

**ADJUDICATOR'S DETERMINATION
No 01.11.01**

UNDER THE

NORTHERN TERRITORY OF AUSTRALIA

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

IN THE MATTER BETWEEN:

**XXXXX
(Applicant)**

AND

**XXXXX
(Respondent)**

BY

John P Fisher (Adjudicator)

DETERMINED

6 April 2011

DETAILS OF PARTIES

The Applicant

XXXX

The Respondent:

XXXX

The Adjudicator:

Mr John Fisher
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ADJUDICATOR'S DETERMINATION

I, John Patrick Fisher, the appointed adjudicator, determine that:

- (i) The Respondent shall pay to the Applicant the sum of \$35,971.54 inclusive of GST within 7 days of the date of this determination. This amount includes interest to the date of this determination.

- (ii) Each party shall bear its own costs and the costs of the adjudication of \$7,700.00 inclusive of GST shall be shared equally between the parties. In order to effect this sharing, costs of the adjudication shall be paid as follows:
 - a. The Applicant has paid an initial deposit of \$7,700.00 inclusive of GST to the adjudicator
 - b. The Respondent shall pay to the Applicant half the cost of the adjudication. That is \$3,850.00 inclusive of GST.

- (iii) If payment of the adjudicated amount and / or share of the costs is not made within 7 days then interest will become payable in addition at the rate set out in the *Civil Judgements Enforcement Regulations 2005 – Reg. 4*, currently 6.0% per annum. However interest shall not become due unless and until the Applicant has invoiced the Respondent correctly for the amounts determined.

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Signed.....

Date 6 April 2011

REASONS

1. BACKGROUND

The Applicant is a contractor which undertook a fit out in NT. The Respondent is the owner of the establishment.

10 A dispute arose between the parties regarding payment of a tax invoice no. 10-06-008 raised by the Applicant on 16 December 2010 for the sum of \$63,404.55 plus GST and a further tax invoice no. 10-06-009 raised by the Applicant on 12 January 2011 for the sum of \$1,193.82 plus GST which remains unpaid. (For the purposes of this determination all figures are referred to exclusive of GST unless specifically stated otherwise.)

2. APPOINTMENT OF THE ADJUDICATOR

20 The Applicant made an application to the Master Builders Association Northern Territory Inc. ("MBNT") for the appointment of an adjudicator to adjudicate the dispute regarding the payment claim under the *Construction Contracts (Security of Payments) Act* ("Act"). On 3 March 2011 I, John Patrick Fisher, an adjudicator registered in Northern Territory, was appointed by MBNT as the adjudicator. The MBNT letter of appointment describes receipt of service from the applicant as dated 25 February 2011. It was later established that service had, in fact, been effected on 24 February 2011. Nevertheless the appointment was still within the 5 working days required by the Act.

30 On the basis of my lack of knowledge of either the parties or the project I considered, that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract. I declare that I have met the Applicant some years ago in circumstances not material to this adjudication but it is my view that I have no reason to disqualify myself as defined by s31 of the Act.

Having subsequently reviewed the response, it remains my view that I have no conflict of interest.

On 9 March 2011 I wrote to the parties on a number of administrative matters. Included within these was:

- (i) A request for an extension of time of one week within which to make my determination, to which I required an answer in order to establish how I would need to plan the

40 undertaking of the determination. Both parties agreed to grant that extension of time. Both parties subsequently agreed to a second one week extension.

- (ii) An explanation that the Registrar will receive a copy of any determination and will make it public unless either party objects due to the confidential nature of the subject. Neither party informed me of any information that, because of its confidential nature, is not suitable for publication by the Registrar

3. SUBMISSIONS FROM THE PARTIES

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Following appointment, I received from MBNT one lever arch file prepared by the Applicant containing; the application, a copy of the contract, the statutory declarations of **Person 1** and **Person 2** and various evidentiary documents, the whole separated into Tabs 1 to 18.

On 10 March 2011 I accepted service of the response by email from the Respondent's legal advisor. Such a mode of service was prearranged given the tyrannies of distance between Darwin and my service location in Perth. Hard copy material was provided by courier on 14 March 2011 as agreed. This contained one lever arch file in which was the response, the statutory declarations of **Person 3 and Person 4** and various evidentiary documents.

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4. CONTRACT

The contract between the parties is in the form of a standard Master Builders Association (New South Wales) document which references drawings and specifications to be included in the contract. The contract is signed by both parties but undated. The Applicant states that the contract came into effect during or around April 2010, which the Respondent does not dispute. I am therefore satisfied that the contract was formed around then. The exact date of formation is not material to the dispute.

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5. DISMISSAL CONSIDERATIONS

Section 33(1) of the Act compels the adjudicator to dismiss an application without making a determination on the merits, in the following circumstances:

1. Pursuant to 33(1)(a)(i), if the contract concerned is not a "*construction contract*" as defined in the Act.

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2. Pursuant to 33(1)(a)(ii), if the application has not been prepared and served in accordance with section 28 of the Act.
 3. Pursuant to 33(1)(a)(iii), if an arbitrator or other person or court or other body has made an order, judgement or other finding concerning the payment dispute in issue.
 4. Pursuant to 33(1)(a)(iv), if the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time and any extension thereof is insufficient.

90 If none of these circumstances apply then the adjudicator is required to determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment.

The Respondent submitted that I should dismiss the application without determining the matter on two grounds as follows:

(i) The invoices are addressed to "XXXX" not to the Respondent and that this gives rise to jurisdictional error as the payment claim was to a different party rendering the adjudication application invalid based on interpretation of s5(1)(a) and (b) of the Act.

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(ii) The payment claims were not properly served on the Respondent.

The Respondent raises two further issues, which appear in the general context of jurisdiction as follows:

(iii) The validity of the Respondent's notices of dispute, and

(iv) The disclosure of a "Without Prejudice" offer of settlement.

110 Issues (iii) and (iv) are not issues of jurisdiction. Issue (iii) I have dealt with under the merits. With respect to issue (iv) I have ignored the "Without Prejudice" offer except to the extent that it confirms the concessions made elsewhere regarding COR 41 and Items 016 and 018 of COR 42. I have confirmed to my own satisfaction that, apart from these issues raised by the Respondent, there are no other matters which may result in a lack of jurisdiction so for expediency I have confined myself to these issues below.

Application Invalid Based on Interpretation of S5(1)(a) And (b) of The Act.

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Sections 5 (1) (a) and (b) of the Act state:

5 Construction contract

(1) *A construction contract is a contract (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:*

(a) *to carry out construction work;*

(b) *to supply to the site where construction work is being carried out any goods that are related to construction work;*

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The Respondent asserts that the adjudicator has no jurisdiction within the Act because the payment claim was addressed to “XXXX” not the Respondent and that therefore the claim was not served on a contracting party.

I am satisfied that the contract is between the Applicant and the Respondent despite the somewhat confusing background introduction to the application. Neither party denies this. Both parties acknowledge that previous invoices, which were issued to “XXXX”, were paid regularly by the Respondent, except when, by agreement, they were paid by “YYYY”. Given the continued acquiescence to this arrangement by both parties throughout the period of the contract I do not accept the Respondent’s contention that the payment claim was invalid. For the purposes of this contract the Respondent was trading as “XXXX” even, as may be the case given the lack of public information regarding the status of “XXXX”, if it had not informed ASIC. Further the question of whether a payment claim was validly made is one which needs to be considered its merits. It is not relevant to whether the adjudicator has jurisdiction. In this instance the relevant requirements for jurisdiction are that the Applicant has satisfied s33(1)(a)(i) and (ii) of the Act. I am satisfied that the application does so and, in consequence I reject the Respondent’s assertion that I do not have jurisdiction due to an error regarding the contracting party.

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I note also the Respondent’s reference to *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd [2007] NSWSC 1340*. I do not feel bound by this authority, first because it is not in the relevant jurisdiction, although I must give it the consideration it is due, and second because it does not apply to the particular circumstances of this case. The misdescription of the parties in that case was only sufficient to invalidate the application consequent on the lack of a contract between the parties. Here there is a clear contract between two clearly described parties.

Payment Claims Were Not Properly Served on the Respondent

160 The respondent asserts that, because the first payment claim was served by email and the Respondent assumes that the second payment claim was served by email, neither claim was properly served. The Respondent notes that Clause 29 of the contract states:

A notice (and other documents) will be deemed to have been given, received or served:-

(a) if addressed or delivered to the other party at the relevant address in the contract or the last relevant business address, which for the purpose of service will include a facsimile number but not an email address, communicated in writing to the person giving the notice.....

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The Respondent then states that accordingly service of the payment claims by email was defective.

I do not draw the same inference as the Respondent from the plain wording of the clause. The clause is merely a deeming provision which states that a notice or document will be deemed to have been served in the circumstances described. It does not state that these are the only methods by which service may be effected. If the other party is willing to be served by an alternative method the contract does not prevent it.

180 Following receipt of the first and second invoices **the Respondent** issued notices of dispute on 4 January 2011 and 23 January 2011 respectively. In order to issue the notices of dispute, which make no reference to dispute over the manner of service, it must have accepted service of the invoices. I therefore reject the Respondent's submission that service of the payment claims was defective.

Further service of the payment claims is not the factor which determines whether I have jurisdiction. The factor is service of the application for adjudication. Service of a payment claim may have a bearing on the merits of the case but not on jurisdiction.

190 Having considered all the objections to jurisdiction raised by the Respondent I find that I have no reason to dismiss the application without making a determination on the merits in accordance with s33(1)(a) of the Act. In consequence in accordance with s33(1)(b) I must determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.

6. MERITS

The disputed invoices are:

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(i) Tax invoice no. 10-06-008 raised by the Applicant on 16 December 2010 for the sum of \$63,404.55 plus GST, and

(ii) Tax invoice no. 10-06-009 raised by the Applicant on 12 January 2011 for the sum of \$1,193.82 plus GST

The arguments raised by the parties refer to amounts both inclusive and exclusive of GST. For the purposes of clarity I have generally dealt with amounts exclusive of GST except where I have shown both.

210 **Tax invoice 10-06-008**

On 16 December 2010 the Applicant issued a payment claim in the form of Tax Invoice 10-06-008 and its attachments. On 4 January 2011 the Respondent issued a notice of dispute.

The Applicant asserts that the notice of dispute was not a valid notice under the implied provisions of the Act because it was not served in time. In consequence the Applicant asserts an entitlement to be paid the entire amount of the claim. The Respondent submits that the notice was, in fact, served in time.

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The implied provisions of the Act are only implied into the contract where the contract does not have a written provision about that matter. The Respondent submits that the contract has provisions dealing with the time for making payment claims and that therefore there is no ability to imply the provisions of the Act. The contract states, at Schedule 2(c)(i), that payment claims are to be made on the due date which is determined by two alternative methods:

(A) Every 30 days from the commencement of work

(B) On the 15th day of the month

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It is clear that the design of the standard form of contract anticipates that the parties will delete one method. However both methods have been adopted by the parties leaving some confusion.

The Respondent argues that, in accordance with method (A) within the contract, the applicable date for making the payment claim was 27 November 2010 and in accordance with method (B) the applicable date was 15 January 2011.

240 I am in agreement with the principle laid out by the Respondent for method (B) but in method (A) the date of commencement of the work is not stated in the contract and I find that the Respondent has made unsubstantiated assumptions about the date to suit its argument. That leaves the contract uncertain in respect of the date when payment claims must be made.

It therefore follows that the contract does not have a written provision about how a party must make a claim to the other party for payment. In consequence the provisions in the Schedule, Division 4 of the Act are implied in the construction contract. I am satisfied that the payment claim meets the requirements set out in s5(1) of Division 4 and therefore is a valid payment claim and that the date of the payment claim is 16 December 2010.

250 I accept the Respondent's submission that the time for giving a notice of dispute is not expressly stated in the contract, however I find that by inference from the contract schedule (c)(ii)(A) this must be no later than 14 days after the claim is made since this is when payment is due. If this inference cannot be made then I accept that the time for giving a notice of dispute must be implied from Division 5 s6(2)(a) of the Act, which, coincidentally, is also 14 days.

260 As the invoice was issued on 16 December 2011 it was necessary to either issue a notice of dispute or pay the claim within 14 days, i.e. by 30 December 2010. I have had regard to the Respondent's calculation of time. However the 14 days inferred in the contract or implied from Division 5 s6(2)(a) of the Act are calendar days. The Act expressly refers to working days elsewhere but specifically does not do so in this instance. The Interpretations Act NT s28(2) allows the exclusion of a non-working day or public holiday from the time period only if it falls on the last day. 30 December 2010 was a Thursday, a working day. Thus the notice of dispute was issued too late and payment should have been made within 28 days of the payment claim, which is by 13 January 2011.

270 The effect of the refusal of the Respondent to pay by 13 January 2011 was not that the Applicant had an automatic entitlement to the entire amount of the claim. It was that a payment dispute regarding the payment claim arose on 14 January 2011 under s8(a) of the Act. That dispute has to be determined on its merits.

Although there is agreement between the parties regarding the total amount of the payment claim, \$63,404.55, there is some difference in the detail of what is in dispute. I have

extracted in Table 1 and 2 below the amounts stated in the payment claim and the notice of dispute accordingly.

Table 1 Payment Claim - Invoice 10-06-008

	Description	Amount (Excl GST)	\$GST	Total incl GST	Comments
1.1	Undisputed sums within invoice 10-06-008	12,044.74	1,204.47	13,249.21	Paid, not in dispute
1.2	Money owing from tax invoice of 14 /09/10	1,711.13	171.11	1,882.24	Unpaid, out of time for adjudication
1.3	COR 041. Supply additional tiles	3,428.88	342.89	3,771.77	In dispute
1.4	COR 042. Install timber ceilings	40,614.27	4,061.43	44,675.70	In dispute
1.5	COR 043. Modify cool room support beams	5,605.54	560.55	6,166.09	In dispute
	TOTAL of invoice	63,404.55	6,340.46	69,745.01	
	Amount in dispute in this adjudication	49,648.69	4,964.87	54,613.56	

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Table 2 Disputed Amounts - Invoice 10-06-008

	Description	Amount (Excl GST)	\$GST	Total incl GST	Comments
	TOTAL of invoice	63,404.55	6,340.46	69,745.01	
2.1	Less COR 042. Install timber ceilings	-40,614.27	-4,061.43	-44,675.70	In dispute
2.2	Less COR 043. Modify cool room support beams	-5,605.54	-560.55	-6,166.09	In dispute
2.3	Less provision for finishing ceilings	-2,080.00	-208.00	-2,288.00	In dispute
2.4	Less provision for erecting timber screens	-2,880.00	-288.00	-3,168.00	In dispute
2.5	Less provision for painting ceiling edges	-180.00	-18.00	-198.00	In dispute
	Total paid	12,044.74	1,204.47	13,249.21	
	Amount in dispute in this adjudication	51,359.81	5,135.98	56,495.79	

I deal with each disputed item as follows:

COR 041. Supply additional tiles

The applicant claims \$3,428.88 for the supply of additional tiles. The Applicant notes that supply of tiles is specifically excluded from the contract by virtue of being in the list of exclusions at Schedule 1(c). Subsequent to the application for adjudication being served the

290 Respondent conceded this amount as due in the email from David Baldry to Paul Baxter dated 4 March 2011 5:55pm. I therefore allow the full amount of \$3,428.88.

COR 042. Install timber ceilings

The Applicant claims \$40,614.27 as a variation for the installation of the timber ceiling supplied by the Respondent. This amount is in place of an amount of \$14,023.60 which was in the contract.

300 The Applicant submits that it has a right to value the entire work as a variation because the work was substantially different as follows:

- The timber battens for the ceiling, a client supply item, were provided to it after practical completion and therefore it was necessary to remobilise,
- The **business** was operational and it was therefore necessary to undertake the work out of hours at night,
- Storage was no longer available on site and it was necessary to substantially increase handling and transportation of the materials
- There were no fixing support details provided and these had to be designed on site by the installer
- The material supplied was of variable cut size which required additional setting out

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I have had regard to the statutory declarations of **Person 1 and Person 2** for the Applicant and **Person 3 and Person 4** for the Respondent. I find as facts that:

(i) The timber battens were provided to the Applicant on 27 August 2010. Since the **business** opened on 26 August 2010, practical completion as defined in Clause 18(a) had been achieved. It was necessary to return to an operational environment that was different to a construction site. The different environment did not require the Applicant to remobilise since there were still minor works being attended to.

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(ii) Work to fix the timber ceiling was generally undertaken during normal working hours. I have inspected the timesheets provided. I can find one night of night work. Other work has been carried out during normal working hours.

(iii) Storage for the ceiling timber was provided by the Respondent in an adjacent unit from 27 August 2010 to mid November 2010. The fact that the time that storage was available was insufficient was due to the builder's own delays.

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(iv) Fixing support details were provided on **the Architect's** drawing **###**. These details were insufficient to undertake the work. The contract did not require the builder to develop the design. Nevertheless, as insufficient details were available, the Applicant developed its own details on site with the acceptance of the Respondent.

(v) The timber material was of variable size requiring additional work.

340 The contract sets out in Clause 9 how to deal with valuing variations. Specifically it only allows for work to be revalued if the original work is omitted and different work is put in its place. Subject to certain exceptions outlined below, that is not the case here. The same ceiling was installed as the Applicant contracted to install. Therefore the starting point is that the contract price of \$14,023.60 is payable for the works.

Thereafter additional moneys are due if additional works were undertaken. The Applicant claimed within COR 42 for 18 items which I deal with below.

Items 001 to 009 - Labour

350 The Applicant has claimed a total of \$27,009.09 in respect of the labour items 001 to 009, representing the cost of 9 different men working on the site. Generally, as I have established above, the men were carrying out work which was within the contract and there is no reason why additional amounts should be paid in respect of labour. However I have found that installation of clips involved omitting the original insufficient fixing details and adding different fixing details accepted by the Respondent. By the definition in Clause 9(a)(i) of the contract this was a variation. I have established from the timesheets that fixing of preparation and fixing of clips took 114.5 hours at the rate of \$60.00 allowed for labour. This totals \$6870.00. Clearly a part of this cost would have been incurred whatever fixing system had been used. I will allow that 50% of this amount is due as a variation. That is \$3,435.00.

Items 010 and 014 - Ceiling hanging materials.

360 The Applicant has claimed \$1998.56 for ceiling track, clips and screws for the ceiling hanging materials. I have already found that the work was a variation and therefore payment is due. While I allow the amount claimed, credit must be given for omission of the original ceiling hanging materials which were included in the tendered price. The value of this credit is not defined by the contract but I consider this is of the order of \$1,000. I therefore allow \$998.56.

Items 011 and 012 - Black backed insulation

370 Drawing xxxx shows that DECI-TEX P40 or approved equivalent was to be overlaid on the ceiling. The Applicant made it clear to the Respondent that DECI-TEX P40 was not available. A combination of other materials was offered as an alternative by the Applicant. I note that, much later, the Respondent was able to find readily available another material, DECI-TEX P44, but this does not imply that the specified material was available at the time. There was no suggestion by the Applicant that the alternative materials would incur extra cost. The

Respondent made no objection to the equivalent materials but did not approve them in writing. I find that the Respondent did accept the approved equivalent.

380 Under Clause 9(j) of the contract the Builder is required to substantiate that the work is not part of the original contract works. Plainly the original material specified was part of the original contract works. The provision of an approved equivalent for the builder's convenience does not constitute a variation to the contract for which the builder should automatically be paid. If the Applicant considered it was appropriate to be paid, under Clause 9(c) it was incumbent on the Builder to obtain a written instruction from the Owner. If the Owner failed to provide a written instruction then a meeting should have been held under Clause 24(v) to agree and record the matter. This was not done. In consequence I consider that the Applicant was, in fact, substituting the material as an approved equivalent at no additional cost over the contract price. Therefore I will not allow any amount for this item.

Item 013 Wall frame for bulkheads

390 The parties acknowledge that the Respondent varied the works in accordance with Clause 9(a)(i) of the contract. They differ on the extent of the additions and omissions. Neither party has provided clear information to me on the extent of the works. I am prepared, on the balance of probability, to accept the Applicant's version of the additional works involved and therefore I will allow an amount of \$440.00 for the panelling.

Item 015 Adjust fire sprinklers

I am prepared to accept the Applicant's view that the fire sprinkler heights did need to be fitted hard to the temporary ceiling to comply with fire requirements and that they later required adjustment from the temporary position to the permanent position. I will allow the amount of \$1,350.00 claimed.

400 **Item 016 Remove/Install Lights**

I note that in the statutory declaration of Person 4 that the cost of removing and reinstalling the lights was conceded as being due, although this has currently not been paid. I therefore accept the amount is due and allow the \$880.00 claimed.

Item 017 Paint bulkheads black

410 Both parties acknowledge that there was a request from the Respondent to paint the bulkheads black and that that request varied the contract. There is also agreement that work, in the form of timber batten fixing, was omitted, to be completed at a later stage when more client supplied timber was available. I refer here only to the painting and deal with the timber below. The Applicant claims \$919.71 for the painting which appears to be the total of costs labour and material respectively from the Tropical Painting invoice (\$850.00) and Bunnings Invoice 2320/53245 (\$91.21). I cannot reconcile the small difference between

the total claimed and the sum of these two invoices. Nevertheless since the amount claimed is smaller than the sum of the invoices and the Respondent does not dispute the invoices, I will accept that amount of \$919.71.

Item 018 Screen

420 I note that in the statutory declaration of Person 4 that the cost of the screen was conceded as being due, although this has currently not been paid. I therefore accept the amount is due and allow the \$980.00 claimed.

Counterclaims by the Respondent

The Respondent claims at 57(xii) of the response that the work of the installation of the ceiling was incomplete and that therefore it has the right to set off the costs of completing or rectifying the work. Specifically it refers to the first Notice of Dispute of 4 January 2011, Item 3(a) to (c) and I deal with these as follows:

- (a) Finish the edges of two erected ceilings, install a finishing timber strip and erect a third ceiling. Claimed set off \$2080.00.

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I accept the Applicant's contention that the timber was to have been supplied pre-cut and that any refinishing work, had it been carried out, would have been at extra cost. I am unable to locate the timber shadow strip at all on Detail 4 of Drawing xxxx. However I have already made a credit allowance in Items 010 and 014 above for such work. I do not agree with the Applicant's submission that the third ceiling was not part of the originally contracted work and therefore the lack of completion of this work merits a credit. However the Respondent's evidence of the cost of this work is somewhat contradictory. Hours and costs do not correlate at all. I will therefore limit the total set off to \$1,000.00.

- 440 (b) Provision for erecting 3 timber screens in other areas. Claimed set off \$2,880.00

The Respondent has not led me to any information regarding these screens being part of the main contract or any apportioned value other than its own unsubstantiated estimates of what the work might cost. I will not allow any set off for this item.

- (c) Painting to the edges of the drop ceiling. Claimed set off \$180.00. Having accepted that the client supplied ceilings should have been prefinished I cannot accept that the Applicant is responsible for this amount. I will not allow set off of this amount.

450 **Summary of COR 42**

In summary I have allowed the amount calculated from the table below.

Table 3 - Adjudicator's Determination Regarding COR 42

Item No.	Description	Excl GST	GST	Incl GST
	Contract Value	14,026.00	1,402.60	15,428.60
001	Labour		0.00	0.00
002	Labour		0.00	0.00
003	Labour		0.00	0.00
004	Labour		0.00	0.00
005	Labour		0.00	0.00
006	Labour		0.00	0.00
007	Labour		0.00	0.00
008	Labour		0.00	0.00
009	Labour	3,435.00	343.50	3,778.50
010	Ceiling hanging materials	998.56	99.86	1,098.42
011	Black backed insulation	0.00	0.00	0.00
012	Black backed insulation	0.00	0.00	0.00
013	Wall framing for bulkheads	440.00	44.00	484.00
014	Included in 010		0.00	0.00
015	Adjust fire sprinklers	1,350.00	135.00	1,485.00
016	Remove / install lights	880.00	88.00	968.00
017	Paint bulkheads black	919.71	91.97	1,011.68
018	Screen	980.00	98.00	1,078.00
	Less Counterclaim	-1,000.00	-100.00	-1,100.00
		<u>22,029.27</u>	<u>2,202.93</u>	<u>24,232.20</u>
	15% builder's margin on variations	685.24	68.52	753.76
		<u><u>22,714.51</u></u>	<u><u>2,271.45</u></u>	<u><u>24,985.96</u></u>

In summary I determine that \$22,714.51 is due in respect of COR42.

COR 43 Modification of Cool Room Support Beams

460 The amount of \$5,605.54 has been claimed for modification of structural beams under the cool room. There is no mention of this sum in the response save for the calculation reflected in Table 2 above. It is evident from photographs and the comments of **Person 3** at Section 7 of his statutory declaration that the work was undertaken. I note **Person 3's** views that the work might have been carried out in a cheaper manner but on the balance of probability I consider that the amount has been withheld only because there is a dispute over other issues. I therefore determine that the full amount of \$5,605.54 is payable.

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Summary of Dispute regarding Tax Invoice 10-06-008

In summary the amounts I determine are due in respect of Invoice 10-06-008 are:

	Description	\$ Amount (Excl. GST)	\$ GST	\$ Total (Incl. GST)
1.3	COR 041. Supply additional tiles	3,428.88	342.89	3,771.77
1.4	COR 042. Install timber ceilings	22,714.51	2,271.45	24,985.96
1.5	COR 043. Modify cool room support beams	5,605.54	560.55	6,166.09
	TOTAL DUE	31,748.93	3174.89	34,923.82

480 **Tax Invoice 10-06-009**

On 12 January 2011 the Applicant issued a payment claim in the form of Tax Invoice 10-06-009 and its attachments. On 23 January 2011 the Respondent issued a notice of dispute. There is agreement between the parties that this notice of dispute was issued within the period required under the contract.

The Respondent disputes the entire payment claim made within the invoice amounting to \$1,193.82. The payment claim is made up of two purported variations, COR 44 and COR 45.

490 **COR 44 Additional Works to Timber Ceiling**

This dispute relates to the provision of access covers for services within the timber ceilings. The Applicant acknowledges the work was within the original contract but submits that because it was necessary to return to site to complete the works after practical completion, the work should be treated as a variation.

The Respondent submits that the quality of the work was rejected and therefore no payment is due.

500 For the same reasons set out in COR 42 above, the works cannot be removed from the original contract and priced anew as a variation. The variation can only stem from additional costs as a result of circumstances different from that at the time of tender. If there was a variation due to labour outside hours the cost has been dealt with under COR 42 which covered general costs for all labour evidenced. I therefore do not allow the amount of \$640.00. Similarly I see no reason for the cost of wire of \$8.56 to hold insulation as this would need to have been

510 applied even if the work were carried out prior to handover. Finally for the same reasoning as in COR 42 I allow half of the cost of the furrings; that is \$72.00 on the basis that the original price should have allowed for some fixing methodology. However, given the evidence of the photographs attached to **Person 3's** statutory declaration, it appears that there were workmanship issues which, though the responsibility of the Applicant, were not attended to by the Applicant. I therefore deduct \$72.00. In consequence the sum total that I allow for additional works to the ceiling is \$0.00.

COR 45 Door Handles

520 The Applicant claims the cost of replacing door handles which had been left on site and subsequently lost. The Applicant claims that they had been placed in the care of the **business's** staff, who were responsible for their loss. The Respondent cites Clause 15(d) of the contract which requires that materials on site must be adequately stored and protected. I am in agreement with the Respondent that responsibility for storing the parts was that of the Applicant. The Act of handing them over to a staff member who had no contractual responsibility for their care was a risk that the Applicant chose to take. The financial risk of that loss must be borne by the Applicant. I therefore do not allow any amount for this item.

The total amount that I allow for Tax Invoice 10-06-009 is \$0.00.

Summary

The net amount I determine is due from the Respondent to the Applicant in respect of the dispute is:

530	Tax invoice 10-06-008	\$31,748.93.
	Tax invoice 10-06-009	0.00
	TOTAL	\$31,748.93

7. INTEREST

The Applicant has requested that I determine that interest be paid on the amount claimed within the current invoice at the rate of 10.5%.

540 Under s35(i)(a) of the Act I determine that interest shall be due at the rate set out in the contract. That rate is described in Clause 15(g) as 1.00% per month. Clause 15(g) prescribes that the rate should be applicable if payment is not made within 10 days of 'request'. Request is not a defined term but by reference to Clause 15(b) I take it to mean the date of the payment claim. Since the payment claim is not due to be paid until 14 days after the date

of the payment claim there appears to be some conflict within the contract regarding the date when interest charges should start. I determine that interest payments on an unpaid amount shall start on the fifteenth day after payment was claimed. That is on 31 December 2011. The payment has been outstanding for 3 full months and therefore interest is applicable at 3%. That interest is 3% x \$31,748.93, i.e. \$952.47.

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8. CONCLUSION

The Applicant requests the Adjudicator to determine the amount of \$55,926.56 plus GST plus interest is due to be paid.

The total amount that I determine is payable is:

Due in respect of payment claim	\$31,748.93
Due in respect of interest	<u>\$952.47</u>
560 TOTAL (exclusive of GST)	\$32,701.40
GST @ 10%	<u>\$3,270.14</u>
TOTAL (inclusive of GST)	\$35,971.54

9. COSTS OF ADJUDICATION

570 I determine that each party shall bear its own costs and that the costs of the adjudication shall be shared equally between the parties.

The costs of the adjudication are:

Adjudicators fees 25hrs @\$285.00 per hour	7,125.00
GST	712.50
Total inclusive of GST	<u>\$7,837.50</u>

The Applicant has already paid \$7,700 (incl. GST) on account. Since the cost of collection of the unpaid amount may well exceed its value, I will accept that payment has been made in full.

580 The Respondent shall pay to the Applicant half of the cost of the adjudication, \$3,850 (incl. GST) within 7 days of the date of this determination (see front cover).

10. PAYMENT MECHANISM

The amount that I have determined together with the costs of the adjudication shall be paid by the Respondent to the Applicant within 7 calendar days of the date of this determination (see front cover). The Applicant shall raise a GST invoice for the new amount, together with a credit note for the total amount of Invoices 10-06-008 and 10-06-009 to reach the Respondent prior to the expiry of the 7 days.

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If payment of the adjudicated amount and / or share of the costs is not made within 7 days then interest will become payable in addition at the rate set out in the *Civil Judgements Enforcement Regulations 2005 – Reg. 4*, currently 6.0% per annum.