

ADJUDICATOR'S DETERMINATION
UNDER THE
NORTHERN TERRITORY OF AUSTRALIA
CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

Paul W Baxter (Adjudicator)

DETERMINED

6 February 2013

DETAILS OF PARTIES

The Applicant

Applicant's legal representative and correspondence address:

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NT 0800

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The Respondent

Respondents' legal representative and correspondence address:

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The Adjudicator:

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ADJUDICATOR'S DETERMINATION

I, Paul William Baxter, the appointed adjudicator, determine that:

- (i) The Respondents shall pay to the applicant the sum of \$45,890.67 within 7 days of the date of this determination. This amount includes interest to the date of this determination.
- (ii) Each party shall bear its own costs and the costs of the adjudication of \$ inclusive of GST shall be shared equally between the parties.

- (iii) If payment of the adjudicated amount and / or share of the costs is not made within 7 days then interest will become payable in addition at the rate set out in the *Civil Judgements Enforcement Regulations 2005 – Reg. 4*, currently 10.5% per annum. However interest shall not become due unless and until the Applicant has invoiced the Respondents correctly for the amounts determined.

Signed.....

Date 6 February 2013

REASONS

1. BACKGROUND

- 1) The Applicant is a Darwin based construction company which undertook the extension of an existing dwelling at [dwelling location]. The Respondents are the owners of the premises.
- 2) A dispute arose between the parties regarding payment of a tax invoice no. 00002945 raised by the Applicant dated 8 October 2012 for the sum of \$143,212.14 inclusive of GST, of which \$63,212.14 remains unpaid.

2. APPOINTMENT OF THE ADJUDICATOR

- 3) The Applicant made an application to the Master Builders Association Northern Territory ("MBANT") for the appointment of an adjudicator to adjudicate the dispute regarding the payment claim under the Construction Contracts (Security of Payments) Act ("Act"). On 24 December 2012 I, Paul William Baxter, an adjudicator registered in the Northern Territory was appointed by MBANT as the adjudicator.
- 4) On the basis of my lack of knowledge of either the parties or the project, I considered that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. I declare that I have known of [the contact for the Applicant] for a number of years but have had no social or business dealings with him. I have had no dealings with [the respondents].
- 5) It remains my view that I have no conflict of interest in this matter.
- 6) On 9 January I wrote to both to both parties seeking an extension of time of 10 working days within which to make my determination. Both parties agreed to grant that extension of time.

SUBMISSIONS FROM THE PARTIES

- 7) Following appointment, I received from MBANT one lever arch file prepared by the Applicant containing: the application, a copy of the contract, and various evidentiary documents separated into Tabs 1 to 25.
- 8) On 8 January 2013 I accepted service of the response in person from the Respondent's legal advisor to my residential address, as directed by me in my letter to both parties dated 2 January 2013. This contained one lever arch file in which was the response, the statutory declaration of [Respondent A] and various evidentiary documents separated into Tabs 1 to 40.

3. CONTRACT

- 9) The final contract between the parties is a matter of consideration pertinent to this adjudication and is dealt with henceforth in formation of contract.

Formation of Contract

- 10) The Applicant contends that on 30 April 2012, due to lack of availability to purchase Master Builders Association (NSW) Head Contract, an interim contract was prepared between the Applicant and the Respondents.
- 11) [The Applicant]'s Contracts Manager admitted to mistakes in this contract, mainly related to the discrepancy of a 6% mark up. A new contract was entered into for a contract sum of \$463,444.00 incl GST.
- 12) Further discussions regarding variations followed and a new contract amount of \$410,735.00 incl GST was agreed upon by both parties.
- 13) This generally concurs with the Respondents' submission that as a consequence of agreed variations, the value of the scope of works was reduced to \$410,735.00 incl GST.
- 14) The contract is dated 6 July 2012. The Applicant's contract shows an amount of \$410,735.00 incl GST, whereas the Respondents' contract shows a sum of \$417,016.00 incl GST.
- 15) The contract documents include:
- 18.1 Guide to Standards and Tolerances 2007
 - 18.2 Plans and Drawings
 - MBD-879-1 TO
 - MBD-879-28

Schedule 2

V Work excluded from contract work and contract sum

Schedule 7 Special conditions work included in contract

- 16) The As Constructed drawings cannot be considered part of this contract as they were only available 15 August 2012, some 36 days after the date of this contract.
- 17) The Gant chart is not included in this contract. The one provided 9 May 2012 has no resemblance to the new contract and cannot be considered.
- 18) Paragraph 74 of the [Respondent A]'s statutory declaration claims that contract number 1 became obsolete and contract number 2 was the only contract signed. In paragraph 75, she also states that at no time did she agree to a 'Fresh Contract' subsequent to the additional variations under contract 2. The "fresh contract"

contained very descriptive schedules of extra work to be undertaken by the Applicant and works that were to be undertaken by the Respondent and were to be removed from the Applicant's original quotation. The contract amount of the revised scope of works added up to \$410,735.00 incl GST.

- 19) [Respondent A] states the document being attachment 9 of the Application for Adjudication has never been provided to her or her partner.
- 20) Yet attachment 23 of the Application states that by letter 23 July 2012 from the respondent, the brief estimate summary and the brief variation summary (Saturday 10 July) adds up to \$373,396.00 and you have written that as the revised contract sum. With GST, the final cost is \$410,735.00. I do not understand why the last revised contract has a price of \$417,016.00.
- 21) I do not believe the statement that she and her partner had never seen the "fresh contract" which includes the revised price for the works and incorporates new contract conditions.
- 22) The difference between the two contracts is possibly the excavation work and the demolition of the retaining wall. This contract number 4 was presented to the financier. This contract is dated 6 July 2012, some 17 days before the Respondents' letter.
- 23) On the basis of probability I find that the Respondents have agreed for work to continue on the basis of the "fresh contract" which incorporates the new contract price \$410,735.00 and the conditions of contract incorporated within the new contract.
- 24) The sequence of events including a respondent visiting the applicant's house to view the windows, the non payment of the June Progress Claim, the original contract, new contract variations, deletions to scope of works and bankers requests leads me to conclude that the contract dated 6 July is a true reflection of the contract between the Applicant and the Respondents at that time.
- 25) On the balance of probabilities, I find that the contract under consideration is \$410,735.00 which includes the original drawings and variations included in the schedules.

4. DISMISSAL CONSIDERATIONS

- 26) Section 33(1) of the Act compels the adjudicator to dismiss an application without making a determination in the following circumstances:
- a) Pursuant to 33(1)(a)(i), if the contract concerned is not a “*construction contract*” as defined in the Act.
 - b) Pursuant to 33(1)(a)(ii), if the application has not been prepared and served in accordance with section 28 of the Act.
 - c) Pursuant to 33(1)(a)(iii), if an arbitrator or other person or court or other body has made an order, judgement or other finding concerning the payment dispute in issue.
 - d) Pursuant to 33(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.
- 27) If none of these circumstances apply then the adjudicator is required to determine, on the balance of probabilities whether any party to the payment dispute is liable to make a payment.
- 28) With respect to the specific facts of this case, I deal below with each of the issues in points 1-7 above:
- a) The manner of appointment has been dealt with above. The application has been satisfactorily served in accordance with the requirements of s 28 of the Act.
 - b) The contract for the works was dated May or June 2012, which is after the commencement of the Act.
 - c) The site is within the Northern Territory.
 - d) There is a payment dispute within the meaning of the Act. The dispute arose when the Respondents refuted and rejected a request for funds based on Tax Invoice Progress Payment 5 received by Respondents 11 October 2012.
 - e) The Applicant is a party to the contract.
 - f) The Application for Adjudication was made 20 December 2012, which is within 90 days after the time for the payment of the claim arose.
 - g) The matter related to the supply of labour and materials for the site and the work clearly falls under the definition of “construction work”.
- 29) Finally the Applicant has stated that the matter is the subject of a mediation being conducted by MBANT.
- 30) Regarding 33(1)(a)(iii), provides that the adjudicator must dismiss the application if:
- An arbitrator or other person or a court or other body dealing with the matter has made an order, a judgement or other finding.

- 31) There was no representation from either the Applicant or Respondents regarding the power to impose an outcome by way of order or otherwise on the parties to the mediation.
- 32) I sought further submissions from both parties regarding the status of the mediation.
- 33) A letter from the parties constituting their joint submission pertaining to the issue of jurisdiction was submitted 11 January 2012.
- 34) The parties submitted that it is their view that mediation is different from Arbitration, Court or Tribunal process whereby the parties submit evidence for determination or finding. Mediation is a wholly voluntary process whereby any agreement reached must be agreed by both parties and is never imposed by the facilitating person and therefore can never amount to a determination or finding of any fact or other matter relevant to the dispute by a third party. A Mediator does not have any power to impose an outcome by way of judgement or order or otherwise on the parties to a mediation.
- 35) Accordingly, they submitted I do have jurisdiction to determine the matter and that a mediation process is not a process which is contemplated by Section 33(1)(a)(iii) of the Act. In respect of the mediation itself, the mediation was private and confidential and the outcome was non binding until and unless the parties thereto entered into a binding agreement evidencing the outcome of the mediation. No such legally enforceable agreement was entered into, leaving it open to me to make a determination in accordance with the Act.

The Application

- 36) In the Application, the Applicant claims it was entitled to payment in the amount of \$143,212.14 incl GST for progress payment number 5 dated 5 October 2012.
- 37) The disputed invoice is

Tax Invoice no. 00002945 raised by the Applicant on 8 October 2012 for the sum of \$143,212.14 inclusive of GST.
- 38) For the purposes of clarity I have generally dealt with amounts inclusive of GST except where I have shown both.
- 39) On 8 October 2012 the Applicant issued a final payment claim in the form of Tax Invoice no. 00002945 and its attachments.

The Response

- 40) In their response, the Respondents challenge payment of the claim on the basis that:
 - a) No discussions took place as to the price, nor was there a quote either verbally or in writing for the excavation and demolition of the retaining wall
 - b) H-1 The works have not reached practical completion and no Notice of Practical Completion has been provided
 - c) The Respondents did not approve design variations to the kitchen pantry
 - d) Rectification costs due to incorrect placement of columns

- e) [The Respondent's draftsman] had no real or ostensible authority
- f) The applicant has voided the contract and has not been back on site since early October 2012

I will deal with each of these objections in turn.

No discussions took place as to the price, nor was there a quote either verbally or in writing for the excavation and demolition of the retaining wall

- 41) In tab 2 page 7 of the response, it shows that in late January 2012, the Respondents asked [the Applicant's representative] if it was feasible to remove the backyard retaining wall and cut out the area to create a two tier garden bed on site. The Applicant replied that it was feasible and an excavator would be on site to excavate the footings.
- 42) On 19 March 2012 the Respondents asked [the Applicant's representative] for a detailed quote for the removal of the retaining wall and excavation.
- 43) On 15 May 2012 the Respondents attended the site and marked out the section of the retaining wall they wanted removed. The same day, the west footing for the column supporting the kitchen and extension was excavated.
- 44) On 6 June 2012, the Applicant forwarded a detailed final cost of the retaining wall excavation and earthworks of \$9,812.00 excl GST. No mention of this price was included in the second contract which was signed 15 June 2012.
- 45) [Respondent A] states in Tab 23 that she sought 3 quotes for the work ourselves and arrived at a figure of \$3725.90 incl GST and were happy to round the figure to \$4,000.00 to close the matter.
- 46) The Applicant claims that on 15 May 2012, his foreman was asked by [one of] the Respondents to dig out the backyard. [The foreman] laid out a garden hose to show the extent of the excavation and [Respondent A] confirmed this was correct. [The Applicant's representative] then gave a detailed costing breakup of the work he performed.
- 47) Subsequent to the rejection of the costings, they were forwarded to a Quantity Surveyor (Q.S. Services) for his expert opinion.
- 48) Q.S. Services have summarised the \$7,051.00 excl GST was fair and reasonable for the scope of work described and is based on recorded hours and hourly rates commensurate with the resources used.
- 49) It is clear that [Respondent A] has requested the Applicant to do the extra work to the contract and the only issue to settle in this matter is the value of the works. In this case, I find it is immaterial that both parties have not agreed in writing as to what is the true value of the variation works.
- 50) The Applicant has sought independent advice from a quantity surveyor, and the Respondents have made a throwaway offer of \$4,000.00 incl GST as a way of settling the matter without addressing the detailed breakup of costs submitted by the Applicant. The Respondents make no reference to the detailed cost break up submitted by the Applicant.

- 51) On the basis of probabilities I find that [Respondent A] has directed the applicant to demolish the retaining wall and excavate extra areas and the value of the works is \$7051.00 excl GST in accordance with QS Services expert advice.
- 52) I find that the entire demolition of the retaining wall and associated extra excavation is a variation to the contract and the amount of the variation is \$7,031.00 excl GST.

Practical Completion

- 53) The Respondents say that the works have not reached the stage of Practical Completion and that the builder is not entitled to seek the final payments until this has been reached. Letters contained in tabs 34 and 35 of the Response lists many defects and omissions.
- 54) The Respondents' list of defects and omissions are dealt with in other parts of this adjudication.
- 55) This argument that a Final Payment Claim cannot be made because the works have not reached Practical Completion misunderstands the contract.
- 56) Under Schedule 4 Payment for Work, payments are to be made monthly and within seven days of the invoice being provided to the owner. There is no mention of Practical Completion stopping or hindering the making of a Progress Claim or indeed a Final Claim. A Final Claim and a Progress Claim have to be treated the same for the purpose of payment. It must be challenged in writing within two days on receipt of the Owner or paid within 7 (or fourteen days as per invoice) by the Owner. This payment was able to be claimed as the Applicant had substantially completed the project.

Practical completion is irrelevant to the final claim.

- 57) I find that a Final Claim is a valid claim under the contract and the applicant is entitled to seek payment for this claim.

Respondent did not approve design variations to kitchen pantry

- 58) The Respondents say that they did not approve any design variations to the kitchen/pantry extension dimensions except to extend the east side of the kitchen wall by approximately 1000mm, and did not authorise the reduction in the length of the wall, size of windows and distance between the windows and the column.
- 59) The Applicant argues this is a design issue that needs to be discussed with [the Respondents' draftsman]. [The draftsman] provided direction to 'the fix' and this was the result. The issue needs to be taken up with [him].
- 60) Given difficulties with the issues regarding the back wall, these windows needed to be adjusted. It was all approved by [the draftsman] to do that.
- 61) Measurements are incorrect.
- 62) Measurements are incorrect-need to be taken from outside.
- 63) The changes incorporated in this design variation are made from the difference between drawing MBD-879-3 to MBD-879-3C. The changes include but are not limited to

- a) Delete pantry window
 - b) New window to kitchen extension
 - c) Kitchen enlarged
 - d) Kitchen bi-folds stacked on north wall
 - e) Stairs shifted
 - f) External kitchen wall dimensions changed from 331 x 331 to 162 x 500
 - g) The kitchen/pantry wall on these drawings is the same overall length as the original drawings. The only change in dimensions is external kitchen wall dimensions changed from 331 x 331 to 162 x 500
- 64) [Respondent A] instructs her draftsman to provide as constructed drawings with detailed dimensions of windows and distances between them but the drawings do not support her claims in item 68 of the Statutory Declaration:
- a) That the dimension between the kitchen windows was incorrect as the documented 1200mm wall section between the windows was only measured 1130mm and as such the 1200mm Rangehood could not be accommodated.
 - b) Each of the kitchen window dimensions are 540mm wide instead of the documented 600mm wide.
 - c) The windows in the ensuite are 540mm wide instead of the documented 600mm wide.
 - d) The distances between the windows above the vanity should be 600mm but are 500mm and the corner window is hard up against the corner, it should be documented 1000mm x 600mm.
 - e) The bifold doors are 5300mm in length but are only 5000mm in length.
- 65) These are incorporated on the drawings provided by [Respondent A]'s draftsman under her direction.
- 66) I acknowledge that the Respondent has engaged M Kelly to write a report and submit as constructed drawings to the kitchen/pantry area and comment on the repositioning of the kitchen column some 530mm out of place.
- 67) M Kelly provides an explanation of what should have happened but there is no explanation as to what did happen in relation to the column moving some 530 mm and the knock on effect to the dimensions of the kitchen/pantry wall.
- 68) His drawing shows a different dimension to the kitchen/pantry wall than that of the Respondents' draftsman] but does not show any different dimensions to any windows or spacing between the windows particularly in the kitchen wall.
- 69) Kelly also draws the last spacing between the columns to be 2532mm not the 3062 shown on the [Respondent's draftsman's drawing] as constructed drawing.
- 70) The only evidence provided by both parties is that [Respondent A] was present when she instructed the foreman to demolish the retaining wall and do extra excavation.

[Respondent A] argues in her response that she is the only person authorised to give directions and instructions to the applicant to do variation works.

- 71) I find it necessary to consider the actions of [Respondent A] with respect to moving the column some 530mm. [Respondent A] says she is the only person under the contract authorised to give directions and instructions to the applicant to do variation works. She says that she was on site the day the applicant was excavating for the column footing. She makes no reference to the Applicant's statement that she and the foreman set out the excavation with a garden hose.
- 72) The draftsman she engaged to draft the "as constructed" drawings shows the column was not moved. She states that bifold doors are 5300mm in length but are only 5000mm in length whereas the dimension of the verandah/kitchen wall in which 1 bifold door is installed is only 4500mm and the new verandah bifold door is shown on the as constructed drawings at 5300mm.
- 73) [Respondent A] also accepts a quotation from the Applicant for changes of doors and windows requested in the amount of a \$2,855.00 deduction. She visits his house 3 June and 15 June confirms her acceptance. The Applicant has named numerous windows and doors in this quote but has not provided a detailed description or sizing of the new windows he is providing. The Respondents do not provide any details or sizing of windows they are accepting.
- 74) The Respondents say that some windows are the wrong measurement. The applicant argues that measurements are incorrect. Some photos contending to show the size of windows provided by the Respondents show the end of a tape measure. These photos do not provide any evidence as to the size of the windows and hence they are of no use in this application.
- 75) The revised drawings show some minor changes. As window changes have been ordered by the Respondents and the Respondents' drafter has drawn them on the 'As constructed' drawings'.
- 76) Minor changes to window dimensions have been accepted by the Respondents through their acceptance of the quotation of the windows by the Applicant. The actual dimensions and the nature and extent of these changes cannot be determined with the information provided. There is no original window schedule or a revised window schedule incorporated in the plans provided. The only evidence provided is that there has been a variation of the windows. This indeed could mean changing windows to suit difficulties to back wall.
- 77) On the balance of probabilities I find that [Respondent A] directed the foreman to set out the kitchen column so as to not interfere with the retaining wall. The knock on effect changed the kitchen/pantry wall dimensions. [Respondent A] also issued a variation order and instructions to change windows and bi-fold doors. As a consequence of the variation and instruction dimensions and extent of windows have been changed in the contract and that the changes occurred were to accommodate changes either ordered by the Respondents or to accommodate changes required for a more suitable construction outcome due to the difficulties provided by the renovation project.
- 78) I therefore find that the Respondents have approved design changes that have affected the dimension of the walls to the kitchen and the adjacent areas and have changed dimensions of some windows.

Rectification costs due to incorrect placement of columns

- 79) The Respondents have presented a quote in the amount of \$185,000.00 + GST to carry out the rectification works and reconstruct the columns in the kitchen/pantry area.
- 80) Under the Act I cannot deal with this matter and as equally an adjudicator cannot consider a claim of this nature without the party making a separate claim and application under the Act.

The draftsman has no real or ostensible authority

- 81) The Respondents say that there is no evidence provided by the Applicant, which would establish that [the draftsman] had real or ostensible authority to approve a design variation. The Respondents have included [the draftsman] in various transmittals regarding variations, drawings, site visits and progress payments.
- 82) The Applicant has stated that [the draftsman] provided a direction as to a 'fix' where the windows were not far enough apart in the kitchen and that the windows were only 460mm wide. He also says that the windows in the en suite and louveres only 880mm x 540mm were approved by [the draftsman] as there were difficulties with the issues regarding the back wall and the windows needed adjusting.
- 83) The changes to the kitchen area by extending the east side wall are substantial and apart from a quotation from [the Applicant] regarding deletion of pantry windows, frosted glass to en suite windows, timber louveres to bottom four in kids bedroom and internal bedroom windows (\$2,855.00).
- 84) [Respondent A] says that she accepts this figure (Tab 2, 87 (d)). Neither party has provided any evidence in the form of documentation that [the draftsman] had real or ostensible authority to approve a design variation. There is no direction from [the draftsman] to change the windows nor is there any direction from the Respondent to [the draftsman] to request change of windows from the Applicant.

The Applicant has voided the contract and has not been back on site since early October 2012

- 85) The Applicant has submitted a progress payment dated September 2012. Under the contract, progress payments are to be paid within seven days. The tax invoice gives fourteen days for payment. Even allowing fourteen days for payment, no payment has been made within this time.
- 86) Clause 14 (a) of contract
- If the owner fails to pay any sum or part sum of money due under the contract, the builder may suspend work until the default is rectified.
- 87) Suspension of the works is a legitimate right of the builder under the contract. The Respondents have not paid the builder any or part of the money due under the contract and the builder has exercised its right under the contract to suspend works.

88) I find that the builder has not voided the contract by suspending the work but has exercised his right under the contract to suspend works until the default of non-payment has been rectified.

89) Schedule of Defects and Responses

| Defect/Issue | Respondent's Issues | Applicant's Response |
|--|---|--|
| 1. Two fluorescent lights left at premises on 19/10 | Can be installed by Respondent's electrician – deduct installation cost from claim 5 | Electrical works removed from scope of works – not charged for, so no deduction |
| 2. TV Antennae Cable not put back in wall | Builder to arrange this to be put back inside wall or Respondent will deduct cost from final claim | Electrical works removed from scope |
| 3. Flashing not fixed with pop rivets | Flashing still not fixed with pop rivets to side of house alongside carport | Unsure – need to investigate and rectify if needed |
| 4. Kitchen windows not far enough apart | 1200mm range hood to fit between windows won't fit – windows only 1130mm apart. Issue was discussed with [draftsman], who knew about range hood | Design issue – discuss with [draftsman] – he provided direction for a 'fix' with this result |
| 5. Windows only 460mm wide | Window openings in drawings 600mm wide, installed windows only 460mm wide – rectify for ventilation and light | Design issue to discuss with [draftsman] |
| 6. Windows to ensuite only 540mm, louvers only 880mm x 540mm | Windows in en suite were meant to be 600mm wide, louvers should have been 1000mm x 600mm | Windows needed to be adjusted due to issues with back wall – all approved by [draftsman] |
| 7. French doors are 2.1m high | In drawings French doors are 2.1m high, installed height only 2.05m | Measurements are incorrect |
| 8. Bi-fold doors shortened to 1.96m and 2.26m | Bi-fold doors with super screen were to be 2.1m high, only 1.96m. Bi fold doors along kitchen/ deck interface were to be 2.4m high but only 2.26m | Measurements incorrect – need to be taken on outside |

| | | |
|---|--|--|
| 9. Air conditions in room under house disconnected | Both air conditioners in disconnected, need to be reconnected. Should Respondents' electrician do this and deduct cost from final claim or will Applicant's electrician arrange this | Electrical work so outside builder's scope of works |
| 10. \$1770 + GST deduction for kitchen roof section not enough | Believe amount deducted not enough to cover labour and material costs to complete kitchen roof section. | No further deduction will be given – job was priced on basis that [the Applicant] would undertake full job. Deduction given is the most we can remove, no further deduction will be granted. |
| 11. Corrugated iron and insulation | Should have been left on site by Applicant so no need to purchase new materials | Owners were credited back for this amount – both labour and materials |
| 12. Drain to be installed for kitchen gutter | Getting a quote for installation, happy for Applicant to finish this or will deduct from final claim | All kitchen work removed from scope of works |
| 13. Gutter and drain behind ensuite not installed | Please inform as to whether completing work or deduct from final claim | This was deducted from final payment claim |
| 14. Ensuite fascia is not perpendicular – gutter needs to be packed out | Needs to be rectified or deduct from final claim | Set up to receive a half-round gutter as per plans |
| 15. Pool fence and path repaired to poor standard | Original row of bricks under fence not removed, stand on sides. Bricks replaced by Applicant laid flat, don't match up – lack of attention to detail | Disputed |
| 16. Rectification of paved area unsatisfactory | Poor workmanship, new square section made instead of following pattern of old pavers to blend in | Disputed |
| 17. Cyclone proofing variation – weren't | No communication – variation has come as a surprise for \$15,856.00 + | Information was passed onto [draftsman] – he admitted he failed to pass |

| | | |
|---|--|--|
| informed | GST, would like to review upgrading cost of \$15,741 + GST in claim. Should have been informed in advance of additional charges? | this onto the owners. Not Applicant's responsibility |
| 18. Welds for window shares not cleaned and galvanized properly | Need to be galvanized for long term rust resistance – advise if will do this or deduct from final claim | Disputed |
| 19. Pantry wall tie down loose – want all checked | Extremely loose, concerned how well other tie downs secured – please check all. | The tie down is timber |
| 20. Deck sanding & oiling not completed but charged – want deduction for sanding | Trade mark up allowed \$2,575.80 + GST for sanding – accept oiling done by painters and doesn't require deduction, sanding does | All was taken out and amended of final payment claim |
| 21. Welds in ensuite not cleaned or galvanized | Please advise whether this will be done or to arrange for it and deduct from final claim | Disputed |
| 22. Additional 2 hours of welding work had to be done to rectify welds in kitchen | Kitchen section built by [Applicant] did not pass Engineering inspection, had to be re-welded – deducting from final claim | Already certified by engineer – certification in Applicant's possession. This is disputed. |
| 23. No concrete sheeting in main bathroom | Please inform whether we should buy materials and install them and deduct cost from final claim | Not part of scope of works – not supplied |
| 24. No deduction for skirting - \$517.30 (+GST) | Please rectify this | This was incorporated into deductions on final amended payment claim |
| 25. Have deducted \$650 + GST for solar dome when quoted \$891 + GST | Please rectify | This was based on original quoted costings. No further deductions will be granted |
| 26. Corrugation in kitchen windows | Corrugation on all window awnings except kitchen. Have put these up, two | Not part of scope of works – however if Respondents cut corrugation it will fit |

| | | |
|--|--|---|
| | columns running up kitchen wall at an angle are too close to the windows so can't accommodate full sheets of corrugation | |
| 27. Double power point disconnected | Please arrange to reconnect, or deduct from final claim | Not part of scope of works when electrical was removed |
| 28. Downstairs air conditioner switches – are they safe to be removed? | Switches left attached – have they been disconnected? Are they safe to remove? | Not part of scope when electrical was removed. Have checked by own electrician. |

I have examined the schedule of defects and responses, and on the balance of probabilities I have found the following deductions are to be included in the sum of money to be paid in the determination of this adjudication:

1. The electrical work is to be carried out by the Respondents' electrician
No deduction
2. Antennae work to be carried out by Respondents' electrician
No deduction
3. Flashing not fixed by Applicant
Deduct \$500.00 + GST
4. Rectification of windows is not a matter I can deal with under the Act
No deduction
5. Rectification of windows is not a matter I can deal with under the Act
No deduction
6. Rectification of windows is not a matter I can deal with under the Act
No deduction
7. Rectification of French doors is not a matter I can deal with under the Act
No deduction
8. Rectification of bifold doors is not a matter I can deal with under the Act
No deduction
9. Air conditioners are to be reconnected by Respondent's electrician
No deduction
10. Deduction for kitchen roof section by Applicant is correct
No further deduction
11. Deduction for corrugated iron and insulation has been made and is adequate
No further deduction
12. Drain installation work is variation and not in scope of works
No deduction
13. Gutter and drain behind en suite deducted from final claim
No further deduction

14. No evidence that set up of gutter is incorrect
No deduction
15. No evidence to suggest pool fence and path is of poor standard
No deduction
16. No evidence to support claim rectification of paved area is unsatisfactory
No deduction
17. Cyclone proofing – no evidence to support variation of \$15,856.00 + GST.
18. Upgrading cost to be paid in full by Respondents - no evidence to suggest the upgrading cost of \$15,741.00 + GST should not be paid in full by Respondents.
19. No evidence to support frames should be galvanised
No deduction
20. No evidence to support claim that cyclone proofing wasn't completed
No deduction
21. Deck sanding cost amended as per final claim
No further deduction
22. No evidence to support that welds in en suite not clean or galvanised
No deduction
23. Two hours of welding carried out in kitchen by Respondents to rectify welds
Deduct \$180.00 + GST
24. Concrete sheeting to main bathroom not part of scope of works.
Deduction for internal lining already approved.
25. Deduction for skirting not incorporated in final claims
Deduct \$569.00
26. Deduction for solar dome incorporated in final claims. Deduction of \$650.00 + GST acceptable.
No further deduction
27. Corrugation in kitchen windows not part of scope of works
No deduction
28. Not part of scope of works. Respondents' electrician to fix
No deduction

90) Having agreed that the Applicant has a right to payment, I could decide not to deal with the matter of the submission and payment of all progress claims relating to this contract. However in the matter of the progress claims, I will deal only with the dates submitted to the Respondents and the date of payment by the Respondents.

| Progress Payment | Date Submitted | Amount | Date paid | Amount paid |
|------------------|-------------------|--------------|-------------------|-------------|
| No. 1 A | 6 June 2012 | \$106,417.17 | Nil payment | Nil payment |
| No. 1 B | 4 July 2012 | \$95,623.99 | 13 July 2012 | \$95,623.99 |
| No. 2 | 4 July 2012 | \$59,770.81 | 13 July 2012 | \$59,770.81 |
| No. 3 | 30 July 2012 | \$25,055.03 | 3 August 2012 | \$25,055.03 |
| No. 4 | 28 August 2012 | \$40,552.03 | 11 September 2012 | \$40,552.03 |
| No. 5 A | 25 September 2012 | \$147,450.44 | Nil payment | Nil |

| | | | | |
|---------|-----------------|--------------|-----------------|-------------|
| No. 5 B | 11 October 2012 | \$143,212.14 | 3 December 2012 | \$80,000.00 |
|---------|-----------------|--------------|-----------------|-------------|

- 91) The table above along with the further information contained in the Response indicates that there was a timing difference between the date of application for progress payment and the date it was received. The Applicant has stated that the final progress claim was forwarded to [the draftsman] for provision to the Applicant. If this was the case, in this instance it explains why there was a difference in progress claim dates and receipt by the Respondents.
- 92) The Respondents argue they had no agreement or arrangement for the Applicant to direct payment claims to [the draftsman]. This argument is inconsistent with the fact that all progress claims were dated from 7 – 14 days earlier than when they were received by the Respondents.

6. CONCLUSION

- 93) I find that the Applicant is able to make progress claims under the contract and under the Act as he has not voided the contract by abandoning the site and failure to reach Practical Completion is not a valid reason for non payment of a Progress Claim. I will now deal with the disputed matter.
- 94) I would now like to deal with the claim in dispute progress claim no. 5B dated 5 October 2012 and received by the Respondents on 11 October 2012 in the amount of \$143,212.14 (incl GST).

Deductions

| | |
|---|--------------|
| Arbitration payment | -\$80,000.00 |
| Credit for skirtings | -\$569.00 |
| Extra for flooring and cyclone tie down | -\$17,441.60 |
| Welding by Respondents | -\$198.00 |
| Flashing not fixed by Applicant | -\$550.00 |
| | _____ |
| Total deductions | \$98,758.60 |
| Amount owing | \$44,453.54 |

Interest

- 95) The Applicant states that interest pursuant to the terms of the contract is also claimed.
- 96) I note that the Applicant is only claiming interest for the amount in dispute since the \$80,000.00 was paid.

- 97) Having established that the amount to be paid is \$44,453.54 I must now calculate the interest owing.

| | |
|---|------------------|
| Date of Claim received by owner | 11 October 2012 |
| 14 days for payment | 25 October 2012 |
| Date used in calculations for payment | 13 February 2013 |
| Interest payable under the contract 10% | |
| Amount of interest payable | \$1,437.13 |

Costs

Clause 36(1) of the Act requires the parties to bear their own costs.

Clause 36 (2) of the Act empowers the Adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

The submissions from both parties have merit and are neither frivolous nor vexatious.

I find that the obligations as to costs as set out in Clause 36 (1) should not be altered.

Determination

- 98) In accordance with 38(1) of the Act I determine that the amount to be paid by the Respondents to the applicant is \$45,890.67 being the amount owing of \$44,453.54 plus interest to 13 February 2012 of \$1,437.13. Interest accrues on the sum of \$44,453.54 at the rate of \$12.18 per day from 13 February 2012.
- 99) The sum of \$45,890.67 is payable immediately.
- 100) I draw the parties' attention to the slip rule in s 43 (2) if I have made some correctable error.