

Adjudication Decision: 24.18.01

Construction Contracts (Security of Payments) Act

Adjudicator: Paul Baxter (24)

Applicant - Claimant

Name [redacted]

ABN

Address

Respondent

Name [redacted]

ABN

Address

Work [redacted]

Location of site **NORTHERN TERRITORY**

Payment claim

| | |
|----------------------------|------------------------------|
| Date | 8 June 2018 |
| Due date for payment claim | 23 July 2018 |
| Amount of payment dispute | \$6,928,869.52 Excluding GST |

Application detail

| | |
|--------------------------|---------------------------------|
| Application service date | 21 st September 2018 |
| Appointment response | 28 th September 2018 |
| Response date | 5 th October 2018 |

Adjudicators Determination

| | |
|----------------------------------|---------------|
| Amount to be paid: | \$0.00 |
| Due date for payment: | N/A |
| Amount of interest: | \$0.00 |
| Claimant's adjudication costs: | 50% |
| Respondent's adjudication costs: | 50% |

Determination date: 16 November 2018 (3 week's extension granted)

A. DECISION

I have decided under the *Construction Contracts (Security of Payments) Act* ("the Act"), and in respect of the claimant's adjudication application:

- the amount to be paid by the respondent,
- the amount of interest until this determination, and
- the parties are liable to pay the costs of the adjudication in the proportions, as shown on the first page of this decision.

B. REASONS

I Background

1. [*Applicant's name redacted*] (referred to in this adjudication as the "claimant") was engaged by [*respondent's name redacted*] (referred to in this adjudication as the "respondent"), for THE ENGINEERING PROCUREMENT AND CONSTRUCTION OF [*project name redacted*] CONTRACT DATED 22ND DECEMBER 2015.
2. There was a written ENGINEERING PROCUREMENT & CONSTRUCTION CONTRACT executed by the parties on 22 December 2015.
3. Payment claim "Milestone 10 dated 8th June 2018 for \$6,928,869.52 (excl. GST), consisting of a claim under the Contract and 19 claims for variations and seven extension of time claims was delivered to the respondent.
4. Payment certificate 13 dated 25 June 2018, identified a scheduled amount of \$0.00 (excl. GST) (the "scheduled amount") was payable.
5. The claimant lodged its adjudication application with the Chairman NT Division of the SA Chapter of the Institute of Quantity Surveyors on the 21st September 2018.
6. The respondent lodged its adjudication response on 5th October 2018.
7. I requested the Registrar's consent to extend the time to decide this payment claim, and he granted an extension until 16 November 2018 for the determination.
8. The issues that emerged from an initial review of both parties' material, were as follows:
 - i. whether the claimant was not entitled to submit the Purported Request for Payment because it had not achieved completion of the work in respect of "Milestone 10."
 - ii. whether the claimant was in breach of the EPC contract because between the date of the Purported Request for Payment and the date of the Payment Certificate it had failed to provide Bank Guarantees required under the EPC Contract.
 - iii. whether the claimant's variation claims are time barred under the EPC Contract.
 - iv. whether the claimant is entitled to extensions of time ("EOT's");
 - v. whether the respondent was entitled to set off liquidated damages;
 - vi. whether the respondent was entitled to set off the costs of having taken the works out of the hands of the claim
 - vii. whether the respondent could claim set off for any amounts that I may have found

II. Material Provided in The Adjudication

Application

9. I received six lever arch folders documents from The Chairman of the NT Division of the SA Chapter of the Institute of Quantity Surveyors dated 28th September 2018.
10. In the application, the claimant outlined the basis of the payment dispute, and provided annexures supporting its submissions that it had provided in the application.

Response

The response comprised of the following:

No. Description

- 1 Respondent's Response Submissions
- 2 Statutory Declaration of [A] sworn 4 October 2018
- 3 Statutory Declaration of [B] sworn on 4 October 2018
- 4 Statutory Declaration of [C] sworn 4 October 2018
- 5 Expert report prepared by [D] of [*consultant firm name redacted*]
- 6 Expert report prepared by [H] of [*consultant firm name redacted*]
- 7 One USB containing a copy of the legal cases the Respondent relies upon with key cases printed in hard copy

Adjudicators Correspondence

- 3rd October letter from Adjudicator
- 4th October email from Respondent
- 10th October letter from Adjudicator
- 10th October email from Registrar
- 10th October letter from Adjudicator

III. Threshold Matters

Construction contract and construction work

11. Section 33 of the Act provides that an application must be dismissed if it is not a construction contract. Therefore, it must be a construction contract to be within jurisdiction, so I need to carry out an investigation about this issue.
12. Thereafter, s33(1)(a)(ii) of the Act requires that the application be prepared and served in accordance with s28 of the Act.
13. The claimant provided the contract [*redacted*] Project in Sect 2 Background of Volume 1 of its application, and the respondent, at paragraph 1.2 agreed that this was the contract between the parties.
14. At paragraph 13 of the application submissions, the claimant submitted that the contract:
 - i. was a *construction contract* within the meaning of s5 of the Act, and
 - ii. the work it performed or undertook to perform was *construction work* within s6 of the Act;
 - iii. the goods and services it supplied were *goods and services relating to construction work* within the meaning of s7 of the Act.
15. In the response submissions, the respondent conceded:

- i. at paragraph M, that the contract was a *construction contract* within s5 of the Act;
 - ii. at paragraph 2.7, that the work was *construction work* within the meaning of s6 of the Act
16. Accordingly, there is no contest between the parties about this aspect, and I am satisfied that it is a *construction contract* within the meaning of the Act.

Did the application comply with s28 of the Act?

17. s28 of the Act provides several statutory requirements to found jurisdiction in this adjudication. These include:
 - i. a written application [s28(1)(a)];
 - ii. served on the other party [s28(1)(b)];
 - iii. and served on the prescribed appointer [s28(1)(c)(ii)];
 - iv. provide any deposit or security that the adjudicator requires.
18. At paragraph 1.8 of the response submissions, the respondent conceded that the application had been served on it and made no submissions that the application was not served in accordance with the requirements of the Act.
19. Given that there is no dispute between the parties, I find therefore that these requirements had been complied with.
20. Furthermore, given that I was appointed by the Chairman of the NT Division of the SA Chapter of the Institute of Quantity Surveyors a prescribed appointer. I received the application documents at his office.
21. I find that:
 - i. there was a written application to NT Division of the SA Chapter of the Institute of Quantity Surveyors; and
 - ii. that Regulation 6 of the *Construction Contracts (Security of Payment) Regulations* (the "Regulations") which provides that:
 - a) the name and contact details of the prescribed appointer;
 - b) the claimant's name and contact details;
 - c) the name and contact details of the other party to the contract, was complied with because all these details were on the form.

I did require a deposit under of \$16000.00 under s 46(7).

22. Accordingly, I am satisfied that the application required it to be adjudicated in accordance with my obligations as an adjudicator under the Act, if it involves a *payment dispute*.

IV Is it a payment dispute?

23. At paragraph of its submissions, the claimant submitted:
 - i. the payment claim had been rejected or wholly or partly disputed in accordance with s8(a)(i) of the Act; and
 - ii. the amount claimed in the payment claim and the amount certified the payment schedule had not been paid in full.
24. I am satisfied from the material that:

- iii. A payment seeking an amount of \$6,928,869.52 was made on 8 June 2018;
 - iv. A payment schedule certifying \$0.00 was issued to the claimant, which I accept was on 25 June 2018.
25. No payment was made by the respondent on 6 July 2018
 26. The respondent claims the application should be dismissed on its merits for one or more of the following grounds:
 - a) [*The claimant*] was not entitled to submit a Request for Payment because it not had achieved completion of the works in respect to milestone 10
 - b) [*The claimant*] was in breach of EPC contract because between the date of the claim and the date of the certificate it had failed to provide Bank Guarantees required under the EPC contract
 - c) [*The claimant*] failed to establish any entitlement to the monies claimed for measured work in respect to Milestone 10 in its request for payment
 - d) [*The claimant's*] variation cost claims are time barred under the EPC contract
 - e) [*The claimant's*] delay cost claims do not comply with the terms of the EPC contract; and
 - f) Even if the Variation Claims and EOT claims are valid the claimant has failed to establish any entitlement to monies for these claims
 27. The claimant says it has completed the works described within the Request for Payment and paragraphs 24-26 of the [*redacted*] Declaration
 28. The claimant refers to paragraphs below and says that the respondent has conceded that "Milestone #10" was achieved and is payable (and has been made an election in that regard) and relies only on its alleged set off for liquidated damages in response
 29. While at paragraph 2 of the Payment schedule the respondent introduces a number of sentences attempting to "reserve it's rights "it nonetheless, at the end of the paragraph, says the following:

[The respondent] in its sole and unfettered discretion, elects to access the payment milestone #10 as complete
 30. The claimant claims on that basis, the respondent has elected to not contest the claim for the contract sum identified in the Request for Payment and the respondent cannot, as part of this Adjudication Application seek to contest the validity of that claim.
 31. The claimant claims the respondent has made its election and is bound by that election.
 32. Paragraphs 45-55 of [*C's*] Declaration declare that works had been done up to a certain point and in the interests of fairness and recognizing that contractors had cash flow issues it was agreed to make the payments prior to them being payable by the respondent under the EPC contract. This was despite the fact that under EPC contract the respondent could have simply refused to make any payment until the entirety of the works required to trigger the respective milestone payments had been achieved
 33. I agree that this approach adopted by the respondent was appropriate because payment was made for work undertaken and they believed that this satisfied the need to consider the proper management of [*its*] funds

34. This approach is consistent with implied provisions of the Act;

Division 2 Contractors entitlement to be paid

2 Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations

(2) Subclause (1) applies whether or not the contractor performs all its obligations

35. I am satisfied that the respondent in its sole and unfettered discretion has elected to access the milestone #10 as complete and that the respondent having previously adopted principles under Division 2 of the Act that the claimant is entitled to be paid a reasonable amount for performing its obligations whether the claimant performs all its obligations is required under the Act to make a payment for this Request
36. I determine therefore that the form of the Request of Payment was in accordance with the terms of the Act and was valid.
37. I must now determine whether the Payment Claim has been made in accordance with the terms of the Contract
38. The Bank Guarantees to be provided by the claimant were in the amount of \$5,757,075.00 (X2) and were provided to the respondent in accordance with the Contract.
39. The claimant says that the fact that the project was delayed beyond the date for expiry of the Bank Guarantees was a result of the conduct of the respondent as set out further in these submissions. The respondent should not be entitled to claim the benefit of the provision of a new Bank Guarantee in these circumstances and should not be able to rely upon clauses 10.10 and 9.1.
40. Further, as set out below at paragraph 10.5 the claimant submits that clause 9.1 is void as a penalty.
41. In assessing the claimant's Request for Payment, dated 8th June 2018, the respondent elected to:
- i. assess the Payment Milestone #10 as being complete (being a prerequisite to payment provided by Clause 9.8 (b));
 - ii. not rely on clause 9.1(a) as a reason to not assess the claimant's Request for payment.
42. As submitted above paragraph 7.1 the claimant submits that, having made such an election, the respondent cannot now resile from that election in this payment dispute.
43. Nevertheless, the claimant submits that, if the respondent were to attempt to resile from its earlier election and attempt to rely on clause 9.1 or clause 9.8(b) that would not give the respondent a basis on which to refuse payment of the Request for Payment Milestone #10 given that:
- i. At the time the claimant made the Request for Payment for Milestone #10, the claimant's bank guarantee was still current, it not needing to be replaced by the claimant until 18 June 2018.

44. The claimant therefore satisfied the terms of clause 9.1 at the date the Request for Payment was made, pursuant to clause 9.2, the respondent was required to pay the claimant the Contract Price in accordance with the requirements of the Contract.
45. Whilst the replacement Bank Guarantee was not provided to the respondent until 26 June 2018, clause 9.1 only purports to condition the claimant's entitlement to claim a payment, and the respondent's obligation to make a payment, under the Contract. Continued compliance with the requirements of clause 9.1 is Not a precondition to the respondent's obligation to issue a Payment Certificate under Clause 9.7.
46. Pursuant to clause 9.8, if the respondent:
 - Received a Request for Payment which complied with clause 9; and the respondent was satisfied the Payment Milestone(s) the subject of the Request for Payment had been completed.
47. Then the respondent was required to pay the amount in the Request for Payment (or a lesser amount determined by [*the respondent*]) within 20 Business Days (that is by 6 July 2018). The Bank Guarantee had been replaced by that time such that the respondent cannot not rely on clause 9.1 as a reason to withhold payment.
48. Attached in **Annexure A** to these submissions is a copy of an email exchange between the parties in relation to the late provision of the Bank Guarantee from 14 June 2018 to 28 June 2018.
49. In any event, it cannot be said that the claimant's brief delay in the provision of a replacement Bank Guarantee was a major breach or the respondent has suffered any prejudice.
50. The respondent's submissions *on non-entitlement to payment due to outstanding replacement Bank Guarantees*.
51. At the time of Payment Certificate, the claimant was in breach of clause 10.10 for failing to provide a replacement Bank Guarantee. Clauses 10.6 and 10.7 require the claimant to provide the respondent with two Bank Guarantees that collectively amount to 20% of the Contract Price. The claimant provided these Bank Guarantees. Clause 10.10 states:
 - "on or before the date that is 10 Business Days before the expiry date of the Security Provided under Clauses 10.6 and 10.7, the Contractor must provide to the Owner a replacement Bank Guarantee in the Approved Form and from an Approved Provider."*
52. The claimant's Bank Guarantee became due for replacement in accordance with clause 10.10 on 18 June 2018. The claimant replaced the Bank Guarantee on 26 June 2018 – 1 day after the Payment Certificate was issued.
53. The circumstances of the claimant's Bank Guarantees are detailed in [C's] Declaration at paragraphs 63 to 68.
54. Accordingly, as at 25 June 2018 when the respondent issued its Payment Certificate for the Contract Claim the claimant had an outstanding Bank Guarantee and was in breach of clause 10.10.

Clause 9.1 states:

"The parties agree that the Contractor is not entitled to claim, and the Owner is not required to make, any payment under this Contract until such time as the Contractor has: delivered the various Bank Guarantees to the Owner in accordance with the requirements of Clauses 10.6 10.7 or 10.10 (as the case may be)".

55. In accordance with Clause 9.1, the respondent was not required to make any payment to the claimant due to the outstanding status of the claimant's replacement Bank Guarantee under Clause 10.10.
56. The claimant, having cured its breach of the EPC Contract's requirement in respect of the Bank Guarantee, is now able to make a further Request for Payment for the Milestone 10 work.
57. However, it cannot retrospectively cure the invalidity of the Purported Request for Payment that is the subject of this Application.
58. To enliven the claimant's right to make an adjudication application under section 28 of the Act, the claimant must first meet its contractual obligations to make a payment claim.
59. Clause 9.1 of the EPC Contract states:

"The parties agree that the Contractor is not entitled to claim, and the Owner is not Required to make, any payment under this Contract until such time as the Contractor has: Delivered the various Bank Guarantees to the Owner in accordance with the Requirements of Clauses 106 10.7 of 10.10 (as the case may be);"

60. The claimant was required under Clause 10.10 to provide a replacement bank guarantee to the respondent on 18 June 2018. The claimant failed to provide this replacement bank guarantee until 26 June 2018.
61. Despite the claimant's failure to meet the condition precedents entitling them to payment under the contract, the respondent issued the Payment Certificate, detailing the set-off of the debts due and payable as a result of the claimant's failure to achieve Commercial Operation by the Date for Commercial Operation.
62. As a result, the claimant's failure to provide the replacement bank guarantees within the prescribed timeframe, the claimant has not met the definition of a 'Payment Claim' under the Act and there can therefore be no 'Payment Dispute' between the parties.
63. The position is evident in ABB Australia, at [30] 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 obligation 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) to dismiss the application without a determination on the merits." (emphasis added)

At [32] Her Honour continues:

"...it seems to me that the objective of s33 (1) is to apply to just such a situation. If a claim for payment is incapable, under the contract, of giving rise to a liability to pay, then there is no point in an adjudicator looking into the underlying merits of the contractor's claim to be entitled to payment for performance of its obligation under the contract. It would be a waste of time and money. Hence s 33 (1) (a) of the Act directs the adjudicator, in those circumstances, to dismiss the application without enquiring into those underlying merits." (emphasis added)

At [34] Her Honour continues:

"The Act requires the adjudicator to make such a determination ..." (emphasis added)

64. Her Honour's position is also mirrored in *Lend Lease Building Contractors Pty Ltd t/as Sitzler Baulderstone Joint Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor* [2015] NTSC 10, 35 where she states:
"if the requirement of s (33(1)(a) are not met, an adjudicator must dismiss the Application without making a determination of its merits."
65. Regarding the Bank Guarantee the circumstances surrounding the claim are most unfortunate.
66. At the time of making the claim 8th June 2018 the claimant was not in breach of the Contract regarding Clause 10.1. By 18th June 2018, it was required under the contract, and apparently with some form of agreement with the respondent, to replace the Bank Guarantee until August 2018.
67. When the certificate for payment was issued 25th June 2018 the replacement bank Guarantee had not been issued (issued 26th June 2018).
68. For the payment claim to be in accordance with the contract I believe that at the date of the payment claim and the date of the payment certificate the claimant is obliged to meet the obligations under the contract. The claimant was in default of his obligations to have the replacement bank guarantee in place at the time of issuing the certificate of payment.
69. I acknowledge that the original bank guarantee expired 30th June 2018 but under 10.1 of the contract it was an obligation of the claimant to have replacement bank guarantees issued by 18th June 2018. There can be no payment claim certificate paid if the claimant fails to meet his obligations under the contract.
70. The claimant failed to meet the basic requirements of Clause 9.1 and has therefore not triggered its rights to make a payment claim under the EPC Contract. The respondent rejects the proposition that the conditions precedent required to trigger a payment claim under the EPC Contract amount to a penalty. Rather, the conditions precedent in clause 9.1 represent the parties' rights and obligations under the Contract to give commercial efficacy to the EPC contract.

VII Find the Following:

71. Clause 9.1 of the EPC Contract states:
The parties agree that the contractor is not entitled to claim, and the owner is not required to make, any payment under this Contract until the Contractor has:
- a) Delivered the various Bank Guarantees to the owner in accordance with Clauses 10.6, 10.7, of 10.10
72. The claimant was required under Clause 10.10 to provide a replacement bank guarantee to the respondent on June 18, 2018. The claimant failed to replace the bank guarantee until 26 June 2018. As a result of the claimant's failure to provide the replacement guarantee within the prescribed timeframe, the claimant has not met the definition of a Payment Claim under the Contract. Even though the bank guarantee was in place by the time the payment was due the replacement guarantee was not in place at the time required under the contract. Replacing a bank guarantee is not an exceptionally difficult task and is a common requirement in contracting.

73. In *ABB Australia*, at (30) 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”.
74. The claimant by failing to replace the bank guarantees until 26 June 2018 has not meet the contractual obligations to make a payment claim
75. I am not persuaded that the ‘prevention principle’ applies for the provision of the replacement Bank Guarantees.
76. In *Lend Lease Building Contractors Pty Ltd t/as Sitzler Boulderstone Joint v Venture v Honeywell Limited t/as Honeywell Building Solutions & Anor* [2015] NTSC 10,35, where she states:
“if the requirements of s 33 (1)(a) are not met an adjudicator must dismiss the application without making a determination on its merits”
77. I hereby determine that the under s 33(1)(a) of the Act that I must dismiss the application without making a determination on its merits.

VII Costs of Adjudication:

78. S36(1) of the Act makes the parties liable to bear their own costs, including the cost they are liable to pay the adjudicator.
79. S46(4) of the Act provides that the parties are jointly and severally liable to pay the costs of the adjudicator in equal shares, but this can be altered if I am satisfied that a party has incurred costs of the adjudication because of unfounded submissions by a party. Both parties submitted substantial claims and on the balance of probabilities I find that both parties will share the cost of the adjudication equally.

Claimant (already paid): \$16,000.00

Respondent to pay claimant: \$8,000.00