

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

Adjudication Determination 64.21.01

Adjudicator (Registration number) : William Mark Jones (64)

Applicant : [redacted]

ABN : [redacted]

Address : [redacted]

Respondent : [redacted]

ABN : [redacted]

Address : [redacted]

Project : Building

Work : Block laying

Location of work : [redacted] NT

Payment Claim Dispute

Claim Date : 22 July 2021

Claim Amount : \$56,500.00 (excl GST)

Disputed amount : \$20,755.00 (excl GST)

Dispute Date : 26 July 2021

Application for adjudication

Application Service Date : 3 November 2021

Appointment Date : 4 November 2021

Response Service Date : 15 November 2021

Determination

Determination Date : 9 December 2021

Amount payable to applicant : Nil

Applicant's adjudication costs : 50%

Respondent's adjudication costs: 50%

## Reasons

### Extension of time

1. I sought and was granted by the registrar an extension of time of 10 working days.

### Background

2. On or about 1 March 2021 the parties entered into an oral contract under which the applicant would carry out block laying for the respondent on a building located in the Northern Territory.
3. The works involved three stages. The initial two stages were charged and paid for at an agreed rate of \$3.40 per block. The respondent provided a copy of invoice 0128 dated 4 May 2021 as evidence of the rate charged and paid.
4. It appears there may have been some variations although they were not properly documented.
5. On 22 July 2021 the applicant issued invoice number 0144 (the alleged 'Payment Claim') for the sum of \$56,500.00 excluding GST (\$62,150.00 inclusive of GST) being for the third stage. The invoice was not based on block rates like the earlier invoices but was based on dayworks.
6. The description on the invoice was merely '*Casuarina drive Nightcliffe supply labour sand cement saw blades equipment for blocklaying 620 hours @\$85 per*'. The total amount for this line item was \$52,700.00.
7. There was a second line item being '*Materials saw blades \$3,800.00*'.
8. The applicant did not provide any timesheets or even any description of the works carried out under the payment claim.
9. On 26 July there was an exchange of texts during which the respondent claimed there was no agreement to carry out works on hourly rates. On 7 August there was an exchange of emails/texts in which the respondent asked the applicant to 'resubmit a fair and proper invoice'.
10. The respondent rejected the invoice and made its own assessment of the value of the work carried out. The respondent assessed the value of the work in stage three at \$35,745.00 plus GST. The respondent provided the following description of the basis of its assessment of the progress claim in an email dated 8 August 2021:

*6410 blocks @ \$4.50 per block - \$28,845 (note that ground floor was \$3.40 per block)*

*Cutting blocks – \$3800*

*Redo opening to gym (requested by owner) - \$500*

*Lifting of blocks by hand - \$1000*

*Extra cutting as requested by builder - \$1000*

*Extra scaffolding as requested by builder - \$600*

*Total           \$35,745.00*

*GST             \$3,574.50*

*Total           \$39,319.50*

11. The respondent paid that amount on 8 August 2021, cleared on 9 August 2021.

### **Appointment**

12. I am adjudicator number 64 registered under the Act and am qualified to adjudicate a payment dispute under the Act.
13. On 3 November 2021 the applicant served an application for adjudication of a payment dispute on the respondent and on the Resolution Institute. On 4 November 2021 the Resolution Institute appointed me to adjudicate the payment dispute.
14. I do not have a material interest in the outcome of the adjudication that would disqualify me under s31 from adjudicating the payment dispute.
15. I confirm I have jurisdiction to adjudicate the payment dispute if any exists.

### **Additional Information**

16. I asked the parties for additional information on two occasions.
- 16.1. On 2 Dec I requested copies of any emails/texts responding to the payment claim.
- 16.2. On 6 Dec I advised the parties that the provision in Schedule 1 Division 4 of the Act about how to make a payment claim had to be implied into the oral contract and that the invoice may not have complied with the provision. I advised that this may be fatal to the application as the invoice would not be a claim under the contract. I asked for submissions on those issues.

17. The applicant provided me with a list of alleged variations. He did not provide me with any costs of the individual variations. In any case information provided now does not change the fact that no supporting information was provided with the invoice when it was served, as required by the provision about how to make a payment claim.
18. The respondent provided me with a text exchange dated 26 July 2021 during which the respondent rejected the use of hourly rate.
19. Neither party properly addressed the legal issues I raised in my request.

### **Implied provisions**

20. Part 2 Division 2 of the Act implies provisions for matters when there is not a written provision about the matter. Being an oral contract, all of the provisions addressed in Part 2 Division 2 are implied into the contract.
21. Particularly relevant to this adjudication is the matter of how to make a payment claim.
22. Part 2 Division 2 section 19 provides

*'The provisions in Schedule 1, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment'.*

23. Schedule 1, Division 4 provides the following implied provision:

Content of claim for payment

- (1) A payment claim under this contract must:
  - (a) be in writing; and
  - (b) be addressed to the party to which the claim is made; and
  - (c) state the name of the claimant; and
  - (d) state the date of the claim; and
  - (e) state the amount claimed; and
  - (f) for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and
  - (g) for a claim by the principal – describe the basis for the claim in sufficient detail for the contractor to assess the claim; and
  - (i) be given to the party to which the claim is made.

- (2) For a claim by the contractor, the amount claimed must be calculated in accordance with this contract or, if this contract does not provide a way of calculating the amount, the amount claimed must be:
- (a) if this contract states that the principal must pay the contractor one amount (the contract sum) for the performance by the contractor of all of its obligations under this contract (the total obligations) – the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or
  - (b) if this contract states that the principal must pay the contractor in accordance with rates stated in this contract – the value of the obligations performed and detailed in the claim calculated by reference to the rates; or
  - (c) otherwise – a reasonable amount for the obligations performed and detailed in the claim.
- (3) Subclause (2) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subclause (2)(a), (b) and (c).

(my emphasis)

## Analysis

24. My first task is to determine whether I should dismiss the application under s33(1)(a) of the Act without making a determination of its merits s33(1)(b). Amongst the potential reasons for dismissing the application is if the application has not been prepared and served in accordance with s28. S28(2)(b)(ii) requires a copy of the payment claim to be attached to the application.

### **Invoice is not a valid payment claim under the contract**

25. It is trite law that the existence of a payment dispute is a prerequisite for an adjudication.

Furthermore, there must be a valid ‘payment claim under a construction contract’ for there to be a ‘payment dispute’. Section 7A of the Act defines a ‘payment claim’ to be a claim made under a construction contract and section 8 defines a ‘payment dispute’ to require the existence of a payment claim made under a contract.

26. In *ABB*<sup>1</sup> Kelly J said:

In the case of a claim by a contractor, in order to determine whether a payment dispute has arisen, the adjudicator must first determine whether the contractor has made a claim under the contract for payment of an amount in relation to the performance by the contractor of its obligations under the contract. This necessarily entails the adjudicator going to the terms of the contract and asking whether what purports to be a payment claim is capable of giving rise to a liability on the part of the principal to pay. If not, then there is no “payment dispute” and the adjudicator is required by s 33(1)(a) to dismiss the application without a determination on the merits.

27. In *K & J Burns*<sup>2</sup> Olsson AJ said:

According to its normal English connotation, that word (‘under’) signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.

Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract.

In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.

28. In *Laing O’Rourke* the WASCA found to be ‘under’ a construction contract, the payment claim must be made in accordance with the terms of the relevant construction contract.<sup>3</sup>

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<sup>1</sup> *ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors* [2017] NTSC 1 at 30

<sup>2</sup> *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at 235

<sup>3</sup> *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130

29. The provision implied in Schedule 1 Division 4 requires the payment claim to itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim. The invoice fails to itemise or describe any of the obligations of the applicant.
30. Furthermore, the implied provision requires a payment claim to be in accordance with and with reference to rates stated in this contract. The only rates agreed by the parties were the block rate of \$3.40 and referred to in the previous payment claims. There is no reference to the agreed rates in the invoice. I have not been provided with any submission claiming hourly labour rates were agreed to be used.
31. Relevantly, the applicant certainly did not provide sufficient detail for the respondent to be able to assess the claim.
32. Should there be no available rates Clause 5 of Division 4 requires a reasonable amount for the obligations performed and detailed in the claim. The obligations were not detailed in the invoice.
33. The invoice for day rates is nothing more than a quantum meruit claim.
34. It is well established that a quantum meruit claim is not a claim under a contract. In *Delmere Holdings*<sup>4</sup> the WASC held that claims in quantum meruit are outside a contract not 'under' it
35. The applicant has not provided me with any evidence to support the quantum of the claim. The claim is merely for 620 hours at \$85 per hour plus \$3,800 worth of saw blades. No timesheets or other explanation of the claim have been provided.
36. Furthermore, the applicant has provided me with very little support for his allegations of extra work. The applicant has not provided me with any meaningful and measurable description of any extra works above and beyond that of the first two stages. The applicant has not provided me with any drawings, specifications, variation correspondence to explain any alleged extra work.
37. The respondent, on the other hand, has provided the basis on which it calculated its payment, immediately made that payment, and offered the applicant the opportunity to provide more details of its claim should he disagree with the respondent's assessment.
38. I find the invoice was not a payment claim under the construction contract and therefore there is no payment dispute capable of being adjudicated.

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<sup>4</sup> *Delmere Holdings Pty Ltd v Green* [2015] WASC 148

### **Application Time limit**

39. In the alternative to the above, I also find the application for adjudication was out of time.
40. S28(1) requires any application to be served within 65 working days of the payment dispute arising.
41. S8 provides that a payment dispute arises when the claim has been rejected or wholly or partially disputed.
42. The applicant claims the dispute arose on 5 August being the date for payment the applicant unilaterally claimed his invoice to be due for payment.
43. In response to my request of 2 December the respondent provided evidence that it had disputed the invoice as early as 26 July 2021 when it said it had not agreed to an hourly rate.
44. I accept the date of the dispute to be 26 July 2021
45. There are 72 working days between the date of the alleged payment dispute and the service date of 3 November.
46. The application was seven days out of time and must be dismissed.

### **Conclusion**

47. For the above reasons I dismiss the application under s33(1)(a) without making a determination of its merits.

### **Adjudication cost**

48. The Act provides for the parties to share the cost of the adjudication equally unless the adjudicator finds the conduct of a party has been frivolous or vexatious or made unfounded submissions.
49. I find the parties will bear the \$2,000 cost of the adjudication equally.

Signed

William Mark Jones

NT Adjudicator number 64