

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant

and

Respondent

I, Cameron Ford, determine on 1 October 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is \$329,236.55 plus GST, being the amount owing of \$321,649.16 plus interest of \$7,587.39 to today. Interest accrues on the sum of \$321,649.16 at the rate of \$92.53 per day from today. The amount of \$329,236.55 plus GST is payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Appointment as adjudicator

1. On 17 September 2008 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment.

Documents received by adjudicator

2. I received and have considered the application and the supporting documents 1 to 12 attached to the application, together with the response and two letters attached thereto.
3. The response was delivered on 29 September 2008 making my determination due no later than 13 October 2008.

JURISDICTION

4. The parties agree and I find that I have jurisdiction and that:
 - (a) there was a construction contract, namely a Subcontract Agreement dated 6 November 2006 – s 27;
 - (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;
 - (c) the dispute was not the subject of an order, judgment or other finding, although proceedings in the Supreme Court of the Northern Territory have been commenced by the applicant.

THE APPLICATION

5. The applicant seeks \$774,317.66 plus GST and interest for a payment claim said to have been made on 10 June 2008. The applicant was the builder and the respondent the contractor under a construction contract which the applicant terminated on 12 September 2007 for the respondent's alleged breaches. The claim is for the cost of work done by the applicant since that date which the applicant says it is entitled to recover from the respondent. The amount claimed is the total of the following four claims (or invoices):

<u>Invoice no.</u>	<u>Invoice date</u>	<u>Claim date</u>	<u>Amount (\$ ex GST)</u>
611	15 Oct 2007	25 Oct 2007	120,158.72
614	20 Nov 2007	20 Nov 2007	143,245.86
620	5 Feb 2008	4 Feb 2008	189,263.92
646	11 June 2008	10 June 2008	321,649.16

6. In relation to the alleged termination, the respondent says that the applicant wrongfully repudiated the contract which the respondent accepted, or that if it, the respondent, terminated the contract (which it does not admit), it was entitled to do so because of certain failures of conditions precedent.
7. The respondent's response was in the form of a defence to court proceedings, with no supporting objective factual material other than two letters passing between the parties. Neither did the respondent assert that the work alleged to be done by the applicant for which it made the payment claim was not done or was not of the value claimed.

Applicant's entitlement to make the payment claims

8. The applicant says that there is no provision in the contract as to how it, as builder, may make a payment claim against the respondent contractor. As a result, the applicant says, the provisions of Division 4 of the Schedule to the Act are implied into the contract by virtue of s 19.
9. Opposing this suggestion, the respondent says that the contract contains a written provision as to how the applicant may make a claim against the respondent, namely cl 23. The respondent does not expressly state that the claim of 10 June 2008 does not comply with cl 23 or is in some other way invalid. Of the three earlier payment claims made 26 October and 20 November 2007 and 5 February 2008 the respondent "denies their validity as inconsistent with the provisions of clause 23 of the subcontract". It does not say how they are inconsistent.
10. The first issue I have to determine is whether or not the contract makes written provision for the builder to make a claim against the contractor where the builder has terminated the contract. While the respondent does not identify which subclause of cl 23 is said to make that provision, it would appear to be cl 23.3 which states:

23.3 Adjustment to Subcontract Sum

When any of the Subcontract Works execute (sic) by others as referred to in Clause 23.2 have been completed, the Builder shall assess the cost, losses, expenses and damages it has thereby incurred and shall notify the Subcontractor of those amounts, and the difference between the sum of those amounts and the amount which would otherwise have been paid to the Subcontractor had the Subcontractor completed those Subcontract Works, which difference is a debt due and payable upon such notice by the Subcontractor to the Builder.

11. The four claims are clearly within cl 23, arising out of the respondent's alleged default and the applicant's assumption of the work. It was under cl 23 that the applicant gave notice to the respondent on 12 September 2007 and "assumed the conduct of the Clause 23 Works" (application par 14).
12. The applicant does not say in its application why cl 23.3 is not a "written provision about how a party must make a claim to another party for payment", to use the words of s 19 of the Act. To my mind, that is exactly what cl 23.3 is. It uses the imperative "shall", equating in this context to the "must" of s 19, and the amount notified becomes a "debt due and payable" on notice being given. That, to my mind renders the notice "a claim to another party for payment".
13. This obviously accords with the applicant's view at the time it made the 10 June 2008 claim as, after referring to the entitlement to make the claim under cl 23.2, it said "We accordingly *claim* the sum of \$321,649.16 plus GST ..." (my emphasis).
14. Subclause 23.3 does more than give the applicant the right to claim an amount from the respondent: it goes on to state *how* the claim is to be made, bringing the provision within the wording of s 19.
15. I find, therefore, that the contract contains written provision as to how the applicant must make a claim for payment from the respondent, and that the provisions of Division 4 of the Schedule are not implied into the contract.

Do the four payment claims comply with cl 23.3?

16. Although asserting it, the respondent does not explain why the payment claims are inconsistent with cl 23. I cannot see the inconsistency and find that the four payment claims comply with cl 23.3.

Is the application out of time?

17. Section 28 of the Act requires an application to be brought within 90 days after a payment dispute arises. By virtue of s 8, a payment dispute relevantly arises when an amount claimed is due under the contract but unpaid (to paraphrase).
18. Under cl 23.3, a claim by the builder against the subcontractor is a debt due and payable upon notice being given. No time is allowed for the subcontractor to pay, no doubt because of the circumstances in which such a claim would be made. Therefore, to use the words of s 8, the amounts claimed were “due to be paid under the contract” on the date notice was given to the respondent.
19. That, however, is not the end of the matter. Section 20 implies into a contract certain provisions relating to responding to and paying payment claims where there is no written provision about when and how a party must respond to a payment claim and by when a payment must be made. That section says:
- The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:
- (a) when and how a party must respond to a payment claim made by another party;
- (b) by when a payment must be made.
20. This contract contains no written provision about those matters in relation to a claim by the builder against the subcontractor under cl 23.3. The provisions of Division 5 of the Schedule are therefore implied into the contract, which states:

Division 5 Responding to payment claims

6 Responding to payment claim by notice of dispute or payment

(1) This clause applies if –

- (a) a party receives a payment claim under this contract; and
- (b) the party –
 - (i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or
 - (ii) disputes the whole or part of the claim.

(2) The party must –

- (a) within 14 days after receiving the payment claim –
 - (i) give the claimant a notice of dispute; and
 - (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
- (b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must –

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

21. By subclause (2), the respondent had 14 days from receipt of the notices to dispute them, failing which it had 28 days from receipt to pay them. Remembering that Division 5 is implied into the contract as a contractual term, the amounts claimed were “due to be paid under the contract” (s 8) 28 days after receipt by the respondent.
22. That brings the notice of 10 June 2008 within the 90 day period for an application.
23. I find that the application is out of time in respect of the payment claims of 25 October 2007, 20 November 2007 and 4 February 2008 (taking the date of the notice rather than the invoice) but is in time in respect of the payment claim of 10 June 2008.

Does the notice of 10 June incorporate and claim the three earlier claims?

24. In the application the applicant asserts that the 10 June 2008 payment claim was for \$774,317.66. This figure is the total of the three previous claims and that of 10 June.
25. Disputing this, the respondent says that the 10 June payment claim was not for that amount but only for \$321,649.16.
26. Since I have found that it is only the 10 June payment claim which can be adjudicated in this application, the resolution of that dispute is important.

The 10 June payment claim

27. The 10 June payment claim is in the form of a letter from the applicant to the respondent. After setting out the entitlement under cl 23.2, the letter says:

We accordingly claim the sum of \$321,649.16 plus GST, to which we are entitled under the Subcontract for costs and expenses of the Subcontract Works completed to end of May 2008 or alternatively as damages for your breach in abandoning the Subcontract Works, determined as follows:

28. There is then a table setting out the items of costs and expenses, the present costs to execute, the respondent’s subcontract price, the percentage completed as at 31 January 2008 and the costs of works completed as at that date.

29. Item 10 of the table is “Total Costs & Expenses (excl GST)”, being the total of all previous items, namely \$774,317.66. There then follows this:

Less Invoice No. 611	\$120,158.72
and Invoice No. 614	\$143,245.86
And Invoice No. 620	\$189,263.92
	\$452,668.50

Total Costs & Expenses (excl GST) \$321,649.16

A tax invoice for the money presently identified due to us under the Subcontract in respect of the Subcontract Works executed by others to the end of May 2008 is also attached.

We reserve our entitlement to recover further amounts in respect of our costs, losses and damages as and when those losses and damages accrue, or can be reasonably identified by us.

30. The attached tax invoice No. 646 is for “Sub-contractor work completed to 31/5/08” for \$321,649.16, plus GST of \$32,164.92, totalling \$353,814.08.
31. While the letter constituting the claim sets out all of the work incorporated in the previous three claims and work done since then, nowhere does the letter *claim* the amounts of the three previous claims. In fact, it does the opposite. It expressly claims only \$321,649.16 plus GST in the narrative, and subtracts the three previous claims from the initial total in item 10 to give the final total of that figure.
32. No argument has been put by the applicant as to why it asserts that the 10 June letter claims the full \$774,317.66. It simply says in par 19 of the application that it “served a payment claim dated 10 June 2008 in the sum of \$774,317.66 (exclusive of GST)”.
33. Even giving the letter of 10 June a generous interpretation, I cannot see an argument that it claims the full amount of \$774,317.66. On its face and in substance it claims only \$321,649.16 plus GST.
34. To test that proposition, I ask for what amount would a court give judgment if the applicant were to sue on the 10 June claim as a debt due and payable under cl 23.3. In my view, a court would only give judgment for \$321,649.16 plus GST.

35. Depending on the wording of the contract, it may have been possible for the applicant to include the three previous claims in the 10 June claim: *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (Supreme Court of NSW, 1 April 1998, unreported – BC9800988). I do not, however, have to decide that issue because I have found that the 10 June claim does not claim those amounts.
36. I find therefore that the payment claim of 10 June 2008 was for \$321,649.16 plus GST and did not include a claim for previous amounts claimed.

MERITS OF THE CLAIM

37. The applicant says the respondent owes the amount of the claim because:
- 36.1 the work was done and the respondent did not dispute or pay the amount of the claim within 14 or 28 days respectively after the claim as required by cl 6(2) of Div 5 (the applicant refers to the equivalent provision in Div 4, however I have found that Div 5 is the applicable provision). As a result, the applicant says, the respondent is required to pay the amount claimed;
- 36.2 the respondent admitted in its defence to the Supreme Court proceedings the contract, the scope of works, relevant breaches of contract, receiving a show cause notice and failing to show cause, and receiving the applicant's notice of 12 September 2007 to take the work out of the respondent's hands. Those proceedings were commenced on 14 March 2008 and, as far as I can understand from the Statement of Claim, seek payment of the three earlier claims, and at present do not include the 10 June claim;
38. The respondent does not address the point that failure to dispute the 10 June claim within 28 days has the effect that the respondent must pay that amount, a point that is clearly raised in pars 7(b)(iv)(B) and 23 of the application. As a general response, the respondent simply says that the terms of Div 4 are not implied into the contract because the contract has a written provision as to how to make a payment claim (response, par 3).

39. In my view, the respondent's failure to give a notice of dispute within 14 days after the 10 June claim, or to pay the amount claimed within 28 days thereafter has the effect that the amount is due and payable under the terms of cl 6(2) of Div 5, which by virtue of s 20 is a contractual term.
40. Even in the absence of this provision I would have found that the amount of the 10 June claim was due by the respondent to the applicant. This is because the applicant has provided evidence, in the form of the claim, that the work was done and the claim made, while the respondent has not disputed that the work was done, has not provided any evidence and has made only assertions, and did not dispute the claim when it was made.
41. I find therefore on the merits and on the balance of probabilities that the applicant is entitled to the sum of \$321,649.16 plus GST as claimed in the 10 June 2008 claim.

Interest

42. Interest is payable on that amount from 9 July 2008, which is 28 days after 11 June 2008 (the day the 10 June 2008 claim was served on the respondent), a period of 82 days. Interest is therefore:

$$\$321,649.16 \times 10.5\% \times 82/365 = \$7,587.39$$

Application oppressive and vexatious

43. In par 21 of its response, the respondent says the application is vexatious and oppressive in that it duplicates the issues in the Supreme Court proceedings in which the applicant has full and complete remedies, and that the applicant "should on those grounds or as a matter of discretion be left to pursue its remedies in the proceedings".
44. To begin with, an adjudicator has no power to dismiss or refuse to deal with an application on those grounds. Once an adjudicator has jurisdiction he has an obligation to complete the adjudication: see s 33.
45. Secondly, the fact that proceedings are on foot is not a ground ipso facto to stay an application. As Southwood J said in *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5 at [17]:

The provisions of the *Construction Contracts (Security of Payments) Act* do not prevent a party to a construction contract from starting proceedings before an arbitrator, another person or a court in relation to a dispute or other matter arising under the construction contract.

46. In *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 at [23], after referring to and distinguishing cases which have refused to enjoin adjudicators, Angel J said “The Northern Territory legislation in contrast to interstate legislation expressly contemplates concurrent jurisdiction to resolve disputes.”
47. This is not a matter for me, in any case – it is a matter for the court. Until restrained by the court I must complete my adjudication.

DETERMINATION

48. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is \$329,236.55 plus GST, being the amount owing of \$321,649.16 plus interest of \$7,587.39 to today. Interest accrues on the sum of \$321,649.16 at the rate of \$92.53 per day from today.
49. The sum of \$329,236.55 plus GST is payable immediately.
50. Each party is to bear its own costs of the application. There is nothing to bring either party’s conduct within s 36(2) of the Act. Each has been partially successful in its submissions.
51. I draw the parties’ attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Dated: 1 October 2008

CAMERON FORD

Registered Adjudicator