**In the matter of**

**the**

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

**(the Act)**

**and**

**[Redacted]**

**(the Applicant)**

**And**

**[Redacted]**

**(the Respondent)**

**ADJUDICATOR’S DETERMINATION NT 49.23.05**

## Regulatory Information

|  |  |
| --- | --- |
| Applicant’s Name | [Redacted] |
| Applicant’s ABN | [Redacted] |
| Applicant’s Address | [Redacted] |
| Respondent’s Name | [Redacted] |
| Respondent’s ABN | [Redacted] |
| Respondent’s Address | [Redacted] |
| Site Location | [Redacted], NT |
| Adjudicator’s Name | William Timothy Sullivan |
| Date of Determination | 20 December 2023 |
| Determination ID Number | 49.23.05 |

**ADJUDICATOR’S DETERMINATION**

**49.23.05**

I, William Timothy Sullivan, as the Adjudicator for the adjudication application dated 22 November 2023 made by the Applicant pursuant to the *Construction Contracts (Security of Payments) Act 2004* (NT), for the reasons attached to this Determination determine on the balance of probabilities, that:

a) the Respondent is to pay the Applicant the amount of $3,105.00 pursuant to s33(1)(b)(i) of the Act; and

b) the Respondent is to pay the Applicant the amount of $31.76 interest, pursuant to s33(1)(b)(i) of the Act;

c) the date for the purpose of s33(1)(b)(ii) was 7 November 2023; and

d) the parties are each to bear 50% of the costs of the adjudication pursuant to s36 and s46 of the Act.

Signed:

……………………………………..

William Timothy Sullivan

NT Adjudicator Registration No 49

Date 20 December 2023

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## Introduction

1 This adjudication arises in respect of a payment dispute under an agreement between the Applicant and the Respondent for hire of excavation plant. The Applicant and the Respondent are also Parties to other agreements for hire of plant. The agreements are each identified by a unique number, such as ADT23, ADT24, etc. This determination is only in respect of issues arising in connection with Hire Agreement ADT28.

2 In respect of ADT28, the Applicant served a payment claim on the Respondent claiming $18,584.00. Lawyers acting for the Respondent responded to the Applicant advising that the Respondent wholly disputes the claim. Issues raised included, in broad terms:

(a) the purported payment claim was not made pursuant to the terms of a construction contract;

(b) the contract between the parties did not provide for an obligation by the Applicant to deliver the truck ADT28 to a construction site and hence the contract was not a construction contract;

(c) the Applicant was not a contractor as required by s7A of the Act;

(d) the truck ADT28 was not fit for purpose and the Respondent is not liable to the Applicant for the hire fee; and

(e) the Applicant has not provided the adjudicator with the information required by s28 of the Act.

3 Because of the conclusion reached in this determination, partly in respect of when the hire agreement became operative, it has not been necessary to address the other issues referred to in paragraph 2 above.

## Requirement to Dismiss or Determine the Application

4 Section 33(1) of the Act requires the adjudicator to dismiss an adjudication application without making a determination or otherwise determine whether a party to the payment dispute is liable to make a payment or to return any security. With respect to subsections 33(1)(a)(i) – (iv) as explained below I concluded that:

a) The Hire Agreement is a construction contract. Therefore s33(1)(a) does not support the Application being dismissed.

b) The Application has been prepared and served in accordance with s28 of the Act. Therefore s33(1)(a)(ii) does not support the Application being dismissed.

c) The payment dispute that is the subject of the Application is not the subject of another application that has not been dismissed or determined. There are six other adjudication applications that have been referred to me determine. Each of these are applications in which the applicant and respondent are the Applicant and Respondent in this Adjudication. However, each of those applications are in respect of a dispute which is not the subject of this Application. Therefore s33(1)(a)(iia) does not support the Application being dismissed.

d) I am unaware of an order, judgment or finding having been made by an arbitrator, or other person, or a court, or other body about the dispute that is the subject of the Application. Therefore s33(1)(a)(iii) does not support the Application being dismissed.

e) It is possible to fairly make a determination because the matter is not complex and because the prescribed time, or any extension of it, is sufficient. Therefore s33(1)(a)(iv) does not support the Application being dismissed.

5 Because there are no grounds on which the Application must be dismissed under s33(1)(a) of the Act, I have determined, on the balance of probabilities, whether a party to the dispute is liable to make a payment.

## Construction Contract

6 The Applicant and Respondent are Parties to a ‘Hire Agreement’ dated 27 June 2023. The written part of the Hire Agreement is identified on its cover as Hire Agreement #: MH12. Although the Respondent has a contrary view, the Hire Agreement is an agreement for the Applicant to supply by hire to the Respondent one piece of equipment for a construction site in the Northern Territory.[[1]](#footnote-1) The cover page of the Hire Agreement refers to ADT28 Serial Number CAT00740PB1023032008. It is clear from submissions and supporting documents that this a reference to hire of a dump truck generally used on mining and construction projects.

7 Under s5(1)(b) of the Act, a construction contract is a contract under which a person has an obligation to supply to the site where construction work is being carried out any goods that are related to construction work.

8 On its face, the signed contract does not present a complete record of the Parties’ agreement. Both Parties have contributed to the payment dispute by not completing relevant parts of the Hire Agreement at the time of signing and not clarifying their agreement. To identify relevant rights and obligations it is necessary to also have regard to contemporaneous events and discussions leading up to the Hire Agreement being signed by the Parties. I have gleaned some matters from the Parties’ submissions and from the signed document which assist in understanding the Contract. Prior to the Hire Agreement the Respondent was working through matters with a head contractor for a large earthworks subcontract as part of construction of a facility in the Northern Territory. Heavy plant, such as the plant to which the Hire Agreement relates, was in high demand at that time and the Respondent wanted to ensure that dump trucks would be available when needed to carry out its subcontract work for the head contractor. The Applicant had dump trucks available but also had inquiries from others wanting to hire them.

9 The Applicant says that one of the issues confronting the Respondent was timing of the hire and that it was contemplated that the head contractor would require the machines onsite around July 2023. The Applicant also says that the Respondent could not be sure when it would commence the hire. This, in part, is also reflected by the signed Hire Agreement leaving blank some significant parts of the offer made by the Respondent such as ‘Hire Start’ and ‘Hire Duration’. The Respondent’s offer also leaves blank the boxes which show whether the Applicant or the Respondent would deliver ADT28 to the Site. Paragraph 4.b) and c) of the Hire Agreement indicate that mobilisation and assembly costs would be invoiced at cost plus 10%. I read this as at least being a clarification that the ‘Hire Rate $/hr’ in the Respondent’s offer did not include transport to the construction site and assembly costs.

10 The reference in this determination to the Respondent’s offer is based on the Hire Agreement being structured by the first part being expressed as an ‘Offer’. The offer does not include information regarding a start date for the hire or the duration of the hire. The offer document bears a date of 27 June 2023 on its face.

11 The Applicant explained that the Respondent did not want to hire the trucks too early but at the same time wanted to ensure they were available when the contract timings became certain. To solve this, the Applicant says:

the parties agreed on a flat rate for each truck of $115.00/hr. It was further agreed that the Principal [the Respondent] would pay 50% holding fee for each truck for the month of June 2023, with a formal hire agreement to be entered into in early July 2023.

12 There was an exchange of emails between the Parties from 24 June 2023 until 5 July 2023. These related to establishing the Hire Agreement and support a view that the Parties were working through matters to establish the terms on which trucks and other plant could be hired by the Applicant to the Respondent if it was required. As referred to above, the Applicant was aware that the Respondent could not be sure when it would commence the hire. None of the contemporaneous documents refer to the Respondent agreeing to pay 50% holding fee for each truck for the month of June 2023 and this is not mentioned in the Hire Agreement.

13 The Adjudication Response relies on a Statutory Declaration by [the Chief Financial Officer of the Respondent] dated 14 December 2023 (the **CFO Declaration**). The CFO Declaration addresses events that occurred after the Hire Agreement was signed. With no disrespect to the deponent, the CFO Declaration does not add clarity to the terms on which the Parties entered into the agreement for hire of the truck to or by the Respondent.

14 So far as I could ascertain from the Hire Agreement and the Parties’ submissions, the Parties’ respective obligations are only set out in part in the written Hire Agreement. The Hire Agreement and the discussions associated with the Hire Agreement provided for the Applicant to initially hold the truck (and other trucks under separate hire agreements) so that it was available when contract timings as between the Respondent and the head contractor became certain. The Hire Agreement would then continue for the ‘Rental Term’. The Rental Term is addressed in clause 3.1 of the Terms and Conditions as follows:

The term commences on the Commencement Date and, subject to clauses 10, 14 and 15, and ends on the date that we [the Applicant] receive all of the equipment from you [the Respondent].

15 Clause 1.1 defines ‘Term’ to mean the rental term referred to in clause 3.1.

16 ‘Commencement Date’ is defined in clause 1.1 of the Terms and Conditions to mean the Commencement Date specified in the Rental Agreement. There is no Commencement Date specified in the Rental Agreement.

17 ‘Hire Period’ has a defined meaning. Clause 1.1 of the Terms and Conditions states that it means the period from and including the Hire Start Date to and including the Hire End Date. ‘Hire Start Date’ and ‘Hire End Date’ are not defined in the Terms and Conditions but there is provision in a table in the Respondent’s offer for a Hire Start and Hire Duration to be inserted. However, both have been left blank by the Parties.

18 My reading of the Contract is that there is a contract between the Parties under which the Applicant would hold the truck from around 24 or 28 June 2023 so that it was available to the Respondent when the date that it was required for work to be carried out by the Respondent for the head contractor became known. There may have been an agreement, as contended by the Applicant, that the Respondent would pay the Applicant for holding the truck but that part of the agreement is not an agreement to supply the truck and there is insufficient evidence as to the amount, if any, payable for keeping the truck available until work commenced. The Hire Agreement did not include an obligation on the Applicant to deliver the truck to the construction site but it is apparent that the Applicant’s obligation was to supply the truck for the construction work at the construction site.

19 The Hire Agreement identifies the Site address in the Northern Territory. The Respondent also explained that the Applicant delivered a truck to the Respondent the purpose of which was to carry dirt around a construction site.[[2]](#footnote-2)

20 Section 7(1)(c) of the Act provides that goods are related to construction work if they are supplied by hire or otherwise for use in connection with the carrying out of construction work at the site of the construction work. Under the Hire Agreement, although the Hirer (the Respondent) was to mobilise the equipment to site, the equipment was agreed to be supplied by the Applicant for use in connection with construction work at the Site. An agreement to hold the truck, whether at a location chosen by the Applicant or at a location chosen by the Respondent, so that it would be available when needed, is not itself supply of the truck for construction work and, if that was all there was to the Hire Agreement, the Hire Agreement would not be a construction contract for the purpose of the Act.

21 The part of the agreement which is for supply of goods for construction work is the supply by hire for the period commencing when the truck was to be taken to the construction site to be used for the construction work. The Applicant’s explanation that the Respondent could not be sure when it would commence the hire indicates that commencement relates to the start of the period when the truck was needed by the Respondent for carrying out the construction work. It is this part of the Hire Agreement that makes the Hire Agreement a construction contract for the purpose of the Act in that the Applicant had an obligation to supply to the site where construction work is being carried out goods that are related to construction work if they are plant or materials supplied by hire for use in connection with the carrying out of construction work at the site of the construction work. It makes no difference to ‘supplying’ the truck for construction work whether the physical delivery of the truck was to be carried out by the Applicant, the Respondent or another entity.

22 As the relevant parts of the Hire Agreement were not completed before contract signing I have taken the Hire Agreement for supply of the truck for carrying out construction work to commence from when the truck was transported to the construction site. It is noted that the Hire Agreement is not signed by the Applicant but that does not give rise to any issues in this Adjudication.

23 According to the Adjudication Response[[3]](#footnote-3) the Applicant delivered ADT28 and 6 other trucks to the Respondent’s premises. The Respondent’s premises are not the construction site at which the trucks were to be used. According to the Respondent, the purpose of delivering the truck to the Respondent’s property was to help the Applicant with its storage problem. It is also likely that they were stored at the Respondent’s location so that they would be available when needed as indicated by the Respondent’s explanation that the Applicant had agreed to reserve the trucks for future hire by the Respondent pending commencement of the Respondent’s contract with the head contractor at a construction site in the Northern Territory.

24 The written part of the Hire Agreement could not be regarded as setting out all of the rights and obligations of both Parties but, considered in light of both Parties’ submissions, the obligations were initially for the Applicant to make the truck available to the Respondent in anticipation of the Respondent mobilising it to the Site when the Respondent’s client, the head contractor, required the truck on site.[[4]](#footnote-4)

25 Having regard to the above, the Hire Agreement is a construction contract to which the Act applies.

## Prohibited Contract Provisions

26 Sections 12, 13 and 14 of the Act set out provisions of construction contracts that are prohibited by the Act. The Hire Agreement does not include pay if paid or pay when paid provisions and therefore s12 does cause any provision of the Hire Agreement to be of no effect.

27 The payment terms under the Hire Agreement do not provide for payment to be made more than 30 working days after the payment is claimed and therefore s13 of the Act does not apply to cause the time for payment in the Hire Agreement to be read otherwise than as stated in the Hire Agreement.

28 There are no contract provisions in the Hire Agreement that are prescribed by the Regulations to be a prohibited provision.

29 Based on these matters, the Hire Agreement does not include any prohibited provisions.

**Implied Provisions**

30 Part 2, Division 2 of the Act identifies provisions that are implied in a construction contract that does not have a written provision about the matters set out in ss16 to 24 of the Act. Section 25 provides that the *Interpretation Act 1978* and sections 4 to 8 of the Act apply to the interpretation of a provision that is implied in a construction contract under Part 2 of the Act despite any provision in a construction contract to the contrary.

**Variations**

31 Section 16 of the Act addresses variations of the contractor’s obligations under the Contract. The contractor, having regard to s5(1) of the Act, is a person who has the obligation under the Hire Agreement to supply the equipment. In this Adjudication, the Applicant is the contractor. Section 16 reads as follows:

The provisions in Schedule 1, Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.

32 The implied provision in Schedule 1, Division of the Act is as follows:

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on:

(a) the nature and extent of the variation of the obligations; and

(b) the amount, or a way of calculating the amount, that the principal must pay the contractor in relation to the variation of the obligations.

33 Clause 14 of the Hire Agreement is set out below because it is the contractor (the Applicant in this instance) who has authority to agree to a request by the Hirer (the Respondent) to vary the Agreement. Clause 14 reads as follows:

14.1 We [the Applicant] may in our absolute discretion agree to a request by you [the Respondent] to vary any terms of this Agreement or any rental transaction under this Agreement, including a variation to the Term, the Equipment rented or Services provided.

14.2 No variation will be affective unless it is in writing, is signed by or on behalf of both of us.

34 Because of clause 14, the Hire Agreement does have a written provision about variations of the contractor's obligations under the contract and therefore the provisions in Schedule 1, Division 1 are not implied in the Hire Agreement.

## Contractor's entitlement to be paid

35 Section 17 of the Act provides:

The provisions in Schedule 1, Division 2 are implied in a construction contract that does not have a written provision about the amount, or a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

36 Schedule 1, Division 2 provides:

**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 of its obligations.

37 The Hire Agreement has written provisions related to the hourly rate that the Applicant is entitled to be paid for hire of the truck and therefore there is a provision for a way of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs in supplying the truck for construction work.

## Contractor's entitlement to claim progress payments

38 Section 18 of the Act reads as follows:

The provisions in Schedule 1, Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations under the contract the contractor has performed.

39 Schedule 1, Division 3 reads as follows:

**3 Entitlement to make claim**

The contractor is entitled to make one or more claims for a progress payment in relation to the contractor's obligations it has performed and for which it has not been paid by the principal.

**4 When claim can be made**

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making another claim for an amount payable to the contractor under or in connection with this contract.

40 Although the Hire Agreement includes provisions regarding the Applicant’s entitlement to be paid it does not include a written provision about whether or not the Applicant is able to make a claim to the principal for a progress payment or when it can be made. Accordingly, the provisions in Schedule 1, Division 3 are implied in the Hire Agreement.

## Making payment claims

41 Section 19 of the Act is directed to how a party must make a claim for payment. Section 19 reads:

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.

42 Notwithstanding that the Hire Agreement has a provision relating to payment in response to tax invoices, it does not have a written provision about how a party must make a claim to another party for payment. Therefore, the following provision from Schedule 1, Division 4 is implied in the Hire Agreement:

**5 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).

## Responding to payment claims and time for payment

43 Section 20 of the Act reads:

The provisions in Schedule 1, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:

(a) when and how a party must respond to a payment claim made by another party;

(b) by when a payment must be made.

44 The Hire Agreement does not have a provision regarding when and how a party must respond to a payment claim made by another party. Clause 4.4 does provide for when a payment must be made but only where the Applicant has accepted an application from the Customer (the Respondent) to open a 30 day commercial credit account. It is not known whether there is a commercial credit account to support the term in clause 4.4. Accordingly, the following provisions from Schedule 1, Division 5 are implied in the Hire Agreement:

(1) This clause applies if:

(a) a party receives a payment claim under this contract; and

(b) the party:

(i) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(ii) disputes the whole or part of the claim.

(2) The party must:

(a) within 10 working days after receiving the payment claim:

(i) give the claimant a notice of dispute; and

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) within 20 working days after receiving the payment claim, pay the whole of the amount of the claim.

(3) The notice of dispute must:

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract; and

(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

## Interest on overdue payments

45 Section 21 of the Act states that the provisions in Schedule 1, Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

46 The Hire Agreement provides for the Applicant to charge interest calculated on a daily basis and compounded monthly on overdue amounts from the date on which a payment is due to the date of actual receipt of the payment at an interest rate which is 4% greater than the rate published by Westpac or its successor on commercial overdraft finance facilities in excess of $100,000 as at the due date for payment. As the Hire Agreement has a written provision about interest to be paid on any payment that is not made at the time required by the contract, the provision set out in Schedule 1, Division 6 are not implied in the Hire Agreement.

## Ownership of goods

47 Section 22 states that the provisions in Schedule 1, Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods passes from the contractor for goods that are:

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under the contract.

48 The Hire Agreement does not provide for ownership of goods passing from either party to the other. The goods are supplied solely on a hire basis. As the equipment supplied by hire will not itself be paid for by the Hirer only the hire charges are to be paid for and, as the goods will not become a fixture at any time, the provisions in Schedule 1, Division 7 are to be implied pursuant to s22 although they may have little work to do as ownership of the goods does not pass to the Hirer. It follows that the following provisions are implied in the Hire Agreement:

**When ownership of goods supplied by contractor passes**

(1) Subclause (2) applies to goods that are:

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under this contract.

(2) The ownership of the goods passes from the contractor when whichever of the following happens first:

(a) the contractor is paid for the goods;

(b) the goods become fixtures.

## Duties as to unfixed goods on insolvency

49 Section 23 of the Act addresses duties as to unfixed goods on insolvency. The section states that the provisions in Schedule 1, Division 8 are implied in a construction contract that does not have a written provision about what must happen to unfixed goods of a kind mentioned in section 22 if either of the following persons becomes insolvent:

(a) the principal;

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods or services that are related to construction work.

50 The Hire Agreement does not have such a written provision and therefore the following provision is implied in the Hire Agreement:

**9 Duties of principal and other persons about unfixed goods on insolvency**

(1) This clause applies if:

(a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract; and

(b) the contractor has not been paid for the goods; and

(c) the goods have not become fixtures; and

(d) ownership of the goods has not passed from the contractor; and

(e) the goods are in the possession of or under the control of:

(i) the principal; or

(ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods or services that are related to construction work; and

(f) the principal or that person becomes an insolvent.

(2) The principal and the person must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of another person (other than the contractor) except with the prior written consent of the contractor.

(3) In addition, the principal and the person must allow the contractor a reasonable opportunity to repossess the goods.

(4) In this clause:

***insolvent*** means:

(a) for an individual – an insolvent under administration as defined in section 9 of the Corporations Act 2001; or

(b) for a body corporate – an externally-administered body corporate as defined in section 9 of the Corporations Act 2001.

## Retention money

51 Section 24 of the Act addresses retention money. It states that the provisions in Schedule 1, Division 9 are implied in a construction contract that does not have a written provision about the status of an amount retained by the principal for the performance by the contractor of its obligations under the contract.

52 As the Hire Agreement does not have a written provision about the status of an amount retained by the Respondent for the performance by the contractor of its obligations under the Hire Agreement, the following provision is implied in the Hire Agreement:

**Retention money to be held on trust**

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations part of that amount (the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first:

(a) the retention money is paid to the contractor;

(b) the contractor agrees in writing to give up any claim to the retention money;

(c) the retention money ceases to be payable to the contractor under this contract;

(d) an adjudicator, arbitrator or other person or a court or other body decides the retention money ceases to be payable to the contractor.

## Interpretation of implied provisions

53 The *Interpretation Act 1978* and sections 4 to 8 of this Act apply to the interpretation of a provision that is implied in a construction contract under this Part [3] despite any provision in a construction contract to the contrary.

## Application for Adjudication

54 On 22 November 2023 the Applicant served on the Royal Institution of Chartered Surveyors Dispute Resolution Service (**RICS DRS**) an application for adjudication of a payment dispute pursuant to s28(1) of the Act (**Adjudication Application**). The adjudication application refers to a Hire Agreement ADT28. The Respondent is named in the Adjudication Application.

55 On 27 November 2023 RICSDRS appointed me to adjudicate the Adjudication Application and allocated an identification number of NT 49.23.05 to the Adjudication Application. On 27 November 2023 I wrote to the Applicant, the Respondent and to RICS DRS confirming my acceptance of the appointment, advising my hourly rate for adjudicating the application, and confirming that I have no known conflicts with either party or the project.

56 In response to a request by me under s34(2)(a) of the Act it was confirmed that a copy of the Adjudication Application was served on the Respondent on 23 November 2023.

57 Sections 28(1) and 28(2) of the Act requires that, to apply to have a payment dispute adjudicated, a party to the contract must, within 65 working days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b):

(1) (a) prepare a written application for adjudication; and

(b) serve it on each other party to the contract; and

(c) serve it on:

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or

(ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or

(iii) otherwise – a prescribed appointer chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).

(2) The application must:

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and

(b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

(3) The first day of the time period mentioned in subsection (1) is the day after the payment dispute arises, as set out in section 8.

58 On 10 October 2023 a payment claim was served on the Respondent claiming $18,584.00. On 23 October 2023 lawyers [[5]](#footnote-5) acting for the Respondent responded to the Applicant advising that the Respondent wholly disputes the claim. Accordingly, there is a payment dispute as defined in s8(1) of the Act which arose on 23 October 2023.

59 The 65 working day time limit in which to apply for adjudication would end on 2 February 2024. The Application is in writing. The Application was served on the Prescribed Appointer on 22 November 2023. The Application was served on the Respondent on 23 November 2023.[[6]](#footnote-6) Both of these dates are within the 65 working day time limit.

60 For section 28(2)(a) of the Act, an application for adjudication must be prepared in accordance with and contain the information prescribed by the Regulations.[[7]](#footnote-7) The Application must have attached to it the construction contract involved or relevant extracts of it and any payment claim that has given rise to the payment dispute. The Application must also state or have attached to it all the information, documents and submission which the party making it relies on in the adjudication.[[8]](#footnote-8)

61 The Application does have attached to it a copy of the written parts of the construction contract involved, i.e. the Hire Agreement. The Application also attaches a payment claim made by the Applicant which gave rise to the payment dispute. It is notable that the Payment Claim is not in the form of a tax invoice although the amount claimed includes GST. The tax invoice attached to the Payment Claim is not an invoice from the Applicant but it does provide details of how the amount claimed is calculated. Without a tax invoice from the Applicant any conclusions I have reached are GST exclusive amounts. The Adjudication Application does have attached to it information, documents and submissions and I have taken those attachments to the Application to be all of the information, documents and submissions on which the Applicant relies.

62 Section 6 of the Regulations provides that, in addition to the other information required by section 28(2) of the Act, an application must contain:

(a) the name and contact details of the appointed adjudicator or prescribed appointer; and

(b) the applicant's name and contact details; and

(c) the name and contact details of each other party to the contract.

63 The Application contains the details required by s28 and Regulation 6.

64 The Hire Agreement is not a high value construction contract as referred to in s10A of the Act as the amount payable under Hire Agreement is below the prescribed amount of 500 000 000 monetary units.

## Adjudication Response

65 On 14 December 2023 the Respondent served on me a response (Adjudication Response) to the Adjudication Application in accordance with s29 of the Act and s7 of the *Construction Contracts (Security of Payments) Regulations 2005* (NT). The Adjudication Response complies with s29(2)(a) of the Act.

## Matters Considered

66 I have made this Determination on the basis of the Act and Regulations and having regard to s34(1)(a) of the Act on the basis of:

(a) the Adjudication Application and attachments; and

(b) the Adjudication Response and attachment.

67 These are comprised of the following:

Adjudication Application:

* Adjudication Application Form
* Written Submissions (Tab 2)
* Hire Agreement (Annexure A) plus contemporaneous agreements
* Payment Claim (Annexure B)
* Notice of Dispute (Annexure C)
* Inspection Form (Annexure D)
* Correspondence (Annexure E)
* Plant Return (Annexure F)

Adjudication Response

* Adjudication Response Submissions
* Statutory Declaration by [the Chief Financial Officer of the Respondent] dated 14 December 2023 and attachments.

68 In respect of s34(2) of the Act:

(a) apart from requesting submissions in respect of service of a copy of the Adjudication Application on the Respondent, I have not made any other request for submissions pursuant to s34(2)(a);

(b) I have not requested a conference as permitted under s34(2)(b); and

(c) I have not inspected any work, tested anything to which the payment dispute relates, and have not engaged an expert to investigate and report on any matter relevant to the payment dispute, as permitted under s34(2)(c).

## Application of the Terms of Hire

69 The Applicant claims in respect of ADT28, an amount of $18,584.00 including GST made up by the Applicant as follows:

|  |  |
| --- | --- |
| August | $20,240.00 |
| Mob | $1,200.00 |
| Sub Total | $21,440.00 |
| GST | $2,144.00 |
| Total | $23,584.00 |
| Less Paid | $5,000.00 |
| Claimed | $18,584.00 |

70 I could not identify an agreement for the Respondent to pay a holding fee or a fee to reserve the truck in the event that it was to operate at the construction site. Although this is raised by the Applicant in paragraph 3 of the Adjudication Application submissions, no claim is made for June 2023. My understanding of the Hire Agreement is that hire (or the rental period) commenced when the truck was mobilised to the construction site. The Applicant did not provide records of hired hours but relied on its view that there was a monthly minimum amount payable of $20,240.00 per truck. That is not how I read the Hire Agreement.

71 The Hire Agreement has written provisions related to the hourly rate that the Applicant is entitled to be paid for hire of the truck and therefore there is a provision for a way of determining the amount that the contractor is entitled to be paid for the obligations the contractor performs in supplying the truck for construction work.

72 The Hire Agreement at clause 4.1 requires the Respondent, throughout the Term, to pay the Applicant ‘the rental instalments’, but rental instalments are not identified as such in the Hire Agreement. On one view of it, rental instalments may be argued to be the hourly rate applied for the minimum hire hours per month. This appears to be the basis on which the Applicant makes its claim but it would not explain how a monthly charge could apply if the machine was unserviceable such that the operating time of 176 hours could not be achieved. In respect of ADT28 the evidence of the [Chief Financial Officer of the Respondent] is that the truck only worked for 27 hours and that he had been informed that the truck was otherwise unserviceable. The Hire Agreement does not state that there is a daily rate or a monthly rate or a monthly minimum hire amount and it does not state that the Respondent must, as a minimum, pay for the minimum hours at the agreed hourly rate. I have therefore understood the Hire Agreement to be that the Applicant is entitled to payment at the hourly rate for each hour that the truck supplied to the Respondent operated for construction work and not on the basis of a minimum hours per month or for time on site when it was unserviceable.

73 There a few supporting documents provided by the Applicant. There is a ‘Machine Fit for Purpose Form’ dated 12 July 2023 for ADT28. There is also a ‘Machine Movement Sheet’ dated 12 July 2023 showing movement from the Darwin yard to the Respondent’s yard. There is another ‘Machine Movement Sheet’ showing that ADT28 was moved from the Respondent’s yard to the construction site on 22 August 2023. According to the CFO Declaration at paragraph 8 the machine worked for 27 hours at the construction site.

74 Based on my understanding of the Hire Agreement the hourly rate would apply from when the truck was mobilised to the construction site and charges at the hourly rate would apply when the truck operated. In the absence of a daily, weekly, or monthly rate I have taken it that the amount payable is for the hours that the truck operates on the construction work as supported by clause 12.1 of the Terms and Conditions. This clause provides that hours of operation of the equipment will be determined as ‘Service Meter Units (SMU’s)’. If the meter fails the operating hours must be recorded by the Respondent ‘but in any event shall not be less than the hours of each shift during which the Equipment is being used. The Equipment must not be used for more than 3 days without a functioning service meter.’

75 According to the Adjudication Response, ADT28 was used for 27 hours. There are no documents or submissions to the effect that ADT28 was used for any other hours.

76 Based on this, the only conclusion available is that the Applicant is entitled to payment for 27 hours at the hourly rate.

77 The other component of the claim is for ‘Mob’ for $1,200.00. This is not explained and it is not mentioned in the supporting invoices. Mobilisation Costs are defined in clause 1.1 of the Terms and Conditions. Page 3 of the Hire Agreement at paragraph 4.b) provides that the Respondent will be invoiced at cost plus 10% for mobilization costs incurred for the transport and assembly to site and all demobilisation back to the Applicant’s Darwin Workshop. Although there is evidence to support the movement there is no evidence of cost. The ‘cost’ on which the $1,200.00 is based is not identified. If the Applicant’s charge had been calculated in accordance with the Hire Agreement, the base cost, excluding GST, would have been about $1,090 but I could not find any documents to support figures in this range.

78 Another amount brought to account in the claim is a $5,000 amount paid. I note that this is in the part of the claim that deals with GST inclusive amounts. There is no indication as to the purpose of the $5,000 payment.

79 Based on the information available, I determine that the Applicant is to be paid $3,105.00 for 27 hours at the agreed hourly rate in respect of the payment claim for ADT28.

## Interest and due date for payment

80 The following provisions from Schedule 1, Division 5 are implied in the Hire Agreement:

(2) The party must:

(a) within 10 working days after receiving the payment claim:

(i) give the claimant a notice of dispute; and

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) within 20 working days after receiving the payment claim, pay the whole of the amount of the claim.

81 Applying 20 working days from 10 October 2023 (the date of the payment claim), the due date for payment works out to be 7 November 2023.

82 The Hire Agreement provides for the Applicant to charge interest calculated on a daily basis and compounded monthly on overdue amounts from the date on which a payment is due to the date of actual receipt of the payment at an interest rate which is 4% greater than the rate published by Westpac or its successor on commercial overdraft finance facilities in excess of $100,000 as at the due date for payment. The applicable rate published by Westpac is 8.11% per annum. Therefore the applicable rate for the purpose of clause 4.5 Terms and Conditions is 12.11% per annum which converts to a daily rate of 0.033%. Applied to the amount payable for the period from the due date for payment until the date of this determination this calculates to $31.76 ($3,105.00 base amount x 0.033% x 31 days).

## Cost of the Adjudication

83 Because this determination is made simultaneously with 6 other determinations under relevantly identical Hire Agreements between the same Parties in respect of supply of goods by hire related to the same construction work, the approach I have taken is to work predominantly on one base determination, insofar as it has been feasible to do so, then apply the particulars from each of the 7 applications to produce the 7 determinations. The factual information for the 7 applications varies in significant respects. Based on the approach I adopted, as foreshadowed in my notice to the Parties accepting the referrals, I have allocated 1/7th of the total costs of the adjudications to each matter.

Tim Sullivan

Adjudicator – NT-49

1. Hire Agreement, page following cover page. [↑](#footnote-ref-1)
2. Adjudication Response, para 9. [↑](#footnote-ref-2)
3. Adjudication Response, paras 10 – 12. [↑](#footnote-ref-3)
4. Based on the Applicant’s explanation at paragraphs 1 to 3 of the Adjudication Application submissions. [↑](#footnote-ref-4)
5. Cozens Johansen Lawyers’ letter dated 23 October 2023. [↑](#footnote-ref-5)
6. As confirmed by Cozens Johansen Lawyers’ email dated 29 November 2023. [↑](#footnote-ref-6)
7. Section 28(2)(a) [↑](#footnote-ref-7)
8. Section 28(2)(b). [↑](#footnote-ref-8)