

**Adjudicator's Determination**  
**Pursuant to the Construction Contracts (Security of Payment) Act 2004**

Adjudication Number	<b>28.12.01</b>				
Prescribed Appointer	<b>RICS Dispute Resolution Service.</b>				
Adjudicator	<b>Russell Welsh (Adjudicator 28)</b>				
Applicant:	<div style="background-color: black; width: 100%; height: 15px; margin-bottom: 5px;"></div> <div style="background-color: black; width: 80%; height: 15px; margin-bottom: 5px; margin-left: 10%;"></div> <div style="background-color: black; width: 60%; height: 15px; margin-left: 20%;"></div>				
Respondent:	<div style="background-color: black; width: 100%; height: 15px; margin-bottom: 5px;"></div> <div style="background-color: black; width: 80%; height: 15px; margin-left: 10%;"></div> <div style="background-color: black; width: 60%; height: 15px; margin-left: 20%;"></div>				
Project:	<div style="background-color: black; width: 100%; height: 15px; margin-bottom: 5px;"></div> <div style="text-align: right;">, NT.</div>				
Amount to be paid by Respondent	<b>\$135,598.97</b> including GST				
Due Date For Payment	Within 7 days of release of determination				
Adjudication Fees Apportionment	<table style="width: 100%; border: none;"> <tr> <td style="width: 80%;">Applicant:</td> <td style="text-align: right;">0%</td> </tr> <tr> <td>Respondent:</td> <td style="text-align: right;">100%</td> </tr> </table>	Applicant:	0%	Respondent:	100%
Applicant:	0%				
Respondent:	100%				
Date of Determination or Dismissal	3 <sup>rd</sup> August 2012				
Payment Claim	<p>Claimed Amount : <b>\$131,853.51</b> including GST</p> <p>Dated : 9<sup>th</sup> March 2012</p>				
Notice of Dispute / Response to Payment Claim	<p>Notice of Dispute Amount : \$0.00</p> <p>Dated: 23<sup>rd</sup> March 2012</p>				
Adjudication Application	Dated: 9 <sup>th</sup> July 2012				
Adjudicator Acceptance	Dated: 11 <sup>th</sup> July 2012				
Adjudication Response	Dated: N/A				

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## **The Determination or Dismissal**

1. I, Russell Welsh, Registered Adjudicator Number 28, as the Adjudicator pursuant to the Construction Contracts (Security of Payment) Act 2004 (the Act), for the reasons set out in this determination, determine that:
  - a. The amount to be paid by the respondent to the applicant is \$135,598.97 including GST.
  - b. The respondent is to pay the amount due to the applicant within 7 (seven) days of the date of the determination being released.

## **Background**

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for [REDACTED] Northern Territory (the Project).

## **Appointment**

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointer under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 11<sup>th</sup> July 2012 by the RICS Dispute Resolution Service pursuant to section 28(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant, the respondent and the Registrar on 11<sup>th</sup> July 2012, pursuant to section 30(1)(c) of the Act.

## **Material**

6. The following material was provided to me:
  - Adjudication Application dated 9<sup>th</sup> July 2012.

## Jurisdiction

7. The work executed under the construction contract is 'construction work' on a site in the Territory as defined under section 6(1)(c) of the Act.
8. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
9. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
10. To the best of my knowledge neither of the events stated in section 27(a) or 27(b) has occurred in respect of this matter.
11. I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

## Payment Claim

12. The applicant served the respondent with its payment claim pursuant to section 5(1)(i) of the Schedule, Division 4 of the Act, on 9<sup>th</sup> March 2012 in the amount of \$131,853.51 including GST. The respondent has confirmed in its Notice of Dispute receiving the applicant's payment claim as asserted by the applicant.
13. The payment claim was in writing pursuant to section 5(1)(a) of the Schedule, Division 4 of the Act.
14. The payment claim was addressed to the party to which the claim was made pursuant to section 5(1)(b) of the Schedule, Division 4 of the Act.
15. The payment claim stated the name of the claimant pursuant to section 5(1)(c) of the Schedule, Division 4 of the Act.
16. The payment claim stated the date of the claim pursuant to section 5(1)(d) of the Schedule, Division 4 of the Act.
17. The payment claim states the amount claimed pursuant to section 5(1)(e) of the Schedule, Division 4 of the Act.
18. The payment claim itemises and describes the work performed and to which the claim relates, pursuant to section 5(1)(f) of the Schedule, Division 4 of the Act.

19. The payment claim is signed by the claimant pursuant to section 5(1)(h) of the Schedule, Division 4 of the Act.
20. I am therefore satisfied that the payment claim complies with the requirements of section 5 of the Schedule, Division 4 of the Act.

### **Notice of Dispute / Response to Payment Claim**

21. The respondent responded to the applicant's payment claim with its notice of dispute dated 23<sup>rd</sup> March 2012 and within the time permitted pursuant to section 6(2) of the Schedule, Division 5 of the Act.
22. The notice of dispute is in writing pursuant to section 6(3)(a) of the Schedule, Division 5 of the Act.
23. The notice of dispute is addressed to the claimant pursuant to section 6(3)(b) of the Schedule, Division 5 of the Act.
24. The notice of dispute states the name of the party giving the notice pursuant to section 6(3)(c) of the Schedule, Division 5 of the Act.
25. The notice of dispute states the date of the notice pursuant to section 6(3)(d) of the Schedule, Division 5 of the Act.
26. The notice of dispute identifies the claim to which the notice relates pursuant to section 6(3)(e) of the Schedule, Division 5 of the Act.
27. The notice of dispute disputes the claim under section (6(1)(b)(ii) and identifies each item of the claim that is disputed and states, for each of the items, the reasons for disputing it pursuant to section 6(3)(g) of the Schedule, Division 5 of the Act.
28. The notice of dispute is signed by the party giving the notice pursuant to section 6(3)(h) of the Schedule, Division 5 of the Act.
29. Pursuant to section 8(a) of Part 1 Division 2 of the Act, the dispute is taken to have arisen on the day the payment claim is due to be paid under the contract, i.e. on 23<sup>rd</sup> March 2012.

### **Adjudication Application**

30. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
31. The applicant applied for adjudication of the payment dispute on 9<sup>th</sup> July 2012 and within the time allowed pursuant to section 28(1) of the Act.
32. The application is in writing pursuant to section 28(1)(a) of the Act.
33. The application was served on the respondent pursuant to section 28(1)(b) of the Act.
34. The application was served on RICS Dispute Resolution Service pursuant to section 26(1)(c)(iii) of the Act.
35. The application contains the information required by Regulation 5 pursuant to section 28(2)(a) of the Act.
36. The application states the details of or attaches to it the information required pursuant to section 28(2)(b) of the Act.
37. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

### **Adjudication Response**

38. The applicant says that it served with a copy of its adjudication application on the respondent on 9<sup>th</sup> July 2012 and has provided evidence of service on the respondent.
39. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant i.e. 9<sup>th</sup> July 2012 plus 10 working days = 23<sup>rd</sup> July 2012.
40. The respondent has not served its adjudication response on the adjudicator within the prescribed time pursuant to section 29(1) of the Act, or at all.
41. Accordingly, I am satisfied that the respondent has not complied with section 29 of the Act.

### **Reason for the Determination**

42. In making this determination I have had regard to the following matters, pursuant to section 33 of the Act:

- the application and its attachments.

### **Contract**

43. The applicant says that the contract is partly in writing, partly oral and partly by part performance, comprising:

- the subcontract agreement entered into on 5<sup>th</sup> September 2010;
- the discussions and agreements between the applicant and the respondent both before and after the signing of the subcontract agreement; and
- the performance and conduct of the parties.

44. I have carefully considered the submissions and I am satisfied that a contract between the parties exists in the terms asserted by the applicant.

### **Issue in Dispute**

45. The applicant claims \$131,853.51 including GST in respect of plasterboard installation work, interest on overdue payments and reasonable costs.

46. The respondent's points of rejection noted in its notice of dispute are summarised as:

- a. Statutory bar to claim;
- b. Contractual bar to payment claim;
- c. Right to set-off for defective works, incomplete works and delay;
- d. Overpayment under the contract in relation to percentage of work complete;
- e. No substantiation of extra work; and
- f. No entitlement to interest.

47. I will address each item in turn as follows:

***Statutory bar to claim:***

48. The respondent says that the applicant is not entitled to payment because;
- a. it has failed to comply with section 5(1)(f) of the Schedule, Division 4 of the Act;
  - b. there is insufficient detail for the respondent to be able to assess the claim;
  - c. the claim does not identify the work performed in sufficient detail; and
  - d. no supporting documentation was provided with the claim.
49. I have carefully considered the submissions of the parties and, in my view, there is no validity to the respondent's arguments and I agree with those advanced by the applicant.
50. Accordingly, on this point the respondent has no valid reason for withholding payment.

***Contractual bar to payment claim:***

51. The respondent says that the applicant has not complied with the subcontract payment clauses in making payment claim.
52. I have carefully considered the submissions of the parties and, in my view, there is no validity to the respondent's arguments and I agree with those advanced by the applicant.
53. In particular, I find the payment provisions in the subcontract, namely 'Payment Terms' and 'sub Contract Payments', to be contradictory and therefore cannot be relied upon and have not followed by the parties.
54. Accordingly, on this point the respondent has no valid reason for withholding payment.

***Right to set-off for defective works, incomplete works and delay:***

55. The respondent say that it is entitled to set-off its costs and damages incurred and referred to in its notice of dispute.
56. The respondent has not identified the particular clause in the subcontract which it relies upon to set-off any alleged costs incurred and, in my view, there is no such entitlement.
57. The respondent has provided no substantiation of its allegations of defective or incomplete work on the part of the applicant.
58. I have carefully considered the submissions of the parties and, in my view, there is no validity to the respondent's arguments and I agree with those advanced by the applicant.
59. Accordingly, on this point the respondent has no valid reason for withholding payment.



***Overpayment under the contract in relation to percentage of work complete:***

- 60. The respondent says that the applicant has over claimed for the work carried out (which is somewhat different to asserting that the applicant has been overpaid).
- 61. The respondent has provided no evidence to support its assertions.
- 62. I have carefully considered the submissions of the parties and, in my view, there is no validity to the respondent's arguments and I agree with those advanced by the applicant.
- 63. Accordingly, on this point the respondent has no valid reason for withholding payment.

***No entitlement to interest:***

- 64. The respondent says the applicant has no entitlement to interest because there is no entitlement to the underlying claim for payment.
- 65. For the reasons stated above, I have found that the respondent has valid reason for withholding payment.
- 66. The subcontract is silent on the entitlement to interest on overdue payments and accordingly section 6 of the Schedule, Division 6 of the act implies an entitlement to interest on overdue payments into the contract.
- 67. I have carefully considered the submissions of the parties and, in my view, there is no validity to the respondent's arguments and I agree with those advanced by the applicant.
- 68. Accordingly, on this point the respondent has no valid reason for withholding payment.

**Valuation of issues in dispute**

- 69. The applicant has provided an itemised breakdown of the amount of \$131,853.51 including GST claimed in its Schedule to the payment claim. The items claimed are addressed as follows:

***Item 1: Construction Work and Related Goods and Services***

- 70. The claimant claims \$115,577.00 including GST being the balance claimed as owing in respect of five invoices.
- 71. I have carefully considered the applicant's claim and in my opinion, based upon the material provided, the rates claimed appear to be in accordance with the agreement between the parties where applicable and where not applicable, the rates are fair and reasonable.

72. Accordingly, I find in favour of the applicant and value the issue in dispute at the claimed amount of \$115,577.00 including GST.

***Item 2: Interest***

73. The claimant claims \$8,576.51 including GST for interest on overdue payments.

74. In respect of invoice 15/2011 the applicant has adopted a rate which is less than the rate prescribed by Rule 35.08 of the Federal Court Rules, therefore I accept the amount claimed.

75. In respect of invoice 16/2011 I agree with the applicant's calculation.

76. In respect of invoice 17/2011 the applicant has adopted a rate (10.50%) in excess of the rate prescribed by Rule 35.08 of the Federal Court Rules (10.25%), therefore I have assessed the interest to be \$2,130.67 including GST, being \$51.96 less than the amount claimed.

77. Accordingly, I find in favour of the applicant and value the interest in the amount of \$8,524.55 ( $\$8,576.51 - \$51.96 = \$8,524.55$ ) including GST.

***Item 3: Reasonable costs***

78. The claimant claims \$7,700.00 including GST for reasonable costs allegedly incurred because of the respondent's failure to make payment.

79. The applicant says that because the respondent remained silent on this issue in its notice of dispute, it has adoptively admitted this issue.

80. The applicant does not provide a breakdown or substantiation of its claim for reasonable costs and therefore it is difficult to know exactly what is being claimed for and whether the amount claimed is in fact covered by the contract.

81. Notwithstanding the lack of substantiation provided, I am satisfied that the amount claimed is reasonable for the efforts expended by the applicant to chase overdue payments and make this adjudication application.

82. Pursuant to section 36(2) I determine that the respondent must pay 100% of the costs claimed as a result of its vexatious conduct and unfounded submissions.

83. Accordingly, I find in favour of the applicant and value the reasonable costs at the claimed amount of \$7,700.00 including GST.

### Interest until determination

84. Pursuant to sections 35 of the Act I determine that the respondent shall be liable to the applicant for interest from the date the dispute arose until the date of this determination at the rate prescribed by Regulation, calculated as follows:

Value of Construction Work	\$115,577.00
Due date for payment	8/04/2012
Date of Determination	3/08/2012
Days payment delayed	117
Interest rate - Rule 35.08 Federal Court Rules	10.25%
Interest to determination	\$ 3,797.42

85. Accordingly, I find in favour of the applicant for interest until the date of determination in the amount of \$3,797.42 including GST.

### Summary

86. A summary of the valuation of construction work is as follows:

Item	Description	Payment Claim \$	Adjudicated Amount \$
1	Construction Work	115,577.00	115,577.00
2	Interest	8,576.51	8,524.55
3	Reasonable Costs	7,700.00	7,700.00
		<u>131,853.51</u>	<u>131,801.55</u>
4	Interest to determination		3,797.42
			<u>135,598.97</u>

87. Accordingly, I find in favour of the claimant and value the work in the amount of \$135,598.97 including GST.

### Adjudication costs

88. Pursuant to sections 36 of the Act I determine that the respondent shall bear the costs in relation to the adjudication of the dispute and that the respondent shall be liable for 100% of the costs of the adjudication because of its unfounded submissions.
89. The adjudication costs for this determination amount to 16.75 hours @ \$325.00 plus GST = \$5,988.13 including GST. A tax invoice will be issued accordingly.

A handwritten signature in cursive script, appearing to read "Russell Welsh", with a long horizontal flourish underneath.

Signed: .....  
Russell Welsh – Registered Adjudicator No. 28

Dated: 3<sup>rd</sup> August 2012.

