

**Claimant: NIGEL UNDERDOWN TILING**  
**Respondent: ELEGANT PROPERTIES PTY LTD**

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the “Act”), decide (with the reasons set out below) as follows:

1. The adjudicated amount in respect of the adjudication application dated 9 January 2007 is **\$4,477 including GST**
2. The date on which the amount became payable is **7 December 2006**.
3. The applicable rate of interest payable on the adjudicated amount is **16.457%** simple interest.
4. The Respondent is liable to pay the ANA’s fees and the adjudicator’s fees

Signed: .....

Date:.....

Chris Lenz Adjudicator

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**Background**

1. Nigel Underdown Tiling, ABN 19 591 251 81345 (referred to in this adjudication as the “Claimant”), entered into a verbal contract with Elegant Properties Pty Ltd, ABN 15 072 746 322, in October 2006 (referred to in this adjudication as the “Respondent”) to install porcelain tiles at a new house (the “house”) at 218 College Court, Caboolture in Queensland (the “contract”).
2. In October 2006 the Claimant carried out tiling work at the house and invoiced \$4,477.00 for the work on 31 October 2006.
3. On 23 November 2006 the Claimant served a payment claim for \$4,477.00 for the work.
4. The Respondent did not serve a payment schedule, and on 12 December 2006 the Claimant served a notice under s21(2) of the Act that he intended to have the payment claim adjudicated.
5. On 18 December 2006, the Respondent served a payment schedule on the Claimant.
6. The Claimant made a written application for adjudication on 9 January 2007 (the “application”) and the Respondent provided an adjudication response on 16 January 2007 (the “response”).

**Appointment of Adjudicator**

7. The Claimant applied in writing to the Institute of Arbitrators and Mediators (“IAMA”) on 9 January 2007 for adjudication. Subject to my finding jurisdiction, which is dealt with below, I find that the application in writing satisfies s21(3)(a) of the Act.
8. I find the application was to IAMA, as an authorised nominating authority, with registration number N1057859, thereby satisfying s21(3)(b) of the Act.
9. By letter dated 11 January 2007 IAMA referred the adjudication application to me to determine, pursuant to s23(1) of the Act. I am registered as an adjudicator under the Act with registration number J622914.
10. I accepted the nomination by facsimile dated 12 January 2007 sent to the Claimant and to the Respondent, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.

**Material provided in the adjudication**

11. I list the Claimant’s material and the Respondent’s material separately.

**Claimant’s Material**

This material comprised the application dated 9 January 2007, containing the following documents:

- i. The Claimant’s submissions dated 9 January 2007 in support of the application, which was provided by way of a chronology;

- ii. Claimant's payment claim dated 23 November 2006 for \$4,447.00;
- iii. Claimant's notice under s21(2) of the Act that he intended to have the payment claim adjudicated;
- iv. Respondent's letter to Nagel Underwood Tiling dated 25 November 2006 responding to the payment claim, disputing agreed rate for tiling, quantity of tiling work done, and alleging defective work;
- v. Claimant's letter dated 27 November 2007 in response;
- vi. Respondent's letter dated 28 November 2006 in response, reiterating that work to be complete by 1 December 2006;
- vii. BSA License search for Mike Rosch showing BSA license cancelled;
- viii. Claimant's email to BSA advising of alleged unlicensed work by the Respondent;
- ix. Copy of fax journals to demonstrate invoice, payment claim, s21(2) notice and letters to the Respondent, were faxed to Respondent;
- x. Statutory Declaration of Dallas Foster Morgan Williams dated 7 January 2007;
- xi. Undated letter from Amber Morayfield identifying dates of delivery of tiles to the house;
- xii. 2 pages of Amber delivery copies of invoices for the Respondent for tiles for the house;
- xiii. Extract of a White Pages listing for Elegant Properties Pty Ltd;
- xiv. Extract of Internet extract of contact details for Respondent in Queensland;
- xv. 2 extracts of Internet advertisements for the sale of the house;
- xvi. 2 pages of Internet extract from Peter Brookes Property Marketing of house;
- xvii. Express Post Envelope returned to sender;
- xviii. Respondent's payment schedule dated 17 December 2006 stating that it proposed to pay \$1,912.13 less rectification and attaching:
  - a. A schedule identifying issues in dispute and advising that the Respondent was not indebted to the Claimant at all;
  - b. Claimant's letter to the Respondent dated 28 November 2006;
  - c. Two pages of photographs alleging defects;
  - d. Respondent's letter to the Claimant dated 25 November 2006.

### Respondent's Material

The Respondent's material consisted of the adjudication response of 28 pages (the "response") sent on 16 January 2007 consisting of:

- (i) Respondent's submissions (3 pages);
- (ii) Copy of a diary entry dated 3 October 2006;
- (iii) Copy of a bank statement showing payment for a Qantas flight and some notes;
- (iv) Copy of a floor plan for the ground floor of house;
- (v) Copy of a floor plan for the first floor of house;
- (vi) Copy of payment schedule dated 17 December 2006 and its attachment;
- (vii) Copy of Claimant's letter to Respondent dated 28 November 2006;
- (viii) Copy of Respondent's letter to Claimant dated 25 November 2006;
- (ix) Copy of fax transmission verification for above letter dated 27 November 2006
- (x) 2 pages of photographs;
- (xi) Copy of tax invoice from Amber dated 25 October 2006;
- (xii) Copy of Claimant's notice to Respondent dated 12 December 2006;
- (xiii) Copy of Claimant's invoice number 219 dated 30 October 2006;
- (xiv) Copy of Claimant's letter to Respondent date 28 November 2006;
- (xv) Copy of Claimant's letter to Respondent dated 27 November 2006;

- (xvi) Copy of payment claim;
- (xvii) Copy Respondent's letter to Claimant dated 25 November 2006
- (xviii) Copy of Respondent's letter to Claimant dated 28 November 2006.

### Jurisdiction

12. s3 of the Act requires that:
  - (1) the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
  - (2) that the *construction work* was carried out, or the related goods and services supplied for construction work, in Queensland.
13. Turning firstly to schedule 2 of the Act. It defines a *construction contract* as follows:
 

*“”construction contract” means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”*
14. The Claimant's submissions referred to a verbal agreement between the Claimant and Respondent (through Mr. Mike Rosch) reached on 26 September 2006 for laying of ceramic tiles of \$30 per square metre for floor tiles and \$35 per square metre for wet areas.
15. The Claimant's submissions referred further to a revised verbal agreement between the Claimant and Respondent (through Mr. Mike Rosch) on 3 October 2006 for \$40 per square metre for laying of porcelain tiles at the house.
16. The Respondent's first two paragraphs of submissions dealt with the dispute over the rate for tile laying, in which the Respondent asserted that \$20 per square metre had been agreed. I will turn later to the dispute over the agreed rate, but am satisfied that the parties had an agreement for tile work to be done at the house in Caboolture, which I find is in Queensland (the “project”).
17. The Respondent took issue with the Claimant's assertions that the meeting to finalise agreement on rates took place on 3 November (sic), which I take to mean October 2006 because of Mr. Roach's diary entry on that day regarding his flight to Brisbane only arriving at 19.05. For present purposes I am satisfied that an agreement was reached in early October 2006, as the precise date is not necessary to establish at this stage, providing it is after 1 October 2004.
18. I am satisfied therefore that there was an *agreement or other arrangement* as provided by Schedule 2 of the Act, in early October 2006, in which the Claimant undertook to carry out work for or to supply related goods and services to the Respondent. This satisfies part of the definition of *construction contract*. However, it is necessary for me to determine whether the undertaking related to *construction work* or to supply related goods and services in relation to *construction work*.
19. Construction work is defined in s10 of the Act as:
 

*“(1) Construction work means any of the following work –*  
*(a) The construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;...*”

20. I am satisfied that tiling of the house falls within s10(1)(a) of the Act as *construction work* as it is part of the construction of the house, which I am satisfied is a building.
21. I now extract the relevant provision dealing with related goods and services.

***11 Meaning of related goods and services***

1. ***Related goods and services***, in relation to construction work, means any of the following—
  - i) ...
  - (b) *services of the following kind—*
    - i) *the provision of labour to carry out construction work;*”

22. I find that the Claimant agreed to do the tiling work, with tiles supplied by the Respondent falls within the meaning of *services* s11(1)(b)(i), as the provision of labour to carry out the *construction work* of tiling.
23. I am therefore satisfied that the contract date was after 1 October 2004, and it related to *construction work* and the supply of related services for *construction work* that I find is in Queensland.
24. I find therefore that s3 of the Act has been satisfied for the reasons outlined above and because none of the exceptions contained within s3(2) and s3(3) of the Act applies to disqualify the *construction work* from the application of the Act.
25. Consequently, I have jurisdiction to adjudicate this matter and now proceed to do so, being mindful of the constraints imposed by the Act in carrying out this function.

**Scope of the adjudication**

26. s26(1) of the Act requires that I am to determine:
  - a. The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the “**adjudicated amount**”); and
  - b. The **date** on which any such amount became or becomes payable; and
  - c. The **rate of interest** payable on any such amount.
27. s26(2) of the Act restricts the matters that I may consider in determining an adjudication application. s26(2) of the Act provides:

*“In deciding an adjudication application, the adjudicator is to consider the following matters only (my emphasis added):*

- (a) *the provisions of this Act, and to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
- (b) *the provisions of the construction contract from which the application arose;*
- (c) *the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
- (d) *the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*

(e) *the results of any inspection carried out by the adjudicator of any matter to which the claim relates.*”

28. Part 4A of the *Queensland Building Services Authority Act 1991* (The “QBSA Act”) may apply to this adjudication to which I will return later and I did not conduct any inspection of the project.
29. s35(3) also gives me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the ANA’s fees and adjudicator’s fees and expenses. I will exercise that discretion after dealing with the substantive issues.

### **Requirements of an adjudication decision**

30. The Court of Appeal in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 394* (“*Brodyn*”) has provided a very useful guide for adjudicators in relation to the requirements of an adjudication decision. At para 53 and following, Hodgson JA said with reference to the similar NSW legislation:

*“[53] What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:*

1. *The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
2. *The service by the claimant on the respondent of a payment claim (s.13).*
3. *The making of an adjudication application by the claimant to an authorised nominating authority (s.17).*
4. *The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
5. *The determination by the adjudicator of this application (ss.19(2) and 21(5), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*

31. I will now check that each basic and essential requirement has been complied with.

### **Detailed consideration of each Basic and Essential Requirement**

#### *The first basic and essential requirement – the construction contract*

32. I have already found that there is a *construction contract* to which the Act applies, which gave me jurisdiction to proceed with the adjudication.
33. I will consider the contract in a bit more detail at this stage, as there is a dispute about the rate for tiling work and the Respondent asserts that the Claimant is lying about the price for the tiling. When discussing jurisdiction, I already referred to the contending assertions in relation to the rates. At this stage I will also consider the issue of workmanship, as it arises out of the contract.
34. The Claimant included a statutory declaration of Dallas Foster Morgan Williams that he was aware of tiling pricing being discussed in September 2006 at \$30-35 per square

metre for ceramic tiles. This is consistent with what the Claimant asserted in his submissions.

35. Although Mr. Williams did not discuss pricing for porcelain tiles, he did say that they would attract a higher price than ceramic tiles. I am satisfied with the Claimant's submissions, and as a matter of commonsense, that porcelain tile laying would be more expensive than ceramic tiles because they would take longer to lay. This finding accords with Mr. Williams' statement.
36. The Respondent, however, asserted in its letter dated 25 November 2006 that the agreed tiling price was \$18.00 per square metre plus GST. Furthermore, in the payment schedule attachment paragraph 3, the Respondent again asserted that the Claimant had agreed to tile for \$18.00 per square metre, and this was reiterated in the response submissions.
37. Mr. Williams's statutory declaration also dealt with the quality of the workmanship of the Claimant's tiling at the house, which he said was to the BSA standard, apart from two rectifications, and that any issues or legitimate rectifications were handled in a prompt and tradesmanlike manner.
38. His statutory declaration also dealt with his association with the Respondent, as he was the person who provided the BSA license for the construction of the house by the Respondent, and that he withdrew his license when he was aware of the Respondent prolonging payments and allegations of shoddy workmanship in relation to other subcontractors. I am confining my decision to this dispute, so I am not taking into account adverse references made about the Respondent's dealings with other subcontractors. However, I am prepared to find that Mr. Williams was so concerned about the management of the work at the house that he withdrew his license from the project.
39. The Respondent had earlier made assertions in the 25 November 2006 letter that, "*The tiles are not acceptable and charges are being treated as FRAUD and the complain (sic) to revue (sic) your trade integrity and the work will be ask (sic) for assessment of your license BSA (sic). The inspector has been engage (sic) to verify the quantities to your expense. The report will be filed to BSA and CTTT for requesting to remove your license due to the fraud and the faulty workmanship by registered trade (sic).*"
40. As a matter of logic, I would have expected that the Respondent would have controverted Mr. Williams's statement on oath because it asserted fraud arising out of the rate of \$40.00 and \$35.00 per square metre claimed and poor quality workmanship, both of which were dealt with by Mr. Williams on oath. Such matters are serious assertions which the Respondent said it would bring to the BSA's attention, and yet it gave nothing on oath about these two key issues in this dispute. The Respondent also made no reference to the withdrawal of Mr. Williams' license on the project.
41. Given the absence of a statutory declaration from the Respondent relating to what it had earlier asserted were serious matters of fraud and poor workmanship, and which were put in issue by the Claimant through Mr. Williams, I find that the Respondent's assertions in its 25 November 2006 letter, the payment schedule and the response submissions carry little weight.

42. Accordingly, I find that it is more likely than not that the agreed tiling rate was \$40.00 per square metre for the porcelain tiles because it is a higher price than ceramic tiles, as agreed by Mr. Williams, who referred to discussions regarding \$30-35 per square metre for ceramic tiles. I also find that the rate for wet area ceramic tiles is \$35.00 per square metre as claimed by the Claimant and confirmed by Mr. Williams as within the range of prices discussed.
43. I reject the Respondent's assertions regarding the pricing, which would have had the Claimant agreeing to work on porcelain tiles for nearly half the rate of ceramic tiles. Apart from my earlier finding that the Respondent's submissions on pricing and workmanship carry little weight, I am not prepared to find that a commercial tiler would agree to work for such low rates.
44. I have given the Respondent's submissions little weight in relation to workmanship for the reasons outlined above. I am aware of the Respondent's photographs identifying alleged defective workmanship, but am not satisfied that they demonstrate workmanship of a poor quality. As a matter of commonsense and logic defects are created in construction work that is of a good standard that require rectification, and I am satisfied from Mr. Williams's statement that the Claimant rectified work quickly and in a tradesmanlike manner. I am prepared to accept that the Claimant's reference in his letter to the Respondent dated 27 November 2006 that he was only too happy to carry out some minor rectification work if he was going to be paid for his work, and that he was happy for a BSA inspector to go over the work. Accordingly, I am not prepared to find that the work was of poor quality, and that if the Claimant had been paid, that the minor effects would have been rectified
45. The parties agree that the contract was for a week's tiling work, and I am satisfied that this was agreed, subject to the availability of tiles for carrying out the work. I find that the Claimant has shown that not all the tiles were available when he commenced work on 3 October 2006 from his submissions and the letter from Amber and the delivery invoices. Furthermore, this was confirmed by Mr. Williams who said that the Respondent's Mr. Rosch was responsible for the control of ordering up supplies, and that when tiles ran out on the job, there were 7 or 8 working days between tile deliveries requiring the Claimant to go to other jobs. Given that not all tiles were available at the commencement of work, I find that the contract would imply that the Claimant complete the work within a reasonable time of being given the tiles to do the work.
46. I have therefore established the *first basic and essential requirement*.

*The second basic and essential requirement – service of the payment claim*

47. The *second basic and essential requirement* requires the service of the payment claim on the Respondent in accordance with s17 of the Act.
48. s103(1) of the Act allows the contract to provide for the way of service, otherwise one would have regard to s103(2) of the Act dealing with other laws regarding service.
49. The contract between the parties was oral and did not seal with service. s103(2) of the Act provides that s39 of the *Acts Interpretation Act 1954* (the "AIA") regarding service is preserved. s39 of the AIA provides:

*”(1) If an Act requires or permits a document to be served on a person, the document may be served—  
 (a) on an individual...; or  
 (b) on a body corporate—by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate.”*

50. The Claimant has demonstrated that it faxed the payment claim to the Respondent, and in the 25 November 2006 letter the Respondent referred to the payment claim, so I am satisfied that the Respondent received the payment claim by facsimile.
51. Accordingly I find that proper service of the payment claim took place as required by s17 of the Act so that the *second basic and essential requirement* is satisfied.

*The third basic and essential requirement – valid application to an ANA*

52. I have already found the Claimant has validly made the application to IAMA which is an ANA. Accordingly, *the third basic and essential requirement* is satisfied.

*The fourth basic and essential requirement – eligible adjudicator*

53. *The fourth basic and essential requirement* requires compliance with the Act regarding the reference to an eligible adjudicator: s21(6) of the Act. I have already found that I am an eligible adjudicator because I am registered, thereby satisfying s22(1) of the Act.
54. I am not a party to the period subcontract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have been properly appointed under the Act as required by s23(2) of the Act.
55. Accordingly, *the fourth basic and essential requirement* has been satisfied.

*The fifth basic and essential requirement – s26(1) requirements*

56. *The fifth basic and essential requirement* is that the Adjudicator decide the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable in accordance with s26(1) of the Act.
57. The decision is in writing in accordance with s26(3)(a), and I have provided reasons in accordance with s26(3)(a) because the parties have not agreed to waive the requirement of reasons: s26(3)(b). The decision was made after further consideration of the merits in the dispute, to which I now turn.

**Further discussion on the merits in the dispute**

*Payment claim*

58. s17(2) of the Act, provides the statutory requirements for the payment claim:

*“A payment claim-*

- (a) must identify the construction work or related goods and services to which the progress claim relates; and  
 (b) must state the amount of the progress payment that the claimant claims to be payable (the “**claimed amount**”); and*

*(c) must state that it is made under this Act.”*

59. The payment claim bears the endorsement “This invoice is a claim for payment under the Building and Construction Industry Payment Act 2004” and it attached Invoice 219, which provided the calculation of the amount of the progress claim. Furthermore, the payment claim explained the work that was carried out and identified the house.
60. I am satisfied that the information provided complies with s17(2) such that it is a *payment claim* under the Act, as it identified the work, provided a claimed amount and carried the endorsement.

*Payment schedule*

61. s18(2) of the Act requires that a payment schedule:

*(a) must identify the payment claim to which it relates; and*  
*(b) must state the amount of the payment, if any, that the respondent proposes to make (the **scheduled amount**).*

62. The Respondent did not provide a payment schedule until invited to do so under the Claimant’s s21(2) notice dated 12 December 2006. I am satisfied that the notice was received by the Respondent on 12 December 2006, as it was sent by fax. The Respondent had 5 business days after service of this notice to provide a payment schedule, and it did so on 18 December 2006, which is within the time period.
63. The payment schedule referred to the payment claim and stated that \$1,912.13 was the amount the Respondent proposed to pay less rectification. Accordingly, I am satisfied that it is a valid payment schedule. I now turn to the reasons in the payment schedule for non payment.

*Payment schedule reasons for non payment*

64. The Respondent’s paragraph 4 of the payment schedule attachment stated that payment was to be on completion of the work, and that the photographs attached demonstrated that the work was not complete. I am not prepared to accept that the contract provided a term that payment was to be on completion of the work. There is no evidence that this was an express term of the contract.
65. The Claimant conceded that he would complete the work in a week, with the proviso that the tiles were available. I have already found that the tiles were not all available when work commenced on 3 October 2006. The concession by the Claimant that work would be complete within a week does not carry with it an agreement that payment would be made on completion of the work. It may flow as a matter of logic in normal circumstances of the work only taking a week to complete, but I am not prepared to find this as a term when the Respondent did not provide all the tiles when the work commenced.
66. Therefore, whether or not the photographs referred to in paragraph 5(a) demonstrate that the work was incomplete about which I make no finding, this does not preclude the Claimant from making a progress payment under the Act. If the Respondent is making the assertion that it is a condition precedent to payment that all work be complete, in the case where it failed to provide the tiles, then I would find that such an agreement was contrary to s99 of the Act, as it would be restricting the right of the

Claimant to progress payments under s12 of the Act. Accordingly, the payment schedule assertion that no monies were payable because work was not complete is rejected.

67. The payment schedule paragraph 5(b) reference that the Claimant charged the wrong amount per square metre is rejected because I am satisfied that the payment claim rates of \$40.00 per square metre for porcelain tiles and \$35.00 per square metre for ceramic tiles in wet areas is in accordance with the contract. This paragraph of the payment schedule referred to an attached letter, but it was not clear what letter was being referred to. Elsewhere in the payment schedule there was reference to the letter dated 25 November 2006, so I have assumed that this is the letter referred to. This letter maintains a rate of \$20.00 per square metre for tiles that I have already rejected, so this reason for non payment is rejected.
68. The payment schedule paragraph 5(c) reference to work not being complete within the agreed time is rejected because I have found that the Respondent failed to provide the tiles at commencement of the work, and I have found that the Claimant could complete the work within a reasonable time. Accordingly this reason for non payment is rejected.
69. The payment schedule paragraph 5(d) reference to work not being completed in a tradesmanlike manner with the attached photographs is rejected because I have already found that the Claimant carried out proper quality work on this house because Mr. Williams' uncontroverted statutory declaration says so. Accordingly this reason for non payment is also rejected.
70. The payment schedule paragraph 5(e) does not explicitly deal with reasons for not payment on which I can make any decision.
71. The payment schedule paragraph 5(f) reference to the request to the Claimant to return to rectify defective work and that rectification costs would be payable does not explicitly deal with reasons for not payment on which I can make any decision.
72. The payment schedule paragraph 5(g) reference to the Claimant's refusal to complete the work or return to site to discuss anything to resolve the dispute is not borne out by the material. I have found that the Claimant stated in the letter dated 27 November 2006 that he was prepared to return to rectify some minor defects providing he was paid for the work done. The Claimant reiterated this in a letter to the Respondent dated 28 November 2006, but added that he would only return when the Respondent was licensed to do work in Queensland. He added that work was completed to a degree where payment could not be withheld, and that the Respondent's requests/demands would be ignored until he was paid.
73. I accept that there were some minor defects that required rectification as the Claimant had conceded this fact, but I have found otherwise that the Claimant carried out proper quality work on this house because Mr. Williams' uncontroverted statutory declaration says so. Accordingly, I find that it was not unreasonable for the Claimant to wait for payment for the work in the face of accusations of fraud for overcharging and defective work, neither of which I have found were justified on the material.
74. This means that I find that in relation to the payment schedule paragraph 6, that the Respondent was not entitled under the contract to rectify the Claimant's defective

work, and I reject the Respondent's estimate of \$880.00 to rectify the work on the basis it was firstly unjustified, and secondly was not supported by any invoices or receipts. Accordingly, I reject this as a reason for non payment.

75. In the payment schedule paragraph 7, I note that the Respondent then states that as a result of its assertions that the Respondent is not indebted to the Claimant at all. I cannot accept this submission, and it is inconsistent with the earlier concession by the Respondent that \$1,912.13 was owing to the Claimant.
76. I therefore find that there are no justifiable reasons put forward in the payment schedule for non payment of the payment claim. I now turn to the response submissions.
77. In the response the Respondent made reference to calculations relating to the quantity of tiles and that it had been overcharged, and it provided two floor plans to support its calculations. I am not prepared to consider these submissions, as I find that they are reasons that were not explicitly advanced in the payment schedule, and I am prevented by s24(4) of the Act from allowing reasons that were not in the payment schedule.
78. I accept that the Respondent cross referenced the 25 November 2006 letter in which it had included an assertion that the quantity of tiles was incorrect, but it did not make any specific reference to this in the payment schedule. Given that the reference to the letter in the payment schedule specifically dealt with the incorrect rate for tiling and the concerns about defective work, I am not prepared to consider that the payment schedule, merely by reference to the letter also included a challenge to the quantity of tiles as a reason for non payment. Accordingly, the only reasons for non payment allowed in the response, are those explicitly dealt with in the payment schedule, and those have been rejected.

### **Adjudicated amount**

79. I must be satisfied that the Claimant has the right to the progress payment before it can be considered the adjudicated amount, and I refer to s12 of the Act that provides:

***“12 Rights to progress payments***

*From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.”*

80. I will need to determine the reference date for this claim, so as to be satisfied that the Claimant was entitled to make the claim. *Reference date* is defined in Schedule 2 of the Act as:

- “(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or*
- (b) if the contract does not provide for the matter-*
- (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and*
- (ii) the last day of each later named month.”*

81. I find that the verbal contract had no term dealing with a date for progress payments, so I find that the first *reference date* for this contract was the end of October 2006, as I have found that this was the month in work was first carried out. I therefore find that the first *reference date* was 31 October 2006. I have found that invoice 219 was sent by fax on 31 October 2006, and that the payment claim was served on 23 November 2006. I find that this was from the *reference date* of 31 October 2006, thereby entitling the Claimant to a progress payment.

*Calculation of the amount*

82. The adjudicated amount must be decided and the Act makes provision for deciding the amount [s13 of the Act] or valuing the construction work [s14 of the Act]. Turning to each in turn:

***“13 Amount of progress payment***

*The amount of a progress payment to which a person is entitled in relation to a construction contract is--*

- (a) *the amount calculated under the contract; or*  
 (b) *if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.*

***14 Valuation of construction work and related goods and services***

*(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued--*

- (a) *under the contract; or*  
 (b) *if the contract does not provide for the matter, having regard to--*  
     (i) *the contract price for the work; and*  
     (ii) *any other rates or prices stated in the contract; and*  
     (iii) *any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and*  
     (iv) *if any of the work is defective, the estimated cost of rectifying the defect.*

83. I am satisfied that invoice 219 reference to 67 m<sup>2</sup> of porcelain tiles at \$40.00/ m<sup>2</sup> is an amount calculated under the contract, as is the 29 m<sup>2</sup> of ceramic tiles in wet areas at \$35.00/ m<sup>2</sup>. These two items amount to \$3,695.00, excluding GST.
84. However, the screeding of wet area floors, laying of sill tiles, tile angles and floor wastes amounting to \$375 were not identified in the verbal agreement. However, in the Respondent's 25 November 2006 letter, the Respondent reluctantly accepted these charges, and I am therefore satisfied that they constitute a variation agreed to by the Respondent, as provided in s14(1)(b)(iii) of the Act. Therefore, I find that the amount for the construction work is \$4,070, plus GST.
85. I am therefore satisfied that the Claimant is entitled to the payment claim of **\$4,477.00 including GST as the adjudicated amount.**

**Due date for payment**

86. s15 of the Act deals with the due date for payment, and provides in s15(b) of the Act that if the contract does not provide about when a progress payment becomes payable, then it is 10 business days after the payment claim is made.
87. I find that there is nothing in the verbal contract about progress payment dates, so s15(b) of the Act is enlivened. The payment claim was served on 23 November 2006 so the **due date for payment is 7 December 2006.**

**Interest**

88. I must consider whether the contract is a *building contract* to which s67P of the QBSA Act applies. This provision is in Part 4A of the QBSA Act which deals with building contracts other than *domestic building contracts*. A *domestic building contract* is defined in Schedule 2 of the QBSA Act as having the meaning in the *Domestic Building Contracts Act 2000*.
89. s7(2) of the *Domestic Building Contracts Act 2000* (“DBCA”) provides that a *domestic building contract* does not include a contract between a *building contractor* and a *subcontractor*. Schedule 2 of the DBCA defines a *building contractor* as a person who carries out *domestic building work*. I need to consider whether the Respondent carried out *domestic building work*. *Domestic building work* is defined in s8 of the DBCA as *the erection or construction of a detached dwelling*. As a matter of commonsense I find that the house is a detached dwelling. This means that the Respondent is a *building contractor* under s7(2) of the DBCA.
90. I find that the definition of *subcontractor* under Schedule 2 of the DBCA as a person entering into a contract with a *building contractor* to carry out *domestic building work*. I have already found that the work was *domestic building work*, so the Claimant falls within the definition of *subcontractor* under the DBCA. Accordingly, it is a *subcontractor* within the meaning of s7(2) of the DBCA, which means that the contract is not a *domestic building contract*, as this is specifically excluded from the definition under the DBCA. I am therefore required to consider the provisions of Part 4A of the QBSA Act.
91. s67P of the QBSA Act provides for interest of late progress payments in relation to a *building contract*. *Building contract* is defined in s67A of the QBS Act as a contract or other arrangement, other than a domestic building contract, for carrying out building work in Queensland. *Building work* is defined in Schedule 2 of the QBSA Act as *the erection or construction of a building*, and I find that the house is a *building*.
92. s67P(2) provides that interest at a *penalty rate* is payable for unpaid progress payments, and the penalty rate is defined in s67P(3) as 10% per year plus the annual rate of 90 day bank bills published by the Reserve Bank of Australia. I referred online to the Herald Sun’s 17 January 2007 reference to the 90-day bank bill rate of 6.457 per cent from the Reserve Bank. **I therefore find interest at the penalty rate of 16.457% on the unpaid payment claim.**

**Authorised Nominating Authority and Adjudicator’s fees**

93. s34 and 35 refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has succeeded in the quantum of his

payment claim. I have found against the Respondent in its submissions, and that the Claimant had to provide a notice under s21(2) of the Act to receive a payment schedule. After considering all of the material, I was unable to accord much weight to the Respondent's submissions. In the face of Mr. Williams' statutory declaration, in circumstances where the Respondent with its claims of the Claimant's fraud and poor workmanship should have controverted Mr. Williams on oath, it did not do so.

94. Accordingly, I have found little merit in the Respondent's case, and in exercising my discretion, I therefore find that the Respondent should pay the ANA's and my fees.

Chris Lenz  
Adjudicator

23 January 2007