

DETERMINATION

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DETERMINATION NO. 23.10.01

**Adjudicator's Determination pursuant to the
*Construction Contracts (Security of Payments) Act***

Applicant

and

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator, determine on 13 October 2010 in accordance with section 38(1) of *the Construction Contracts (Security of Payments) Act* that the amount to be paid by the Respondent to the Applicant is \$NIL.

I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

13 October 2010

Details of the Parties

Applicant

Applicant's Lawyer
Richard Poiner
Barrister at Law
Email - rpoiner @ bigpond.net.au

Respondent

Respondent's Lawyer
Minter Ellison
Melissa Compain
Lawyer
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Appointment

The Applicant applied on about 21 September 2010 for an adjudication under the *Construction Contracts (Security of Payments) Act* (the Act), consequent upon which I was appointed adjudicator on 28 September 2010 by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointer under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

Documents Reviewed

I have received and considered the application together with the attachments A to N.

I also received and considered the response dated 6 October 2010 which was received on that day by e-mail. The response contained the statutory declaration of RB with 15 annexes and the statutory declaration of PS containing 17 annexes and the attachment number 1 which contained the Northern Territory's contract, specifications and drawings.

I also received an e-mail on the 30 September 2010 which contained undated correspondence, from Richard Poiner, a barrister who is acting for the applicant.

I also received an e-mail from the solicitors for the respondent on 2 October 2010. That e-mail also contained correspondence dated 2 October 2010.

I also received by email a further letter of 6 October 2010 from the solicitors for the Respondent.

I considered the contents of those documents.

Service

I received an e-mail on the 30 September 2010 which contained undated correspondence, from Richard Poiner, a barrister who is acting for the applicant. That e-mail alleged the application was served by being posted on 21 September 2010 by express post. Mr Poiner says the post office said the application would be delivered the next day. It was not.

The alleged payment claim is dated 25 June 2010. The notice of dispute was delivered on the same day as the claim. 90 days from that date is 23 September 2010.

The solicitors for the Respondent say the application was sent to a PO address and was collected on 23 September 2010. The solicitors provide a copy of a post office document that is alleged to relate to the application and shows the date and time referred to by the solicitors as the date of service. I determine the date of service is the date the respondent collected the document from the post office.

There is no issue as to service of the application.

The response was delivered to me by email on 6 September 2010 and in paper form on 7 September 2010. There is no issue as to the service of the response.

Issues as to Jurisdiction

The Jurisdiction Questions

Section 33 of the *Construction Contracts (Security for Payments) Act* ("the Act") requires the adjudicator to, within the prescribed time, dismiss the application without consideration of its merits if one of the following are true:

- The contract concerned is not a construction contract.
- The application has not been prepared and served in accordance with section 28.
- Another body has dealt with the subject matter of the dispute that is the subject of the application.
- The adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or it cannot be completed in time.

s.28 Requirements

Section 28 requires the following:

The applicant must be a party to the contract and serve the written application within 90 days of the dispute arising.

The applicant must provide any deposit of security for the cost of the adjudication that the adjudicator requires.

The application must be prepared in accordance with the regulations and state the details of or have attached to it:

- the construction contract or relevant extracts and

- any payment claim that has given rise to the payment disputes and
- all the information documents and submissions on which the party making it relies in the adjudication.

Section 28 requires there to be a conforming application and service of the application within 90 days of a payment dispute arising, which in turn requires the determination of the existence of a payment dispute, which in turn requires the determination of the existence of a payment claim together with a challenge to the payment claim or a failure to pay the amount claimed which all require a determination of what is the construction contract and what are its terms, express or implied.

Construction Contract

In order that the adjudicator might consider whether the adjudication application refers to a Construction Contract the adjudicator has to determine what acts or documents comprise the contract.
I determine that the application relates to a Construction Contract as defined in the Act.

The applicant submits that on 16 December 2009 the contract was formed when the respondent delivered a purchase order which accepted the applicant's quotation.

The purchase order refers to the applicant and is dated 16 December 2009 and provides a purchase order number. The body of the purchase order states: "please supply the following goods in good order and condition. Steel framing and structural steel for [project]-Alice Springs. As per SFA quote". The price is inclusive of GST \$403,260.

The quotation is obviously part of the contract as is the purchase order.

The quotation is attachment B to the application. It is dated 8 September 2009 and the client is noted as [the Respondent]. The quote is to supply ex-factory Brisbane steel framing as per document provided. The document then sets out the projects and provides the sum for each project arriving at a grand total of \$366,600 plus GST.

The document then sets out what is included in the quotes and what is excluded. The quote was subject to final approved drawings, final engineering report and information. It reserves the right to charge additional costs if there were changes.

The terms of payment are stated as, "payment 14 days from the date of invoice."

The applicant refers to a variation to the contract allowing for transportation of the goods to the respondent's yard in Alice Springs. The price of the contract was varied so as to include a further \$115,500 inclusive of GST. The adjusted sum of the contract was \$518,760 inclusive of GST.

The applicant submitted their design drawings to the respondent for their approval and such approval was given by the respondent.

The respondent says that in addition to the quote and purchase order it supplied the applicant with a copy of the Northern Territories contract specifications and drawings.

The respondent alleges a conversation occurred after receipt of the quotation and it alleges the sequence and timing for the provision of the structural and framework steel components for the [project] were agreed in that conversation.

The respondent alleges a variation to the contract to provide for transport costs to the respondent's site in Alice Springs. There was an adjustment to the contract price in the sum of art \$15,500 inclusive of GST.

I determine that the construction contract was made up of the quote, the purchase order, the content of the conversation as to the delivery times and the drawings submitted by the applicant and approved by the respondent.

There is no dispute by the parties to the adjudication that the contract which was entered into was a construction contract. I am of the same opinion and determine the contract was a construction contract as required by the Act.

The Payment Dispute

Overview

One of the requirements of Section 28 is that there must be a payment dispute as defined in the Act.

This requirement means the adjudicator has to determine that the elements of a payment dispute exist.

Section 8 of the Act sets out those requirements.

A payment dispute arises if -

- (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;

- (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
- (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

The elements of a payment dispute are:

1. There is a payment claim;
2. The amount claimed in the payment claim is due to be paid under the contract but has not been paid in full; or
3. The claim has been rejected or wholly or partly disputed.

In order that a payment dispute might be determined the adjudicator has to determine:

1. what documents or actions make up the contract.
2. the terms of the contract by which a payment becomes due.
3. whether the claim is rejected or wholly or partly disputed -
 - 3.1 as per the express terms of the contract or
 - 3.2 as per the terms in Schedule 1 Division 5 implied into the contract pursuant to s20 of the Act.

The Payment Claim

In order that there might be a payment dispute there has to be a payment claim in existence.

The Parties Submissions

The Applicant

The applicant in paragraph 18 of the application sets out a table with respect to the progress claims made in respect of the construction contract. At paragraph 19 the applicant says payment claim number 5 was made on 25 June 2010 in compliance with the Act.

It is payment claim No 5 which is the subject of the adjudication (Application Paragraph 21). The relevant payment claim is attachment D - 1/1.

The document is dated 25 June 2010 and it is headed tax invoice/progress claim. It is addressed to the respondent.

The set out is as follows:

Current claim		\$471,600.00
Less retention	\$0	
Sub total	\$471,600.00	
Less previous payments	\$405,052.29	
Total for this claim (excluding GST)	\$66,547.71	
GST	\$6,654.77	
Total claim (including GST)		\$73,202.48
Total amount payable to this claim (including GST)		\$73,202.48

Error! Not a valid embedded object. The table so far as it relates to the 5th claim is wrong in that it sets out the wrong amount claimed.

The Respondent

A.

The respondent says the alleged payment claim is not a proper payment claim.

The respondent says that the terms set out in Schedule 1 Division 4 of the Act are implied into the contract pursuant to section 19 of the Act and allege the payment claim does not comply with those terms.

Specifically the respondent says that the claim was not given to the respondent in an acceptable manner and it was not signed.

B.

The respondent alleges that the sums claimed in the invoice dated 25 June 2010 have been claimed before, namely in an invoice dated 24 March 2010.

Consideration of Objection A

Where a contract does not have a written provision about how a party must make a claim to another party for payment the terms in Division 4 are implied into the contract.

In this matter the contract contains a term, "payment 14 days from date of invoice."

That provision is not sufficient to be a provision as to how a party must make a claim.

I determine that in this matter section 19 of the Act applies and the terms relating to how a party must make a claim are those set out in Division 4.

That being so the payment claim is not signed. This is a requirement of division 4.

I note that before this claim there were 4 other claims that the respondent admits were not signed and did not comply with those terms.

I determine that the respondent is now estopped from claiming the fifth claim the subject of this adjudication does not comply as it does not contain a signature.

If I am wrong and the phrase "payment 14 days from date of invoice" means the Division 4 terms are not implied then a signature is not needed as that term does not require one.

Similarly if service by email were a problem the respondent has not raised the objection until now and is estopped from saying that the means of service is inappropriate where it has received the previous claims by email.

Respondent's Submissions on Objection B

The respondent alleges that the sums claimed in the invoice dated 25 June 2010 have been claimed before. The respondent alleges the same claim was made in an invoice dated 24 March 2010. The respondent says this is the invoice the applicant says is dated 1/4/10 in its table. That would appear to be so. Annexure PS6 of Attachment 3 of the Response to the Application is alleged to be the invoice dated 24 March 2010. It claims the same amount

as the applicant lists in its table for the 1/4/10 payment claim. No other payment claim is revealed to me.

I find on the balance of probabilities that the payment claim dated 1/4/10 in the applicants list of payment claims is the payment claim that is PS6 in the Response.

The respondent says that the payment claim made, dated 24 March 2010 was e-mailed by the applicant on that day to the respondent. It had attached to it a document described as the "progress claim summary" (Response paragraph 17; Attachment PS6).

The respondent points out that the "progress claim summary" at PS6 claims 100% of the contract sum and that the tax invoice claims \$173,202.48 including GST as being the balance owing on the contract.

The respondent submits that the 24 March claim was to be the applicant's final claim for the works. In the progress claim summary the respondent submits, no portion of the sub contract sum had been left unclaimed. This seems to be so.

The respondent submits that the claim was disputed and after discussions the respondent paid \$100,000 of that claim leaving a balance of \$73,202.48 inclusive of GST, unpaid.

This sum of \$73,202.48 inclusive of GST, was unpaid, the respondent submits, because of discussions had between the parties.

I note the 25 June 2010 payment claim is for \$73,202.48 inclusive of GST.

The applicant's table as to the amount of the 5th payment claim is wrong although the date is correct.

Consideration of Objection B

AJ Lucas and Repeat Claims

In *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4 the Court was considering a contract that did not allow for repeat claims. The alleged payment claim under consideration repeated invoices that had been previously presented for payment.

The Court held by majority that the application could only relate to the earlier claims, repeated in the claim the applicant alleges in the adjudication application is the relevant payment claim for adjudication, and hence the application was not prepared and served within time. [50]

Mildren J held that, the act does not allow a payment claim which includes a claim which has already been the subject of a previous payment claim but which is out of time for the purposes of s 28 to be available for adjudication. [11]

The reasons he gave were that the act does not permit them because there is no section saying they are allowed like in the NSW Act [10] and to allow them would defeat the purpose of the 90 day time limit [11] and the Act provides for no extensions of time. [11]

Justices Southwood and Riley held that s.8 does not permit a payment dispute to be retriggered [45] [49] and the construction contract did not allow a repeat payment claim. [46][49]

The Court held (by majority) to put it another way, that, when an application for adjudication involves a payment claim which relates to a claim for work which has already been the subject of a previous payment claim, the later payment claim is substituted by the payment claim earlier in time in relation to the repeated claims and the adjudicator has to determine if the earlier payment claim gave rise to a payment dispute 90 days or less from the date of the application for adjudication.

In *GRD Group NT Pty Ltd v J Burns Electrical Pty Ltd* [2010] NTSC 34 Justice Mildren held that if the claim is a repeat claim the Adjudicator has no jurisdiction to entertain the application in as much as the repeat claim was based on the previous invoices because it was out of time. The Judge has accepted the Majority decision in *AJ Lucas*, namely the earlier claim is substituted for the later and then the 90 day period is applied. He has resiled from his position that the latter claim was not available for adjudication without there being any reference to the earlier claim.

This Matter

In this matter by tax invoice dated 24 March 2010 the applicant made a claim against the respondent for the balance of the sums outstanding pursuant to the contract. Attached to that document was a document called a "progress claim summary". The second document makes it quite clear that the tax invoice dated 24 March 2010 was making a claim for the completion of 100% of the works contemplated by the contract and was therefore claiming the balance of the contract sum payable.

The tax invoice dated 25 June 2010 is also making a claim for the completion of 100% of the works contemplated by the contract and was therefore claiming the balance of the contract sum payable.

There is no information supplied with the invoice dated 25 June 2010 ("the June claim") which shows it is claiming for works not included in the invoice dated 24 March 2010 ("the March claim"). The June claim is not accompanied by a "progress claim summary".

I find the March claim is for \$173,202.48 and that \$100,000 was paid by the respondent as a result of that claim and subsequent discussions between the parties. This left the sum of \$73,202.48 as unpaid on the March claim. The June claim is for \$73,202.48 which is the balance unpaid of the March claim. The inference is that the June claim is for the unpaid portion of the March claim and for the cost of the works claimed in the March claim and I so determine.

I determine for the reasons set out above the tax invoice dated 25 June 2010 is making a claim for some of the same works that were claimed in the invoice dated 24 March 2010.

The time by which the respondent needed to deliver an application for adjudication with respect to the works claimed for in the March claim, expired at the latest on the 28 July 2010 if the invoice was delivered on 1 April 2010 as submitted by the applicant - i.e. 28 days to pay the claim if there was no notice of dispute (Division 5) and then 90 days (Section 28). If the March claim was delivered earlier or the sum claimed became due earlier or there was a notice of dispute earlier, then the expiry date would be earlier but that does not matter for present purposes.

I find the applicant is making a repeat claim in the invoice dated 25 June 2010 for the works for which a claim for payment had been made in the invoice dated 24 March 2010. Repeat claims are not provided for in the contract.

If the tax invoice of 24 March 2010 is a payment claim then the subsequent invoice dated 25 June 2010 cannot be the payment claim to which the adjudicator can refer in conducting the adjudication for the reason that it is a repeat claim. *AJ Lucas*. The question of whether repeat claims are allowed is presently on appeal but only as to those contracts which contain clauses which require or allow repeat payment claims. This contract does not contain such a term.

For reasons set out below I determined that the tax invoice of 24 March 2010 is a payment claim as contemplated by the Act.

I determined therefore that the tax invoice dated 25 June is a repeat claim as described in *AJ Lucas* and the adjudication has to consider the earlier March claim as being the payment claim that gave rise to the payment dispute, the subject of this adjudication application.

As the June claim is not the relevant payment claim, no payment dispute as described by Section 8 of the Act can arise from that Invoice. The March claim gave rise to a payment dispute at the latest by 29 April 2010 (implied terms and Section 8). The latest the applicant could make an application for adjudication with respect to that payment dispute was 28 July 2010. If I am out by even a month in my calculations, the effect will be the same. The application for adjudication with respect to the payment claim that was the first in time in relation to the cost of the works claimed in the latter payment claim has been made more than 90 days after the payment dispute arose and therefore has not been made within time.

The application therefore does not comply with section 28 of the Act.

That being so, the adjudicator must pursuant to section 33 (1) (a) (ii) of the act dismiss the application without making a determination of its merits.

I determined that the application must be dismissed pursuant to section 33 (1) (a) (ii) of the Act and the application is hereby dismissed.

The Prior Payment Claim

On about 24 March 2010 the applicant sent a tax invoice to the respondent.

It is in the same format as the invoice dated 25 June 2010 but has attached to it the document entitled "progress claim summary".

I have previously determined that the provisions of section 19 of the Act apply to this contract and the terms set out in Division 4 of Schedule 1 of the Act are implied into the contract between the applicant and the respondent.

Similarly I have decided that even though the document of 25 June 2010 is not signed as required by the implied terms, the document is still a payment claim because the respondent has on previous occasions accepted similarly unsigned documents as a payment claim and is now estopped from making the complaint that the lack of signature means the document is not a payment claim.

As with the June claim, the March claim is unsigned but for the same reason that lack of signature does not mean that the June claim cannot be a payment claim, similarly the lack of signature does not stop the March claim from being a payment claim. Similarly with respect to the mode of service.

The March claim was not a repeat claim for although the March claim appears to repeat previous claims it also makes fresh claims with respect to

those items of work that had previously been claimed but not for 100% of the works. Prior to the March claim only 67% of the works had been claimed for but in the March claim the balance of 23% was being claimed for. The 23% of the works not previously claimed for could be dealt with in an adjudication. *GRD Group*.

In addition, the March claim contains the "progress claim summary" which itemised and described the obligations the contractor had performed and to which the claim relates in sufficient detail for the principal to assess the claim. This document would make the March claim comply with the implied terms, in that sense. (See division 4 paragraph 5(f)).

The respondent has in respect of the June claim made the comment that that claim was not accompanied by a "progress claim summary" and the respondent is unable to determine what works the June claim relates to as it does not itemise and describe the obligations the contractor had performed and to which the claim relates in sufficient detail for the principal to assess the claim. There is some doubt therefore that the June claim complies for that reason with the implied terms of the contract so as to make it a payment claim (See division 4 paragraph 5(f)). If that were so, it would not be a payment claim.

If the applicant alleges the June claim is a payment claim sufficient to sound jurisdiction in the adjudicator, then but for the claim being a repeat claim, the applicant cannot be heard to object to the March claim being found to be a payment claim, given that it is set out in the same manner but has even more particularity as to the works covered by the March claim than the June claim.

I determine for the reasons set out above that, the March claim is a payment claim as required by the (implied) terms of the contract and was able to give rise to a payment dispute that was available for adjudication.

Assessment

I need not make an assessment in light of my not having jurisdiction to determine the application on its merits.

Costs

Section 36(1) of the Act requires the parties to bear their own costs.

Section 36(2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.

The respondent made submissions as to costs but I reject them. The respondent asserts intentions and qualities of the applicant exist that cannot be determined by me on the material available.

I determine that the obligations as to costs as set out in Clause 36(1) should not be altered.

Conclusions

1. In accordance with s.38(1) of the Act I determine that the amount to be paid by the Respondent to the Applicant is \$nil.
2. I make no determination as to costs.
3. I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.
4. I draw the parties' attention to the slip rule in s 43(2) if I have made some correctable error.

Dated: 13 October 2010

David Alderman
Registered Adjudicator