Reference: RJFE/1408

IN THE MATTER of an Application for Adjudication
Pursuant to the Construction Contracts (Security of Payments) Act (NT)

BETWEEN:

Applicant

and

Respondent

DETERMINATION

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24 January 2012

Robert Fenwick Elliott
Registered Adjudicator
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Formal Matters

1. By letter dated 4 January 2012 from Mr Cris Cureton on behalf of the Institute of Arbitrators & Mediators Australia, I was appointed as Adjudicator in relation to the adjudication initiated by an Application for Adjudication by the Applicant dated 23 December 2011. I accepted that appointment by email, and by letter and email to the parties on 4 January 2012.

2. As to the matters referred to in Section 33(1)(a) of the *Construction Contracts (Security of Payments) Act 2009 (NT)* ("the Act") I am satisfied that the contract concerned is a Construction Contract, and neither party has suggested to me nor do I have any reason to believe that an Arbitrator or other person or Court or other body dealing with the matter has made any Order, Judgment or other finding about the dispute that is the subject matter of the application, and I am not satisfied that it is not possible fairly to make a determination because of the complexity of the matter or because of the prescribed time or any extension of it is not sufficient for another reason.

3. The question of whether the application has been prepared and served in accordance with Section 28, and in particular whether the Applicant prepared and served the written application for an Adjudication within 90 days after the dispute arose has been a matter of more difficulty, and I sought and obtained further submissions on this point from each party. I have concluded that it was.

4. I also requested a conference under section 34(2)(b) of the Act, which took place in Darwin on 20th January 2012. The Applicant was represented by DS and KB. The Respondent was represented by PB and AB. During the course of that conference, I spoke on a loudspeaker telephone with Mr Murray Gray of RMG, who is the person who was responsible for the sampling that lies at the heart of the Claim 1 issue.

5. There is no information in this Determination that, because of any confidential nature, is not suitable for publication by the Registrar under Section 54.

Decision

6. I hereby determine on the balance of probabilities that the Respondent is liable to make a payment to the Applicant. The amount to be paid is $17,919.55, and the date on or before which this amount must be paid is 1 February 2012.

Reasons

7. As required by Section 38(1)(d) of the Act, my Reasons for this Determination are as set out below.

A Compound Dispute

8. It is evident that this is a compound dispute. The Applicant itself describes it as consisting of three payment claims at paragraph 6.1 of the Application for Adjudication, which is in the following terms:-

> "6.1 There are three payment claims in this dispute as follows:-
>
> Claim 1: a claim for unentitled damages in the sum of $12,417.57 including GST;
>
> Claim 2: a claim for additional variational works carried out on the [project 1 works] in the sum of $27,594.82 including GST; and
>
> Claim 3: a claim for additional variational works part performed as urgent repairs on the project 1 works] in the sum of $19,333.36 including GST."

9. It is clear that claims 2 and 3 are more closely connected with each other than either of them are with claim 1.

10. Having in mind the terms of Section 34(3) of the Act, which provides that an appointed Adjudicator may with the consent of the parties adjudicate simultaneously two or more payment disputes between the parties, I invited on 12 January 2012 both parties to provide me with further submissions as to whether they had consented, or did now consent to simultaneous adjudication under Section 34(3), and also whether there was any reason why I should not treat each of the three claims separately for the purpose of Section 33(1)(a)(ii). Both parties have given the appropriate Section 34(3)(b) consent, the Applicant by paragraph 3.1 of its further submissions of 16 January 2012, and the Respondent's by paragraph D of its further submissions of 17 January 2012.

11. Further, each party has indicated consent to the common sense approach that I should treat each of the three claims separately for the purpose of Section 33(1)(a)(ii) of the Act (the Applicant by paragraph 2.2 of its further submissions, and the Respondent by paragraph C of its further submissions).

Section 33(1)(a)(ii)

12. Were I to find that any of three claims fell within the terms of Section 33(1)(a)(ii) in the sense that the Adjudication Application was not made within 90 days of the payment dispute arising, then I would be obliged to dismiss the application in respect of that claim without making any determination on the merits. It is accordingly appropriate that I deal with this issue in respect of each of the three claims before addressing the merits.

The Timing of the Applicant's Further Submissions

13. By my email of 12 January, I requested further submissions on this topic and set deadlines. In the case of the Applicant, the deadline was "close of business on Monday 16 January 2012". I

received those further submissions at 6.21pm on that day. In its further submissions, of 17 January, the Respondent has, at paragraph 4, referred to that timing, and asserted that since the Applicant is in breach of the deadline I set, I am not permitted to have regard to the Applicant's Submissions. I do not accept that proposition. The terms of Section 33, requiring an Adjudicator in certain circumstances to dismiss an application without any determination on the merits, is a provision which applies regardless of what submissions, if any, are made by the parties on the point. There is nothing in the Act in relation to further submissions that are equivalent to the somewhat draconian terms of the East Coast Security of Payment model, and I would be neither inclined nor permitted to disregard the Applicant's submissions.

(a) I am not so inclined because I am permitted by Section 34(b) to inform myself in any way I consider appropriate, and a submission from a party provides appropriate information whether it satisfies a deadline or not.

(b) I would not be so permitted because to disregard the Applicant's submission would fall short of the rules of natural justice, and in this regard I respectfully adopt what was said in *Ace Constructions & Rigging Pty Ltd v ECR International Pty Ltd* in the Local Court in New South Wales, considering an adjudication under the Construction Contracts Act 2004 (WA)[1]

> 57 The adjudicator took the view that response had not been served in accordance with the methods outlined by the Interpretation Act and therefore had not been validly served in accordance with the requirements of the Construction Contracts Act. He concluded that service of the response by mail or hand delivery in accordance with s.76 of the Interpretation Act was required before the response could be considered in the course of the adjudication and that ECR's response was, therefore, inadmissible.
>
> 58 The applicant argues that the adjudicator was wrong in accepting Ace's submissions…
>
> 69 Section 30 of the Construction Contracts Act states that "the object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible." Section 32 provides that the adjudicator must take into account any properly served response and is not bound by the rules of evidence. It provides that the adjudicator may inform him- or herself "in any way he or she thinks fit". To obtain the required information, the adjudicator may request submissions and information and may set timetables for the provision of that material. The adjudicator is also given wide investigative powers of inspection and appointment of experts.

[1] http://feg.com.au/cases/AcevECR.htm

> 70 The applicant contends that the purpose of the scheme is to resolve disputes on their merits after a fair and informal inquisitorial process. It argues that, even if the response was not served with all due formality under the procedure required by s.27, because he was obliged and entitled to inform himself about all relevant data, the adjudicator had the statutory discretion to admit the response and ought to have done so.
>
> 71 Ace, on the other hand, argues that this court is not entitled to consider questions of procedural fairness or natural justice because to do so would be, in effect, to conduct a judicial review of the adjudicator's decision, a process specifically excluded by operation of s.46. For the reasons given above at [21]-[24], however, I consider that this is not a review and the argument misconceived. It also argues that there is, in any event, no evidence of procedural unfairness.
>
> 72 I disagree. The refusal by the adjudicator to admit and consider the response resulted in a process that inevitably was procedurally unfair. Natural justice or procedural fairness consists essentially in two things: a fair, detached tribunal and each party having an appropriate opportunity of being heard. No suggestion of bad faith on Mr Machell's part is made but the fact remains that ECR was incorrectly refused the chance to put its case.

14. In any event, I deliberately set the deadline using the words "close of business" because that term affords some commonsense flexibility, and thereby avoids the effect of unhelpful technical arguments that can arise where, for example, an email is delayed for a while when caught in a spam filter or for other technical reasons.

15. As it happens, my conclusions on the 90 day issue do not precisely follow the submissions of either party, and in order to ensure that I have not denied either party the opportunity to address the reasoning that I have adopted, I provided the parties on 18 January with a draft of my reasoning, in order that they may have the opportunity, if they wish, to further address me on the point on the conference that was held on Friday 20 January. I deal with what was said at the conference at paragraph 35 below.

16. Further, by its further submissions of 17 January, the Respondent has submitted that I should disregard certain identified paragraphs of the Applicant's Further Submissions on the basis that they are irrelevant to the questions that I had asked. For reasons which appear below, the majority of paragraphs identified make submissions which I have not accepted, and so the question is whether I have regard to them or not is immaterial. But in any event, I am disinclined to disregard the answers to any questions which I ask of the parties. I have in mind not only the terms of Section 34(1) of the Act, whereby I must act informally and if possible make my determination on the basis of the Application and the Response, but may inform myself in any way I consider appropriate, but also the object of the Act as set out at Section 3(2)(b), which seeks the rapid resolution of payment disputes arising under construction contracts. That object is not advanced by the artificial exclusion of

relevant information where such exclusion may encourage a party to prolong the dispute by taking it on to another forum.

Is Claim 1 Barred by the 90 day Rule?

17. Section 28 of the Act provides that:-

> To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided by Section 39(2)(b):-
>
> (a) Prepare a written application for adjudication;
>
> (b) Serve it on each other party to the contract.....

18. By Section 33(1)(a)(ii) I am mandated, if the application has not been prepared and served in accordance with Section 28, to dismiss the application without making a determination of its merits.

19. The history of Claim No. 1 plainly stretches back much further than 90 days, and it is therefore necessary for me to consider whether the application for adjudication was prepared and served within the 90 day period. That in turn, requires a consideration of the question of when the disputes arose.

20. This is spelled out by Section 8 of the Act, which is in the following terms:-

> A payment dispute arises if:
>
> (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; 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.

21. The Applicant is not quite right to assert, as it does in paragraph 1 of its further submissions of 16 January, that "for there to be a payment dispute there must first be a payment claim as defined by Section 4 of the Act" because a payment dispute may also arise under Section 8(b) – that is to say when an amount retained by a party is due to be paid, but is not paid.

22. It is possible that the draftsman of this provision, originally to be found at Section 6(b) of the *Construction Contracts Act 2004 (WA)* had in mind retention money in the sense of the traditional small percentage retained by a principal under a Construction Contract by way of security for defects in the work. Very often, one half of such retention money falls to be released at practical completion, and the other half at the expiry of the defects liability period. A form of such provision appears at Clause 5 of the General Conditions of Contract which are incorporated, albeit with modifications, in

the case of this contract. But the wording of Section 8(b) of the Act is not, in its terms, so limited, and so I must consider whether Claim 1 does amount to something retained by the Respondent under the contract and if so when, due to be paid, it was not paid.

23. It is notorious that under the East Coast model of Security of Payment, there are marked differences between what may be due under a Contract, and what an Applicant may be entitled to be paid by way of progress payment under the East Coast Security of Payment Acts. But the Northern Territory Act with which I am concerned is much less contorted in this regard; my essential task is to have regard to what is due under the terms of the contract albeit that, as is typically the case in arbitration, I am not necessarily bound to give effect to certificates for payment, but may ordinarily give certificates the evidentiary weight that I consider appropriate (Section 37(2)(b)).

24. When considering the question of when an amount under the contract is due for the purpose of Clause 8(b) I must have regard to the terms of the contract as to when progress payments are due.

25. Under Clause 42.1 of the General Conditions of Contract the Superintendent is required to determine the value of the work carried out from time to time and to issue progress certificates. Prima facie, the amount shown by certificates is due to be paid within 14 days after the issue of the progress certificate, but subject to a number of express contractual deductions, including, not only any retention money provided by the Annexure, but also "any other amount that the Principal may be entitled to deduct from the money due under that progress certificate". In this case, Clause 42.1 was amended by paragraph 2.12 of the Amendments but the underlying procedure whereby payments were to be certified remains.

26. In this case, there is an express power for the Respondent to make reductions in the amount due pursuant to Clauses 14.10.5 and 18.8.2 of the Specification, and the Respondent made a deduction in that respect as calculated at Item 4 of Contract Change Order No. 5, of 1 December 2010, which was provided under Tab 4 of the Adjudication Application, in the sum of $11,288.70, which equates to $12,417.57 if GST is added. It is common ground as stated by the parties during the conference that this deduction was reflected in the certification and accordingly, in my view, it cannot be said that this amount was, in or about November 2010, an amount that was "due to be paid under the contract". For this reason, rather than for the reasons set out at paragraphs 1.2 to 1.4 of the Applicant's further submission, I do not think that a payment dispute arose within the meaning of Section 8 in or about December 2010 in respect of Claim No. 1.

27. The Applicant says that its Tax Invoice of 2 September 2011 (which I have under Tab 2 of the Adjudication Application), amounts to a payment claim. The Respondent takes a different view, and asserts that payment claim 1 cannot be said to be a progress payment, apparently on the ground that it is not a claim that is "correct and in order for payment". I prefer the Applicant's submission in this

regard. Under Section 4 of the Act, a payment claim is defined to mean a claim under a construction contract made, in the case of the contractor, "for payment of an amount in relation to the performance by the contractor of its obligations under the contract". In my view, payment claim CM20111 is such a claim. Certainly, it refers to "damages unilaterally deducted from the contract for unproven asphalt voids" but it is perfectly apparent that the document amounts to an assertion that such damages are not due, and accordingly that the amount payable to the contractor in relation to the performance of its obligations under the contract are due.

28. The Respondent also canvasses the possibility at paragraph 7(a) of its submission of 17 January that, because that invoice contains the words "trading terms: net 14" that the due date for payment was 14 days. I do not accept that the addition of those or similar words to an invoice can of themselves have the effect of altering a due date for payment that has already been established by a binding contractual arrangement and I therefore dismiss that the suggestion that that invoice became due for payment on 16 September 2011.

29. When did the amount claimed in that claim become "due to be paid under the contract" within the meaning of Clause 8(a)? In order to make sense of Clause 8(a) of the Act, the reference to "due to be paid" must, at any rate for timing purposes, be treated as a reference to when the amount is claimed to be due to be paid, and I accept the Applicant's calculation at paragraph 1.8 of its further submissions that that must be 30 days from receipt of the claim, being the period prescribed by Clause 2.12 of the Request for Tender including amendments to General Conditions of Contract, provided to me under Tab 1 of the Application for Adjudication.

30. The Respondent has, by its further submissions of 17 January, made the alternative suggestion that the invoice may have become due after 28 days, under the implied provisions of the Act. In my view, the implied provisions in this regard, which appear at Clause 6(2)(b) of the Schedule to the Act, do not bite because the contract does have a relevant written provision about the relevant matter within the meaning of Section 20(b). Accordingly the Clause 6 implication (which is within Division 5 of the Schedule) has no application.

31. In any event, even if the Respondent were right about this point, the Adjudication Application would still be within the 90 day period as calculated by the second line in the table at paragraph 1.8 of the Applicant's further submission of 16 January 2012.

Is Claim 2 Barred by the 90 Day Rule?

32. As to claim 2, the Respondent at paragraph 11 of its further submissions of 17 January repeats the suggestion that the 14 day trading terms are applicable; and I have rejected that suggestion above. The Respondent concedes that, but for that point, payment claim 2 would be within time.

33. For the reasons contended for by the Applicant, I find that claim 2 is within time.

Is Claim 3 Barred by the 90 Day Rule?

34. In its submissions, the Respondent asserts that payment claim 3 is premature. I will deal with this argument below. It is not suggested, however, that payment claim 3 is too late, and for the reasons submitted by the Applicant, I find the payment claim 3 is within time.

The 90 Day Rule – Position of the Parties

35. I have set out in the preceding paragraphs the draft decision that I sent to the Parties prior to the conference. Because I regard the point as one that is open to argument, I began by conference by inviting the Parties, and particularly the Respondent, to address me on the topic. The Respondent indicated that it accepted the above analysis, and that none of the claims were barred by the 90 day rule, and that it wanted the substantive issues resolved without spending any more time on the 90 day issue. I have accordingly preceded on the basis that it common ground between the parties that none of the claims is barred by the 90 day rule.

Claim 1 – The Merits

36. It is apparent from Change Order No. 5 that the amount deducted by the Respondent for the alleged voids failure of $12,417.57 including GST is a deduction from amounts which would otherwise be due. I accordingly proceed on the basis that if there be no entitlement to the deduction, then the sum claimed is due. There is no suggestion to the contrary in the Response.

37. There is no dispute between the parties that there is provision in the contract for deduction in the event that the Applicants work fails the specification requirements; the relevant provisions are at Clauses 14.10.5 and 18.8.2 of the specification contained in the Request for Tender. These clauses have been provided to me at pages 100 and 118 of 118 respectively of the document under Tab 1 of the Application for Adjudication. The failures upon which the Respondent relies are those set out in a number of laboratory reports from RMG Geotechnical Consultants which are contained behind Tab 6 in the Adjudication Application.

38. At paragraph 15 of the Response, the Respondent says that the only compliant sample was sample 2010/542 in report RMGR859 of 28 October 2010, although it is apparent from the face of the other reports that a number of other samples did conform to the heavy traffic conformance band of 3.0 -7.0 as set out in paragraph 14.10.5.

39. I also note that some of the samples show voids greater than the reduction level 1 band of 7.1 – 8.0 percent, and it appears that that the superintendent was taking a “broad brush” approach, averaging out the compliant samples with the badly non compliant samples to conclude that the more modest level 1 reduction was fair as an overall figure. Be that as it may, I must approach this issue on the basis of the deduction that has in fact been sought.

40. In the event, the contract work prior to its subsequent variation (as to which see below) was rather more extensive, in the case of the [project 1 works], than Douglas Partners had recommended. The relevant drawing is drawing number R10-1884, which I find at the back of Tab 1 of the Response documents. This shows, for the [project 1 site] itself, not only a new wearing course of 50 mm asphalt, but also a new basecourse of 200 mm (described on the drawings as FCR with 2 percent shrinkage to achieve 100 percent MMDD) and, under that, a new 100 mm thick sub-base to a particular specification. That drawing also requires the removal of the existing sub soil drain and the provision of a new sub soil new drains were to be constructed at both at the inner kerb of the roundabout and, more importantly for these purposes, at the outer kerb, where the drain is described at drawing R10-1876, and also referred to as sheet number 7 of 18. That drawing shows a 2.5% fall towards the outer kerb, not only at the top of the new asphalt wearing course but also at the bottom of the basecourse. This stipulation is repeated in the notes to the drawings R10-1887, also identified as sheet 18 of 18. Under the heading "pavement" note 1 reads:-

> "Following excavation, an even ground surface with 2.5 percent cross fall to the outside kerb shall be maintained everywhere. This shall follow by watering and compacting to achieve minimum 98 percent MMD. Test proving shall be required."

The post-contract reductions in scope

41. It is apparent that there were then two variations to that contract specification:-

(i) To remove from the specification the requirement to replace the Dwyer basecourse and sub base, and instead just to replace the asphalt wearing surface.

(ii) To provide that, instead of removing the whole of the asphalt wearing surface – which was assumed to be 50 mm, instead just to remove the top 40 mm of the asphalt.

42. That these variations were made is common ground between the parties, and I have to proceed on the basis of that common ground. However, there are a number of unsatisfactory aspects to the variations:-

(a) Despite their being presented in reverse order, the first variation must have come before the second, otherwise the second does not make sense.

(b) The variations were documented badly and late.

43. As regards the first variation – the removal of the basecourse etc work –the first written record appears to be by means of an email from AB of Friday 22 October 2010, together with a spreadsheet, which I have behind Tab 5 of the attachments to the Adjudication Application.

44. Unhelpfully, the "combined total" shown on this document is zero, but I calculate that adding up the items gives a figure slightly in excess of $500K which is of the same order but not the same as the figure later calculated in change order 5.

45. The change order itself comes a couple of months later, by contract change order number 5, which I have behind the same Tab. Numerous deletions are listed such that there is a total deductions figure of $665,469.62, all of which save $11,228.70 – being for the voids failure – represents the work that has been omitted from the contract. In the extras column, there is one item for $214,595.25 at item 3 described as follows:-

> "PROFILE AND DISPOSE 50 MM ASPHALT WEARING COURSE AND PLACE NEW ASPHALT WEARING COURSE MIX TIGHT A15EPMB 50 MM COMPACTED THICKNESS INCREASE 50 MM^2 AT $56.11 = $236,054.77 GST INCL."

46. This addition was in addition to changes previously ordered of $81,572.51.

47. In crude terms, it is clear what was going on here. Of the original contract sum of some $784K, some $644K was taken out, $296K was put back in, $11,000 was taken out as a penalty for the voids failure, leading to an adjusted contract sum of $425K.

48. This change order is, of course, predicated on the presumption that the existing asphalt wearing course was 50 mm thick, whereas the trial pits dug by Douglas Partners had shown that the depth of the asphalt at the [project 1 site] varied between 20 mm and 90 mm (Douglas Partners results are summarised at Table 2 at paragraph 5 of their report). How is it supposed to be possible for the Applicant to profile and dispose of 50 mm of asphalt wearing course in areas where that course was in places only 20 mm thick? And yet more pertinently for present purposes, how was the Applicant supposed to achieve the 2.5% cross fall at the top of the sub grade as described by drawing R10-1876 if the work of removing and replacing the basecourse above that level be removed from the contract work?

49. The documentation of the subsequent arrangement, to reduce the depth of the old asphalt being removed from 50 mm to 40 mm, is documented even more poorly. In fact, it appears not to be documented at all. It appears to have been agreed on site on 19 October 2010, and there is a diary note of that meeting behind Tab 2 of the attachments to the Response – but that diary entry – whilst documenting the reason for the change (namely the profiler being bogged down as it broke through the asphalt) does not document the change.

50. There is an issue between the parties as to whether the effect of this change was to require the removal of 40 mm of the old asphalt and to replace it with an equivalent depth of 40 mm, or to remove 40 mm of asphalt and to replace it with 50 mm of asphalt, thereby raising the finished surface

level by 10 mm. Whichever interpretation be right, neither is reflected in the contract change order of number 5 which came 2½ months later, which – inconsistently with the submissions of both parties – requires the profiling and disposing of 50 mm of the existing asphalt wearing course.

51. At the conference, Mr Blackburn gave evidence that he has personal knowledge of this issue, having been on site at the relevant time, and that it was in fact 40mm that was replaced, i.e. that as far as possible, the original levels were maintained. The Respondents had no evidence to the contrary, and so I find as a fact that the Applicant profiled off approximately 40 mm, and laid a replacement course of approximately 40mm.

52. The applicant's essential point with regard to this issue is that the core samples were taken at depths which exceeded the depth of the tarmac that it itself laid, i.e. 40mm. In other words, their point is that the samples included, not only the asphalt that they had just laid, but also the asphalt that had been laid some 15 years ago.

53. My task is defined by Section 33(b) of the Act. If the necessary preconditions for a determination under merits are met, I must determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, and if so determine the amount.

54. Under the unamended terms of Clause 42.1 of the General Conditions of Contract, it falls to the superintendent to determine the value of the work carried out in performance of the contract, and to certify accordingly, and by Section 37(2)(b), whilst such certificates are not binding on me, they should carry the evidentiary weight that I consider appropriate. However, in this case, the usual provision was deleted by Clause 2.12 of the Amendments to General Conditions at page 18 of 118 within the request for tender, and in view the effect of that amendment is to remove such evidentiary weight as might attach to the exercise of the superintendent's discretion in determining the value of work. Accordingly, I must approach the issue simply as a matter of fact. Even if I were to conclude that the laboratory testing process was flawed by reason of the samples being taken from a too greater depth, this would not of itself be necessarily determinative, since by Section 34(1)(b) I am not bound by the rules of evidence and may inform myself in any way I consider appropriate.

55. The conference held on 20th January was very helpful in resolving this issue. It is evident from the photographs before me that the samples consisted of cores, being asphalt with, at least in some cases, some basecourse material stuck to the bottom. AB was clear that there was no question of any of the basecourse material being included in the testing, and Mr Skewes accepted that, as do I. More problematic is the question of whether the testing might have included not only the new asphalt, but also some of the old asphalt, laid some 15 years ago. AB said not; Mr Skewes suggested, essentially, that we just do not know, and that it was not right to deduct anything in circumstances where the sampling was suspect (the point was put more forcefully in the Adjudication Application.

56. Accordingly, and with the consent of the parties, I spoke to Mr Murray Gray of RMG on a telephone on "speaker" mode, such that the parties could hear the conversation. It was Mr Gray who did the sampling. His evidence was quite clear: he tested only the new asphalt, and there is no possibility that his test results could have been contaminated by the old asphalt.

57. I have no reason to doubt Mr Gray's clear evidence, and having heard at first hand what Mr Gray had to say. DS did not continue to suggest that the test results were suspect. Accordingly I reject the Applicant's case that the sampling was unreliable.

Claim 1 – an alternative approach

58. DS then took a slightly different tack, suggesting during the conference that the table at the bottom of page 100 of 118 of the Specification should not apply, given the omission of the replacement of the basecourse and subbase.

59. In order to understand this argument, it was appropriate to explore the reasons why asphalt might fail the relevant test. The Parties were in substantial agreement about this: there are three factors which, in practice, typically explain such a failure:

a) The asphalt being insufficiently hot when laid;

b) An insufficient number of passes with rolling equipment once the asphalt is laid;

c) The basecourse being insufficiently hard.

60. From the Respondent's point of view, of course, no proof is normally required in this regard. If the asphalt fails to meet the test, then the contractor is liable for the consequences – in this case the automatic reduction in price which is provided for in the contract. Nevertheless, AB gave evidence that the principle reason for the failure was the first factor that had come into play here – the Applicant's subcontractors were laying asphalt, he said, that was far too cold. For the Applicant, DS asserted that it was the third factor. His argument was that the condition of the basecourse was taken out of his control when the first variation referred to at paragraph 41 above was ordered.

61. This argument was not made in the Adjudication Application, although the Respondent was evidently alive to the point on the basis that it was made, albeit somewhat obliquely, in earlier correspondence, and in particular the Applicant's letter of 13 October 2011, which I find behind Tab 12 of the Application documents (incorrectly identified in the Adjudication Response as Tab 13). But in any event, I reject it, for the following reasons.

The Pre-contract reduction in the [project 2] scope

62. First, I was persuaded by the Respondent that, although the drawings contained within the contract required the replacement of the basecourse and sub base on both [project sites], yet the work

of replacing the basecourse and sub base on the [project 2 site] was removed from the scope of the work before the contract was let, and thus did not form part of the contract work at all. That point does not emerge from paragraph 4.5 of the Preliminary Clauses (page 28 of 118) but does emerge from the Respondent's letter of 31 August 2010, the Applicant's email of 23 August 2010 and from a comparison of page 4 of 32 with page 6 of 32 of the Tender Response Schedules.

63. The conclusion means that I do not accept paragraphs 2.4 and 2.7 of the Adjudication Application, which asserts that the post-contract reduction in scope applied to [projects].

64. Thus the contract documents are to be construed on the basis that clause 14.10.5 of the specification – the table at the bottom of page 100 of 118 – was there, and fell to be applied in respect of both [projects] when, in the case of [project 2], the basecourse and sub base were not to be replaced. In these circumstances, it is not open to the Applicant, having agreed to the contract in that form, to assert that part of the contract was to be disregarded from day 1 of the contract, before the scope was further changed.

The hardness of the exiting basecourse

65. Secondly, it appears from the Douglas Partners report that the existing basecourse, although suspect in other respects, did not suffer from any generalised lack of hardness. The evidence that emerged from the conference was that, although there were one or two soft spots, that conclusion was generally correct. The locations from which the non-conformant samples were taken were spread around the site, on both roundabouts. I conclude, therefore that it is most unlikely that the failure of the Applicant to achieve the required standard was as a result of soft basecourse.

The quantum of the deduction

66. I note that the calculation of the deduction in contract Change order 5 is based on a total surface area of 3,051 m^2 and in the conference, I sought clarification as to how that square meterage compared with the 4,207 m^2 referred to in the preceding item of the same document. In answer, Mr Busato told me that it was intended to reflect the point that there had been some degree of compliance and he said, looking at the numbers, that he thought that the Respondent had "short changed" itself in relation to that square meterage. It was not asserted on behalf of the Applicant that the area was wrong, and it is not necessary for me to reach any view on the hypothetical question of whether the Respondents might have charged for a slightly greater square meterage.

Decision on Claim 1

67. For the above reasons, I find that the Respondent was entitled to make the reduction that it did make as calculated at Item 4 of its contract Change order 5, and accordingly, the Applicant's Claim No 1 fails in its entirety.

Claim 2 – The Merits

68. Prior to these works, it is evident that these two roundabouts were in poor condition, and needed repairing. So much is evident from the Douglas Partners report. It is also perfectly evident that by reducing the scope of the repair work to the [project 1 site] – and in particular by omitting the originally specified removal and replacement of the basecourse and sub base – that the Respondent could not expect the effectiveness of the remedial work to remain unchanged. It is particularly to [project 1] that this issue relates, partly because the omission of the basecourse work from the [project 2 site] had already occurred pre-contract, and partly because it was on the [project 1site] that the ponding occurred, and in respect of which Claim 2 arises.

69. It is common ground that on 13 January 2011, the respondent required the applicant to address the issue of water ponding on the western side of the [project 1site]. The respondent characterises the necessary work as correcting a defect in the applicant's work (paragraph 40 of its Response) whereas the applicant says that the ponding was the result of a pre-existing condition, and was not the result of any defect in its own work (paragraph 1.10 of the Adjudication Application).

70. In order to make a decision as to which party's contention is to be preferred, it is necessary to trace the history of the work. Unless stated to the contrary, the following references are to [project 1], and not to [project 2].

71. Of particular assistance is the Douglas Partners Report of March 2010, which is provided to me behind Tab 1 of the Adjudication Application. In the absence of any conflicting material, I take it that this report accurately describes the nature of the roundabout before the applicant started work.

72. That report unequivocally notes that, in the case of the [project 1site] that the wearing course was in bad shape. The report describes it as having been "sheared and mounded in isolated areas" (paragraph 7.2.2) and it is evident that such distortion is bound to have an adverse effect on drainage characteristics of the roundabout. The report is more equivocal as to whether or not there was also damage to the basecourse. At paragraph 7.2.2 of the report it is noted that "there was no visual evidence of cracking or distortion to the basecourse" but at paragraph 7.4.2 it is suggested that distortion had occurred, not only to the wearing course but also "possibly the upper 20 to 50 mms of the stabilised basecourse".

73. Accordingly, the recommendation that was made in that paragraph was not nearly to remove the whole of the asphalt wearing course in areas that were cracked or distorted but also to "moisture condition and re-profile if necessary, the cement stabilised basecourse layer, then re-compact the surface with 6 passes of a heavy flat drum or rubber tyred roller".

74. The report contained the results obtained from digging some test pits. In the case of the [project 1site], it was found that the wearing course that was of a variable thickness, ranging from 20[2] mm to 90 mm, and that the basecourse thickness ranged from a 170 mm to 200 mm with possibly 340 mm thick basecourse intersected in test pit 8 (paragraph 7.2.2).

75. The contract required the basecourse, the sub base and the drainage to be replaced, and set out requirements as to finished levels which, I am satisfied, would have required the roundabout not to be susceptible to appreciable ponding. This is so notwithstanding that the contract contained some ambiguities on precisely what falls were to be achieved. The contract drawing number R10-1876 requires a fall of 2.5% towards the outer kerb, both at finished road level, and also at the level of the bottom of the basecourse. Similarly, the notes to the drawings on drawing number R10-1887 say under the heading "pavement":-

> 1. FOLLOWING EXCAVATION, AN EVEN GROUND SURFACE WITH A 2.5% CROSS FALL TO THE OUTSIDE KERB SHALL BE MAINTAINED EVERYWHERE. THIS SHALL FOLLOW BY WATERING AND COMPACTING.

76. Conversely, drawing R10-1884 refers to a variable fall. DS gave evidence, which I accept, that he was told orally to follow the line of the existing kerb, which was not being replaced – it is by no means obvious how this was to be reconciled with the absolute levels identified by the drawings. Be that as it may, I am satisfied that the contract as entered into required the Applicant to reconstruct the [project 1works] with such falls as would have avoided ponding. The Applicant could and should have laid the sub base, the basecourse and the asphalt course, each with the right falls (although in practice it may not have much mattered in practice if there have been minor variations in the levels of the lower courses which would have been corrected by fine tuning the depth of the asphalt course. It was not suggested to the contrary by the Applicant).

77. What is much less clear is what the effect of the post-contract reductions was in scope on this requirement.

78. It is obvious that the variations were documented badly. I have already referred at paragraph 45 above to Change order 5, which is obviously inaccurate in referring to the 50mm which had been varied to 40mm. It was put to me at the conference that this was merely a typographical error, but I do

[2] The figure given at paragraph 7.2.2 of the report is a range of 40mm to 90 mm. But it appears that this is probably a typographical error, because Table 2 at paragraph 5 on page 4 gives the asphalt depth as 20 mm for both trial pits 12 and 13, and the test pit logs attached to the report for TP 12 and 13 also identify a 20 mm depth. It may be that Douglas Partners were treating trial pits 12 and 13 on the [project 1 site] as different, because they were both on the approach roads, rather than on the [project 1 site] itself. In any event, it is clear that the report did find significant variable thickness in the wearing course.

not think that can be right. It is much more probable that the change from 50mm to 40 mm had simply been overlooked.

79. What was also overlooked was any attempt to define precisely which parts of the specification and drawing remained, and which were being lost. I have already decided that the requirement for compaction of the asphalt itself, at Clause 14.10.5, remained. But what of the requirements as to finished levels so as to achieve falls that would prevent ponding?

80. Before answering this question I should make clear that I do not wish this part of my reasoning to be treated as a damnation of the way that this contract was administered. In my experience of dealing with disputes arising out of road building[3] over the past 35 years, I have seen much less careful contract administration than this. It is not unusual or inappropriate for some aspects of what needs to be done to be resolved on site.

81. In my view, the removal of the basecourse etc work on [project 1site] meant that the stipulations as to finished levels were also being removed from the contract. If, instead of essentially reconstructing the whole of the road structure, the Applicant's task was simply to profile off the top 40 mm of the existing road surface, and replace it with 40 mm of new asphalt, then the result would be that the [works] will end up at more or less the same levels as before the work started. I use the expression "more or less" advisedly, since it is clear from the Douglas Partners Reports that there were pre-existing localised distortions in the pre-existing road surface, and the work as varied would have removed those local distortions, which would have caused relatively minor localised ponding. This is not to say, of course, that the result would be bound to lead to generalised ponding, but simply that the surface levels which the Respondent could legitimately expect following the variation was much more of a "hit or miss" matter than would have been the case if the contract work had remained unaltered.

82. The Applicant sought to persuade me from photographic evidence at the conference that certain darker patches on aerial photographs of the roads was evidence of pre-existing ponding. I was not convinced by this evidence, anymore than I was convinced by the Respondent's suggestion that the email from Mr Ben Langdon 9 January 2012, which I found behind Tab 9 of the Response, was convincing evidence that there was no pre-existing ponding. I prefer to reach my conclusion on the basis that the effect of the Contract Variation No. 5 was to remove from the contract requirements the stipulations as to finished levels which would have ensured that there be no ponding.

83. During the conference, AB on behalf of the Respondent sought to persuade me, albeit with some vacillation, that contract Change order 2 which I find behind Tab 6 of the Response, amounted

[3] Among the other types of construction and engineering disputes I have dealt with as a Construction Specialist Lawyer.

to the necessary instruction that the Applicant should have finetuned the depth of the asphalt course as necessary in order to prevent ponding. The line in question in that Change order reads as follows:-

1. ASPHALT CORRECTION COURSE – 12 TONNES AT $770.00 PER TONNE (INCL GST) $8,400.00.

84. I was not so persuaded for a number of reasons, and in particular:-

(a) The sequence is wrong. All the Change orders came late, but this one – is number 2, logically precedes Change order 5, which contained the reduction in scope. It would thus be entirely illogical for an earlier Change order to be construed as the "fine tuning" consequent upon a later Change order.

(b) The words of the Charge order itself come under the following introductory words:-

"Pursuant to Clause 40.1 of the above Contract, the Contract is hereby changed as follows: REMOVE PAVEMENT. The effect of this Change Order on the Contract Sum is set out hereunder and such effects are hereby accepted.

These words strongly suggest that the 12 tonnes of correction course being referred to here relate only to the item concerned with the removal of the sturated pavement, and not as a generalised item applicable to the whole of the [project 1 works].

(c) The quotation which preceded that contract Change order on the same day, and which I find one page further on under Tab 6, gives the reason for the variation as follows:-

"CORRECTION ASPHALT COURSE REQUIRED ON EXPOSED BASECOURSE BEFORE PLACEMENT OF WEARING COURSE."

Again, these words point to this Change order being concerned just with the relatively small localised area where the basecourse had been exposed by the 40m profiling (such limited areas having been foreshadowed by the Douglas Partners report, which identified that, in at least two areas, the pre-existing asphalt was merely 20mm thick, such that exposure of the basecourse was going to be the inevitable consequence of profiling 40mm of material).

85. Accordingly, I conclude that, on the balance of probabilities, the Respondent's requirement of 13 January 2011 to address the issue of water ponding on the western side of the [project 1 site] was not an instruction for the rectification of a defect for which the Applicant was liable, and accordingly the Applicant is entitled to treat it as a variation for which it is entitled to payment.

Quantum of Claim 2

86. The quantum of Claim 2 appears by the Applicant's Tax Invoice No. CM20113, which I find behind Tab 2 of the Adjudication Application documents.

87. The invoice is not well particularised. At the conference, the Applicant offered to provide me with further supporting material after the conference, but in my view, this was too late.

88. The first item claimed is for "contract services" in the sum of $6,064.80 plus GST. At the conference, I asked what this was, and was told by DS that it represented the cost of external assistance that he had sought from a person he preferred not to identify, but whose role is essentially that of Claims Consultant.

89. The terms of Clause 40.2 of the General Conditions of Contract as varied by Clause 2.10 of the Amendments to General Conditions of Contract are relatively unhelpful in formulating the valuation of variations where there are no applicable rates in a Schedule of Rates; the touchstone is such rate or price as the Superintendent shall consider reasonable. I disallow this first item on the basis that it is essentially cost incurred in pursuing this claim, rather than in doing the work.

90. As to the other items, I was told by DS that the items for [subcontractors] represent the actual cost of subcontracted services. It would have been more satisfactory if the supporting invoices had been produced in the first place, but nevertheless, I am prepared to allow them in full, as I do the two labour items, on the basis that there was nothing in any of the answers DS gave me to any of my other questions during the conference which gave me to believe me that he was being anything other than straight forward and honest in what he said.

91. In reaching this decision on Claim 2, I have in mind that the work done was not sufficient to entirely eradicate the problem. It prevented the ponding in the area identified, but, as DS said, it created a different problem of ponding further in to the centre of the roundabout. In other words, the work was necessary but not sufficient to eradicate the ponding problem.

92. Accordingly, I decide that the amount payable in respect of Claim 2 is as claimed except for the first item.

Claim 3 – The Merits

93. Claim 3 is rather different. It is common ground that on 20 October 2011, the Respondent directed further repairs, but the Applicant did not do any physical work on site in response to such direction. Instead, the parties engaged in communications evidencing a dispute as to responsibility for the work. The Applicant put in a quotation which was not accepted, and in the event, the Respondent had the work done by another Contractor.

94. The Applicant's claim is particularised – again poorly – in its Tax Invoice CM20114 in the total sum of $19,333.66, of which the largest item is again for "contract services" of $6,136.05 plus GST, again, as the Applicant acknowledged during the conference, for the costs of its claims consultant.

95. In my view, the whole of Claim No 3 is more to be characterised as costs incurred in relation to the dispute, and none of the costs relate to any work actually carried out on site by the Applicant. Accordingly, I disallow the whole of Claim No 3. Whether it is premature is thus irrelevant.

The Cross Claims

96. The Respondents have made 3 Cross Claims, which are set out at paragraph 67 of the Response:

(a) $3,003.99 (including GST) being the costs for bitumen testing for the SAMI Report, following arrangements documented in the Respondent's email of 24 January 2011 which I have behind Tab 4 of the Response documents.

(b) $26,223.01 (including GST) in respect of the cost of the eventual ponding fix[4]

(a) $1,957.22 (including GST) for the costs of conformance testing in relation to the ponding repair work.

97. It is, of course, perfectly possible under the Act for a principal to make a payment claim against a contractor for an amount in relation to the performance or non performance by the contractor of its obligations under a Construction Contract (Section 4 of the Act), and for a payment dispute under Section 8 to arise if that claim is disputed, and for the principal then to make an Application for Adjudication in respect of that dispute under Section 28. Subject to the provisions concerning simultaneous adjudication at Section 34(3) of the Act, such a claim can be dealt with in the same adjudication as a claim by a contractor against the principal, and in this case the respondent brings its cross claim both as a counterclaim, or alternatively as a set-off (paragraph 67 of the Response).

The Counterclaim

98. The counterclaim does not even begin to get off the ground, for the simple reason that the Respondent has not complied with the provisions of Section 28 for the purpose of getting an adjudication of its cross claim underway. It is not necessary for me to formally dismiss the counterclaim under Section 33, because there has never been an application to dismiss.

99. However, it is doubtful that anything of any great materiality hinges on this, because, given my decision in relation to the Applicant's claims, and my approach in relation to costs, the treatment

[4] The figure at paragraph 67(b) is clearly a typographical error – the correct figure appears from paragraph 63.

of the cross claims by way of set-off is essentially the same as if they had been brought by way of counterclaiming adjudication.

Set-Off

100. I am satisfied that, if and to the extent that the Respondent is entitled to a set-off against the amounts that would otherwise be due to the Applicant under the contract, then I should give effect to that set-off.

101. This is essentially because, under Section 33(1)(b) my essential task is to determine on the balance of probabilities that whether any party to the payment dispute is liable to make a payment to the other and the effect of a set-off, if established, is to reduce or extinguish such a liability. It is therefore necessary for me to consider each of the three cross claims in turn.

Cross Claim No. 1

102. The key document in relation to cross claim no.1 is the email from AB of the Respondent to KB of the Applicant of 24 January 2011, which appears at Tab 4 of the Response documents. This email follows differences between the parties as to the test results for the asphalt which had already been obtained. AB asked KB to arrange for samples to be taken from both [project sites]. It stipulated some conditions as to how that sampling should be done, and arrangements whereby the samples would be split into two, one half of the samples to be retained by the Respondent and the other by the Applicant. The email went on:

> "We will send the [Respondent's] sample away for independent testing to determine the products supplied.
>
> If the product is found to be conforming, [the Respondent] will pay for the testing, if the product is found to be non-conforming the cost of the testing will be borne by you, and we may seek further reduction in payment for the non-conforming product...."

103. It is evident that this proposal, insofar as it contained an offer, was accepted by the Applicant, because the samples were taken and were sent away for independent testing by SAMI Bitumen Technologies.

104. The SAMI results focus not only on the percentage of in situ voids, but also the quality of the bitumen. At paragraph 19 of the Response, the percentage of voids is recorded at 11.9%, which is not the whole story, because the result page which appears behind Tab 5 shows not only that void figure of 11.9% for [project 1], but the slightly better figure of 11% for [project 2]. Be that as it may, both of those figures are worse than the RMG results.

105. Accordingly, and applying the arrangement set out in AB's email of 24 January, the cost of this testing falls to be borne by the Applicant.

106. In any event, and in light of my decision on the Applicant's Claim 1 that the asphalt did fail to fulfil the requirements of the contract, I would in any event have treated the cost of this testing as deductible from the contract sum pursuant to the terms of Clause 31.8 of the General Conditions of Contract, as contended for the second sentence of paragraph 66 of the Response.

107. I accordingly decide that the sum of $3,003.99 including GST is deductible by the Respondent by way of set-off.

108. For the sake of completeness, I should say that I have in mind the terms of Clause 46 of the contract as deleted and replaced by Clause 2.13 of the Amendments to the General Conditions, whereby the Respondent has a contractual right of deduction. By "set-off" in this decision, I accordingly mean not only the right to deduct sums from the contract price pursuant to ordinary principles of law and equity, but also the contractual mechanism whereby such matters also operate to reduce the contract price itself. In practical terms, there is really no material difference for the purposes of this dispute between these mechanisms.

Cross Claim No. 2

109. The second cross claim is for the sum of $26,223.01 including GST, being the amount the Respondents paid to [a subcontractor], whose Tax Invoice appears behind Tab 14 of the Response.

110. The largest item particularised in that invoice is for the supplying and laying of 161m^2 of asphalt, and the second largest item is for 8.5 tonnes of additional asphalt described as "additional AC4 corrector". This analysis is consistent with the analysis that the Applicant having added some additional material in early 2011 to correct the initial ponding, this further quantity of asphalt needed to be added in order to deal with the subsequent ponding which consequentially occurred further in towards the centre of the roundabout.

111. Had the original scope of the [project 1] work not been reduced, this work would properly be regarded as work needed to correct a defect in the Applicant's work. However, but for the reasons which I have set out in relation to the Applicant's Claim No. 1, I am not of the opinion that the Applicant was, following the reduction in scope, liable for failing to achieve the originally specified levels. Accordingly, I reject Cross Claim No. 2.

Cross Claim No. 3

112. Cross Claim 3 is for the sum of $1,957.22 including GST, being the cost of conformance testing in respect of the "urgent repair works". This amount appears from the Tax Invoice of RMG provided to me behind Tab 13 of the documents provided with the Response.

113. To some degree, this item is in the nature of costs, in the sense that the report on the asphalt provides figures for the voids of 4.8%, 4.2% and 6.4%, are all of which are compliant with the

specification requirements at Clause 14.10.5 of the Specification. The report thus supports the Respondent's position that it was perfectly possible to achieve the compaction requirements of the Contract. Insofar as this testing is to be so characterised, I decline to allow it for the reasons set out below in relation to costs.

114. Insofar as the testing is regarded as simply a part of the cost of the work covered by Claim No. 2, I reject it for the same reasons as set out in relation to Claim No. 2.

Interest

115. I am empowered by section 35 of the Act to award interest. I decline to do so, for two reasons:

116. First, the only one copy of the Applicant's claim that I have decided is payable is poorly particularised: no adequate details of it were given the Respondent until the conference on 20th January 2012. Whilst it might have been open to the Respondent to have requested more details of it, it is understandable why they did not do so, I do not think it can reasonably have been said that the Respondent's failure to certify and pay Claim 2 was unreasonable, either before or after the delivery of the claim for it.

117. Secondly, even if I were to award interest for the last few weeks[5], the award would be a small one, and in my view a reasonable and pragmatic approach is treat any small amount of interest that I might otherwise have awarded as balanced by any adjusting decision I might otherwise have made under section 46(9) to allow for the fact that the Respondent booked and paid for the cost of the hotel room that was required for the night following the conference (and, for that matter, provided the venue for the conference itself). These sums in question are small, and approximately balance.

118. As to interest under the Contract, I have in mind the contractual provision at Clause 42.1 as amended by 2.12 of the Amendments to the General Conditions, in light of which interest is not due under the Contract.

119. I have considered whether it would be appropriate to add interest to the relatively small amount that I have decided that the Respondent is entitled to by way of set-off in respect of Cross Claim No. 1.

120. I do not think that I am empowered to award interest on this amount under Section 35 of the Act, because it has not been the subject of an Adjudication Application (see above). Neither has any claim been made in the Response for interest on this small sum. I note that there was a suggestion made by the Respondent at the time in correspondence that, if it issued proceedings to recover that

[5] In its further submission at paragraph 1.13, the Applicant puts the due date as 3rd October 2011.

amount, it would claim interest thereon, but no such proceedings have been identified and in any event I would not have the power to award interest that might have been due in such proceedings under the applicable Court Rules.

121. Accordingly, I do not augment the set-off that I have allowed in respect of interest. For the sake of completeness, I add that, taking all the circumstances in to account, including the factor that I have not allowed interest on the Applicant's Claim No. 2, I would not regard it as just or reasonable to add interest to the amount that I have allowed by way of set-off.

Calculation of Total Amount Payable

122. Pulling the threads together, the total amount payable by the Respondent to the Applicant is accordingly $17,919.55 calculated as follows:-

Applicant's Invoice CM20113	
Total ex GST	$25,086.20
Less first item disallowed	$6,064.80
Balance ex GST	$19,021.40
GST thereon	$1,902.14
Balance including GST	$20,923.54
Less Crossclaim 1	$3,003.99
Amount due	$17,919.55

123. This figure includes GST. It is not necessary for me, nor within my power, to make any order with regard to tax invoices, but it follows from this Determination that the parties should issue such credit notes or tax invoices as are appropriate to reflect this decision.

Costs

Costs of the Parties

124. Prima facie, the parties to a dispute bear their own costs in relation to the adjudication of a dispute (Section 36(1) of the Act).

125. I am not satisfied that has been any frivolous or vexatious conduct on the part of either party within the meaning of section 36(2). On the contrary, I have found both parties to have been straightforward in their submissions, both in writing and during the conference. And whilst I have not accepted all of the submissions put to me, I do not regard any of the submissions as so unfounded as to trigger a section 36(2) decision that either party should pay any part of the other party's costs.

126. Accordingly, I make no decision that either party should pay any part of the other party's costs; they must each bear their own.

Alternative Procedures

127. I have noted what the Respondent has said concerning the availability of alternative procedures that might have been available to resolve this dispute. However, the Applicant has the right under the Act to bring this Application, regardless of the dispute resolution mechanism contained within the contract, and so I do not regard this as a factor which should prevent me from dealing with this Application on its merits, nor do I regard it as a factor that is material for the purpose of costs.

Costs of the Adjudication

128. The parties are jointly and severally liable to pay my costs at the relevant rate and the expenses I have incurred (section 46(4) and (1A)). The relevant rate is $400 per hour plus GST and expenses, being my rate published under section 55 of the Act and as agreed by the parties.

129. My costs in this case are somewhat higher than might be typical than in a single issue dispute about $90K. This is partly because this is adjudication has involved three separate disputes, together with jurisdictional issues and a 3 part cross claim, but more significantly because of the cost and expense involved in the conference. I initially proposed to the parties that that conference should be by telephone or Skype, which would have added little to the cost, but both parties asked that the conference should be in person, and in Darwin, thereby necessitating me to travel to Darwin[6] and hence stay overnight in a hotel. In the event, the conference, which lasted for some 3 hours, was all the more useful for being in person, and because of the informal nature of the process, we were able to cover the ground that might more likely have taken very much longer in a court or traditional arbitration environment.

130. My costs and expenses are as follows:

Costs of the adjudication

		GST	Total
Number of hours spent	41.35		
Hourly rate	$400.00		
Adjudicator's fee	$16,540.00	$1,654.00	$ 18,194.00
Air fare	$3,005.18	$300.52	$ 3,305.70
Taxi fares to & fro in Darwin	$50.00	$5.00	$ 55.00
			$ 21,554.70

[6] I had explained to the parties that I would not be prepared to make that journey in economy class.

Payable by Applicant	$ 10,777.35
Payable by Respondent	$ 10,777.35
	$ 21,554.70

131. As between themselves, the parties are liable to pay these costs in equal shares (section 46(5)). Neither party has paid any part of these costs so far, and so I make no decision under section 46(9)[7]

_____

Robert Fenwick Elliott
Adjudicator
24 January 2012

[7] See paragraph 117 above in relation to the cost of the hotel room.