

ADJUDICATORS DETERMINATION

Adjudication Identification Number: 43.14.02

Adjudicator: Neil Kirkpatrick

Address: C/- Construction Expert Services
PO Box 2218, Brighton North,
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Telephone: 03 9592 9324

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Applicant:

Respondent:

Date of Adjudication Claim: 25 September 2014

In respect of the application for adjudication made by the Applicant on 25 September 2014 pursuant to the *Construction Contracts (Security of Payments) Act* (“**Act**”), I make the following determination:

1. The adjudicator dismisses the application pursuant to section 33(1)(a)(iii) of the Act.

The reasons for my determination are annexed as Schedule 1 (Pages 2 - 5).

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is annexed as Schedule 2 (Page 6).

Date: 19 October 2014

Neil Kirkpatrick
Registered Adjudicator No. 43

Schedule 1: Reasons for Determination

Summary

1. The Applicant and the Respondent entered into a written contract under which the Applicant was obliged to undertake civil works at [the project site] (“**Contract**”). The Applicant submitted payment claim No. 12 under the Contract on 30 June 2014 in the sum of \$998,090.14¹. The Respondent rejected the

¹ Sums of money referred to in these reasons exclude GST.

payment claim on 10 July 2014. The Applicant was not satisfied with the Respondent's assessment and subsequently made this application for adjudication on 25 September 2014.

2. I consider that:

- a) The Contract was a "construction contract" to which the Act applies;
- b) A "payment dispute" arose on 10 July 2014, when the Respondent rejected the payment claim² pursuant to s.8(a) of the Act;
- c) The application complied with s.28 of the Act; and
- d) Pursuant to s.33(1)(a)(iii) of the Act the application must be dismissed.

Appointment of Adjudicator

3. By notice dated 30 September 2014 the Royal Institution of Chartered Surveyors, Dispute Resolution Service ("**Prescribed Appointer**") appointed me adjudicator for the purpose of determining the payment dispute, which I confirmed in my letter to the parties dated 30 September 2014 ("**Letter**").

Application and Response

4. The Prescribed Appointer recorded that the Applicant served its written application on 25 September 2014. The application comprised of a formal application together with attachments "Tab 1" to "Tab 14" in volume 1 and a statutory declaration of Mr [A] together with attachments "Tab 1" to "Tab 49" in volume 2.
5. The Respondent was, in the event that it was served with the application on the day that the Applicant served it on the Prescribed Appointer, required to serve a written response on the Applicant and on the adjudicator within 10 business days following the date of service, which I calculated to be by 9 October 2014.
6. In my Letter, I requested that the Applicant advise me in writing by 3 October 2014 when the application was served on the Respondent and for the Respondent to raise any issues in relation to the date of service as soon as possible thereafter.

² Correspondence at tab 28 volume 2, application

7. No response from the Applicant was received. The Respondent confirmed it received the application on 25 September 2014 in its response.
8. On 7 October 2014, the Respondent, by way of email to the prescribed appointer, sought consent from me that it may serve its response at the office of the prescribed appointer.
9. On 7 October 2014, I wrote to the Applicant and the Respondent confirming that for the purpose of s.29(1)(b) of the Act, the Respondent may serve its response at the office of the prescribed appointer and asked that a copy of the response be supplied to my email address pursuant to the request made within my Letter.
10. On 9 October 2014, the Respondent hand delivered its response but did not provide a copy by email. The response was divided into four volumes, comprising of a formal adjudication response together with annexure "one" to "six".

Conflict of Interest

11. From my review of the written application, I formed the view that I had no material personal interest in the payment dispute concerned or in the construction contract under which the dispute had arisen or in any party to the contract. This absence of material personal interest was declared to the Parties in my Letter and no objection was received.

Letter to the Parties

12. In my Letter, I requested that the Parties advise me in writing as to whether there had been any order, judgement or other finding by an arbitrator or other person or court or other body about the dispute that is the subject of the application.
13. No response was received to my Letter and on 7 October 2014 I wrote to the parties again asking for a response.
14. On 8 October 2014, I received a letter from the Respondent enclosing a judgment regarding the payment dispute the subject of this application finding in consideration the Applicant had made a prior application that included the

payment dispute the subject of this application, that this application must fall foul of s.27(a) of the Act.

15. On 9 October 2014, I received a response from the Applicant advising it was seeking instruction to appeal the judgment expecting to be in receipt of those instructions by 4pm on 9 October 2014. No further clarification was received on foot of this correspondence. On 13 October 2014 I requested clarification by 15 October 2014 as to whether instructions had been received.

16. I received no further response.

Adjudicator's Functions

17. S.33(1) of the Act requires that an appointed adjudicator must, within the prescribed time or any extension of it made under s34(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, judgment or other finding about the dispute that is the subject of the application;*

Determination and Reasoning

18. From the foregoing, pursuant to s.33(1)(a)(iii) of the Act, the application must be dismissed on the basis of the judgment of the 7 October 2014 enclosed with correspondence received from the Respondent on 8 October 2014.

Costs of Adjudication

19. From my reading of s.36(1), s.36(2), s.46(5) and s.46(6) of the Act, the adjudicator's power to decide that one party must pay some or all of the other party's costs of the adjudication is limited to the costs of an adjudication as defined in s.46(1A)(a) and s.46(1A)(b) of the Act. From these, the costs of adjudication do not include a nomination fee that may be levied by a prescribed appointer.

20. I was not aware that an application for urgent relief had been sought by the Respondent. The Respondent's letter received on 8 October 2014 enclosing a copy of the judgement dated 7 October 2014, contended that it requested the Applicant inform me that the judgment had been made on the afternoon of 7 October 2014. Neither party informed me of the application to court regarding this payment dispute prior to the judgement being received.

21. I therefore find that there is no basis for a determination under s.36(2) because of frivolous or vexatious conduct by either one party or the other. The judgment has found that the application was unfounded. I therefore determine that the Applicant must pay all of the costs of the adjudication.

Date: 19 October 2014

Neil Kirkpatrick
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Schedule 2: Confidential Information

The following information should remain confidential:

- (1) The names of the parties and their representatives; and
- (2) The location of the project and the works.

Date: 19 October 2014

Neil Kirkpatrick
Registered Adjudicator No. 43