limits on matters raised in defence except that the response must be made within 10 working days of the date of submission of the application. While the adjudicator does not have jurisdiction to determine that an amount should be payable to the respondent he does have jurisdiction to determine any amounts raised in defence which reduce the amount which may be payable to the applicant.
9. The applicant asserts that the application has been made in accordance with s33(1)(a)(ii). I accept this but note that the latest date for service of the application has been incorrectly calculated. Invoice 420 was issued on 13 July 2016. As will be explained later, the respondent had 28 days in which to pay. The respondent did not dispute the claim at the time. Thus the latest time and date for payment was 23:59 on 10 August 2016. The payment dispute arose at 00:00 on 11 August 2016. An application for adjudication must be made within 90 days from the date that the dispute arose. 90 days after 11 August 2016 is 8 November 2016. The application was therefore made well within the time limit.
10. I now turn to the merits of the dispute.

**THE CONTRACT**

1. The contract between the parties was partly written and partly verbal. The written elements comprise:
2. A scope of works and specification
3. A quotation from the applicant, which expressly excluded transport to and from site and accommodation at site, for the sum of $26,070.00.
4. The contract was verbally agreed between the parties at some time prior to 2 June 2016. Subsequently there was further email correspondence on 2 and 3 June 2016 confirming the inclusions and exclusions.
5. On 4 July 2015 the respondent instructed the applicant to make his own transport arrangements for his workers to reach site, approximately 800km from Darwin, and start works on 5 July 2016, thus varying the contract. The parties agreed verbally to the principles of valuing the variation.
6. The contract contained no terms governing the provisions covered by ss16 to 25 of the Act and therefore the provisions within the Schedule Divisions 1 to 9 are implied terms within the contract.

**THE EVENTS**

1. The workers reached the site at sometime around 5 July and completed the works by around 9 July 2016.
2. On 13 July 2016 the applicant emailed invoice no. 420 to the respondent. The amount of the invoice was $29,480, which included the cost of the variation together with a breakdown of the cost.
3. Further requests for payment of the invoice were sent electronically on 2, 9, 10 and 14 September 2016.
4. On 5 October 2016 the applicant sent a further invoice numbered 420A to the respondent. The two apparent differences between invoice 420 and invoice 420A were that the latter invoice was hand signed and dated 5 October 2016. The accompanying email, although headed *“New Invoice”* states *“I refer to job 420 and attach our invoice again.”*
5. During the period 24 May 2016 to 20 July 2016 the respondent prepared a total of 8 invoices to the applicant relating to charges for remedying defective painting on an unrelated project in Darwin. It is not clear whether these were sent to the applicant but they are itemised in a statement dated 31 August 2016 provided in evidence in the response. The combined value of the invoices amounted to a total of $24,090.00.
6. On 13 October 2016, the applicant sought adjudication of the payment dispute.
7. On 21 October 2016, the respondent paid the undisputed amount of $5,390.00, having set off the amount of $24,090.00.

**THE ISSUES**

1. The value of the works and the variation for transport is not in dispute. The issues that arise are:
2. Whether invoices 420 and 420A are valid payment claims under the Act.
3. Whether the respondent was entitled to set off payment in contract, equity or law

I deal with these below.

*Invoices 420 and 420A*

1. The contract between the parties is largely verbal and has limited written terms. One of the purposes of the Act is to imply terms in circumstances where the parties have not agreed written terms covering the situation. The parties did not have a written provision about how a party must make a claim to another party for payment. In consequence, in accordance with s19 of the Act, Schedule Division 4 within the Act is implied as a term of the contract.
2. Schedule Division 4 states:

***Division 4 Making claims for payment***

***5 Content of claim for payment***

*(1) A payment claim under this contract must:*

*(a) be in writing; and*

*(b) be addressed to the party to which the claim is made; and*

*(c) state the name of the claimant; and*

*(d) state the date of the claim; and*

*(e) state the amount claimed; and*

*(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*

*(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*

*(h) be signed by the claimant; and*

*(i) be given to the party to which the claim is made.*

1. The requirement that a payment claim must comply with (a) to (i) above is mandatory. Otherwise such a claim is not a payment claim under the Act.
2. Invoice 420 complies with each of these conditions with the exception of signature. However the Act does not require that the invoice is signed but that the payment claim is signed. The payment claim comprises the whole of the email of 13 July 2016 and its attachments. The email identifies the sender and the intention in respect of the information communicated.
3. The *Electronic Transactions (Northern Territory) Act* s9, permits the use of electronic signatures in certain conditions as follows:

*9 Signatures*

*(1) If, under a law of the Territory, the signature of a person is required, the requirement is taken to have been met in relation to an electronic communication if:*

*(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and*

*(b) the method used was:*

*(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or*

*(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and*

*(c) the person to whom the signature is required to be given consents to the requirement being met by the use of the method mentioned in paragraph (a).*

1. The entirety of the correspondence between the parties has been undertaken by email and by implication the respondent has given consent to the requirement being met. I accept the applicant’s contention that, if he argued that consent had not been given, the respondent would be estopped by convention in that the parties had conducted and would continue to conduct written communications by email. The respondent has not so argued. I therefore accept that the payment claim containing invoice 420 has been signed and that it complies with all the conditions of a payment claim set out in the Act.
2. Turning to invoice 420A, the invoice is the same as 420 except in two respects. First it has been manually signed. Second the date of issue has been adjusted to 5 October 2016.
3. The applicant submits that the payment terms within the contract are 7 days. This may be the time stated on the invoice, which was issued well after the contract was formed, but is not the time agreed within the contract.
4. The contract does not have a provision stating by when a payment must be made. In consequence in accordance with s20 of the Act the implied terms in Schedule Division 5 apply. The schedule provides two alternative payment dates at s6(2), depending on whether the party receiving the claim disputes the claim, as follows:

*(2) The party must:*

*(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.*

1. Thus, if the party does not dispute a claim and pay any undisputed part within 14 days, it becomes liable to pay the entire claim within 28 days.
2. Applying this principle to invoice 420A, since the respondent did not dispute the claim or pay the undisputed part until 21 October 2016, which is in excess of 14 days after receiving the claim, he became liable to pay the entire amount on 2 November 2016. A payment dispute for failure to pay would not then have arisen before 3 November 2016.
3. However the application for adjudication was made on 28 October 2016, at which time there was no payment dispute in respect of invoice 420A because no liability to pay had yet arisen. Since there was no payment dispute at the time of the application it follows that I must dismiss the application in respect of invoice 420A.
4. The question arises whether invoice 420A was designed to supersede invoice 420. If it were the case that invoice 420A superseded invoice 420, such that invoice 420 were withdrawn, then it would be necessary to dismiss the application in its entirety. However the applicant’s email of 5 October 2016 states:

*“.. I refer again to job 420 and attach our invoice again...”*

1. I take this to mean that the applicant did not intend to supersede invoice 420. Rather he attempted to have a ‘two way bet’ by correcting a perceived deficiency by adding a signature to the invoice to ensure compliance with the implied terms.
2. It follows that, if invoice 420 was not intended to be superseded, as I have found, then Schedule, Division 5, s6(2)(b) applies and the respondent became liable to pay the entire claim within 28 days of the date of the claim. As the payment claim was made on 13 July 2016, the respondent became liable to pay the full amount of $29,480 on or before 10 August 2016.
3. I now turn to whether the respondent was entitled to set off any amounts.

*Set Off*

1. The respondent does not deny liability to pay the claim. However he has claimed set off of an amount of $24,090 in respect of remedial works he says he had to undertake on a different project resulting from a breach of the contract relating to that project by the applicant.
2. While the Act requires that a payment claim to be adjudicated must arise under the construction contract, the Act places no such limitations on the defence to the claim.
3. By claiming set off the respondent does not necessarily need to deny the applicant’s original claim, but he claims the right to prove the applicant owes him money from some other transaction and that the amount should be deducted from the applicant’s claim.
4. The entitlement to deduction of set off can arise in three ways:

* Under the contract
* In law
* In equity

1. Dealing first with set off under the contract, such entitlement may arise if there is an express written clause within the contract which states that one party may set off claims against another and the circumstances in which that may be done. A construction contract may be written in terms that permit a party to set off claims arising from an entirely different construction contract between the parties, although such draconian terms are unusual. More frequently the contract permits a party to set off contracharges arising from the same contract.
2. In this case there are no terms which exist within the contract entitling the respondent to set off any amounts and particularly not amounts from an unrelated contract. In consequence the respondent cannot set off under the contract.
3. Turning to set off in law, the principle is that if Party A is liable to pay an amount to Party B, then Party A is entitled to set off any other amount which a court has already found is due as a debt from Party B to Party A and is unpaid.
4. In this case the respondent has claimed amounts relating to eight invoices, however these are simply claims made by the respondent to the applicant. They have not been tested and found by a court to be debts due. Therefore the claims cannot be set off in law.
5. Equity will allow a set-off where it would be unconscionable to allow one party to insist on its legal right without first accommodating the other's countervailing legal right. This is different to set off where there is a clear debt due. Complex legal cases arise around the equitable set off principles of law. The NSW Court of Appeal's decision in [*Hawes v Dean [2014] NSWCA 380*](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2014/380.html?stem=0&synonyms=0&query=title(Hawes%20and%20Dean%20)) provides some clarification.
6. In the current circumstances the claims made by the respondent are not backed by any evidence that remedial work was required, or indeed undertaken, nor is there evidence of the cost of undertaking remedial works. The only evidence is a statement showing claims having been made. Those claims arise from an entirely different contract between the parties, who have rights under that contract to litigate or adjudicate.
7. Because the claims are untested and because the respondent has avenues to test his claims it would not be unconscionable to allow the applicant to insist on his right in adjudication and therefore no set off in equity arises.
8. Using the time limiting principles set out above, the majority of the claims raised in defence do appear on their face to have been raised too long ago for a separate application for adjudication to be made by the respondent but that does not prevent the respondent from seeking to prove the claims in litigation.
9. In summary, I find that the respondent is not entitled to set off any amount, whether in contract, in law or in equity. The respondent has paid $5,390.00 to the applicant on 21 October 2016, and consequently is liable to pay a further $24,090.00.

**INTEREST**

1. The applicant claims interest on the amount claimed in invoice 420 at the rate of 7.75% per annum from 20 July 2016.
2. The Act entitles a party to interest on amounts found to be due from and including the day after it is due until and including the date it is paid. In accordance with s34 of the Act and s9 of the *Construction Contracts (Security of Payments) Regulations*, the interest rate is the rate fixed from time to time for section 85 of the *Supreme Court Act*.
3. S85 of Supreme Court Act refers to the Supreme Court Rules which state at Rule 59.02 that a judgment debt carries interest from the date of judgement at the rate per annum fixed for section 52(2)(a) of the *Federal Court of Australia Act* *1976*(Cth) from time to time. The rates are fixed twice a year for the periods starting on 1 January and 1 July. Currently the rates are 5.75% for prejudgment interest and 7.75% for post-judgment interest.
4. The correct interest rate to be used up to the time stated for payment within this adjudication is therefore 5.75%. If amounts remain outstanding thereafter the applicable interest rate is 7.75%.
5. In my determination, I have allowed the respondent 7 days in which to pay. I calculate that the interest due at 5.75% on the amount of $24,090 from 11 August 2016 to 12 November 2016 is $352.94
6. I further calculate that the interest due on the amount of $5,390.00 from 11 August 2016 to 21 October 2016 is $60.29.
7. The total prejudgment interest due is therefore $413.23. Currently interest is not subject to GST.
8. Should the determined amount not be paid by 12 November 2016 then further interest will accrue on any unpaid part of the determined amount at the rate of 7.75% per annum.

**COSTS**

1. The applicant seeks the costs of preparing its application amounting to $2,200.00 on the basis that it was the respondent’s failure to pay which necessitated the application.
2. The Act states at s36:
3. *The parties to a payment dispute bear their own costs in relation to an adjudication of the dispute (including the costs the parties are liable to pay under section 46).*

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

1. A proceeding is frivolous if it is one which no reasonable person could properly treat as bona fide and contend that a party had a grievance which it was entitled to bring before the adjudicator. It is clear in this case that the applicant has a genuine grievance that it has not been paid and the respondent has a genuine reason for wishing to set off.
2. The test for determining whether a proceeding is vexatious was set down in *Attorney General v Wentworth (1998) 14 NSWLR* as:

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

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

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

1. It is clear in this case that the proceedings are not vexatious or unfounded.
2. Consequently I find that each party should bear its own costs.
3. Turning to the costs of the adjudication, the Act sets out at s46(4) and (5) rules for payment of the costs of an adjudication as follows:

*(4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.*

*(5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.*

1. I therefore find that that there is no reason to depart from the principle that each party should bear its own costs and that the costs of the adjudicator shall be shared equally between the parties.
2. The costs of the adjudication are set out in Schedule B.

------------------------------------------------------------------------------------------------------------------------

**SCHEDULE B**

**The matters within Schedule B are confidential and the schedule should be removed before this decision is published.**

**CONFIDENTIAL MATTERS**

The parties have not asked for any matters to remain confidential. Nevertheless, the names of any individuals referred to in the adjudication shall be redacted prior to publication. Given that the location of the works could also identify the parties, any reference to [*location of the works redacted*] shall also be redacted.

**COSTS OF ADJUDICATION**

The costs of the adjudication are:

|  |  |
| --- | --- |
| Adjudicators fees – 20 hrs @ $250.00 per hour | $5,000.00 |
| GST | $500.00 |
| **Total inclusive of GST** | **$5,500.00** |
|  |  |

The applicant has paid a deposit of $4,400. Given the total value of the dispute I will accept this amount as full payment. In accordance with the principles that the costs of the adjudication are shared equally, the respondent shall pay half of the $4,400.00: that is $2,200.00 to the applicant.