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Pursuant to the

*Construction Contracts (Security of Payments) CCA 2004*

Adjudication Number	<b>35.14.06</b>
Prescribed Appointor	<b>RICS Dispute Resolution Service</b>
Adjudicator	<b>John Tuhtan<sup>1</sup></b>
Applicant:	
Respondent:	
Project:	
Amount to be paid by Respondent	<b>\$156,729.95 including GST</b>
Due date for payment	<b>Within 7 days of release of determination</b>
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	2 January 2015
Payment Claim	Claimed Amount : <b>\$161,317.81</b> including GST Dated : 25 October 2014
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : None provided
Adjudication Application	Dated: 4 December 2014
Adjudicator Acceptance	Dated: 5 December 2014
Adjudication Response	Dated: 17 December 2014

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<sup>1</sup> Registered Adjudicator Number 35

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## DETERMINATION

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- 1) I, John Tuhtan<sup>2</sup>, the adjudicator appointed pursuant to section 30(1)(a) of the Construction Contracts (Security of Payments) Act (NT) (CCA), for the reasons set out below, determine that:
  - a) The amount to be paid by the respondent to the applicant is \$156,729.95 including GST.
  - b) Interest is due on the adjudicated amount at a rate of 8.5% per annum from 23 November 2013.
  - c) The respondent is to pay the adjudicated amount to the applicant within 7 days of the date of the determination being released.

## BACKGROUND

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- 2) The application arises from an unpaid payment claim made by the applicant on the respondent under section 8(a) of the CCA for construction work carried out under a construction contract at the [redacted] (**Project**).

## APPOINTMENT OF ADJUDICATOR

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- 3) Pursuant to section 28(1)(c)(iii) of the CCA, the applicant served its adjudication application on the RICS Dispute Resolution Service, which is a prescribed appointor under the CCA.
- 4) The adjudication application was referred to me as adjudicator on 5 December 2014 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the CCA.
- 5) The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 5 December 2014.

## DOCUMENTS

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- 6) The following documents were provided to me:
  - a) Adjudication application submissions dated 4 December 2014 on 6 December 2014; and
  - b) Adjudication response dated 17 December 2014 on the same date.

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<sup>2</sup> Registered Adjudicator Number 35

## JURISDICTION

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- 7) The parties entered into a contract, referenced 'Subcontract No. TP012 [works and project details redacted] (**Contract**) or about 22 April 2014. The Contract was entered into after the commencement of section 9 of the CCA.
- 8) The work carried out under the Contract is '*construction work*' as defined in section 6(1) of the CCA.
- 9) Accordingly, the Contract is a construction contract as defined in section 5(1) of the CCA and the CCA applies to disputes arising under the Contract.
- 10) Pursuant to section 27 of the CCA, the applicant is a party to the Contract under which the payment dispute has arisen and is, therefore, entitled to apply to have the dispute adjudicated.
- 11) I am not aware of any unresolved application for adjudication or order, judgment or finding by an arbitrator or court dealing with a matter arising under the Contract as referred to in sections 27(a) or 27(b) of the CCA.
- 12) I am, therefore, satisfied that I have jurisdiction to determine the adjudication application pursuant to the CCA.

## PAYMENT CLAIM (PROGRESS CLAIM NO. 5)

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- 13) The applicant served the respondent with Progress Claim No. 5 on 25 October 2014 (payment claim), which was the payment claim for the purposes of the CCA. The payment claim was comprised of 2 parts as follows:
  - a) '*Original Contract Works*' in the amount of \$30,044.00 excl. GST.
  - b) '*Approved Variations*' in the amount of \$116,608.55 excl. GST. The claim for approved variations were stated as follows:

Reference	Description	Total amount claimed	
VO 02	Additional cable support system	\$9,377.69	
VO 03	FAT testing	\$29,000.84	
VO 04	FAT testing	\$20,077.04	
VO 05	Additional ADR	\$2,820.00	
VO 06	Changing Rubber gaskets to fibre gaskets	\$85,149.25	

VO 07	FIP program changes	\$2,625.00	
[redacted]		\$7,433.80	
VO 08	Install additional 2 x fire hydrant stand - pipes	\$2,062.00	
VO 09	Shutdown services provided	\$2,520.00	
VO 10	Labour capture for wrong valves	\$12,223.20	
VO 11	Additional leaking trim	\$1,340.30	
VO 12	Fault finding	\$840.00	
VO 13	Delay damages	\$5,040.00	
	<b>TOTAL 'APPROVED VARIATIONS' CLAIMED</b>	<b>\$116,608.55</b>	

- 14) The total amount claimed to date under the Contract is \$705,359.24 excl. GST and the payment claim is for the amount of \$146,652.55 excl. GST.

#### **PAYMENT CERTIFICATE**

- 15) The respondent received the applicant's payment claim on 25 October 2014 and issued a payment certificate referenced 'Certificate No. 8' pursuant to clause 12.7 of the Contract on 1 December 2014. The payment certificate was comprised as follows:
- a) Original Contract Works, the Applicant claimed \$30,044 excl. GST and the Respondent certified \$30,944.00 excl. GST. There is no dispute in relation to this part of the payment claim.
  - b) '*Approved Variations*' in the amount of \$116,608.55 excl. GST. Respondent certified \$56,585.28 excl. GST as follows:

Reference	Description	Total amount claimed	Total amount certified
VO 02	Additional cable support system	\$9,377.69	\$0.00
VO 03	FAT testing	\$29,000.84	\$29,000.84

VO 04	FAT testing	\$20,077.04	\$20,077.04
VO 05	Additional ADR	\$2,820.00	\$2,820.40
VO 06	Changing Rubber gaskets to fibre gaskets	\$85,149.25	\$0.00
VO 07	FIP program changes	\$2,625.00	\$2,625.00
[redacted]		\$0.00	\$0.00
VO 08	Install additional 2 x fire hydrant stand - pipes	\$2,062.00	\$2,062.00
VO 09	Shutdown services provided	\$2,520.00	\$0.00
VO 10	Labour capture for wrong valves	\$12,223.20	\$0.00
VO 11	Additional leaking trim	\$1,340.30	\$0.00
VO 12	Fault finding	\$840.00	\$0.00
VO 13	Delay damages	\$5,040.00	\$0.00
	<b>TOTAL 'APPROVED VARIATIONS' CERTIFIED</b>		<b>\$56,585.28</b>

- 16) The payment certificate referenced 'Certificate No. 8' that was issued pursuant to clause 12.7 of the Contract and also indicated 2 set-off amounts referenced:
- a) VO 5 for works undertaken on behalf of the applicant in the amount of \$144,736.71 excl. GST; and
  - b) VO 6.1 for works undertaken on behalf of the applicant in the amount of \$103,305.69 excl. GST.
  - c) The respondent, however, has not considered the back charges in determining the amount of the payment claim that it proposed to pay and the back charges are not relevant to this determination.
- 17) The respondent issued a further payment certificate referenced 'Certificate No. 9' pursuant to clause 12.16 of the Contract on 10 December 2014, which purported certified further claims that had previously been rejected in 'Certificate No. 8'. The payment certificate was comprised as follows:
- a) 'Approved Variations' in the amount of \$116,608.55 excl. GST. Respondent

certified \$91,576.08 excl. GST as follows:

Applicant's Reference	Respondent's reference	Description	Total amount claimed	Total amount certified in Certificate No. 9
VO 06		Changing Rubber gaskets to fibre gaskets	\$21,400.00	\$21,400.00
[redacted]		Install additional 2 x fire hydrant stand - pipes	\$4,961.30	\$4,961.30
VO 08	VO2.1	Shutdown services provided	\$2,062.00	\$2,062.00
VO 09	VO4.2	Shutdown services provided	\$2,520.00	\$2,520.00
VO 10	VO7.1	Labour capture for wrong valves	\$3,929.20	\$3,929.20
VO 11	VO4.3	Additional leaking trim	\$1,340.30	\$1,340.30
VO 12	VO4.4	Fault finding	\$840.00	\$840.00
VO 13		Delay damages	\$5,040.00	\$0.00
		<b>TOTAL 'APPROVED VARIATIONS' CERTIFIED</b>		<b>\$34,990.80</b>

- 18) In summary, the applicant claimed \$146,652.55 excl. GST and the respondent has certified the value of the work completed the subject of the payment claim as \$122,520.08 excl. GST.
- 19) The payment certificate referenced 'Certificate No. 9' that was issued pursuant to clause 12.7 also indicated 2 set-off amounts referenced:
- a) VO 5 for works undertaken on behalf of the applicant in the amount of \$144,736.71 excl. GST; and
  - b) VO 6.1 for works undertaken on behalf of the applicant in the amount of

\$103,305.69 excl. GST.

- c) The respondent, however, has not considered the back charges in determining the amount of the payment claim that it proposed to pay and the back charges are not relevant to this determination.

## DATE OF PAYMENT DISPUTE

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- 20) The applicant submitted its payment claim on 4 December 2014.
- 21) The respondent argues that pursuant to the Contract, the Reference Date was 25 November 2014 and, therefore the due date for payment was 9 January 2015.
- 22) The respondent further submits that as the due date for payment is 9 January 2015 and, pursuant to section 8 of the CCA, there can be no dispute in relation to the payment claim. The respondent further submits that in this context I have no jurisdiction to decide the application for adjudication.
- 23) Specifically, at paragraphs 27 to 30 of the submissions to the adjudication response, the respondent asserts that the applicant's payment claim was void because;
  - a) it failed to lodge its payment claim on 20 October 2014; and
  - b) because it failed to provide certain information required pursuant to Clause 12.6 of the Contract.
- 24) I have determined whether or a payment dispute under the CCA arose in relation to the payment claim as follows.
- 25) Clause 1.1 of the Contract states:

*'Reference Date means the date when the Subcontractor may submit a Payment Claim to [the Respondent] in accordance with clause 12.6 and Schedule A, and has the same meaning as defined in the Security of Payment Act.'*

Reference Date is not defined or used in the relevant Security of Payment Act, which is the CCA.

- 26) Clause 12.6 of the Contract states:
  - 'The Subcontractor may submit a Payment Claim to [the respondent] only on each Reference Date. The Subcontractor warrants to [the respondent] that Payment Claims will: [Emphasis added]*
    - (a) *be calculated for the periods and/or by the method and within the*



*times required by Schedule A and clause 12.13;*

- (b) be in the format [the respondent] requires including the provision of a statutory declaration as required under clause 12.17;*
- (c) be delivered to the [the respondent's] Project Manager or such other nominated person;*
- (d) include the evidence reasonably required by [the respondent] of the value of work completed in accordance with the Subcontract and the amount claimed;*
- (e) set out the total value of work completed in accordance with the Subcontract to the date of the Payment Claim, the amount previously paid to the Subcontractor and the amount then claimed;*
- (f) be delivered only if the conditions precedent to the Subcontractor's entitlement to make a Payment Claim are satisfied; and*
- (g) not include any claims which are barred by clause 16.3 or otherwise .*

*The Subcontractor warrants and represents that if a Payment Claim does not comply with the conditions set out in this clause 12.6: [Emphasis added]*

- (h) that Payment Claim is void; and*
- (i) the Reference Date for the purposes of the Security of Payment Act shall be the same day on the following month.'*

27) Furthermore, Schedule A to the Contract states:

*Reference date  
(Clause 1.1, 12.6, 12.13 and  
13.2(a))*

*(i) Up to Completion, on the twentieth day of each month;*

*(ii) On the receipt of a Completion notice (clause 13.2(a)); and*

*(iii) On the submission of a Final Payment Claim (clause 12.13)*

*Payment Claims  
(Clause 12.6(a))*

*Payment Claims shall be submitted on the twentieth day of each month*

*Payment Schedules  
(Clause 12.7)*

*Payment Schedule to be given within the number of days set out in the Security for Payment Act of receiving a Payment*

*Payment  
(Clause 12.8)*

*Claim.*

*Payment to be made within 45 days of the date of the Payment Claim or the number of days required by the Security of Payments Legislation whichever requirement is the earlier.*

- 28) The first paragraph of Clause 12.6 makes it clear that the applicant may submit a Payment Claim to the respondent only on each Reference Date. Clearly, the applicant failed to submit its payment claim on 20 October 2014 (the Reference Date) and I will consider the consequences of this breach below.
- 29) The respondent has not identified the information required under Clause 12.6 that the applicant failed to provide with its payment claim, which supposedly rendered the payment claim void.
- 30) Accordingly, I will consider below, whether the payment claim provided the information required by Clauses 12.6(a) to 12.6(g).
- 31) Clause 12.6(a) of the Contract requires payment claims to be for work completed during a period specified in Schedule A and Clause 12.13 and the value of that work to be calculated by a method specified in Schedule A and Clause 12.13 of the Contract. Unfortunately, neither Clause 12.13 nor Schedule A specify the periods of work that relate to any Reference Date nor do they state the method of calculating the value of the completed work.
- 32) The payment claim was for work carried out in the month of October 2014 and as there is nothing in the Contract preventing a claim for that period of time, I determine that the payment claim complied with Clause 12.6(a) of the Contract.
- 33) Clause 12.6(b) requires the payment claim to be in a certain format as required by the respondent and provide a statutory declaration in accordance with Clause 12.17 of the Contract.
- 34) The respondent provided a comprehensive response, but did not assert or provide any evidence that the payment claim did not comply with Clause 12.6(b) of the Contract. I determine that the payment claim complied with Clause 12.6(b) of the Contract.
- 35) Similarly, Clauses 12.6(c), 12.6(d), 12.6(f) and 12.6(g) require the applicant to comply with certain provisions of the Contract.
- 36) The respondent provided a comprehensive response, but did not assert or provide any evidence that the payment claim did not comply with Clauses 12.6(c), 12.6(d), 12.6(f) and 12.6(g) of the Contract. I determine that the payment claim complied with Clauses 12.6(c), 12.6(d), 12.6(f) and 12.6(g) of the

Contract.

- 37) Clause 12.6(e) requires the payment claim set out the total value of work completed in accordance with the Subcontract to the date of the Payment Claim, the amount previously paid to the Subcontractor and the amount then claimed.
- 38) The payment claim set out the total value of work completed in accordance with the Subcontract to the date of the Payment Claim, the amount previously paid to the Subcontractor and the amount then claimed. I determine that the payment claim complied with Clause 12.6(e) of the Contract.
- 39) I have determined the consequences of the applicant failing to submit its payment claim on 20 October 2014 as follows.
- 40) Clause B of the Background to the Contract states:

*'The Subcontractor has tendered to perform the Works which form part of the Head Contract Works in accordance with the terms and conditions of this Subcontract.' [Emphasis added]*

- 41) Clause B refers to terms and conditions but provides no definitions as to which provisions of the contract are terms or which are conditions nor as to the consequences of the breach of a term or of a condition.
- 42) Clause 12.6 of the Contract states:

*'The Subcontractor warrants to [the Respondent] that Payment Claims will:*

*(a) be calculated for the periods ...;*

*...*

*The Subcontractor warrants and represents that if a Payment Claim does not comply with the conditions set out in this clause 12.6:*

*(h) that Payment Claim is void; and*

*(i) the Reference Date for the purposes of the Security of Payment Act shall be the same day on the following month.'*

- 43) The Contract makes it clear that Clauses 12.6(a) to 12.6(i) are of particular importance. Specifically, the Contract distinguishes the Subcontractor's obligations set out in Clauses 12.6(a) to 12.6(i) from the other obligations under the Contract by requiring the applicant to provide a warranty to the effect that it will comply with Clauses 12.6(a) to 12.6(g) and if it does not, then it warrants that the payment claim is void and that it will not be entitled to make a payment

claim until the following month.

- 44) Accordingly, I construe Clauses 12.6(a) to 12.6(g) to be the conditions referred to in the second paragraph of Clause 12.6, which have certain consequences in the event of a breach, which are set out in Clauses 12.6(h) and 12.6(i). I further construe other parts of Clause 12.6 to be terms of the Contract with consequences that may be ascertained from other clauses of the Contract or that may give the respondent a right to payment of damages.
- 45) I read clause 12.6 of the Contract, therefore, as:
- a) containing a term of the Contract, which is that *'The Subcontractor may submit a Payment Claim to [the Respondent] only on each Reference Date.'*; and
  - b) containing conditions that are set out in clauses 12.6(a) to 12.6(g), which if any are breached, have the consequences set out in clauses 12.6(h) and 12.6(i).
- 46) For the above stated reasons, I do not consider that the applicant's failure to submit a payment claim on the 20 October 2014 enlivened the warranties provided under clauses 12.6(h) and 12.6(i) and entitle the respondent to consider the payment claim as being void.
- 47) On my construction of clause 12.6 and Schedule A to the Contract, if the applicant failed to submit its payment claim on 20 October 2014, the respondent;
- a) must to provide a payment schedule *'within the number of days set out in the Security for Payment Act of receiving a Payment Claim.'*; and [Emphasis added]
  - b) must pay the applicant the undisputed amount *' within 45 days of the date of the Payment Claim or the number of days required by the Security of Payments Legislation whichever requirement is the earlier.'* [Emphasis added]
- 48) Accordingly, I do not accept that the payment claim was void because it was submitted on 25 October 2014.
- 49) I have, therefore, calculated the date of the payment dispute as follows.
- 50) Section 20 of the CCA states:
- 'The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:*

(a) *when and how a party must respond to a payment claim made by another party;*

(b) *by when a payment must be made.'*

51) There is nothing in the Contract that states the time by which the respondent must provide to the applicant a response to the applicant's payment claim save for Schedule A of the Contract, which refers to the time required under the CCA.

52) Division 5 of the Schedule A of the CCA states:

*'Responding to payment claim by notice of dispute or payment*

(1) *This clause applies if:*

(a) *a party receives a payment claim under this contract; and*

(b) *the party:*

(i) *believes the claim should be rejected because the claim has not been made in accordance with this contract; or*

(ii) *disputes the whole or part of the claim.*

(2) *The party must:*

(a) *within 14 days after receiving the payment claim:*

(i) *give the claimant a notice of dispute; and*

(ii) *if the party disputes part of the claim – pay the amount of the claim that is not disputed; or*

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

(3) *The notice of dispute must:*

(a) *be in writing; and*

(b) *be addressed to the claimant; and*

(c) *state the name of the party giving the notice; and*

- (d) *state the date of the notice; and*
  - (e) *identify the claim to which the notice relates; and*
  - (f) *if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and*
  - (g) *if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and*
  - (h) *be signed by the party giving the notice.*
- (4) ...'

- 53) The respondent was required to provide its response to the payment claim within 14 days after the date that the payment claim was submitted, which is 8 November 2014 (25 October +14 days is 8 November).
- 54) The respondent failed to provide its response by 8 November 2014 and because there is no provision in the Contract in relation to such failure, Division 5 of the Schedule to the CCA is implied into the Contract.
- 55) Accordingly, the respondent was required to pay the whole of the amount claimed within 28 days of the date of the payment claim, which is 22 November 2014 (25 October 2014 + 28 days is 22 November).
- 56) The payment claim was due to be paid on 22 November 2014<sup>3</sup>, which is the date that the payment dispute arose for the purposes of this determination.
- 57) As the respondent failed to provide its response within the time required by Division 5 of the Schedule to the CCA, the respondent is deemed not to have returned any payment schedule that is material to this determination.
- 58) In other words, to the extent that the respondent provided reasons for withholding payment in its payment schedules, the effect of section 2(b) of Division 5 of the Schedule to the CCA is that I am not permitted to consider those reasons in making this determination.
- 59) Notwithstanding the operation of section 2(b) of Division 5 of the Schedule to the CCA, the applicant must have a prima facie entitlement to payment for the payment pursuant to section 4 of the CCA. Accordingly, I have considered the

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<sup>3</sup> Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd [2012] NTSC 22 at 20.

admissions and certain documents provided by the applicant and the respondent to determine that prima-facie entitlement.

## **APPLICATION FOR ADJUDICATION**

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- 60) Section 28(1) of the CCA entitles an applicant to make an application for adjudication of a payment dispute within 90 days of the occurrence of the payment dispute.
- 61) For the reasons set out above in paragraphs 20) to 56), I have determined that the payment dispute arose on 22 November 2014.
- 62) The applicant applied for adjudication of the payment dispute on 4 December 2014, which is within the time permitted by and in accordance with section 28(1) of the CCA. Specifically;
  - a) The application is in writing as required by section 28(1)(a) and 28(2) of the CCA.
  - b) The application was served on the respondent on 4 December 2014, pursuant to section 28(1)(b) of the CCA.
  - c) The application was served on RICS Dispute Resolution Service on 4 December 2014, pursuant to section 28(1)(c)(iii) of the CCA.
  - d) The adjudicator requested the claimant and the respondent to each provide \$3,000.00 deposit as security for the costs of the adjudication.
- 63) I am, therefore, satisfied that the adjudication application satisfies the requirements of section 28 of the CCA.

## **ADJUDICATION RESPONSE**

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- 64) The applicant served the application for adjudication on the respondent on 4 December 2014.
- 65) Pursuant to section 29(1) of the CCA, the respondent has 10 working days after the date on which it is served with an application for adjudication to prepare and serve its written response on the adjudicator and the applicant. In other words, the respondent had until 18 December 2014 to submit its response to the application for adjudication (4 December + 10 working days is 18 December 2014).
- 66) The respondent served its adjudication response on the applicant on 17 December 2014.
- 67) I am satisfied, therefore, that the respondent served its response within the

timeframes prescribed in the CCA.

## **JURISDICTIONAL CHALLENGES RAISED BY THE RESPONDENT IN THE RESPONSE**

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- 68) In the response, the respondent raised a number of jurisdictional challenges and asserts that I would be acting in excess of jurisdiction if I make a determination on an application on the merits without first being satisfied both reasonably and upon a correct understanding of the law that the criteria in section 33(1)(a)(i)-(iv) have been satisfied.
- 69) A summary of the respondent's jurisdictional challenges is as follows:
- a) *'The Application received by the Respondent did not contain a copy or extracts of the construction contract'* and, therefore, does not comply with the requirements of section 28 of the CCA.
  - b) *'The Applicant's adjudication application was premature, in that it was made before the appropriate time for payment under the Subcontract and before the Respondent had finalised its position regarding the October Claim.'*
- 70) Section 28 of the CCA states:
- (1) *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 for by section 39(2)(b):*
    - (a) *prepare a written application for adjudication; and*
    - (b) *serve it on each other party to the contract; and*
    - (c) *serve it on:*
      - (i) *...*
      - (ii) *if the parties to the contract have appointed a prescribed appointer – the appointer; or*
      - (iii) *...; and*
    - (d) *provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).*
  - (2) *The application must:*
    - (a) *be prepared in accordance with, and contain the information prescribed by, the Regulations; and*



- (b) state the details of or have attached to it: [Emphasis added]
  - (i) the construction contract involved or relevant extracts of it; and
  - (ii) any payment claim that has given rise to the payment dispute; [Emphasis added] *and*
- (c) *state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.*

- 71) The application:
- a) was prepared in accordance with and contained the information prescribed by the Regulations;
  - b) was served on the respondent and the appointer within the times prescribed by the CCA;
  - c) stated the details of the construction contract involved and contained the payment claim that gave rise to the dispute and provided the information, documents and submissions on which the applicant relied in making the application for adjudication;
  - d) had attached to it a USB stick with an electronic copy of the Contract; and
  - e) provided its submissions in support of the payment claim;
- 72) At paragraph 10 of the submissions to the response, the respondent states;
- '...The application received by the respondent did not contain a copy or extracts of the construction contract. Please refer to the statutory declaration of [Mr A].'*
- 73) At paragraph 4 of the sworn statement of [Mr A] of the respondent, he states;
- 'On or about 4 December 2012, I received an email from [Ms B] on behalf of [the Applicant] attaching [the Applicant's] Adjudication Application and supporting documentation, Now attached and marked PDL1 is a copy of the email and the attachments.*
- 5. No paper copies as referred to in the email have been received by [the Respondent].'*
- 74) The email referred to by [Mr A] in the above paragraph was addressed to the appointer was sent on 4 December 2014 and stated;

*'Good morning Alison*

*Please find attached a new application for lodgement.*

*Please note that the respondent is being cc'd in on this correspondence. All paper copies (including a USB stick with a copy of the full contract) will be forwarded in due course.'*

- 75) I note that [Mr A] states that he received no paper copies of the application for adjudication.
- 76) Section 28(2) of the CCA states:
- '(2) The application must:*
- (a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and*
  - (b) state the details of or have attached to it:*
    - (i) the construction contract involved or relevant extracts of it; and*
    - (ii) any payment claim that has given rise to the payment dispute; and*
  - (c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.'*
- 77) On 5 December 2014, I received a paper copy of the application for adjudication disclosed by [Mr A] together with a USB Stick that contained (in electronic form) a copy of the Contract.
- 78) The application for adjudication that I received satisfied all of the requirements of section 28 of the CCA. Notwithstanding that I received a copy of the Contract, the application for adjudication stated sufficient details of the construction contract to enable me to confirm that it was related to the payment claim.
- 79) Accordingly, I reject the respondent's assertion because the application received by the respondent stated the details of the construction contract and satisfied the other requirements of section 28 of the CCA.
- 80) For the reasons set out above in paragraphs 20) to 63), I am satisfied that the application for adjudication was made in accordance with section 28 of the CCA and, accordingly, I reject the respondent's assertion that the application was made before the permitted time specified by the CCA.

## REASONS FOR THE DETERMINATION

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- 81) Pursuant to section 34 of the CCA, I have considered the following matters in making this determination:
  - a) the adjudication application and its attachments; and
  - b) the response and its attachments.
- 82) The respondent failed to provide a notice of dispute in accordance with Division 5 of the Schedule to the CCA, which is a term implied in the Contract by the operation of law for the reasons set out above in paragraphs 50) to 53).
- 83) Accordingly, the respondent became liable to pay the whole of the amount claimed on 22 November 2014.
- 84) Notwithstanding the respondent's liability, the applicant is only entitled to payment for work carried out under the Contract. Accordingly, provided the payment claim relates to work the applicant was required to perform under the Contract, then the applicant's assertion that the claimed work was completed will be sufficient evidence for me to determine the applicant's entitlement pursuant to Division % of the Schedule to the CCA.
- 85) Accordingly, I have only considered the respondent's response to the extent that it contained acceptance of the applicant's claims or evidence that the work the subject of the payment claim was work under the Contract.

- 86) In the adjudication response, the respondent has accepted certain parts of the payment claim as follows:

<b>Applicant's Reference</b>	<b>Respondent's reference</b>	<b>Description</b>	<b>Total amount claimed</b>	<b>Total amount certified</b>
<b>Original Contract Works</b>				
Original Contract Works			\$30,044.00	\$30,944.00
<b>Approved Variations</b>				
VO 02		Additional cable support system	\$9,377.69	\$0.00
VO 03	VO 3.1	FAT testing	\$29,000.84	\$29,000.84
VO 04	VO 1.3	FAT testing	\$20,077.04	\$20,077.04
VO 05	VO 1.1	Additional ADR	\$2,820.00	\$2,820.40
VO 06	VO 8.1	Changing rubber gaskets to fibre gaskets	\$85,149.25	\$21,400.00
VO 07	VO 1.2	FIP program changes	\$2,625.00	\$2,625.00
[redacted]		Install additional 2 x fire hydrant stand - pipes	\$7,433.80	\$4,961.30
VO 08	VO 2.1	Shutdown services provided	\$2,062.00	\$2,062.00
VO 09	VO 4.2	Shutdown services	\$2,520.00	\$2,520.00

		provided		
VO 10	VO 7.1	Labour capture for wrong valves	\$12,223.20	\$3,929.90
VO 11	VO 4.3	Additional leaking trim	\$1,340.30	\$1,340.30
VO 12	VO 4.4	Fault finding	\$840.00	\$840.00
VO 13		Delay damages	\$5,040.00	\$0.00
		<b>TOTAL excl. GST</b>	<b>\$146,652.55</b>	<b>\$122,520.78</b>

- 87) The payment certificate referenced 'Certificate No. 8' that was issued pursuant to clause 12.7 also indicated 2 set-off amounts referenced:
- a) VO 5 for works undertaken on behalf of the applicant in the amount of \$144,736.71 excl. GST; and
  - b) VO 6.1 for works undertaken on behalf of the applicant in the amount of \$103,305.69 excl. GST.
- 88) At paragraph 47 to 49 of the response to the application for adjudication, the respondent has advised me that the validity of its back charges referred to in above paragraph 87) are the subject of a separate Adjudication (reference 30-14-01) before Damien Michael. The respondent submits that *'such back charges have not been taken into consideration in the Respondent's certification of the Applicant's October Claim.'*
- 89) Accordingly, I have not considered the respondent's back charges in this determination.
- 90) The following items claimed are the only items that remain in dispute.

## VO 02 - ADDITIONAL CABLE SUPPORT SYSTEM

- 91) In relation to the item referenced; VO O2 in the above table;
- a) the payment claim identified this work as; 'VO O2 additional cable support system from cable tray' for the amount \$9,377.69 excl. GST.
  - b) Neither of the respondent's payment schedules refer to this claim.
  - c) The statement of [Mr. C], which is attached to the respondent's response to the application for adjudication, states that on 11 March 2014, [Mr C] sent an email to [Mr. D] of the applicant regarding the inclusion of certain cable

ladders in the applicant's contract sum.

- d) The applicant has provided me with no submissions on this claim in its application for adjudication and the respondent has provided me with no evidence that the applicant accepted that it would provide certain cable ladders in accordance with the pre-contract negotiations between the parties.

- 92) Clause 17.7 of the Contract states:

*'This Subcontract constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite:*

- (a) *any prior agreement in conflict or at variance with the Subcontract ; or*
- (b) *any correspondence or other documents relating to the subject matter of the Subcontract which may have passed between the parties prior to the execution of the Subcontract and which are not included in the Subcontract.'*

- 93) Schedule A to the Contract states:

*'The Subcontract is constituted by the following documents listed below in the order of precedence for the resolution of ambiguities under clause 1.2(n)(ii):*

- *Schedule B (Special Conditions)*
- *Schedule A (Particulars)*
- *General Conditions of Subcontract*
- *Schedule G (Scope of Work Description)*
- *Schedule H (Project Conditions)*
- *Schedule F (Supplier Warranty)*
- *Schedule C (Approved Security)*
- *Schedule D (Deed of Guarantee and Indemnity)*
- *Schedule E (Final Account and Release)*
- *Schedule I (Expert Determination Agreement)*
- *Schedule J (RCT Agreement)*

- *Schedule K (Building Code Compliance)*
  - *Schedule L (Statutory Declaration)*
  - *Schedule M (Site)*
  - *Schedule N ([project] Contractor Regulations)*
- 94) The email and discussions referred to by [Mr. C] are not referred to in the Contract and, therefore, do not form a part of the Contract.
- 95) There is nothing in the Contract that requires the applicant to supply the cable ladder that is the subject of the payment claim.
- 96) Accordingly, I determine that the applicant is entitled to payment for the cable ladder that it supplied and installed in the amount claimed in the payment claim of \$9,377.69 excl. GST.

#### **[PROJECT] - INSTALL ADDITIONAL 2 X FIRE HYDRANT STAND - PIPES**

- 97) In relation to the item referenced; '[project]' in the above table;
- a) the payment claim identified this work as; '[redacted] *requested*' for the amount \$7,433.80 excl. GST.
  - b) the respondent's payment schedule identifies this item as; '*VO4.1 Ref [applicant] VD(01) –Supply and install 2 No hydrant points for hydrotesting*' and states that the claimed value is \$4,961.30 and has certified \$0.00 as the payment due.
  - c) The sworn statement of [Mr A], which is attached to the respondent's response to the application for adjudication, states that on 27 October 2014, [Mr. A] send an email to [Mr D and Mr E] of the applicant regarding the value of the amount claimed for the above item referenced '*[project]*'. [Mr. A] further deposes that the applicant returned an amended claim that showed the claimed value of that item had been reduced from \$7,433.80 excl. GST to \$4,961.30 excl. GST and has provided a copy of the applicant's amended claim for a variation referenced; '*VD(01) Install 2 x fire hydrant stand pipes to tanks*'.
- 98) I am, therefore, persuaded that the applicant has changed its claim from \$7,433.80 excl. GST to \$4,961.30 excl. GST, which the respondent accepted by of its further payment schedule that was issued on 10 December 2014 and in its response.
- 99) Accordingly, the applicant is entitled to payment of \$4,961.30 excl. GST for the claim referenced '*[project]*'.

## VO 06 CHANGING RUBBER GASKETS TO FIBRE GASKETS

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- 100) In relation to the item referenced; 'VO6 changing rubber gaskets to fibre gaskets';
- a) The applicant claimed \$85,149.25 excl. GST to change rubber gaskets that had been installed to Klinger C-4210 fibre gaskets pursuant to an instruction given by the respondent on 16 September 2014.
  - b) The respondent asserts that the gaskets provided in the first instance by the applicant did not comply with the requirements of the Contract and rejected the claim for a variation accordingly.
  - c) Subsequently, the respondent offered an ex-gratia payment and certified payment of \$21,400.00 excl. GST to assist the applicant to complete this work in a timely manner.
- 101) In the payment claim, the applicant asserts that it is entitled to payment for the work '*Changing approved rubber gaskets as on design drawings to fibre gaskets as per request*' because that was a variation to the Contract.
- 102) In the application for adjudication, the applicant further asserts;
- 'We advised [the respondent] from the outset that the gaskets installed complied with the Specification i.e. Clause 6.5.4 "The vendor ([the applicant]) shall select suitable gasket material for flanges"; therefore, the replacement of gaskets was considered a variation. Furthermore, we have confirmation from [the respondent], by way of written undertaking, agreeing to pay for costs associated with replacement of gaskets; this is further supported by a partially approved variation and further communication that the balance of variation value is under review.'*
- 103) I have considered the applicant's assertion but I was not provided with a copy of Clause 6.5.4 and the applicant failed to provide any evidence of the written undertaking from the respondent agreeing to pay for costs associated with replacement of gaskets.
- 104) The fact that the respondent certified an ex-gratia payment is not evidence that the respondent accepted the replacement of the gaskets was a variation to the Contract.
- 105) In its response to the application for adjudication, the respondent asserts that the applicant provided gaskets that were not fit for purpose nor did the gaskets supplied comply with the Contract.
- 106) Furthermore, in its response to the application for adjudication, [Mr A] of the respondent states in his sworn statement;



*'Subsequent to the lodgement of its October progress claim, [the applicant] reduced its claims for VO6 defective Gaskets from \$84,149.25 to \$68,202.08, VD(01) the claim for the [project] requested work from \$7,433.80 to \$4,961.30 and V10 for Labour capture went from \$12,223.20 to \$11,582.03. Attached and marked 'PDL4' is a copy of the further material received from [the applicant] for these claims.'*

107) The Contract required the applicant to install 1.5mm thick Klingersil C-4210 or equivalent gaskets. Specifically, the Contract specification referenced; 'JDE1889-SP-91-001 Rev A' refers to 1.5mm thick narrow face Klingersil C-4210 or equivalent gaskets.

108) Clause 3.8.19 of the Schedule G to the Contract requires the applicant to carry out the;

*'Supply and installation of all new materials and equipment including; pipework, bends, flanges, nuts, bolts, washers, seals and components except free issued deluge valves, as per drawings and specification.'*

109) Clause 3.10 of the Schedule G to the Contract states;

*'Samples of accessories or other equipment shall be provided for the Contractor's [sic] prior to procurement of equipment and materials.'*

110) Clause 3.1 of Schedule G to the Contract states:

*"Approved" -Shall mean approved in writing by The Contractor.*

*"Or Equal" -Shall mean equivalent in performance, quality and "approved".*

111) The applicant did not provide the respondent with samples in accordance with above clause 3.10 nor has it provided any evidence that the gaskets supplied were suitable alternatives to the gaskets specified nor that it obtained the respondent's approval to use gaskets other than those specified in the Contract.

112) I am, therefore, not persuaded that the gaskets provided were equivalent to the Klingersil C-4210 that were specified in the Contract.

113) Accordingly, I determine that the gaskets did not comply with the Contract and the applicant is not entitled to payment of the amount claimed save for the amount certified by the respondent.

## **VO 10VO7.1 LABOUR CAPTURE FOR WRONG VALVES**

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114) In relation to the item referenced; 'VO 10 - Labour capture for wrong valves' in the above table;

- a) the payment claim identified this work as; *'VO10 Labour capture and fault finding for wrong valves and trim adjustment'* for the amount \$12,233.20 excl. GST.
- b) The respondent's first payment schedule did not refer to this claim and the respondent subsequently accepted liability for \$3,929.90 excl. GST in its second payment schedule and in its response to the application for adjudication.
- c) In its response to the application for adjudication, [Mr A] of the respondent states in his sworn statement;

*'Subsequent to the lodgement of its October progress claim, [the respondent] reduced its claims for VO6 defective Gaskets from \$84,149.25 to \$68,202.08, VD(01) the claim for the [Project] requested work from \$7,433.80 to \$4,961.30 and V10 for Labour capture went from \$12,223.20 to \$11,582.03. Attached and marked 'PDL4' is a copy of the further material received from [the respondent] for these claims.'*

- d) Attached to the sworn statement of [Mr A] is a copy of the applicant's invoice 10 that changed its claim from \$12,223.20 excl. GST to \$11,582.03 excl. GST. That amended claim No 10 claimed the following;

i)	Fault finding – [names omitted]	80 hrs	
	\$8,400.00		
ii)	Victor 17 <sup>th</sup>	8 hrs	\$840.00
iii)	Sprinkler material trim		\$212.00
iv)	Flights		\$1,433.12
v)	Accommodation		\$484.00
vi)	Profit [on items iii) to v)		\$212.91
vii)	Subtotal		\$11,582.03

115) I am, therefore, persuaded that the applicant has changed its claim from \$12,223.20 excl. GST to \$11,582.03 excl. GST. The respondent subsequently accepted liability for \$3,929.90 in its response to the application for adjudication.

116) In the statement of [Mr A] he states:

*'...there were defects in the material provided so additional work was required from [the applicant] to resolve the issue.'*

39. *This work was programmed to occur on 17 September. Attached is a program marked DCD5 which I had prepared for [the applicant] to undertake the work. Due to the defects [the applicant] were further delayed. However the extent of the delay was only 4 hours and only affected the [the applicant's] personnel who were undertaking the electronic fire component which was to be undertaken between 10:00am and 12:00pm on the attached program.*

40. *The wet commissioning crew who were undertaking activities were not delayed as [the applicant] was not in apposition [sic] to undertake their works due to their own delays.*

41. *The claim also includes cost of airfare and accommodation. These cost are rejected because it is understood that the cost relate to [the applicant's] certifier who was required to be on site for other works in any event.'*

- 117) I accept that the cost of flights and accommodation for the certifier has nothing to do with labour capture and fault finding for wrong valves and trim adjustment.
- 118) The respondent has only provided me with a copy of [Mr C's] program and a statement as to what should have happened. The respondent has not provided any evidence to prove that the applicant claimed for hours that were not spent in fault finding for wrong valves and trim adjustment.
- 119) Accordingly, I determine that the applicant is entitled to payment of this claim less the amount for flights and accommodation and profit on flights and accommodation, which is \$9,473.20 excl. GST (\$11,582.03-(\$484.00 + \$1,433.12)\*110% is \$9,473.20 excl. GST).

## **VO 13 DELAY – STANDBY COSTS**

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- 120) In relation to the item referenced; 'VO 13 – Delay Damages' in the above table;
- a) the payment claim identified this work as; 'VO13 Additional delays time capture due to isolations not being ready to begin function and deluge testing Delay to ESD faults through-out the day.' for the amount \$5,040.00 excl. GST.
- b) The claim is for the costs of its labour including [names redacted] being unable to work due to an act or omission of the respondent but the claim does not disclose on which day the delay occurred.
- c) Neither of the respondent's payment schedules refer to this claim. The respondent denies any liability in relation to this claim in its response to the application for adjudication.

- d) In its response to the application for adjudication, the respondent submits that the applicant is not entitled to any delay damages because;
  - i) The applicant has not provided sufficient information to substantiate its claim;
  - ii) The applicant suffered no delays to the date for completion due to the isolation;
  - iii) The applicant has not submitted any claim for an extension of time;
  - iv) The applicant failed to give the prescribed notice pursuant to clause 10.6 of the Contract;
  - v) The applicant is barred by the operation of clause 10.7 of the Contract;
  - vi) Even if the applicant is entitled to delay damages, these are capped at \$1.00 per day; and
  - vii) Alternatively, the applicant is barred by the operation of clause 11.3 of the Contract.
  
- 121) The sworn statement of [Mr A], which is attached to the respondent's response to the application for adjudication, states that on 27 October 2014, [Mr A] send an email to [Mr C] and [Mr D] of the applicant regarding the value of the amount claimed for the above item referenced 'VO13 Delay Damages'.
  
- 122) [Mr A] further deposes that he asked the applicant to; 'Provide sufficient back-up for auditing purposes please provide details of personnel in attendance, durations and dates.'
  
- 123) The applicant returned an amended claim that showed the claimed value of that item was \$5,040.00 excl. GST that identified the personnel and the time that its personnel were on standby because the respondent failed to isolate certain parts of the works. The respondent has provided a copy of the applicant's claim for a variation referenced; 'Additional delays time capture due to isolations not being ready to begin deluge testing. Delay to ESD faults through-out the day' that was dated 29 October 2014.
  
- 124) The respondent failed to reject the claim and failed to provide reasons for withholding money within the time for providing a response pursuant to Division 5 of the Schedule to the CCA which was an implied term of the Contract. Accordingly, by the operation of that implied term the respondent became liable to make that payment.

- 125) At paragraphs 37 to 41 of the sworn statement of [Mr C], [Mr C] acknowledges that the respondent failed to provide certain isolations. As the respondent failed to provide its notice of dispute in accordance with Division 5 of the Schedule to the CCA, I will not consider the reasons for withholding payment beyond establishing a prima-facie entitlement to payment of the work claimed.
- 126) I am, therefore, persuaded that the applicant is entitled to payment for its claim referenced VO13 in the amount of \$5,040.00 excl. GST.

### VALUATION OF THE PAYMENT CLAIM

- 127) By way of summary, the table below sets out the elements of;
- a) the payment claim for work carried out under the Contract during October 2014 and subsequent adjustments to the payment claim made by the applicant;
  - b) the position accepted by the respondent by way of its response to the adjudication application and the payment schedules; and
  - c) my determination of the parts of the claim that are in dispute as follows:

Applicant's Reference	Respondent's reference	Description	Total amount claimed	Total amount certified	Determination
<b>Original Contract Works</b>					
Original Contract Works			\$30,044.00	\$30,944.00	\$30,944.00
<b>Approved Variations</b>					
VO 02		Additional cable support system	\$9,377.69	\$0.00	\$9,377.69
VO 03	VO3.1	FAT testing	\$29,000.84	\$29,000.84	\$29,000.84
VO 04	VO1.3	FAT testing	\$20,077.04	\$20,077.04	\$20,077.04
VO 05	VO1.1	Additional ADR	\$2,820.00	\$2,820.40	\$2,820.40

VO 06	VO8.1	Changing rubber gaskets to fibre gaskets	\$68,202.08	\$21,400.00	\$21,400.00
VO 07	VO1.2	FIP program changes	\$2,625.00	\$2,625.00	\$2,625.00
[redacted]		Install additional 2 x fire hydrant stand - pipes	\$4,961.30	\$4,961.30	\$4,961.30
VO 08	VO2.1	Shutdown services provided	\$2,062.00	\$2,062.00	\$2,062.00
VO 09	VO4.2	Shutdown services provided	\$2,520.00	\$2,520.00	\$2,520.00
VO 10	VO7.1	Labour capture for wrong valves	\$12,223.20	\$3,929.20	\$9,473.20
VO 11	VO4.3	Additional leaking trim	\$1,340.30	\$1,340.30	\$1,340.30
VO 12	VO4.4	Fault finding	\$840.00	\$840.00	\$840.00
VO 13		Delay damages	\$5,040.00	\$0.00	\$5,040.00
		<b>TOTAL</b>	<b>\$146,652.55</b>	<b>\$122,520.08</b>	<b>\$142,481.77</b>

128) At paragraph 47 to 49 of the response to the application for adjudication, the respondent has advised me that the validity of its back charges referred to in above paragraph 87) are the subject of a separate Adjudication (reference 30-14-01) before Damien Michael. The respondent submits that *'such back charges have not been taken into consideration in the Respondent's certification of the Applicant's October Claim.'*

129) Accordingly, I have not considered the respondent's back charges in this determination.

130) The total amount claimed in the payment claim was \$161,317.81 incl. GST.

131) By way of its payment certificates No. 8 and No. 9, the respondent agreed to pay \$134,772.08 incl. GST.

- 132) I have determined that the applicant is entitled to payment of \$156,729.95 incl. GST.

### **THE DETAILS OF THE DETERMINATION**

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- 133) Pursuant to s 34(1)(a) of the CCA, I have made this determination on the basis of the application and its attachments but I have not considered the respondent's reasons for withholding payment in the payment schedules and the response because they were submitted outside of the permitted time that is specified in Division 5 of the Schedule to the CCA.
- 134) I have, however, considered certain documents provided by the respondent that proved the applicant's prima-facie entitlement under the Contract to various parts of the payment claim.
- 135) Pursuant to s 33(1)(b), I have determined that:
- a) the value of completed work as at the end of October 2014 is; \$701,188.46 excl. GST;
  - b) the respondent must pay to the applicant the sum of \$156,729.95 incl. GST. 7 days after the issue of the determination less any amount paid in relation to the payment claim under its payment certificates No's 8 and 9;
  - c) the calculation of the amount that the respondent must pay the applicant is set out in paragraph 127) of this determination.
  - d) in accordance with clause 35(1)(b) of the CCA, I determine that interest is payable on the amount the respondent must pay to the applicant is 8.5% per annum from 23 November 2014 until and including the date of payment.
- 136) Neither the applicant nor the respondent complied with their respective obligations under the Contract in terms of submitting the payment claim and responding to the payment claim in a timely manner. Accordingly, pursuant to section 36(1) of the CCA, each party shall bear its own costs in relation to this adjudication.
- 137) Pursuant to section 46(5) of the CCA, the costs of the adjudication shall be shared equally by both parties. I acknowledge that the applicant has paid \$3,000.00 to me on account of my costs.
- 138) The costs of the adjudication amount to 29.6 hours @ \$305.00 plus GST, which is; \$9,930.80 incl. GST.
- 139) I will issue a single Tax Invoice to the applicant for my fees in making this determination.

- 140) Accordingly, in addition to payment of the amounts that the respondent must pay to the applicant that are set out above in paragraphs 135)b) and 135)d), the respondent must also pay the applicant one half of my fee, which is \$4,965.40 incl. GST.

### **CONFIDENTIAL INFORMATION**

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- 141) The parties have not indicated which parts of the information provided to me with their submissions are to be treated as confidential.
- 142) If either party considers any part of their submissions confidential or any part of this determination as confidential, I request that they notify me accordingly within 2 working days of receipt of this determination.



Signed:

John Tuhtan<sup>4</sup>

Date: 2 January 2015

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<sup>4</sup> Registered Adjudicator Number 35