ADJUDICATION

UNDER THE

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT (NT)

IN THE MATTER BETWEEN:

(Applicant)

AND

(Respondent)

BY

John P Fisher (Adjudicator)

7 March 2014

NT REGISTRAR REF. 01.14.01

DETAILS OF PARTIES

The Applicant

Represented by:

Clayton Utz Lawyers
17-19 Lindsay Street
Darwin NT 0800

Attention: Mark Spain

Tel: (08) 8943 2500
Fax: (08) 8943 2555
Email: mspain@claytonutz.com

The Respondent:

Represented by:

WBH Legal
24-26 Halifax Street
Adelaide
SA 5000

Attention Ron Bellman

Tel: (08) 8410 4420
Fax: (08) 8410 4464
Email: ron.bellman@wbhlegal.com.au

DETAILS OF ADJUDICATOR

Mr John Fisher
JP Fisher Consulting Pty Ltd
5 Hoxton Rise
Carine
WA 6020

Tel: (08) 9447 3894
Fax: (08) 9238 0778
Email: johnf@jpfc.com.au

ADJUDICATOR'S DETERMINATION

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

(i) The respondent shall pay to the applicant the amount of $129,398.70 inclusive of GST.

(ii) The respondent shall pay to the applicant the amount of $2,400.24 in interest.

(iii) Each party shall bear its own costs and the costs of the adjudication, set out in Schedule B to this determination, shall be shared equally between the parties.

(iv) If full payment is not made within 7 days then interest shall become payable on any amount outstanding at 8.75% per annum thereafter until such time it is paid.

John Fisher
Registered Adjudicator 01
7 March 2014

SCHEDULE A
REASONS

BACKGROUND

1. The respondent is a civil engineering company which was contracted to a main contractor, which, in turn, was contracted to the Northern Territory Government to construct 14km of gravel road and erect three bridges. Part of the respondent's work involved clearing rock in three cuttings. The respondent decided to use blasting to break the rock.

2. The respondent subcontracted the blasting works to the applicant; *[omitted]*. The applicant directly undertook the drilling of a pattern of holes at each cutting preparatory to blasting. The applicant subcontracted the design of the blasting pattern and the blasting itself to a specialist company.

3. Blasting at two of the three cuttings was undertaken successfully, although the specialist found it necessary to use more Centra Gold explosive than it had anticipated at tender on the first two sites. This, it claimed, was because of certain variations requested.

4. The specialist then had insufficient of the same explosive to complete the third site. In order not to have to wait for delivery of more explosive to the remote work area, it used the last of what it had available to complete part of the third pattern and then, by agreement, a different type of explosive, ANFO, for the remainder of the pattern. The third blast did not achieve the extent of rock fracture achieved in the first two blasts.

5. On 31 July 2013, the applicant invoiced the respondent on Tax Invoice 920. The respondent refused to pay for the works, claiming that the work had not been carried out correctly and that it had to use additional rock breaking plant at considerable expense to complete the work. Further, the respondent considered that costs claimed were excessive and sought further information.

6. Despite various email correspondences between the parties the matter remained unresolved. On 12 November 2013 the applicant issued a letter to the respondent attaching a copy of Tax Invoice 920 and providing three pages of further information. Within the letter it expressly stated that the letter and copy invoice combined constituted a payment claim under the *Construction Contracts (Security of Payments) Act (NT)* ("Act").

7. The respondent still refused to pay and the applicant sought adjudication of the dispute under the Act.

APPOINTMENT OF THE ADJUDICATOR

8. On 29 January 2014 the applicant served an application for adjudication of the dispute under the Construction Contracts (Security of Payments) Act (NT) ("Act") on the Law Society Northern Territory ("LSNT") and on the respondent.

9. On 3 February 2014 I, John Patrick Fisher, an adjudicator registered in Northern Territory, was appointed by LSNT as the adjudicator.

10. I considered that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute had arisen or in any party to the contract. On 5 February 2014 I wrote to the parties confirming that I saw no conflict of interest as described in s31 of the Act. Neither party raised any objection to my appointment.

SUBMISSIONS FROM THE PARTIES

11. Following appointment, I received from LSNT one A4 file of documents prepared by the applicant containing:

    (i) Application for adjudication;
    (ii) Attachments at Tabs 1 to 19 including copies of the contract, the payment claim, various evidentiary documents.
    (iii) Two statutory declarations of CBW[1].

12. On 12 February 2014 I received a response from the respondent comprising:
    (i) The response;
    (ii) The statutory declaration of MI.

13. As will be explained later I found it necessary to seek two rounds of further submissions and responses from the parties which the parties provided.

[1] The full name of the declarant can be found in Schedule B

JURISDICTION

14. The adjudicator must dismiss an application without making a determination on the merits, in the following circumstances:

    (i) If there is no *"payment claim"* as defined in s3 of the Act or if there is no *"payment dispute"* as defined in s8.

    (ii) In accordance with s33(1)(a)(i), if the contract concerned is not a *"construction contract"* as defined in the Act.

    (iii) In accordance with s33(1)(a)(ii), if the application has not been prepared and served in accordance with section 28 of the Act.

    (iv) In accordance with s33(1)(a)(iii), if an arbitrator or other person or court or other body makes an order, judgement or other finding about the dispute that is the subject of the application.

    (v) In accordance with s33(1)(a)(iv), if the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time and any extension thereof is insufficient.

15. If none of these circumstances apply then the adjudicator must determine, on the balance of probabilities, whether any party to the payment dispute is liable to make a payment and, if so, the amount of the payment and the date by when it must be paid.

16. I am satisfied that there is no reason to dismiss on the basis of circumstances in 14(ii), 14(iv) and 14(v) above based on the information provided. Neither party has raised any issue regarding these points.

17. The requirements under 14(i) and 14(iii) raise issues of jurisdiction which need to be addressed. Both parties have expressed a clear preference for resolution of the dispute by adjudication. The respondent has stated that it would not challenge any determination on the basis that the adjudicator has wrongly assumed jurisdiction. Nevertheless the adjudicator's power to determine the matter arises only from the Act and s33 provides the mandatory instruction that the adjudicator must dismiss if the conditions above are not met.

18. The question arises as to whether the initial submission of Tax Invoice 920 was a payment claim under the Act and as a result whether the applicant had failed to serve the

application within the 90 days period required by s28(3) of the Act. If that were the case then I would be required to dismiss the application.

19. The respondent submits that the reissue of the invoice was merely an ill concealed attempt by the applicant to get around the fact that the time for applying for adjudication of the dispute had long expired. The applicant, on the other hand, submits that the initial Tax Invoice 920 did not comply with the requirements of a payment claim under the Act. The reason for this was that the implied terms of the Act applied since the construction contract did not have a written provision about how a party must make a claim to another party for payment. The implied terms state that in these circumstances "*..the provisions in the Schedule, Division 4 are implied in a construction contract."*

20. Schedule, Division 4 states;

> *A payment claim under this contract must:*
>
> *(a) be in writing; and*
>
> *(b) be addressed to the party to which the claim is made; and*
>
> *(c) state the name of the claimant; and*
>
> *(d) state the date of the claim; and*
>
> *(e) state the amount claimed; and*
>
> *(f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and*
>
> *(g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and*
>
> *(h) be signed by the claimant; and*
>
> *(i) be given to the party to which the claim is made.*

21. The applicant submitted that Tax Invoice 920 emailed in August did not comply with the requirements above. Consequently there was no payment claim and hence no payment dispute arising in August. Instead the payment claim was the letter of 12 November 2013 and the payment dispute arose when payment was not made within 28 days after the issue of the letter.

22. In a further submission requested by me, the applicant expanded on its submission explaining that it considered that Tax Invoice 920 was not a payment claim when sent in August because it did not comply with the requirements of (f) and (h) in Schedule Division 4 above.

23. With respect to (h) the evidence showed that Tax Invoice 920 had been submitted attached to an email which stated:

> *Please find attached July Invoice 920 for payment...*
> *Signed "[name omitted]"*

24. I explained to the parties, at a teleconference, my preliminary view that s8-9 of the Electronic Transactions (Northern Territory) Act ("ETA") might have a bearing on my decision and accordingly sought a second round of submissions from the parties.

25. In its second submission the applicant proposed a number of reasons why *"[name omitted]"* did not constitute a signature.

26. First; the applicant sought to define the terminology in Schedule Division 4(h) as purely contractual and not statutory. I do not accept this proposition. While the Act states *"A payment claim under this contract must..."* It is plainly not the intention of the Act to simply strongly reinforce the terms of the contract. The effect of the Act is to introduce mandatory requirements under law.

27. Second; the applicant proposed that s9(1)(c) of the ETA *...requires the person to whom the signature is required to be given consents to the requirement being met by the use of the method mentioned in paragraph (a)* and that the respondent had never consented to the use of email. I reject this argument. The entirety of the correspondence within this contract has been carried out by email and all parties have clearly consented to the use of email as the method of written correspondence.

28. Third; at no time did the respondent consider the issue of the Tax Invoice to be a payment claim. The respondent's considerations are irrelevant to whether the email actually was a payment claim. The claim simply had to comply with the requirements of Schedule, Division 4 in order to be a payment claim under the Act.

29. Since I cannot accept any of the propositions put forward by the applicant I find that the Tax Invoice issued in August was attached to an electronically signed email and therefore met the requirements of Schedule, Division 4(h).

30. I now turn to Schedule, Division 4(f). In its application, the applicant merely states that the fact that the obligations the contractor has performed is in insufficient detail to assess the claim is evident from the content of the invoice and the correspondence between the parties that followed. It provides no reasons why it considers that it is evident.

31. The invoice and the relevant correspondence are as follows:

(i) Tax invoice 920
(ii) Email Respondent to applicant 9 August 2014 requesting the applicant to the review the invoice because it appeared to be substantially larger than expected.
(iii) Email CH to MI 12 August 2013, providing an explanation of what was included the mobilisation fee.
(iv) Email respondent to applicant dated 16 August 2013 stating that the mobilisation fee was not reflective of what was in the applicant's original quote.

32. The costs itemised in Tax Invoice 920 are broken down into:

(i) Labour (costs established by the hour)
(ii) Plant (costs established by the hour)
(iii) Specialist's mobilisation, shown as a single sum
(iv) Specialist's blasting costs, shown as a single sum
(v) Applicant's mobilisation, shown as a lump sum as estimated
(vi) Applicant's demobilisation, shown as a lump sum as estimated

33. Tax Invoice 920 was accompanied by an invoice from the specialist, which showed that the specialist's blasting costs were based on a rate per cubic metre producing a cost of the order of but slightly less than the original estimate.

34. The specialist's mobilisation costs were also shown as a lump sum on the specialist's invoice. In addition there are items for blasting engineer's service fee and travel costs. The mobilisation fee, the blasting engineer's fee and the travel costs are not itemised in the applicant's estimate. All were included within the applicant's invoice as described at paragraph 32(iii) above.

35. I find that all the obligations performed have been sufficiently described and itemised on Tax Invoice 920, with the exception of those in 32(iii) above. Those fees did not appear in the estimate, nor were they sufficiently described in order that they could be assessed without further information.

36. The consequence is that, as a result of this one item alone, Tax Invoice 920 did not meet the mandatory requirements of Schedule, Division 4 s5(1)(f) of the Act. I therefore find that Tax Invoice 920 was not a *payment claim* as defined by the Act. It follows that no *payment dispute* could arise under the Act.

37. Tax Invoice 920 was reissued with a further explanatory letter on 12 November 2013. On this occasion there can be no doubt that the letter and invoice were intended to constitute a payment claim since the letter expressly stated;

> *"This letter and the attached invoice constitute a payment claim for the purpose of the Construction Contracts (Security of Payments) Act (NT).*

38. However that is not the test as to whether the letter actually constituted a payment claim. The remaining test that the payment claim had to pass was that of whether the obligations to which the claim relates had been described in sufficient detail to be assessed. It must be said that the further explanation does not throw a great deal more light on the matter than the original invoice. However it does provide a breakdown of the specialist's mobilisation figure to the extent that the respondent was able to assess it, by rejecting it.

39. I therefore accept that the letter of 12 November 2013 constituted a payment claim under the Act.

40. Having decided when the payment claim was made, I now have to decide when the payment dispute arose. The applicant submits that no notice of dispute was received and accordingly the claim was due to be paid within 28 days; that is by 10 December 2013. In consequence a dispute arose on 11 December 2013. The respondent, on the other hand submits that its letter of 22 November 2013 was a notice of dispute.

41. In the case of K*&J Burns Electrical Pty Ltd v GDR group (NT) Pty Ltd & Anor [2011] NTCA 1* Southwood J considered (at 44) the issue of a notice of dispute to be given within 14 days after the issue of a payment claim. A notice of dispute must comply with all the relevant requirements of Schedule, Division 5 s6(2) of the Act. In particular it **must state the reasons for believing that the claim has not been made in accordance with the contract**. (Southwood J's emphasis). While the letter might imply dispute and the last sentence might imply such reasons for belief, the Act emphasises that the correspondence must be a notice of dispute and must state the reasons why the claim is not in accordance with the contract. I do not consider that the letter of 22 November 2013 achieves that level of clarity.

42. I therefore accept the applicant's view that the dispute arose on 11 December 2013. The application for adjudication was made on 29 January 2014, some 42 days after the dispute arose and well within the time bar of 90 days within the Act.

43. It follows that I have jurisdiction to determine the dispute. I note that even if the dispute had arisen on 22 November 2013 the application would still have been made within the 90 day period. Having decided that I do have jurisdiction I now turn to the substantive issues.

FORMATION OF THE CONTRACT

44. The contract was formed by oral discussion about the nature of the works at a meeting between the parties on 10 May 2013 followed by a series of emails between the parties. The applicant submits that the contract had been formed by 7 June 2013. I cannot accept this view since the email of 7 June 2013 did not provide unequivocal acceptance of a clear offer. The events leading to the formation of the contract were as follows.

45. On 10 May 2013 the applicant and respondent met to discuss the project. The same day the respondent sent drawings to the applicant.

46. On 13 May 2013 the applicant replied with Estimate # NCMS-002. The estimate was broken down as follows:

Labour	$80 per/hr
Atlas Copco Remote drill rig	$195 per/SMU hour
Mobilisation	$8400
Blasting	$76,884
Pattern design	$4,000

A note at the foot of the estimate states; *Please note that all travel expenses (i.e. airfares) Fuel and consumables unless stated are not included in any rates above.*

47. On 7 June 2013 the respondent wrote to the applicant an email which included the statement; *As discussed yesterday [respondent] looks like it is going to have to blast the hill as previously quoted, we have however reduced the size of the hill using the D9 dozer*.

48. On 17 June 2013 the applicant emailed the respondent stating that the permit process required a formal risk review and one of its staff would need to visit site together with a representative of the specialist. This would have an impact on the previous estimate. The email chain included a copy of an email from the specialist proposing costs for the visit and stating that it could put together indicative pricing for the blast.

49. On 18 June 2013 the respondent emailed the applicant stating; *"...Can you please provide us with a price to complete these works including blasting.*"

50. The applicant replied the same day, stating;

> *"The blasting and drilling side will be similar to the estimate originally provided (I have attached) the only additional costs will be that incurred is from [specialist] and myself to come to site so Risk management process for permit can take place.*
>
> *Based on the distance we will have 2 days as per costs provided yesterday [Specialist] will also incur flights and accommodation."*(sic).

51. On 25 June 2013 the applicant's representative visited the site and noted that clearance works had been undertaken and that not only had the vegetation been removed but also some overburden.

52. While on site, the applicant claims to have been requested by one of the respondent's site operatives to reduce the size of the blasted rock to a size which could easily be handled. The applicant claims to have informed the specialist accordingly who took it into account by using a smaller spacing of drill hole in the design.

53. On 28 June 2013 the applicant sent a copy of the specialist's design to the respondent by email. The email included an explanation of the drill pattern proposed "to achieve the desired fragmentation". In particular it provided two conditions:

    (i) Some areas of batters would have to be "pulled", i.e. excavated, by the main contractor.
    (ii) The design resulted in 1294 holes and 3778 drill meters, which was a lot more than the specialist was expecting and would cause delays getting sufficient explosive to site until week commencing 22 July 2013.

    The applicant requested the respondent to confirm agreement based on the parameters outlined.

54. The respondent confirmed its agreement to this proposal by email on 1 July 2013. I find that it was this confirmation which provided unconditional acceptance of a clear offer and the contract was formed.

THE EVENTS

55. The applicant mobilised its drilling rig and, on 6 July 2013, commenced drilling on site. The drilling was completed by 14 July 2013.

56. Following drilling the specialist proceeded to install wet explosive (Centra Gold) into the three designated areas to be blasted, Areas A, B and C.

57. As predicted there was a shortage of explosive, which led to an insufficient amount being available for Area C. Rather than delay the works the specialist agreed with the respondent's engineer to use alternative and available dry explosive (ANFO).

58. On 24 and 25 July 2013 the specialist conducted the blasts for each area. The blasts fully shattered the rock in Areas A and B but only partially shattered the rock in Area C.

59. On 8 August 2013 the applicant issued Tax Invoice 920 to the respondent. The respondent queried the value claimed on the invoice and claimed that the blast had failed in Area C.

60. Various correspondences passed between the parties in an attempt to agree the value of the work.

61. The applicant arranged for an investigative report to be undertaken by the specialist to establish what had happened at Area C and whether the charges had misfired. The report was issued to the parties on 10 October 2013.

62. The specialist concluded that the areas of the blast which did not fracture sufficiently were in fact where Centra Gold explosive had been used and not where ANFO had been used. It considered that the insufficient fracture was due to the local geology. However it conceded that an area of up to 1,100m2 and up to 2m deep did not achieve sufficient fragmentation, leaving rocks which might have a dimension of up to 2m.

63. On 12 November 2013 the applicant reissued Tax Invoice 920 together with some supporting information as a payment claim. When the invoice was not paid a dispute arose.

ISSUES IN DISPUTE

64. I find that the issues in dispute are as follows:
    (i) The definition of the word "consumables" within the estimate.

(ii) Whether the instruction by the site operative to fragment the rock into small pieces constituted a variation to the contract.

(iii) Whether the fragmentation of part of Area C failed due to inadequate blasting or because the rock did not heave due to local geological conditions.

I deal with each issue in turn:

Consumables

65. The estimate excludes "consumables". The applicant submits that consumables include the cost of explosive material since this could not be determined at the time of the original estimate and that this cost has been included within the item for "Mobilisation" in the specialists invoice. The respondent submits that "consumables" do not include the cost of explosives and that such a cost is included in the original estimate for blasting.

66. The word "consumables" is not defined in the contract and must therefore be taken to have its common meaning. Macquarie Dictionary defines the word as *(of an item of equipment or supply) normally consumed in use: consumable fuel*; *consumable paper products,* suggesting relatively low value items. While I accept that explosive material is used up in any blast I do not accept that it is a consumable as defined within the estimate. The reasons for this are twofold. First the specialist does not mention it as a consumable in its invoice to the applicant. The cost of the material would be significant and not low value and would otherwise have been highlighted in the same way as cost of travel. Second the cost of the blasting is made up of the cost of the explosive and the labour and transport costs to bring it to site and install in the drilled holes. On the balance of evidence I find that the cost of explosives has been incorporated into the rate per m3 for blasting. It follows that the item for blasting within the applicant's invoice includes the cost of explosives.

67. The conditions of contract and the price agreed between the applicant and the respondent are not subject to the contract agreed between the applicant and the specialist. That is a separate contract and may be the subject of a separate dispute. While the applicant may have intended that the prices were back to back that is not the agreement it struck with the respondent. The only exception to this is the cost of travel. The specialist defines the cost of travel as the actual cost plus 15% and it is reasonable that this cost is transferred to the respondent.

Instruction to fragment rock to small size

68. The applicant claims that it was requested by one of the respondent's site staff to fragment the rock into very small pieces and that as a result the specialist changed the

spacing of the drill pattern to a smaller spacing with the commensurate use of more explosives. In consequence the cost increased and this cost was additional to the original estimate.

69. I do not accept the applicant's submission for two reasons.

70. First, if it was proposed by a site operative that the rock should be fragmented into smaller pieces then that proposal did not come with an authorised instruction to vary the contract. Verbal remarks may be instructions that can vary the terms of the contract. However on this occasion the remark does not appear to have been made by an authorised representative of the respondent and there is no evidence which implies that the authorised respondent's representative instructed a variation. It would be imprudent in the extreme for the applicant to treat every remark by a site operative as an instruction which had a cost implication without confirming with the cost prior to undertaking the work.

71. Second, at the time of the alleged variation the contract had not come into existence and there was no contract to vary. The applicant could have sought a check on the estimated price from its specialist and presented any revised price on the basis of its design of 28 June 2013. It did not do so but entered into the contract on the basis of the cost set out in the email of 18 June 2013.

Area C blast failure

72. The applicant refers to the report by the specialist to explain the blast failure. The specialist states that the area that failed was filled with Centra Gold and not ANFO. Consequently the failure could not be attributed to the change of explosive. I accept this evidence.

73. The report also concludes that the area that failed to heave did not fail because of any problems due to stripping of the overburden above and any resulting changes of blast characteristics. I accept that the design was carried out in full knowledge that the overburden had been removed and that therefore this was likely not to have been a cause.

74. Finally the report concludes that the lack of heave was possibly the result of localised geological conditions which were different to other areas which were blasted. I accept that this is possible.

75. However, the exact reason why the blast failed is not relevant to the dispute. Nor is it relevant that the respondent's engineer agreed to the use of ANFO explosive. The contract to fragment the rock was not subject to geological conditions. The contract was to fragment the rock sufficient for its removal. The respondent's engineer was entitled to rely on the expertise of the specialist to achieve this.

76. The applicant submits that the blast was conducted in accordance with the agreement and that while the results were not all that was hoped for this is the nature of blasting. The applicant did not provide any guarantees as to the outcome of any particular blast as there are too many unknown variables that can affect the outcome of the blast. I cannot accept this argument. The email from the specialist to the applicant of 28 June 2013 forwarded to the respondent on the same day states;

> *I have designed the blast with the following parameters and just want to confirm the assumptions I have made with you and want to know if you want to confirm these assumptions (more importantly the blast results they will yield) with [main contractor] prior to committing to quantities etc.*

The clear implication is that the respondent can expect the results according to the parameters set out, as was indeed the result with Areas A and B.

77. The respondent is entitled to receive what it bargained for. That is sufficiently fragmented rock achieved by blasting. To the extent that the applicant did not provide the bargain the respondent is entitled to damages to put it in the same position it would have been had the bargain been fully completed.

78. In achieving that position it must mitigate its costs. The respondent states (in the statutory declaration of MI) that the applicant proposed that, in excavating the blasted rock (which the respondent was required to do after blasting) it should leave aside rocks which were too hard to break for blasting into a more manageable size by the applicant. This would seem to me to be a sensible mitigating approach. The respondent will need to have equipment on site sufficient to "pull" the rock and has stated that it cleared the overburden with a D9 dozer. Such equipment could be used for any necessary further breakage.

QUANTUM

79. I have reviewed both the Tax Invoice 920 and the proposals for payment made by the respondent. I find that neither assesses the value of the work appropriately. I have set

out in Table 1, below, the estimated costs, the claimed costs and the amount I will allow.

80. The explanations of how I have determined amounts are set out below. The reference number refers to the same number in the table.

1) I have accepted the labour hours within Tax Invoice 920, recognising that the original hours were an estimate.
2) I have accepted the plant hours within Tax Invoice 920, recognising that the original hours were an estimate. I have corrected the rate per hour from $175.00 as invoiced to $195.00 as estimated.
3) Mobilisation is not in contention.
4) I have rejected the costs of specialist mobilisation. These were not included in the contract except in so far as they were itemised as additional costs within the estimate.
5) I have allowed the staff costs of carrying out a preliminary risk assessment visit. I have allowed travel which is identified as additional using the specialists rates inclusive of GST (see note 13).
6) As 6.
7) As 6.
8) As 6.
9) I have allowed the lump sum within the estimate for blasting.
10) I have allowed the lump sum within the estimate for pattern design.
11) I have allowed the lump sum within the estimate for demobilisation.
12) The estimate was silent as to whether GST was applicable. The ACCC has given guidance that a quotation that is given which does not mention GST should be taken to include GST since otherwise the entity quoting may be guilty of misleading and deceptive conduct. There is no evidence that the estimate was clearly provided exclusive of GST. Thus I have taken the estimate to be inclusive of GST. In order to take that into account I have included an additional 10% for GST within items 6 to 9.
13) Finally there is the issue of damages. I accept that while damages could not be claimed within an application since they are never due under the contract, they may reasonably be claimed as a defence. However the respondent's estimates of work yet to be undertaken are priced on the basis that nothing should be paid for the failed area of blast. The only amount that can be claimed as damages is what costs are incurred in returning the respondent to the position it would otherwise have been in had the breach of contract not occurred. I find that the costs described by the respondent in its letter of 16 December 2013 bear little relation

to reality, particularly since, blasted or not, the rock required excavation and removal from its location. The unsubstantiated costs in the MI declaration are similarly high. I have allowed an amount representing approximately 3 to 4 days of wet plant hire to "pull" additional rock in compensation.

81. In summary I allow the amount of $129,398.70 inclusive of GST, which is $117,635.18 exclusive of GST.

INTEREST

82. I allow interest on the amount payable from the day after payment should have been made. The payment claim was made on 12 November 2013. The amount became payable on 10 December 2013. Interest is chargeable from 11 December 2013 to the date of this determination, 7 March 2014. That is a period of 87 days.

83. Northern Territory follows the Federal Court Rules in respect of post judgement interest. I have used the rates of interest specified by the Federal Court. Those are:

1 July 2013 to 30 December 2013	8.75%
1 January 2014 to 30 June 2014	8.50%

The interest incurred was, of course pre not post adjudication. Nevertheless the principle of the rates is reasonable for use. The resulting interest payable is $2,400.24. GST is not payable on interest awarded.

COSTS

84. There is no suggestion that either party has acted frivolously or vexatiously in this matter. I therefore decide that each party shall bear its own costs and that the costs of the adjudicator shall be shared equally between the parties.

85. The costs of the adjudication are set out in Schedule B.

TABLE 1 Comparison of Estimate, Claim and Costs Allowed by Adjudicator

		ESTIMATE					TAX INVOICE 920					ADJUDICATOR				
Ref	**Item**	**Rate**		**Unit**		**Cost $**	**Rate**		**Unit**		**Cost $**	**Rate**		**Unit**		**Cost $**
1	Labour	80.00	$/hr	36	hr	2,880.00	80.00	$/hr	98	Hr	7,840.00	80.00	$/hr	98	Hr	7,840.00
2	Drilling	195.00	$/hr	30	hr	5,850.00	175.00	$/hr	75	Hr	13,125.00	195.00	$/hr	75	Hr	14,625.00
3	Mobilisation	8,400.00	LS	1	LS	8,400.00	8,400.00	LS	1	LS	8,400.00	8,400.00	LS	1	LS	8,400.00
4	*Specialist Mobilisation*	0.00	LS	1	LS	0.00	91,197.10	LS	1	LS	91,197.10	0.00	LS	1	LS	0.00
5	*Specialist risk assessment - staff*											2,035.00	$/day	2	day	4,070.00
6	*Specialist risk assessment - travel*											1,876.77	LS	1	LS	1,876.77
7	*Specialist blast travel*											7,672.63	LS	1	LS	7,672.63
8	*Applicant risk assessment - travel*											1,876.77	LS	1	LS	1,876.77
9	*Applicant blast - travel*											1,876.77	LS	2	LS	3,753.54
10	Blasting	76,884.00	LS	1	LS	76,884.00	67,110.19	LS	1	LS	67,110.19	76,884.00	LS	1	LS	76,884.00
11	Pattern Design	4,000.00	LS	1	LS	4,000.00		LS		LS		4,000.00	LS	1	LS	4,000.00
12	Demobilisation	8,400.00	LS	1	LS	8,400.00	8,400.00	LS	1	LS	8,400.00	8,400.00	LS	1	LS	8,400.00
13	Total net GST										196,072.29					
14	GST					incl					19,607.23					incl
15	**Total incl GST**					**106,414.00**					**215,679.52**					**139,398.70**
16	Less Damages															-10,000.00
17	**Amount due including GST**															**129,398.70**

Schedule B Omitted