ADJUDICATOR'S DETERMINATION

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT

IN THE MATTER OF AN ADJUDICATION BETWEEN:

[the Applicant]

And

[the Respondent]

BY

GRAHAM ANSTEE-BROOK (ADJUDICATOR)(Number 06)

ISSUED: 9 August 2017

Determination No. 06.17.01

CONTENTS

1. DETAILS OF PARTIES

APPLICANT:

C/- Mr R Perkins, Powell & Co Legal
Unit 2/3, 54 Marina Boulevard Cullen Bay NT 0820

RESPONDENT

ADJUDICATOR
Graham Anstee-Brook
42 Minora Road
DALKEITH WA 6009
Email: graham.ansteebrook@aurecongroup.com

Tel: 0412 288 554

2. ADJUDICATOR'S DETERMINATION

I Graham Ivan Anstee-Brook the appointed adjudicator in the matter of the payment dispute between the Applicant and the Respondent determine that:

2.1. The Respondent must pay to the Applicant for VO-01 by 5pm on 16 August 2017 the sum of $32,000.00.

2.2. The Respondent must pay interest to the Applicant by 5pm on 16 August 2017 the sum of $995.17.

2.3. Each party is liable for half of the fees and disbursements of the Adjudicator.

2.4. The Respondent must pay the Applicant by 5pm on 16 August 2017 the sum of $2,910.00 in respect of the Adjudicator's fees and disbursements.

_____

Graham Anstee-Brook
Adjudicator

3. ENGAGEMENT

3.1. On or about 31 March 2016 the Applicant and Respondent entered into a Master Builders Northern Territory Residential Building Contract (the Contract) for the construction of a residential dwelling for a lump sum of $309,000.

4. APPOINTMENT OF ADJUDICATOR

4.1. By a letter dated 10 July 2017 from the Master Builders Northern Territory I was appointed Adjudicator pursuant to section 30(1)(a) of the *Construction Contracts (Security of Payments) Act* (**CCA**).

4.2. I accepted the appointment and wrote to the Applicant and Respondent on 20 July 2017.

5. CONFLICT OF INTEREST

5.1. I have no material personal interest in the payment dispute or in the Contract under which the dispute has arisen.

5.2. I see no reason to disqualify myself pursuant to section 31 of the CCA.

6. DISMISSAL UNDER SECTION 33(1)(a) OF THE CCA

6.1. I am obliged to dismiss the Application without making a determination on the merits depending on my findings of fact relating to of section 33(1)(a)(i) to (iv) of the CCA. I am obliged to consider each of the sub-sections to determine whether I am obliged to dismiss the Application without making a determination on the merits. *Moroney Anor and Murray River North Pty Ltd* [2008] WASAT 111 at [82].

Section 33(1) provides as follows:

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; or

(ii) the application has not been prepared and served in accordance with section 28; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgement 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;

7. CONSTRUCTION CONTRACT

7.1. If the Contract between the parties is not a construction contract I must dismiss.

7.2. Sections 4 and 5 of the CCA defines *construction contract.*

(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;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work;

(c) ….

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.

7.3. Section 6 of the CCA relevantly provides that *construction work* includes the following work on a site in the Territory:

(c) constructing the whole or part of any civil works, or a building or structure, that forms or will form, (whether permanently or not and whether or not in the Territory) part of land or the sea bed (whether above or below it);

(d) fixing or installing on or in anything mentioned in paragraph (c) any fittings forming, or to form (whether or not permanently) part of the thing, including:

(i) fittings for electricity, gas, water, fuel, oil, air, …

(e) …

(f) any work that is preparatory to, necessary for, an integral part of or for the completion of any work mentioned in paragraph (a), (b), (c), (d) or (e), including:

(i) site or earth works ….

(ii) laying foundations; and

(iii)

7.4. I have looked at the Contract and by reference thereto and in particular the Schedule of Inclusions attached to the contract the work performed by the Applicant included:

7.4.1. wall construction for a domestic dwelling;

7.4.2. roof construction for a domestic dwelling;

7.4.3. painting;

7.4.4. supply of door and other fittings

The schedule of Inclusions is a detailed catalogue of work performed in relation to the building of a domestic dwelling.

7.5. The construction work carried out by the Applicant was performed on a site in Northern Territory and having regard to the Application and in particular the description of the construction work performed I am satisfied that the construction work performed by the Applicant falls within the definitions as set out above and that the arrangement between the parties is a construction contract.

7.6. Furthermore the Respondent does not contend in the Response that the work performed by the Applicant does not comprise construction work as defined in the CCA.

8. APPLICATION PREPARED IN ACCORDANCE WITH SECTION 28 OF THE CCA

8.1. To satisfy the requirements of section 28 of the CCA:

8.1.1. within 90 days after a payment dispute arises the Applicant must prepare a written application for adjudication, serve the application on the other party to the contract and on a prescribed appointer

8.1.2. the Applicant must prepare the Application in accordance with and the Application must contain the information prescribed by the Regulations

8.1.3. the Application must set out the details of the construction contract and the payment claim that has given rise to the payment dispute

8.1.4. the Applicant must attach information and documentation to be relied upon by the party to the adjudication

8.2. I have considered the Application and find that it satisfies the provisions of the CCA Regulations and the requirements as set out in paragraph 8.1.3 above.

8.3. The Applicant delivered a payment claim on 29 April 2017 for payment of $36,738.20. The Applicant contends that pursuant to clause 21(c) of the Contract the Respondent must pay Payment Claims within 7 days of the date the claim is submitted to the Respondent.

8.4. The Applicant further contends that at Part 2 – Definitions of the contract Days is defined as *includes Monday to Friday inclusive but excludes public holidays*. Monday 1 May 2017 was a Public Holiday in the Northern Territory (Labour Day) and accordingly the Applicant argues that the Respondent was due to make payment on or before 10 May 2017.

8.5. The Applicant contends that no payment was made and accordingly a Payment Dispute pursuant to section 8 of the CCA arose on 11 May 2017.

8.6. I am satisfied that a payment dispute arose on 11 May 2017 and that the requirements of section 28 of the CCA have been met.

9. ARBITRATOR OTHER PERSON OR COURT

9.1. It is common cause between the parties that an application is with the NT Consumer Commission for alleged breaches of a consumer guarantee by the Applicant.

9.2. The Respondent does not contend that I should dismiss the Application pursuant to section 33(1)(a)(iii) of the CCA however I must be satisfied that I have the jurisdiction to make a determination.

9.3. In my correspondence accepting the appointment to act as adjudicator I requested the parties to advise me if any other adjudicator had been appointed or whether there was any court, tribunal or arbitrator dealing with a matter under the Contract that would attract the provisions of section 33(1)(a)(iii).

9.4. On 21 July 2017 I received submissions from the Applicant in relation to the Consumer Commission Application. I did not receive any submissions from the Respondent and accept the following contentions of the Applicant:

- Pursuant to section 54(FE)(1)(b) of the *Building Act* a contracting residential builder is not prevented from making an application under the CCA in circumstances where there is an application before the Consumer Affairs Commission.

- The Consumer Affairs Commission has not made a decision in relation to the matter before it.

- That given the provisions of section 54(FE)(1)(b) and the fact that the Commissioner has not made a decision section 33(1)(a)(iii) of the CCA is not enlivened.

I am satisfied that I am not required to dismiss the Application without making a determination on the merits pursuant to section 33(1)(a)(iii) of the CCA.

10. PAYMENT DISPUTE

10.1. The Respondent does not contend that a payment dispute under the CCA has not arisen and I have considered the Application and the Response and the Contract and accept the contentions of the Application that a payment dispute arose on 11 May 2017.

11. IMPLIED TERMS

11.1. The Respondent contends that the contract does not have a written provision about how the Applicant is to make a payment claim for payment.

11.2. Pursuant to section 19 of the CCA the provisions in the Schedule Division 4 are to be implied in the Contract if the Contract does not have a written provision about how the Applicant must make a claim.

11.3. Clause 21(b) of the Contract provides as follows:

The Builder must give the Owner an invoice to claim for each progress claim which must also be accompanied by a declaration by the Builder that the work to which the invoice relates has been completed (41HF(1) Building Act).

11.4. At paragraph 5.1.8 the Respondent contends as follows:

The contract does not have a written provision about how a party must make a claim to another party for payment. Thus the s4 of the Payment Act is implied in this contract. The builder himself claims several times in the payment claim, that he has prepared it under s. of the Construction Contracts (Security of Payments) Act. The clause 5(1)(f) clearly says,

"for a claim by the contractor – itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient details for the principal to access the claim".

11.5. Given the provisions of clause 21(b) of the Contract I am satisfied that the implied provisions are not activated.

11.6. The payment claim to which this Application relates is comprised of:

11.6.1. a letter form Powell & Co (solicitors for the Applicant) dated 29 April 2017 which details what work has been done and is being claimed for being in respect of the additional cost for an enlarged floor pad and a split level slab construction to a living room;

11.6.2. a progress payment schedule which sets out the stages of payment a total contract amount variations payments and a total amount of the claim;

11.6.3. Appendix Form 3 being a cost of variation notice; a document headed *[site address redacted]* which details progress payment claims variations calculations of amounts claimed and a total progress payment amount payable;

11.6.4. plans in respect of the matters relevant to the progress claim.

11.7. I am not persuaded by the Respondent that the payment claim does not meet the provisions of clause 5(1)(f) and reject the Respondent's contention that the payment claim is invalid.

12. VARIATION VO-01

12.1. The Applicant contends in relation to variation VO-01:

12.1.1. the Scope of the Work was to increase the living room area by 21.9 m^2 which was directed and negotiated by the Respondent with the builder during the period 6 August 2016 to 15 September 2016;

12.1.2. the Applicant initially priced VO-01 at $41,000 however through negotiations a finally agreed fixed lump sum of $32,000 was agreed between the Applicant and the Respondent on or about 15 September 2016;

12.1.3. at the time VO-01 was negotiated and agreed the Building Permit had not been issued, the Respondent did not have clear title to the land on which the house was to be built and the appropriate building insurances were still to be finalised.;

12.1.4. the building permit was issued on 9 November 2016 incorporating the revised and amended plans for VO-01. These plans were approved for construction showing the increased floor area to the living room;

12.1.5. the works for VO-01 were completed on 27 February 2017 and on 13 March 2017 the Applicant sent a Cost Variation Notice to the Respondent in accordance with clause 15 of the Contract. That notice is at Tab 4 of the Application. Included in that cost variation notice was a revised payment schedule which showed variation VO-01 as part of the Enclosed Staged Progress Payment Claim;

12.1.6. On 18 March 2017 the Respondent wrote to the Applicant to the effect that payment was not due because the works for VO-01 had not been completed. In that correspondence the Respondent states *However, I am grateful for sending me the cost variation notice, and ready to pay in full once the variations are complete in the agreed standard and quality as I have informed you*.

12.2. The Respondent contends that variation VO-01 was to increase the floor slab by 21.0m^2 but also included a number of minor changes being:

- upgraded titles for the bathrooms;

- bulk-head ceiling for the ceiling;
- stepped model kitchen island bench-top;
- changes in the pantry cupboards and walk-in pantry;
- increase of internal area.

Hereafter referred to as the "Additional Floor Changes".

When the Respondent wrote to the Applicant on 18 March 2017 refusing to pay for VO-01 as claimed in Cost Variation Notice dated 13 March 2017 the Respondent failed to make any mention of the other works which the Respondent contends were to be included in VO-01. In support of the contention that VO-02 includes the Additional Floor Changes the Respondent refers to a chain of correspondence at Tab 08 of the Response. I have considered the chain of correspondence to which the Respondent refers and find that there is nothing compelling in those items of correspondence to persuade me that the Additional Floor Changes were included in the work under VO-01.

12.3. At paragraph 2.12 of the Response the Respondent concedes that the Respondent agreed with the builder to pay $32,000 in respect of VO-01.

12.4. At paragraphs 1.7, 1.8 & 1.9 of the Application the Applicant states that V0-01 was negotiated and agreed prior to the building permit being issued and that when the building permit was issued it incorporated the revised and amended plans for VO-01 which indicated the increased floor area. The changes for the plans for VO-01 had been fully discussed between the parties and agreed and the price settled at $32,000 well before the building permit was issued on 9 November 2016.

12.5. At paragraph 2.13 of the Response the Respondent states *I agree the paragraphs 1.7, 1.8 & 1.9 of the application with regard to the VO-01.*

12.6. At paragraph 5.1 of the Response the Respondent contends that the Applicant has not complied with the provisions of clause 21(b) of the contract and Regulation 41 (HF)(i) regarding providing invoices that describe the work that is being claimed. Further the Applicant has adopted a method of deduction of cost in relation to the $32,000 claimed for VO-01 and that there is no detail of the work that had been performed.

I am not persuaded by these arguments and refer to paragraphs 9.4 and 11.6 of this determination.

12.7. At paragraphs 5.1.10 to 5.1.12 the Respondent contends that the Applicant did not give a notice pursuant to clause 15(c)(ii) of the Contract which states:

Upon receipt or delivery of the Variation Notice the Builder will within ten (10) days provide a Cost Variation Notice for the Owner's approval.

It is common cause that the Respondent did not comply with clause 15(c)(i) which required the Respondent to issue a notice to the Applicant requesting the variation for the increased floor area.

12.8. I am satisfied by the narration of events provided by the Applicant and the concessions made by the Respondent that the parties agreed the scope and cost of VO-01.

12.9. I determine that the Respondent must pay the Applicant $32,000 in respect of VO-01.

13. VARIATION VO-02

13.1. This claim relates to work performed by the Applicant relating to a split floor slab which the Applicant claims was due to the dumping of compacted soil across the site where the Respondent's home was to be constructed.

13.2. It is common cause between the parties that the plans approved for construction provide for a single level slab across the entire dwelling.

13.3. The Applicant had commissioned a geotechnical report by Douglas Partners on or about 26 August 2016 which confirmed that the slop was 3-5 degrees in a south – east direction which the Applicant states is consistent with what the Applicant had observed in or about July 2016.

13.4. According to the Applicant by a letter from the Applicant's solicitors to the Respondent dated 2 April 2017 the Applicant became aware of the slope of the site on or about 15 November 2016 after the Applicant had mobilised to the site. The Applicant provided the Respondent with two options to overcome the problem which were:

> *"1. Remove the formwork, cut and fill the block to achieve a suitable level for the raft slab footing, cost estimate $10,000; or*
>
> *2. Adjust the formwork and step the raft slab footing to accommodate and follow the slope of the land – cost estimate $8,000*
>
> *These issues were discussed by telephone with the Owner (Respondent on 16 November 2016, who was overseas at the time. The Owner agreed with option 2 above to step the slab to accommodate the slope of the land and the Builder (Applicant) was prepared to absorb the cost, in good faith, to assist the Owner with the build."*

13.5. The next paragraph in that letter from the Applicant's solicitors to the Respondent states relevantly,

> *This is presently a no cost variation to the Contract, however the builder reserves its rights to claim this variation under the Contract and estimates the cost to be in the vicinity of $8,000…*

13.6. The Respondent disputes the Applicant's claim that she agreed to pay for a split level slab. The Respondent agrees that a discussion was had with the Applicant regarding the two options but that the Respondent advised the Applicant that she was not able to pay the extra amounts. In response the Applicant suggested an alternative which was to have three steps in the middle of the house of 5 steps at the front of the house and that either of these options would be at no cost to the Respondent. The Respondent selected the three step option.

13.7. The Respondent alleges that during the discussions in November there was no mention by the Applicant of soil being dumped on the Respondent's building site which was the cause of a split slab being required. During the directions hearing before the Delegate to the Commissioner in relation to the consumer guarantee proceedings when asked to explain why the report by Douglas Partners did not take into account the slope of the site the Applicant for the first time raised the dumped soil on the site.

13.8. On a balance of probabilities I am not satisfied that the Respondent agreed to pay for VO-02 or that the Applicant intended to claim any amount for the change to the configuration of the slab from the Respondent.

13.9. I determine that the Applicant's claim for VO-02 be dismissed.

14. INTEREST

14.1. The Applicant claims interest pursuant to clause 21(f) of the Contract,

> *(f) if the Builder does not receive a progress payment by the due date, in addition to any other rights it may have, the Builder is entitled to interest on the overdue amount at the rate in Item 15 of Appendix A.*

14.2. A15 of Appendix A of the Contract provides for interest at the rate of 20% per annum adjusted weekly compounding.

14.3. I have calculated the interest payable from 11 May 2017 to 7 July 2017 in the sum of $995.17.

15. APPLICANT'S COSTS

15.1. The Applicant contends that a determination should be made pursuant to s36(2) of the CCA that the Respondent pay the Applicant's legal costs. S36(2) of the CCA provides,

> *(ii) however, if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions, by, an another party the adjudicator may decide that the other party must pay some or all of those costs.*

The Applicant contends that the Respondent in not paying the payment claim the subject of this adjudication demonstrated a disregard for the contract and that despite having legal representation has maintained an unreasonable position which resulted in the Applicant making the Application.

15.2. A test for vexatious proceedings can be found in *Attorney General v Wentworth (1988) 14 NSWLR*

(1) Proceedings are vexatious is they are instituted with the intention of annoying or embarrassing a person against whom they are brought;

(2) They are vexatious if they are brought for collateral purposes and note for the purpose for having the court adjudicate on the issue to which they give rise;

(3) They are also properly regarded as vexatious if irrespective of the motive of the litigant they are so obviously untenable or manifestly groundless as to be utterly hopeless.

I am not persuaded that the Respondent's conduct can be described as vexatious.

15.3. A text for frivolous proceedings was articulated by the Full Court of the Western Australia Supreme Court in *RE Buck [SM]: Ex-parte Coolgardie Gold NL v Copperfield Gold NL (unreported WASC10 26 May 1995)* where the court said that to be frivolous proceedings must be such that *no reasonable person could properly treat as bona fide and contend that [a Plaintiff] had a grievance which [it] was entitled to bring before the court.*

15.4. I am not persuaded that the Respondent had no and has never had any bona fide grounds that could or would support not making payment of the payment claim.

15.5. I decline to make a determination pursuant to s36(2) of the CCA.

16. ADJUDICATOR'S COSTS

16.1. An adjudicator is entitled to payment pursuant to s46 of the CCA which pursuant to s46(5) of the CCA the parties must pay in equal shares.

16.2. I determine that each party must pay half of the Adjudicator's costs including disbursements and each party must pay $2910.00.

16.3. The Applicant has provided the Adjudicator with a deposit for fees in the sum of $6000.00.