

Claimant: Phillip Voll Plumbing

Respondent: Garden City Group Pty Ltd

Adjudicator's Decision under the Building and Construction Industry Payments Act 2004

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated 7 July 2008 is **\$2,055.00** including GST.
2. The date on which the amount became payable is **16 June 2008**.
3. The applicable rate of interest payable on the adjudicated amount is **10%** simple interest.
4. The Respondent is liable to pay the ANA's fees and the adjudicator's fees

Signed: 

Date: **28/7/08**

Chris Lenz Adjudicator

Background

1. Phillip Voll Plumbing (referred to in this adjudication as the "Claimant") was engaged by Garden City Group Pty Ltd (referred to in this adjudication as the "Respondent") to do plumbing works (the "work") at a house at 14 Willowburn Drive TOOWOOMBA in Queensland (the "site").
2. The Claimant's material included an invoice no. 175 dated 2 June 2008 which was faxed to the Respondent identifying the address of the site and referred to "fitout, tank & Range Hood completed and inspected for \$2,055 including GST". This invoice stated that it was a payment claim made pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act").
3. On 15 June 2008 the Claimant sent the invoice again stating that the amount was overdue.
4. The Respondent responded by facsimile on 16 June 2008 (incorrectly stated as 2007) and stated that "This account needs to be checked. Very expensive Wayne Mahoney 16/6/07".
5. In response to this comment, the Claimant provided a breakdown of the hours worked at the site by facsimile on 17 June 2008.
6. On 26 June 2008 the Claimant sent a letter to the Respondent stating that he intended to go to adjudication and invited a payment schedule within 5 business days.
7. These documents from the Claimant accompanied his facsimile journal.
8. No payment schedule was received from the Respondent apart from a "Without Prejudice latter dated 7 July 2008 referring to the 18 June 2008 letter requesting the details requested in the earlier letter. I do not have the 18 June 2008 letter.
9. The Claimant made a written application for adjudication on 7 July 2008 (the "application"). In the application the Claimant provided a one page statement explaining the circumstances surrounding the work for the Respondent, which was on an hourly rate, with the Respondent providing the material to be used in the work.
10. The Respondent sent me a "Without prejudice fax" dated 15 July 2008 stating it was prepared to pay \$1,430.00 i.e. the invoice amount less \$625.00. I sent this fax to the Applicant as it did not appear to have been sent to the Claimant.
11. On 18 July 2008 I received a fax from the Applicant stating that he wanted to proceed with litigation.
12. It appeared to me that neither party clearly understood the operation of the Act and the requirements of it, so I need to carefully ensure that the Act has been adhered to by one or both parties to ensure that it is a proper adjudication.

Appointment of Adjudicator

13. The Claimant applied in writing to the Queensland Law Society ("QLS") on 7 July 2008 for adjudication. Subject to my finding jurisdiction, which is dealt with below, I find that the application in writing satisfies s21(3)(a) of the Act.
14. I find the application was to QLS, as an authorised nominating authority, with registration number N11064504, thereby satisfying s21(3)(b) of the Act.

15. By letter dated 10 July 2008, QLS referred the adjudication application to me by courier to determine, pursuant to s23(1) of the Act. I am registered as an adjudicator under the Act with registration number J622914. I accepted the nomination by facsimile dated 14 July 2008 sent to the Claimant and to the Respondent by facsimile, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.
16. I have no interest in the contract, nor I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have therefore been properly appointed under the Act as required by s23(2) of the Act.

Construction contract

17. s3 of the Act requires that:
 - a. the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
 - b. the *construction work* that was carried out, or the related goods and services that were supplied for construction work, had to take place in Queensland.
18. I find that the plumbing work falls within the definition of Schedule 2 of the Act, which defines a *construction contract* as an agreement or other arrangement as follows:

“construction contract” means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”

19. Although there is no payment schedule, the facsimile from the Respondent on 16 July 2008 did not deny the existence of an agreement, but merely questioned the amount.
20. I find that the fitout of a tank and rangehood falls within the definition of *construction work* as defined in s10 of the Act as installation of ventilation, drainage and/or water supply:

“(1) Construction work means any of the following work –
(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;” [my emphasis]

21. s11 of the Act deals with *related goods and services*, which provides:

11 Meaning of related goods and services

1. ***Related goods and services***, in relation to construction work, means any of the following—
 - (a) goods of the following kind—..
 - (i) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
 - (b) services of the following kind—
 - (i) the provision of labour to carry out construction work;”

22. Given that I find the tank and rangehood falling within construction work, I find the machine hire as plant for use in connection with the construction work and the labour to carry out this work is the provision of labour to do so, thereby both plant and labour satisfies s11 of the Act.

23. I was provided with an earlier invoice for work at the site which was dated 2 March 2008, so I find it highly unlikely that the construction contract for this work was entered into before 1 October 2004. I therefore find the construction contract for this payment claim was after 1 October 2004, and it related to *construction work* and/or the supply of *related goods and services* at Toowoomba which I find is in Queensland.
24. I find therefore that it is a matter which may be adjudicated.

Service of the payment claim and the adjudication application

25. I find from the material provided, and the facsimile number of the Respondent from the adjudication application that that the invoice 175 was served on the Respondent by facsimile on 2 June 2008.
26. I find this **invoice is a payment claim** as it was suitably endorsed and identified the work carried out and the amount being claimed thereby satisfying s17(2) of the Act.
27. The invoice required payment within 14 days of the invoice, which I find is **16 June 2008, and I find that this is the due date for payment**.
28. The adjudication application I find was delivered to the QLS on 8 July 2008, which is 7 business days from the Claimant's letter dated 26 June 2008. This letter required the Respondent to provide a payment schedule within 5 business days i.e. by 3 July 2008.
29. I find the Claimant's letter dated 26 June 2008 was within 20 business days following the due date for payment of 16 June 2008, and that it is a notice satisfying s21(2) of the Act (the "notice"), thereby allowing the Claimant to proceed to adjudication.
30. The application was made within the 10 business days after the 5 business day period allowed in the notice, which I found expired on 3 July 2008. The application was made on 8 July 2008, which is 3 business days after 3 July 2008.
31. Accordingly, I proceed with adjudication, on the basis that service of the payment claim was in accordance with s17 of the Act, and service of the application was valid, and I have been validly appointed, and I am an eligible adjudicator.

Scope of the adjudication

32. Now that I have jurisdiction to proceed, the Act at s26(1) requires that I am to determine:
 - a. The amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the "**adjudicated amount**"); and
 - b. The **date** on which any such amount became or becomes payable; and
 - c. The **rate of interest** payable on any such amount.
33. I find that there was no payment schedule from the Respondent because none of the documents provided by the Respondent by 3 July 2008 satisfied s18(2) of the Act. S18(2) of the Act requires reference to the payment claim as well as an amount stating how much the Respondent was prepared to pay, if anything. I find that no such documents were provided by the Respondent as I was not given the letter dated 18 June 2008 apparently provided by the Respondent by either party.
34. The Respondent's 7 July 2008 letter was too late and in any event it did not satisfy the s18(2) requirements. The Respondent's without prejudice letter dated 15 July 2008 sent to me was also too late to be considered as a payment schedule (the "**15th July 2008 letter**"). Time limits under the Act must be strictly applied.

35. Furthermore, I am unable to consider the 15 July 2008 letter as an adjudication response, because there was no payment schedule provided, so s24(4) prevents me from considering any reason in this letter when there was no payment schedule to which it could refer.
36. Given that there was no payment schedule, I am unable to consider the Respondent's documents any further.

Entitlement and the amount under the contract

37. s12 of the Act gives the Claimant a right to progress payments as follows:

"12 Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

38. Therefore the right to progress payments is governed by the reference date, and I find that the construction contract did not provide for a reference date, which means one must refer to in Schedule 2 of the Act as the last day of the named month.
39. The Claimant provided the Respondent with a supporting document which provided the dates that the work was carried out for invoice 175, and the last date in the supporting documentation I find is 29 May 2008. I am entitled to have regard to this document as it is in support of the payment claim which is allowed by s26(2)(c) of the Act. Accordingly, I find the reference date for the May 2008 work was 31 May 2008:
40. An invoice dated and sent on 2 June 2008 was therefore after or from the reference date and the Claimant is entitled to make a payment claim.
41. Accordingly, I find that the Claimant has an entitlement to a progress claim under s12 of the Act, and I now need to value the claim and decide the adjudicated amount.
42. I have no material from the Respondent upon which I can take notice under the Act that the amount claimed is too high, and I am satisfied that a labour rate of \$50.00 per hour is reasonable, and I am satisfied that work was carried out on those days. This means I am satisfied with an amount of \$1,500 for labour in May 2008.
43. I accept that the contract required that the Claimant was to provide labour and the Respondent was to provide the materials. I am prepared to find that plant is required to assist labour in the carrying out of construction work, and although I have no supporting details from the Claimant about the makeup of the plant hire, the Respondent could have provided a payment schedule, if it wished to take issue on the plant hire amount.
44. I am prepared taking into account that the amount for machine hire in May 2008 could amount to \$368.18, as I have no material from the Respondent upon which I am entitled to rely to controvert this amount. I therefore find that \$368.18 is a reasonable amount for plant hire in May 2008, thereby totalling a claim of \$1,868.18, excluding GST.
45. The Claimant has added 10% GST to the total of \$1,868.18 resulting in a payment claim of **\$2,055.00** and I am satisfied that this is the amount due under the contract (the "adjudicated amount").

Due date for payment

46. I have already found the due date for payment to be 16 June 2008.

Entitlement to interest

47. Neither party made submissions on interest. s15(2)(a) applies because I find that there is no rate of interest under the contract. The Supreme Court rate of 10% is prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*.

48. I do not consider that it is appropriate for me in circumstances where there are no submissions from either party to consider whether this is a *construction contract* to which s67P of the *Queensland Building Services Authority Act* (the "QBSAA") applies, so as to consider whether a penalty rate for interest applies. Accordingly, I make no finding that the QBSAA applies.

49. Accordingly, I find interest at 10% in accordance with s15(2)(a) of the Act.

Authorised Nominating Authority and Adjudicator's fees

50. s34 and 35 of the Act refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has succeeded in the quantum of its claim and the Respondent provided no payment schedule which meant that the Claimant has been forced to have the matter adjudicated. Even after being invited to do so, the Respondent did not provide a payment schedule.

51. Accordingly, I am prepared to decide otherwise than the default provision in ss34(3) and 35(3) of the Act and decide that the Respondent should pay all the ANA's fees and all my fees

Chris Lenz
Adjudicator



28 July 2008