

**Adjudicator's Determination**

**pursuant to the**

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

**Applicant**

**and**

**Respondent**

I, Cameron Ford, determine on 26 September 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is \$1,874,036 inclusive of GST being the amount owing of \$1,821,265.72 plus interest of \$52,770.28 to today. Interest accrues on the sum of \$1,821,265.72 at the rate of \$523.93 per day from today. The amount of \$1,874,036 is payable immediately. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

Applicant:

Respondent:

**Appointment as adjudicator**

1. On 22 August 2008 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed

appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment.

### **Documents received by adjudicator**

2. I received and have considered the application supported by the supporting documents A to Q listed in Schedule 3 to the application, together with the response and the documents attached thereto.
3. The response was delivered on the 5 September 2008 making my determination initially due on 19 September, however I obtained an extension from the Registrar to today, to which neither party objected.

### **JURISDICTION**

4. The parties agree and I find that I have jurisdiction and that:
  - (a) there was a construction contract – s 27;
  - (b) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;
  - (c) the dispute was not the subject of an order, judgment or other finding.

### **THE APPLICATION**

5. The applicant seeks \$1,821,265.72 plus interest, being the total of three invoices rendered on 22 April, 9 and 28 May 2008 as follows:

<u>Invoice</u>	<u>Amount (\$)</u>	<u>Date (2008)</u>	<u>30 days (2008)</u>
104183	338,730.15	22 April	23 May
104301	531,692.43	9 May	10 June
104436	950,843.14	29 May	30 June

6. It says the respondent has not disputed the invoices, and that on 21 July 2008 the applicant issued a letter expressed to be a payment claim under the Act for the three invoices.

7. On 30 July 2008 the respondent issued a notice of dispute in which it said, in summary:
  - (a) Part of invoice 104436 (\$25,840) was included and paid in a previous progress claim in January 2008;
  - (b) the contract only permitted one progress claim on the last day of each month and that it would therefore treat invoice 104436 as the June progress claim which would become payable 30 days after 30 June 2008, namely 30 July;
  - (c) invoice 104301 was due and payable on 30 June, not 10 June, again because of only one progress claim being permitted on the last day of each month.
8. In the notice of dispute dated 30 July, the respondent said “We will write to you separately regarding our payment proposal”. I have not seen that correspondence.
9. I note that in the notice of dispute the respondent did not dispute that the work was done or done to the appropriate standard, and that the only substantive objection was that an amount in invoice 104436 had already been claimed and paid.

## **THE DISPUTE**

10. In its response, the respondent resists payment of the claim on the bases that:
  - (a) the invoices were not delivered on the last day of the month and that three invoices were issued in April and two in May, contrary to the terms of the contract;
  - (b) the invoices did not provide adequate evidence of the matters claimed. There were no records substantiating the “percentage completed” of items of work claimed executed, the claims were not valued in accordance with clause 26, and they included other items for unsubstantiated claims not variations to the scope of works;

- (c) the contract was terminated on 21 May 2008 (the applicant says 26 May) because of termination of the respondent's head contract, and thereafter the right to make progress claims under cl 28 of the contract is no longer operable and is replaced with the right to make a final claim under cl 32.3. As a result, the applicants letter of 21 July could not be a payment claim under the contract.

11. I will deal with each of those objections in turn.

**Were the invoices payment claims under the contract?**

12. Preliminary to answering this question is the further one of what were the terms of the contract. Contrary to the applicant, the respondent asserts that it includes certain subcontract documents set out in par 6 of the response, namely a Deed of Agreement, Subcontract Conditions of Contract, Special Conditions of Contract and applicable parts of the respondent's head contract.
13. The significance of this point is that if those documents form part of the contract, then there is contractual provision for how payment claims are to be made and the relevant provisions of the Act are not implied into the contract.
14. I find that those documents do form part of the contract because of the sequence of events described by the respondent, particularly at par 7 of its response. The subcontract documents were provided to the applicant after which it commenced work on about 26 November 2007 and did not query, comment upon or refuse to accept them. In my view and on the material available to me this is clear acceptance by conduct. Alternatively, the applicant's conduct would raise an estoppel preventing it from asserting the terms were not part of the contract.
15. The Deed of Agreement contains an entire agreement clause and I find this excludes other documents, in particular the applicant's quotation (documents C, D, E and F) and any terms flowing from Schedule 2 to document C.
16. The result is that it is to, and only to, the terms of the subcontract documents described by the respondent that one looks to determine the relevant terms for making payment claims.

17. Clause 28 of the Subcontract Conditions of Contract read with the referenced item in Annexure A – Contract Details, provides for payment claims to:
- (a) be delivered by the applicant to the respondent supported by such evidence as required by the respondent or considered necessary by the respondent to enable it to certify the amount due;
  - (b) be delivered on the last day of each calendar month; and
  - (c) be submitted only once in each month of the subcontract works.
18. Returning to the question of whether or not the invoices were payment claims under the contract, it can be accepted that they do not comply with 17(b) and (c) above. They are clearly not dated the last day of the month, and two were issued in May.
19. However, these three invoices were preceded by six other payment claims, all of which have been paid by the respondent. These previous claims were:

Claim	Issued	Paid
1	2 Nov 2007	1 Feb 2008
2	30 Nov 2007	21 Jan 2008
3	21 Dec 2007	1 Feb 2008
4.2	23 Jan 2008	6 Mar 2008
4.1	30 Jan 2008	21 Apr 2008
5	25 Feb 2008	21 Apr 2008
6	27 Mar 2008	28 May 2008

20. It is evident that there were two claims in February 2007 and another two in January 2008, both of which were accepted and paid by the respondent. Further, only one of the claims was made on the last day of the month, 30 November 2007 (31 January 2008 was a Thursday and there is no apparent reason why the claim could not have been made that day).
21. In those circumstances, where on two occasions the respondent has accepted and paid more than one claim per month, and on six out of the previous seven occasions it has accepted and paid claims made on other than the last day of the month, it seems to me that the respondent has waived strict compliance with those requirements. For present purposes it could be accepted, as the

respondent submits, that strict compliance is otherwise necessary: *Brewarrina Shire Council v Beckhaus Civil Ltd* [2003] NSWCA 4.

22. Because this was an important issue which the parties had not addressed, I invited written submissions on whether the described conduct of the respondent could preclude it from now arguing strict compliance was necessary. Both parties provided helpful submissions, the respondent emphasising that the payment claim was the letter of 21 July 2008, and the applicant referring to cases on estoppel, waiver, and the article of Handley J, *The three High Court decisions on estoppel 1988-1990* (2006) 80 AJL 724.
23. I find that by its conduct described in pars 20 and 21 above, the respondent has waived strict compliance with part of clause 28 of the Subcontract Conditions of Contract and that it is not open to the respondent to now insist on the applicant's issuing only one payment claim per month or issuing payment claims only on the last day of the month.

**Did the claims provide adequate supporting evidence?**

24. By cl 28, the claims were to be supported by such evidence as required by the respondent or considered necessary by the respondent to enable it to certify the amount due. There was no absolute, objective requirement to provide certain, identified information with the claims.
25. The respondent says in par 19 of its response that there were no records substantiating the "percentage completed" of items of work claimed executed, the claims were not valued in accordance with clause 26, and they included other items for unsubstantiated claims not variations to the scope of works.
26. Of importance in this regard to my mind is the respondents notice of dispute dated 30 July 2008, the substance of which is set out above. Nowhere in that notice did the respondent raise the question of supporting evidence. Indeed, the closing sentence of the notice stated "We will write to you separately regarding our payment proposal".
27. To my mind, this suggests that the respondent did not genuinely require further supporting documentation to deal with the claims, or that it was prepared to use other means to obtain whatever information it may have

required. The notice of dispute is written by the project manager of the respondent who would be expected to include a demand for supporting documentation if such were genuinely required.

28. I find that on the material before me the respondent did not require any further supporting evidence for the invoices to be proper payment claims under the contract.

**What was the effect of termination of the contract on 21 (or 26) May 2008?**

29. As stated in par 10(c) above, the respondent says the applicant's letter of 21 July 2008 cannot be a payment claim under cl 28 of the contract because the contract was terminated on 21 May 2008. On termination, it says, the cl 28 payment claim mechanism ceased to operate and was replaced by the cl 32.2 final claim mechanism.
30. I do not have to decide this issue as I have found that the three invoices were payment claims under the contract, triggering a payment dispute under s 8 of the Act when they were due for payment but unpaid. That date was 30 days from the date they were issued, the respondent having, as I have found, waived by its conduct strict compliance with the requirement to issue invoices only on the last day of the month.
31. Payment disputes in respect of the three invoices therefore arose on 23 May, 10 and 30 June as set out in par 5 above.
32. I should state for clarity that in its response, the respondent does not appear to maintain the claim that the \$25,840 referred to in its notice of dispute was previously claimed by the applicant in claim 4.1. The respondent refers to that assertion in the notice of dispute but does not appear to rely on it in the response to resist the application (see pars 35-39 under the heading Conclusion). Rather, the respondent appears to accept that the documents at tab Q establish the non-payment of that amount previously, but says that that information was not included with the claims when initially made.
33. Nevertheless, should I be wrong in my understanding, I find as a matter of fact that the amount of \$25,840 was not previously claimed by the applicant, as set out in the documents at tab Q of the application.

34. I therefore find that the applicant is entitled to the full amount of its claim of \$1,821,265.72 plus interest. Interest is calculated as follows:

**To and including 30 June**

$\$338,730.15 \times 10.5\% \times 72 \text{ days (from 23 May)} = \$3,605.39$

$\$531,692.43 \times 10.5\% \times 55 \text{ days (from 10 June)} = \$3,059.05$

$\$950,843.14 \times 10.5\% \times 0 \text{ days (from 30 June)} = \underline{\$ \quad \quad \quad 0}$

$\$6,664.44$

plus \$523.93 per day from and including 1 July 2008

$(\$1,821,265.72 \times 10.5\% \text{ divided by } 365 \text{ days})$

$\$523.93 \times 88 \text{ days (1 July to 26 Sept)} = \underline{\$46,105.84}$

Total interest to 26 September 2008  $\$52,770.28$

35. Interest accrues at the rate of \$523.93 per day from today.

**DETERMINATION**

36. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is \$1,874,036 inclusive of GST being the amount owing of \$1,821,265.72 plus interest of \$52,770.28 to today. Interest accrues on the sum of \$1,821,265.72 at the rate of \$523.93 per day from today.

37. The sum of \$1,874,036 inclusive of GST is payable immediately.

38. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Dated: 26 September 2008

[signed]

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CAMERON FORD

Registered Adjudicator