

BETWEEN:

Applicant

and

Respondent

DETERMINATION

1. The Respondent is liable to pay the Applicant:
 - 1.1 \$53,797.48, which sum includes GST;
 - 1.2 interest on the sum of \$48,906.80 from 17 March 2014 to the date of this determination, at the rate prescribed for that period; and
 - 1.3 \$2,230.80 being the costs of this adjudication, paid by The Applicant.
2. The total amount due for principal, interest and costs must be paid by close of business on Friday, 4 July 2014.

DATED: 20 June 2014

RKF Davis
Adjudicator

Perth WA

REASONS FOR DETERMINATION

1. The Applicant served this application on the Law Society Northern Territory, as prescribed appointor, on 28 May 2014. On the following day, 29 May 2014, it also served a copy of the application on the Respondent. By letter dated 4 June 2014, the Law Society nominated me as adjudicator to determine the alleged payment dispute. I received the application documents by mail on 10 June 2014.
2. On 11 June 2014, I wrote to the parties, principally to establish contact but also to raise a number of issues relating to the application. I stressed to the Respondent that the Act required it to deliver to me and to the Applicant its response within 10 working days of having received the copy application. I did not receive a response within the time prescribed. In fact, I have not had any contact at all from the Respondent. I must therefore consider and decide upon the application without the benefit of submissions and evidence from the Respondent. The evidence submitted for the Applicant remains uncontradicted.
3. The Applicant seeks payment for readymix concrete supplied to the Respondent in the sum of \$53,797.48.

Background Facts

4. The Applicant is a supplier of readymix concrete. While there is no direct evidence of the fact, I deduce from the name of the Respondent and the evidence as a whole that the Respondent is a builder. In or about October 2013, a representative of the Respondent contacted the Applicant to place an order for approximately 230 m³ of concrete, to be delivered to a construction site in Berrimah. The order was taken and accepted by Mr [redacted], an authorised representative of the Applicant. The representative of the Respondent agreed to pay the "listed account price rate". No part of the contract so formed was in writing.
5. The Applicant supplied concrete to the Respondent pursuant to the initial order over the remainder of October through to December 2013. Between 15 October 2013 and 11 December 2013, it submitted nine tax invoices for

payment, totalling \$53,797.48, including GST. The invoices remained unpaid, despite follow up emails, telephone calls and a letter of demand from the Applicant. At one point the Respondent made an unsubstantiated allegation of defects in the concrete but did not pursue the issue. Finally, on 17 February 2014, the Applicant hand delivered to the Respondent and served by registered post a document headed "Construction Contracts (Security of Payments) Act Payment Claim". Copies of the invoices previously supplied were attached to the document. The payment claim sought payment of \$53,797.48. As noted, the Respondent has not paid the sum claimed, or any amount.

The Applicant's Entitlement

6. I am satisfied the contract between the parties was a construction contract for the purposes of the Act: see section 5(1)(b).
7. Since the agreement between the parties was entirely oral, materially Divisions 4 and 5 of the Schedule to the Act were and remain imported into the contract: see sections 19 and 20. Division 4 sets out the requirements the Applicant must meet in making a valid claim for payment. Division 5 describes how the Respondent is to respond to a claim for payment.
8. The several tax invoices submitted by the Applicant to the Respondent met most of the requirements of Division 4 but they were not signed as required by clause 5(1)(h). Nor were the emailed follow up requests or statements. On the materials before me, the only communication between the parties that qualifies as a payment claim under the deemed agreement, for the purposes of the Act, is the document so headed and delivered to the Respondent on 17 February 2014. That document was clearly prepared with clause 5 of Division 4 in mind: it complied with all the requirements.
9. I then turn to Division 5 to ascertain how the Respondent was required to respond to the payment claim. Clause 6 of Division 5 entitles the Respondent to dispute the amount claimed, wholly or in part, in a stipulated way within a stipulated time. If it does not dispute the sum claimed it must pay "the whole of the amount of the claim" within 28 days of receiving the payment claim. Since it received the payment claim on 17 February 2014, the due date for

payment was therefore 17 March 2014. A payment dispute arose on 18 March 2014. By section 28 of the Act, the Applicant then had 90 days in which to serve its application, as required by the section and the regulations. Since the application was served on the Respondent on 29 May 2014, the Applicant did so well within the prescribed time.

The Claim

10. Since the Respondent has not seen fit at any time to dispute the claim, as provided in clause 6 of Division 5 of the Act, I need only be satisfied on the face of the materials before me, that the Applicant's claim is valid. I am so satisfied. There is nothing in the application to suggest that the delivery documents initially provided to the Respondent nor the tax invoices subsequently delivered were inaccurate, in error, or misstated any element of the transaction or transactions concerned. I am satisfied the Applicant delivered the concrete to the Respondent as alleged, that it is entitled to payment for the concrete supplied to the Respondent and that the Respondent has wrongfully refused to pay on the payment claim dated 17 February 2014. I will make a determination accordingly.

Interest and Costs

11. Pursuant to the agreement between the parties implied by section 21 and set out in the Schedule, Division 6 of the Act, the Applicant is entitled to interest on the unpaid payment claim, from the date on which payment fell due, 17 March 2014, at the rate prescribed by the Regulations for that time. I will make a determination in accordance with section 35 of the Act that the Respondent pay interest on the sum owed less GST, namely \$48,906.80, to the date of this determination.
12. By section 36 of the Act, if a party to a payment dispute has incurred costs in relation to an adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may determine that the other party must pay some or all of those costs. I am satisfied that the Respondent's conduct in ignoring the Applicant's claim, then raising a vague dispute it did not pursue, ignoring a formal payment claim stated to be made under the Act and then ignoring the Applicant's application

for an adjudication determination is both frivolous and vexatious. I make a decision pursuant to section 36 of the Act that the Respondent should pay all of the costs the Applicant has properly incurred in relation to this adjudication.

13. The Applicant claims payment of legal costs of \$1,500.00, plus GST. I would have allowed that claim, which is reasonable in amount, if I had proof it had been incurred. Proof of payment would be ideal but I would have been satisfied with an invoice from the solicitor concerned. No such proof was adduced in evidence, so I cannot allow the claim. The only other cost of the adjudication is my fee, for \$2,028.00 plus GST, a total of \$2,230.80, which the Applicant has paid in full. I will make a determination that the Respondent reimburse that amount to the Applicant.