

BUILDING DISPUTES TRIBUNAL
TE TARAIPUNURA MŌ NGĀ TAUTOHE WHARE

**AGREEMENT FOR EXPERT DETERMINATION
AND RULES FOR DETERMINATION OF DISPUTED MATTERS BY EXPERT**

BY AN AGREEMENT made the _____ day of _____ 2010

BETWEEN _____ (*the Applicant*)

AND _____ (*the Respondent*)

Jointly referred to herein as “**the parties**”

WHEREAS:

- A. Various disputes and differences have arisen between the parties.
- B. The parties have agreed that the matters in dispute shall be referred to Expert Determination in accordance with these Rules.
- C. The parties agree that the reference to Expert Determination shall be on the following terms:

THE PARTIES AGREE AS FOLLOWS:

- 1.1 The matters in dispute between the parties referred to in Schedule A hereto are submitted to the Expert Determination of (*insert name of Expert*) (**the Expert**).
- 1.2 The Expert shall act as an independent expert and not as an arbitrator.
- 1.3 The Expert shall be impartial and independent of the parties and shall assume a continuing duty to immediately disclose to the parties any circumstances arising in the future likely to give rise to justifiable doubts as to the Expert’s impartiality or independence in the eyes of any of the parties, until the Expert Determination is made.
- 1.4 The parties agree that the Expert Determination made by the Expert shall be (*delete one*) [final and binding upon them in all respects and there shall be no rights of appeal or review] [non-binding and the parties expressly reserve their rights to

reject the Determination of the Expert and to instead apply to have the dispute determined by adjudication, court proceedings, or arbitration].

2.0 Replacement of Expert

- 2.1 If the Expert becomes in fact or in law unable to perform the functions of that office, the Building Disputes Tribunal shall appoint a substitute Expert within five (5) working days of receipt of a request by a party to appoint a substitute Expert.
- 2.2 If an Expert resigns or is replaced, the proceedings shall resume at the stage where the Expert who resigned or was replaced ceased to perform the Expert's functions, unless the replacement Expert decides that any part of the prior proceedings are to be repeated.
- 2.3 If an Expert resigns or is replaced all time limits under these Rules will be extended by the period of time that elapses between the Expert's resignation or removal and the appointment of a substitute Expert unless the replacement Expert decides that any part of the prior proceedings are to be repeated. In that event, the period of time that elapses will run from the date of the earliest action to be taken by any party that is to be repeated and the appointment of a substitute Expert.

3.0 Conduct and co-operation by the parties

- 3.1 The parties shall co-operate in good faith with the Expert and with any other party to the dispute and will comply with the Expert's directions to attend conferences and site visits and to provide documents or other evidentiary material.
- 3.2 The parties and their representatives must attend the Preliminary Conference and any further conference, site visit, or inspection of the subject matter of the dispute or any other thing to which the dispute relates, directed by the Expert, unless otherwise agreed with the Expert.
- 3.3 Parties and/or their representatives who attend the Preliminary Conference and/or any further conference, site visit, or inspection of the subject matter of the dispute or any other thing to which the dispute relates, must have personal knowledge of the background facts and relevant circumstances in relation to the dispute and must have the authority to provide all necessary information required by the Expert for the purpose of the Determination.
- 3.4 A party must provide a copy of any document or any other evidentiary material provided by it to the Expert, to every other party.

4.0 The Determination procedure

- 4.1 The Expert may conduct the Expert Determination in any manner that the Expert thinks fit having regard to the nature and circumstances of the matters in dispute and in accordance with these Rules.
- 4.2 The Expert shall adopt procedures and give directions and rulings as required to ensure that the process for the Determination of the matters in dispute is fair, prompt and cost effective.
- 4.3 The rules of evidence do not apply in relation to the Expert Determination.

- 4.4 The Expert may consider and take into account:
- [a] The submissions and evidence of the parties;
 - [b] The context of, and circumstances surrounding, the dispute;
 - [c] This agreement.
- 4.5 The Expert may also:
- [a] Rely on his or her own knowledge, skill and experience in relation to the subject matter of the dispute;
 - [b] Make his or her own enquiries without reference to the parties;
 - [c] Appoint and take advice from other experts and professional advisers in respect of matters which the Expert considers to be outside his or her own expertise to assist him or her in reaching his or her Determination, as long as any such advice is provided to the parties for comment prior to making the Determination. The cost of such experts or professional advisers shall be treated as part of the costs and expenses of the Expert Determination.
 - [d] Convene a conference of the parties and their representatives and/or the experts engaged by the parties and each party and its representatives and/or experts shall comply with the Expert's reasonable directions to attend any such conference.
 - [e] Carry out an inspection of the subject matter of the dispute or any other thing to which the dispute relates, or any thing the view of which might assist in determining the issues and the Expert may use his or her own observations to understand the disputed matters and also as material which the Expert may use in determining the issues submitted for Determination.
- 4.6 The Expert shall convene a Preliminary Conference with the parties, in person or by teleconference, as soon as practicable after the execution of this Agreement. The purpose of the Preliminary Conference is to:
- Discuss and confirm the issues in dispute that are to be determined by the Expert; and,
 - Agree on how the Expert Determination process should proceed, including a timetable for the provision of submissions, documents and other evidentiary material.
- 4.7 The Expert shall endeavour to agree the procedure for the investigation and Determination of the matters in dispute with the parties.
- 4.8 In the absence of agreement, the procedures and the times by which any steps must be taken by the parties shall be determined by the Expert who shall make such procedural directions or rulings in relation to the process or in relation to the Expert's own jurisdiction as the Expert sees fit and in his or her absolute discretion.

4.9 Unless the parties and the Expert agree otherwise, or the Expert directs otherwise, the directions and rulings that may be made by the Expert include, but are not limited to, directions or rulings in relation to:

- Identifying and/or clarifying issues in dispute;
- Jurisdiction;
- Provision of submissions, documents and other evidentiary material;
- Provision of any further submissions, information, documentation and other evidentiary material which the Expert may reasonably require;
- Conferences between the parties, their representatives and/or experts engaged by the parties, including conferences of the parties' experts chaired by the Expert for the purpose of narrowing the issues in dispute and/or clarifying the reasons for any differences of opinion between the parties' experts. Any such conferences shall be conducted and recorded in any manner that the Expert considers appropriate in the circumstances.

4.10 The parties agree that they will be bound by the Expert's directions or rulings and that they are not permitted to challenge the Expert's directions or rulings on issues arising during the course of the Expert Determination process including any rulings in relation to the Expert's own jurisdiction.

4.11 Unless the parties and the Expert agree otherwise, or the Expert directs otherwise, the procedure for the Expert Determination in Appendix 2 shall apply.

5.0 Expert shall proceed in the event of any failure by parties

5.1 The Expert's power to determine the dispute shall not be affected by the failure of any party to provide a submission or a response to the submissions of any other party or to comply with any request or direction of the Expert.

5.2 The Expert may draw any inferences from any such failure that the Expert thinks fit and determine the dispute on the basis of the information available to him or her.

6.0 The Expert's Determination

6.1 The Expert shall make his or her Determination of the disputed matters in writing as soon as practicable after receiving the submissions and evidential material from the parties.

6.2 The Determination (*delete one*) [shall] [shall not] state the reasons upon which it is based.

6.3 Subject to payment of the Expert's fees, a copy of the Expert's Determination shall be sent to both parties.

6.4 Within five (5) working days after the date on which a copy of the Determination is provided to the parties, unless another period of time has been agreed upon by the parties, the Expert may on his or her own initiative, or at the written request of any

party with notice to every other party, correct any errors in computation or any clerical or typographical errors, or any defect of form, or any errors of a similar nature in the Expert Determination.

- 6.5 If so agreed by the parties, a party with notice to every other party, may within five (5) working days after the date on which a copy of the Determination is provided to the parties, unless another period of time has been agreed upon by the parties, request the Expert to give an interpretation of a specific point in the Determination.
- 6.6 If the Expert considers the request for correction or interpretation to be justified, the Expert shall make the correction or provide the interpretation within five (5) working days of receipt of the request.
- 6.7 The correction or interpretation shall form part of the Expert's Determination and shall operate and take effect from the date of the original Determination.

7.0 Termination

- 7.1 The Expert Determination may be terminated at any time by agreement of the parties after consultation with the Expert or the process will be terminated upon the provision of the Determination to the parties, whichever is the earlier event.

8.0 Fees and expenses

- 8.1 The parties shall together and separately be liable for the Expert's fees and expenses.
- 8.2 The Expert's fees shall be calculated at the rate of \$ **(insert GST excl. rate)** per hour plus Goods and Services Tax for each hour during which the Expert is engaged on the duties of the Expert Determination, together with all expenses and outgoings incurred by the Expert in the execution of those duties.
- 8.3 Prior to the Expert engaging on the duties of the Expert Determination, the parties shall pay into the trust account of the Building Disputes Tribunal, a sum as security for the Expert's fees and expenses in accordance with the amounts and terms set out in Appendix 3 to this Agreement.
- 8.4 Any amount paid as security for the Expert Determination is a nominal sum only and shall not be considered an estimate of the Expert's fees and expenses which shall be calculated in accordance with clause 8.2 above.
- 8.5 If the dispute between the parties is settled, or the request for Expert Determination is withdrawn or terminated by the parties for any reason whatsoever before the Determination is made, the parties shall be jointly and severally liable to pay the Building Disputes Tribunal's administration fee in accordance with clause 8 of Appendix 3 to this Agreement together with all fees and expenses incurred by the Expert in the execution of the duties of the Expert Determination up to and including the date on which the request for Expert Determination was withdrawn or terminated, or the date on which the Expert was notified that the dispute had been resolved.
- 8.6 The parties shall be jointly and severally liable for the costs of the Expert Determination together with any additional costs howsoever incurred by the

Building Disputes Tribunal in recovering any overdue monies on a full indemnity basis.

- 8.7 Where time has been scheduled for a conference, inspection, or other attendance relating to the Expert Determination, and the conference, inspection or other attendance is cancelled or postponed by a party less than three (3) full working days before the scheduled date, the Expert shall be paid a cancellation fee for each day, or part thereof, reserved for the conference, inspection, or other attendance.

9.0 Subsequent proceedings

- 9.1 The parties shall not call the Expert to give evidence or to produce documents in any subsequent arbitration or court proceedings arising out of, or in connection with the dispute the subject of the Expert Determination under this Agreement by subpoena or otherwise, and the Expert will not act voluntarily in any such capacity without the written agreement of all the parties.

- 9.3 The parties shall not call for the records, notes or work product of the Expert in any legal or administrative proceeding that arises before, during, or after the Determination of this dispute. However, any Determination made by the Expert that is intended by the parties to have legal effect and to be legally enforceable may be subpoenaed, called for, or produced in any proceedings to which it is relevant.

10.0 Privacy and Confidentiality

- 10.1 The Expert Determination process shall be private and confidential.
- 10.2 The Expert must conduct the Expert Determination in private.
- 10.3 The parties shall maintain the confidentiality of the process and shall not publish, disclose, or communicate any information relating to the Expert Determination or to a Determination made under this Agreement
- 10.4 Any statement, admission, or any document created or made for the purpose of the Expert Determination, and all matters disclosed orally in the course of the Expert Determination shall remain confidential to the parties and shall not be disclosed or adduced in subsequent proceedings by the Expert, the parties, or their representatives and advisers. This requirement is subject to disclosure:
- [a] For the purpose of enforcing any Determination that is intended by the parties to have legal effect and to be legally enforceable; or,
 - [b] When compelled to by court order or subpoena; or,
 - [c] To a professional or other adviser of any of the parties after that person has executed the Confidentiality Agreement for Representatives of Parties to Expert Determination at Appendix 1 to this Agreement; or,
 - [d] Where publication, disclosure, or communication is necessarily involved for the protection of a party's legal rights in relation to a third party; or
 - [e] Where publication, disclosure, or communication is necessarily required to prevent the safety of any person from being endangered,

provided always that such publication, disclosure or communication is no more than what is reasonably required for those purposes and to the extent that any person is required to disclose any information either by law or otherwise, all persons agree to immediately notify every other party of such requirement.

11.0 Exclusion of Liability and Indemnity

- 11.1 The parties together and separately release and discharge the Expert and the Building Disputes Tribunal, its agents, and servants, from all liability of any kind whether involving negligence, breach of contract, breach of fiduciary duty, breach of statutory duty or otherwise which may be alleged to arise in connection with, or to result from, or to in any way relate to the exercise of any of the Expert's or the Building Disputes Tribunal's functions, duties, or powers under this Agreement or otherwise, unless the act or omission is fraudulent.
- 11.2 The parties will together and separately indemnify the Expert and the Building Disputes Tribunal, its agents, and servants, against all claims, costs, expenses, liabilities, awards, damages and proceedings of any kind incurred by the Expert, the Building Disputes Tribunal, its agents, or its servants, in the exercise of the Expert's and the Building Disputes Tribunal's functions, duties, or powers whether under this Agreement or otherwise, unless the act or omission is fraudulent.

12.0 Communications and Contact Details

- 12.1 All documents or information provided to the Expert by one party shall simultaneously be communicated by that party to every other party.
- 12.2 Routine communications and notifications between the Building Disputes Tribunal, the Expert and the parties may validly be made by facsimile or email.
- 12.3 The submissions of case and supporting documents and any other evidentiary material must be delivered to the Expert and every other party by courier at the addresses for service recorded below:

Notice to the Expert:

Notices to the Expert shall be given to an address for service which is:

Phone: (0)

Fax: (0)

Mobile: (02)

E-mail:

Notice to the Applicant:

Notices to the Applicant shall be given to an address for service which is:

Phone: (0)

Fax: (0)

Mobile: (02)

E-mail:

Notice to the Respondent:

Notices to the Respondent shall be given to an address for service which is:

Phone: (0)

Fax: (0)

Mobile: (02)

E-mail:

SAMPLE

We confirm that we have read and understood this Agreement for Expert Determination. We have no further questions about the nature or confidentiality of the Expert Determination process and we, our servants, agents, successors and permitted assigns agree to be bound by the terms of this Agreement.

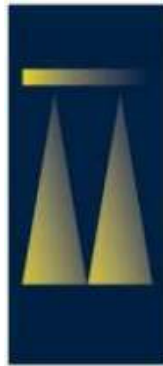
Dated this _____ day of _____ 2010

SIGNED: _____

AS FOR OR ON BEHALF OF *(Name of Applicant)* _____

SIGNED: _____

AS FOR OR ON BEHALF OF *(Name of Respondent)* _____



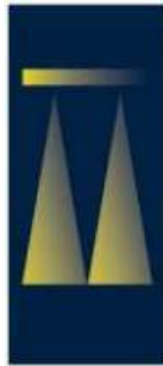
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SCHEDULE OF MATTERS IN DISPUTE FOR EXPERT DETERMINATION

The parties have agreed that the following matters in dispute are the matters to be submitted to the Expert for Determination:

[a]

SAMPLE



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**CONFIDENTIALITY AGREEMENT
FOR REPRESENTATIVES OF PARTIES TO EXPERT DETERMINATION**

The purpose of this agreement is to ensure that you understand the responsibilities that you have to the parties and to the Expert Determination process and that you agree to maintain the confidentiality of the Expert Determination process involving the following parties:

THE PARTIES: *(Name of Applicant)* _____

and

(Name of Respondent) _____

I understand that the Expert Determination process is private and agree to maintain the confidentiality of the process.

I understand that any statement, admission, or any document created or made for the purpose of the Expert Determination, and all matters disclosed orally in the course of the Expert Determination shall remain confidential to the parties and shall not be disclosed or adduced in subsequent proceedings by the Expert, the parties, or their representatives and advisers. This requirement is subject to disclosure:

- [a] For the purpose of enforcing any Determination that is intended by the parties to have legal effect and to be legally enforceable; or,
- [b] When compelled to by court order or subpoena; or,
- [c] To a professional or other adviser of any of the parties after that person has executed the Confidentiality Agreement for Representatives of Parties to Expert Determination at Appendix 1 to the Agreement for Expert Determination; or,
- [d] Where publication, disclosure, or communication is necessarily involved for the protection of a party's legal rights in relation to a third party; or

[e] Where publication, disclosure, or communication is necessarily required to prevent the safety of any person from being endangered,

provided always that such publication, disclosure or communication is no more than what is reasonably required for those purposes and to the extent that any person is required to disclose any information either by law or otherwise, all persons agree to immediately notify every other party of such requirement.

I confirm that I have read and understood this confidentiality agreement.

I have no further questions with regard to the nature or confidentiality of the Expert Determination process, and I agree to be bound by the terms of this agreement.

Dated this _____ day of _____ 2010

Signature:

Signature:

Name:

Name:

Party:

Party:

Role:

Role:

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BUILDING DISPUTES TRIBUNAL
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DEFAULT PROCEDURE FOR EXPERT DETERMINATION

- 1.0 The parties shall within five (5) working days of the execution of this Agreement, identify and clarify the issues in dispute by preparation of a joint statement of issues, or otherwise;
- 2.0 The Applicant shall within ten (10) working days of the execution of this Agreement, serve on the Respondent and the Expert in hard copy by courier, a copy of its submissions in relation to the disputed matters together with all supporting documents and evidentiary material relied upon.

The Applicant's submissions shall include:

- a. A statement in writing detailing the nature and basis of the dispute, the legal and factual issues involved, the Applicant's contentions in relation to those issues and the quantum of its claim;
 - b. The relief or remedy that is sought;
 - c. A copy of the contract or relevant sections thereof, or in a case where the contract is oral, or partly oral, a statutory declaration as to the terms of the contract;
 - d. Any expert report or statements relied upon;
 - e. All supporting documents and other evidential material relied upon;
 - f. The Applicant's written submissions on the legal and factual issues in relation to its claim.
- 3.0 The Respondent shall within five (5) working days after receiving the Applicant's submissions on the disputed matters, serve on the Applicant and the Expert in hard copy by courier, a written response to the Applicant's submissions.
 - 4.0 The Respondent's written response to the Applicant's submissions on the disputed matters shall include:

- a. A statement in writing in reply detailing whether or not it agrees with the Applicant's statement made pursuant to 2(a) above, and if not, its reply as to the nature and basis of the dispute and its contentions in relation to the factual and legal issues and the quantum of the matters at issue;
 - b. Where the terms of the contract are disputed: a copy of the contract held by the respondent or relevant sections thereof, or in a case where the contract is oral, or partly oral, a statutory declaration as to the terms of the contract;
 - c. Any expert reports or statements relied upon;
 - d. All supporting documents and other evidential material relied upon;
 - e. Its written submissions in reply on the legal and factual issues involved.
- 5.0** The Expert may request any party to provide further submissions or evidential material which shall be provided to the Expert and the other party within three (3) working days of receipt of any such request and in the manner requested by the Expert.
- 6.0** The other party may file a submission in response with the Expert and the other party within a further three (3) working days.
- 7.0** The Expert will then make a Determination of the disputed matters as soon as practicable after receiving the parties' submissions and evidential material.



BUILDING DISPUTES TRIBUNAL
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FEES AND EXPENSES FOR EXPERT DETERMINATION

1.0 Application/Nomination Fee

The Building Disputes Tribunal does not charge an application or nomination fee.

2.0 Expert Determination Fees

The Building Disputes Tribunal provides a fully administered, Expert Determination service for disputes of all values.

A Notice of Acceptance of Appointment as Expert will not be served on the parties to the Expert Determination by the Building Disputes Tribunal until the parties have paid (in clear funds) into the trust account of the Building Disputes Tribunal a deposit as security for the Expert's fees and expenses in accordance with the following schedule:

Code	Amount in Dispute	Security Payment Required
EXD1	≤ \$ 24,999.99	\$6,000.00
EXD2	\$25,000.00 ≤ \$49,999.99	\$8,000.00
EXD3	\$50,000.00 ≤ \$99,999.99	\$10,000.00
EXD4	\$100,000.00 ≤ \$499,999.99	\$15,000.00
EXD5	\$500,000.00 ≤ \$999,999.99	\$17,500.00
EXD6	≥ \$1,000,000.00	\$20,000.00

Please note that any amount paid as security for the Expert's fees and expenses is a nominal amount only and **is not, and shall not be considered an estimate of the cost of the Expert Determination** which shall be calculated according to the time engaged on the duties of the Expert Determination by the Expert together with any expenses incurred by the Expert in the execution of those duties.

In the event that the Expert's fees and expenses prove to be less than the amount held by the Building Disputes Tribunal as security, the Building Disputes Tribunal will provide the Expert's Determination to the parties to the Expert Determination as soon as practicable after the Expert has made his or her Determination. The Building Disputes Tribunal will disburse the balance of the monies held as security to the parties in the proportions in which the security was originally paid by the parties unless the parties agree otherwise and

instruct the Building Disputes Tribunal accordingly in writing within two (2) working days of receipt of the Determination.

In the event that the Expert's fees and expenses prove to be greater than the amount held as security, the parties will be advised of the Expert's actual fees and expenses by the Building Disputes Tribunal and the parties will be requested to pay the balance in order to uplift the Determination. When the balance is paid in full, a copy of the Determination will be provided to each of the parties to the Expert Determination by the Building Disputes Tribunal.

If an Expert becomes unable to perform the functions of that office, the Expert shall not be entitled to be paid any fees or expenses in connection with the Expert Determination and any amount paid as security for the Expert's fees and expenses will be applied by the Building Disputes Tribunal to meeting the fees and expenses of the substitute Expert.

4.0 When is Payment Required?

Payment of security for the Expert's fees and expenses is required to be made at the time the signed Agreement for Expert Determination is filed with the Building Disputes Tribunal. No administrative or procedural steps will be taken by the Building Disputes Tribunal until payment of the required security is made in full and the funds are clear.

In the event that the Expert's fees and expenses are greater than the amount held as security, the parties must pay the balance of the Expert's fees and expenses within two (2) working days of receipt of notification by the Building Disputes Tribunal of such additional fees and expenses.

5.0 Liability for Payment

The parties are free to make any arrangements as between them for payment of the Expert Determination fees and expenses. However, it is most common, and indeed desirable, that the parties contribute equally to the cost of the Expert Determination process thus confirming that the Expert is employed for the benefit of all parties and ensuring the 'neutral' status of the Expert.

Notwithstanding any agreement as between the parties, under the Expert Determination Agreement the parties are jointly and severally liable for the fees and expenses of the Expert Determination together with any additional costs howsoever incurred by the Building Disputes Tribunal in recovering any overdue monies on a full indemnity basis.

If the dispute between the parties is settled, or the request for Expert Determination is withdrawn or terminated by the parties for any reason whatsoever before the Determination is made, the Expert is entitled to be paid all fees and expenses incurred by the Expert in the execution of the duties of the Expert Determination up to and including, as the case may be, the date on which the request for Expert Determination was withdrawn or terminated, or the date on which the Expert was notified that the dispute had been resolved.

6.0 Methods of Payment

Payment of all Building Disputes Tribunal fees and Expert Determination expenses may be made by cheque, direct credit, or by credit card (Visa and MasterCard only). Please note

that if paying by credit card there is a merchant transaction fee of 2.75% payable in addition to any invoiced amount.

7.0 Cancellation Fees

In any case where a party notifies the Expert in writing that a scheduled conference, inspection, or any other attendance is to be vacated, whether or not the dispute between the parties has been settled, or the conference, inspection, or other attendance is adjourned by agreement, or the application for Expert Determination is withdrawn or terminated by the parties for any reason whatsoever, and the notice is received by the Expert during ordinary business hours between ten (10) and six (6) working days from and including the date of the scheduled event, the Building Disputes Tribunal will charge a cancellation fee in the amount of 50% of the Expert's daily Fee or part thereof as appropriate.

If such notice is received five (5) working days or less from and including the date of the scheduled conference, inspection, or other attendance, the Building Disputes Tribunal will charge a cancellation fee in the amount of 75% of the Expert's daily Fee or part thereof as appropriate.

In the event that the dispute is settled or the agreement for Expert Determination is withdrawn by the parties, the Expert's fees and expenses including any entitlement to cancellation fees will be deducted from the amount paid as security for the Expert's fees and expenses. The balance of the security monies, if any, will be refunded to the parties in the proportions in which the security was originally paid by the parties unless the parties agree otherwise and instruct the Building Disputes Tribunal accordingly in writing within two (2) working days of notice of settlement or withdrawal.

8.0 Administration Fee payable on Withdrawal or Settlement of Claim

In any case where an application for Expert Determination is withdrawn or terminated, or the dispute between the parties is resolved after receipt by the Building Disputes Tribunal of an application to appoint an Expert and before the provision of an Determination, the Building Disputes Tribunal will charge a fee being not less than \$750.00 in respect of the fees and expenses incurred in relation to the administration of the Expert Determination up to and including the date on which the application for Expert Determination was withdrawn or terminated or the Building Disputes Tribunal was notified that the dispute had been resolved.