

Adjudicator's Determination

Adjudicator Registration Number 17
Identification No: 17.09.02

Pursuant to the Construction Contracts (Security of Payments) Act 2004 (NT)

(Applicant)

And

James Francis Murphy and Patricia Frances O'Hehir

1. I, Charles H. Wright, as the appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (the Act), determine that the Adjudicated amount in respect of the Adjudicated Application served 12 November 2009 is \$Nil.

Appointment of Adjudicator

2. I was appointed as Adjudicator to determine this dispute by the Construction Contracts Registrar of the Northern Territory on 26 November 2009, which was later confirmed by agreement with the parties.

Acceptance of Adjudication Application

3. I confirmed my acceptance as Adjudicator in a telephone conference call on 1 December 2009 and recorded in Item 12. of the Minutes of Telephone Conference Call (item 5.10 below refers)

Documents Regarded in Making the Determination

4. In making this Determination I have had regard to the following:
 - 4.1. The provision of the *Construction Contracts (Security of Payments) Act*;
 - 4.2. The Applicant's Application dated 10 November 2009;
 - 4.3. Attachments 1 to 19 inclusive submitted with and forming part of the Applicant's Application dated 10 November 2009;
 - 4.4. Payment Claim dated 12 October 2009 to which the Application relates;
 - 4.5. The Respondent's Response dated 25 November 2009;
 - 4.6. Attachments 2 to 6 inclusive submitted with and forming part of the Respondent's response dated 25 November 2009.

Conference with the Parties

5. A telephone conference was held with the parties on 1 December 2009 to deal with formal and procedural matters.
 - 5.1. The individuals agreed that they had authority to make decisions and bind the parties they represent;
 - 5.2. The parties agreed that the Adjudicator had jurisdiction in this payment dispute;
 - 5.3. The parties agreed to adhere to the proposed timetable for any further responses required;
 - 5.4. The parties agreed that no other Adjudication Application had been sought;
 - 5.5. The parties agreed that this payment dispute is not subject to an order, judgement or other finding by an arbitrator or other person or a court or other body;
 - 5.6. The parties agreed that they were satisfied that no conflict of interested existed between the parties and the Adjudicator;
 - 5.7. The Applicant confirmed that the Adjudication Application was correctly served on the Respondent on 12 November 2009 and although not evidenced, it was accepted by the parties that the Adjudication Application was served on the Appointer on 12 November 2009;
 - 5.8. It was confirmed and agreed by the parties that the Respondent's Response was served on the Applicant on 25 November 2009 and on the Construction Contracts Registrar on 26 November 2009, both being within ten (10) working days of 12 November 2009;
 - 5.9. Neither party had any objections to the Adjudicator's appointment;
 - 5.10. The Adjudicator confirmed acceptance of the appointment made on 26 November 2009;
 - 5.11. Both parties accepted the estimate of the fee and agreed to have the fee allocated as determined by the Adjudicator.

Determination

6. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*

(a) dismiss the application without making a determination of its merits if -

- (i) the contract concerned is not a construction contract;*
- (ii) the application has not been prepared and served in accordance with section 28;*
- (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
- (iv) satisfied it is not possible to fairly make a determination –*
 - (A) because of the complexity of the matter; or*
 - (B) because the prescribed time or any extension of it is not sufficient for another reason; or*

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine –

- (i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and*
- (ii) the date on or before which the amount must be paid or the security must be returned.*

7. The Respondent's Response has been received, and therefore, s.33 of the Act requires a determination to be made within the *prescribed time* in accordance with s33 (3)(a) which provides that;

(a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or

(b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).

My Determination is therefore required by 10 December 2009.

The Adjudication Application

8. The Adjudication Application consists of the following papers:

8.1 Application for Appointment of Adjudicator (9 pages) detailing the dispute between the Applicant and the Respondent, which includes the following;

(a) Attachment 1 to 19 inclusive.

9. The Adjudication Application complies with section 28 of the Act, in particular;

9.1 Application for Appointment of an Adjudicator dated 10 November 2009 and served on 12 November 2009 is within the prescribed time of section 28(1);

9.2 The Application is;

(a) in writing;

(b) has been served on each party to the contract;

(c) has been served on the Adjudicator who consents to the Adjudication;

(d) have lodged a deposit for the cost of the Adjudication.

9.3 The Application;

(a) is prepared in accordance with, and contains the information prescribed by the Regulations;

(b) states the details of the construction contract;

(c) provides the payment claim that has given rise to the payment dispute;

(d) provides the information and documents upon which it relies in the adjudication.

The Adjudication Response

10. The Respondent's Response was received within the time prescribed in the Act. The Response complies with section 29 of the Act, in particular;

10.1 The Response is in writing;

(a) has been served on each party to the contract;

(b) has been served on the Adjudicator via the Construction Contracts Registrar;

10.2 The Response;

(a) is prepared in accordance with, and contains the information prescribed by the Regulations;

(b) states the details of the dispute to the payment claim;

(c) provides the information and documents upon which it relies in the adjudication.

The Construction Contract for the purposes of the Act

11. The Respondent's Response was received within the time prescribed in the Act. The Response complies with section 29 of the Act, in particular;

12. The Act defines a *Construction Contract* (s.5) as:

(1) *A construction contract is a contract (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:*

(a) *to carry out construction work;*

13. The contract is for work on a *site in the Territory*, is a contract undertaking *construction work* as defined in s.6(1)(c) of the Act and is therefore a *construction contract* under the Act.

14. The written contract consists of the following;

(a) HIA Plain Language Northern Territory Building Contract, signed by both parties and dated 3 May 2008.

Conditions for Determining the Adjudications

15. The conditions for determining the adjudication have been met. The contract is a construction contract as defined by the Act. The site is a site in the Territory. There is a payment dispute. The Application for adjudication has been prepared and served and is in accordance with s.28 of the Act, within time limits, served on the parties and the Adjudicator. The Adjudication deposit has been paid. The parties have confirmed that there are no other proceedings on a matter arising from the construction Contract and being the subject of this determination.

The Payment Claim

16. The payment claim, the subject of this Adjudication, is Tax Invoice/Statement, Invoice No.: 00002062 dated 12 October 2009 for the sum of \$103,311.00 inclusive of GST.

17. The details of the payment claims are;

Invoice from: the Applicant	
Invoice to: the Respondent	
Invoice No.: 00002062	
Date: 12 October 2009	
Contract Price \$335,800.00	
Total Payments to date are:	\$242,208.00
Contract price due to be paid at lock up stage (see clause 3 of the Contract and attached schedule of works done to lock up stage. Refer Attachment "A")	\$338,010.00
Total amount outstanding for works done under the contract to Lock up stage:	\$95,802.00
Total value of further work done from lock up stage to the denial of access to site on 27 July 2009, being a further \$7,509.00 of tiling works paid to the tiling contractor. (Invoice attached)	\$7,509.00
<hr/> Sub Total	<hr/> \$103,311.00
GST	Inclusive
<hr/> Amount Due	<hr/> \$103,311.00

The Applicant's Supporting Documentation

18. The Applicant's supporting documents are;
 - 18.1 Attachment "A" to Invoice 0002062 listing items of work 1 to 25 inclusive;
 - 18.2 Tiling contractors Tax Invoice, Invoice: 00007412 dated 5 May 2009 for the GST inclusive sum of \$9,386.00;
 - 18.3 Section 5 of division 2 of the Schedule of Implied provisions;
 - 18.4 The Applicant's Statutory Declaration consisting of eleven pages and dated 10 November 2009.

Response to Payment Claim

19. The Respondent's supporting documents are;
 - 19.1 Table of payments made to the Applicant shown on page 2 of the Respondent's Response;
 - 19.2 The Respondent's Statutory Declarations, the first, consisting of six pages and dated 25 November 2009, the second, consisting of three pages and dated 25 November 2009.
 - 19.3 Progress Payment Calculation Schedule dated 4 June 2008 prepared by the Respondent's bank.

Payment Claim

20. The Payment Claim is Tax Invoice/Statement, Invoice No.: 00002062, dated 12 October 2009 in the sum of \$103,311.00 inclusive of GST;
21. The Contract entered into between the parties provides instructions for making claims for payment.
22. The provisions of the Contract for making payment claims require at section 3;

Payment

3.1 *You* must pay all statutory fees or reimburse us if *we* have already paid those fees on *your* behalf.

3.2 *You* must pay *us* the price.

3.3 *You* must pay it in instalments at *substantial completion* of the following stages of *the work*;

Stage of the Work	% of price payable	Value
Deposit	5%	\$17,790
1. Complete floor	25%	\$88,950
2. Wall frame	20%	\$71,160
3. Roof	30%	\$106,740
4. Lock-up	15%	\$53,370
5. Final	5%	\$17,790
	The price	\$355,800

23. I find that Tax Invoice/Statement, Invoice No.: 00002062 a valid payment claim under the Act and although it contains a number of flaws, I find that I am unable to dismiss it as none of the flaws give grounds for dismissal.
24. Accordingly, I have jurisdiction to consider the payment claim.
25. The Act requires (at s.33(1)) *An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) -*
- (b) otherwise determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine -*
- (i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and*
- (ii) the date on or before which the amount must be paid or the security must be returned.*
26. The parties entered into a Contract for the construction of a house for the GST inclusive sum of \$355,800 with a Start date of 9 June 2008 and a Finish date of 9 November 2008.
27. The Contract was subject to finance being approved by the Respondent's bank.
28. The 'Advisory Notice' to the Contract at paragraph 9 advises when progress payments are to be made and contains the advice '...Progress payments should *not* be made in advance of the performance of the building work to which the demand relates.'
29. After signing the Contract and after the Respondent's received finance approval from the bank, with agreement of the parties, the terms of payment were varied in accordance with the banks' 'Progress Payment Calculation Schedule'.
30. The bank's Progress Payment Calculation Schedule is;

Stage	%	Payment Due
1.	20%	\$71,160
2.	20%	\$71,160
3.	25%	\$88,950
4.	5%	\$17,790
5.	20%	\$71,160
6.	10%	\$35,580
	Total	\$355,800

31. The bank provided the Application for Progress Payment forms to the Respondent that contained a brief description of the work at each stage. The stages and works are;

- Stage 1. Site preparation/Foundations/Slab complete
- Stage 2. Substantial completion of wall and roof frame and/or brickwork
- Stage 3. External linings/Brickwork complete/Roof covered
- Stage 4. Substantial completion of plasterings, internal linings and ceilings
- Stage 5. Substantial completion of second fix carpentry, kitchen installed excluding stove
- Stage 6. Painting electrical and plumbing complete PC items Practical completion

32. The 'Application for Progress Payment – Contract Builder' form carries the statement made by the Respondent 'Has satisfactorily reached this stage and application is made for a progress payment to the Builder of \$'.
33. The bank's letter to the Applicant dated 4 June 2008, at paragraph 5, contains the instruction '...When works to the agreed stage are completed, please request our customer/s to sign an Application for Progress Payment form....'.
34. The bank's approval letter to the Respondent at paragraph 3 of the second page instructs the Mortgagor (the Respondents) 'You should only sign the Application for Progress Payment if you are satisfied with the construction and that building works have reached the stage of construction indicated'.
35. The Applicant required the deposit to be paid although it was in contravention of the bank's standard Progress Payment Calculation Schedule, and the deposit was paid in a combination of the Respondent's own funds and portion of the bank's loan facility.
36. The Applicant submitted Application for Progress Payment for Stage 1, Stage 2, Stage 3 and Stage 4 all in accordance with the bank's payment requirements and there is no dispute that each one of these Application for Progress Payments were paid in full.
37. On the balance of probability I find that the agreement to vary the terms of payment was intended to hold for the duration of the Contract and not until some specified event took place, at some unspecified time in the future, as purported by the Applicant and refuted by the Respondents.
38. There are a number of flaws in Invoice No.: 00002062 dated 12 October 2009;
 - 38.1 The invoice is not accompanied by one of the bank's Application for Progress Payment forms;
 - 38.2 The invoice is for work 'due to be paid on lock up stage' when Stage 4 Application for Progress Payment in the amount of \$17,790.00 dated 9 June 2009 and issued with the Applicant's Tax Invoice, Invoice No.: 00002049 dated 28 May 2009 was 'progress Claim No. 4 for *Lockup Stage*...';
 - 38.3 A previous Tax Invoice, Invoice No.: 00002057 dated 26 July 2009 in the amount of \$17,790.00 was a 'Claim to get payments up to date, (lock up stage) as per contract,...';
 - 38.4 Invoice No.: 00002062 is claiming the GST inclusive sum of \$103,311.00. The Adjudication Application amount claimed is \$85,521.80 inclusive of GST with an explanation of the difference between the invoiced amount and the claimed amount being the difference resulting for the bank's overpayment on Application for Progress Payment for Stage 1;
 - 38.5 Contained within Invoice No.: 00002062 is a sum of \$7,509.00. The explanation for this amount is given as 'Total value of further work done from lock up stage to the denial of access to site on 27 July 2009, being a further \$7,509.00 of tiling works paid to the tiling contractor. (Invoice attached)'. The attached tiling invoice, Invoice No.: 00007412 is dated 5/05/2009 which is before Invoice N0.: 00002049 for Progress Claim No. 4 for Lockup Stage dated 28 May 2009 and is in the sum of \$9,386.00 including GST;
 - 38.6 Invoice No.: 00002062 reverts to the payment clause in the Contract when the previous operation of the payment provision of the Contract was on the bank's terms;

- 38.7 The Applicant is not entitled to rely on Division 4 of the Schedule as the construction Contract entered into on 3 May 2008, and subsequently modified with agreement between the parties with regard the payment provisions, adequately provides for making payment applications.
39. On the balance of probability I find that the Applicant has been paid in relation to the Contractor's obligations it has performed.
40. The total value of work claimed is \$338,010.00, which is 95% of the original Price. This amount is disputed, by;
- 40.1 The first Statutory Declaration at paragraph 40. and 41. and lists the work outstanding.
- 40.2 The Respondent's email dated 15 October 2009 provides a list of items not in accordance with the Schedule of Finishes and disputes the amount owing.
- 40.3 The Notice of Dispute dated 21 October 2009 and issued by email by the Respondents on 22 October 2009 was issued within 14 days and contains all the information in accordance with Part 6 of Division 5 of the Act but is unsigned by the Respondents. The Notice of Dispute lists the works claimed to have been completed but have not been completed.
- 40.4 An Independent Progress Assessment of the Work by an industry expert states that the Total Value of Work Executed is \$231,946.47 plus GST, for a GST inclusive total of \$255,141.12.
- 40.5 The amount paid to date by the Respondents to the Applicant is \$259,997.20, a fact that is agreed between the Respondent and the Applicant.

Payment for Claim

41. On the balance of probability and for all the reasons set out above, I determine that the Respondent has \$Nil to pay the Applicant.
42. There is no interest payable by the Respondent to the Applicant.

Costs

43. I determine that each party pay one half of the cost of the adjudication.

Conclusion

44. For the reasons set out in this determination, I determine that the adjudicated amount is \$Nil.

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Charles H. Wright
Adjudicator

10 December 2009