

Claimant: **Nathan John Higgins**

Respondents: **William Dixon and Jayne Dixon**

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 9 June 2009 is **\$5,720.00** including GST.
2. The date on which the amount became payable is **6 May 2009**.
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: **30 June 2009**

Chris Lenz Adjudicator

Background

1. Nathan John Higgins trading as Summit Constructions (referred to in this adjudication as the "Claimant") carried out repair work caused by termites to a house at 19 MacDonald St LOTA (the "Lota site") and a house at 14 Coburg St East CLEVELAND in Queensland (the "Cleveland site") for William Dixon and Jayne Dixon (referred to in this adjudication as the "Respondents") which were investment properties.
2. The Claimant's material included invoice no. 8 dated 21 April 2009 which was properly endorsed, as it stated that it was a payment claim made under the *Building and Construction Industry Payments Act 2004 (Qld)* (the "Act") under cover of an email to the Respondents of that date. The email also carried the endorsement required by the Act. The Claimant also attached a bank statement identifying purchases from Bunnings and an invoice from Dave Collett dated 27 February 2009 for work done at the Lota site, together with his original invoice No. 8 dated 10 March 2009 and email correspondence between him and the Respondents (the "email correspondence between the parties").
3. On 21 May 2009 the Claimant emailed a notice to the Respondent stating that the Respondents had 5 business days to provide a payment schedule as he intended applying for adjudication of invoice no. 8 (the "notice").
4. On 27 May 2009 the Respondents emailed the Claimant stating that they had provided their terms of the offer of payment on 12 March 2009, which was attached and was marked "Without Prejudice".
5. On 9 June 2009 the Claimant lodged an adjudication application with the Queensland Law Society ("QLS") and on page 4 of the application he stated that a copy of the application and all supporting documents had been served on the Respondents by email. The Claimant provided submissions in support of his application.
6. On 12 June 2009 the QLS nominated me to adjudicate the dispute and on 16 June 2009 I emailed the Claimant and Respondent and mailed my acceptance notice to both parties.
7. On 17 June 2009 the Respondents emailed me and advised me that the Lota property was not occupied by the Respondents and to use email for contacting them.
8. No adjudication response was received.

Appointment of Adjudicator

9. The Claimant applied in writing to the Queensland Law Society ("QLS") on 9 June 2009 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.
10. I find the application was to QLS, as an authorised nominating authority, with registration number N11064504, thereby satisfying s21(3)(b) of the Act.
11. By letter dated 12 June 2009, 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 16 June 2009 sent to the Claimant and to the Respondent by email and mail, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.

12. 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

13. In order to consider the adjudication application I need to be satisfied that I have jurisdiction to decide the application and 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.
14. I find that the repair work to the houses 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.”

15. I find from the payment claim that there was an agreement or other arrangement as the Claimant carried out work at the two sites because there was a quote to remove termite damaged timber at the Lota site and evidence of a conversation at that site and evidence of the Respondent's request to carry out work at the Cleveland site. The email from the Respondents on 7 March 2009 advised that, “We have no issue with the standard of the work carried out, but we do have an issue with the charges”. I infer from this email that there was agreement for the work to be done, and the contest was merely about the payment amount.
16. I find that the repair work to the houses at the two sites falls within the definition of *construction work* as defined in s10(1) of the Act which provides:

“...the construction, alteration, repair, restoration, (my underlining) maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land...”;
17. The earliest invoice was 10 March 2009 for the work, so I find that the construction contract was entered into after 1 October 2004. I therefore find the construction contract for this payment claim was after 1 October 2004, and it related to *construction work* which I find was in Queensland. I find from the Claimant's submissions that the properties were investment properties.
18. I find therefore that it is a matter which may be adjudicated.

Service of the payment claim and the adjudication application

19. I find that the payment claim was served on the Respondents by email on 21 April 2009. This was substantiated by a copy of the email sent to the Respondents email billd45@hotmail.com.
20. I find that the **payment claim** was suitably endorsed and identified the work carried out on the two sites and the amount being claimed, thereby satisfying s17(2) of the Act.

21. The payment claim did not identify the time for payment there is no evidence provided by the Claimant demonstrating that the agreement provided for a due date for payment.
22. Accordingly, I refer to s15(1)(b) of the Act [which makes provision when the contract makes no provision about the date] and find that the due date for payment is 10 business days after service of the payment claim, which I have found to be the 21 April 2009. Therefore the **due date for payment is 6 May 2009** taking into account the Labour Day holiday on 4 May 2009.
23. There is no evidence in the material of a payment schedule from the Respondents, and there has been no adjudication response, so taking into account the notice provided by email on 21 May 2009, I find that there was no payment schedule provided within the requisite 10 business days after the payment claim.
24. I find that the notice dated 21 May 2009 satisfies s21(2) of the Act because it was given 11 business days after the due date for payment, which is within 20 business days provided by s21(2)(a) of the Act, and it stated that the Respondents had 5 business days within which to provide a payment schedule.
25. On 27 May 2009 the Respondent replied to the Claimant's email in which they reiterated their without prejudice offer. Even if I had regard to such an offer, there was not amount identified that the Respondents were prepared to pay, as it was contingent upon the provision of further invoices which were then to be paid at \$35.00/hr (including GST). I find that this email is not a payment schedule.
26. I find that the Claimant made an adjudication application on 9 June 2009, which is within 7 business days after the payment schedule should have been delivered and that it was served on the Respondents by email.
27. The provisions of the *Electronic Transactions (Queensland) Act 2001* (the "ETA") need to be considered by me because all the correspondence between the parties and the notices under the Act have been by email. I must look to the words of the ETA to see whether the law allows such conduct.
28. s11 of the *ETA* provides:

"11 Requirement to give information in writing

- (1) *If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).*
- (2) *The circumstances are that—*
 - (a) *at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and*
 - (b) *the person to whom the information is required to be given consents to the information being given by an electronic communication.*

29. I find that the all the correspondence by email between the parties demonstrates that the information was readily accessible and the Respondents had given consent to the payment claim and the adjudication application could be given that way, as there was no other means of communication with the Respondents. This was confirmed by the email from one of the Respondents to the adjudicator on 17 June 2009 in which she said that communication should be by email to billd45@hotmail.com and herself by email.
30. s103 of the Act deals with the service of notices and provides:

103 Service of notices

(1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.

(2) Subsection (1) is in addition to, and does not limit or exclude, the Acts Interpretation Act 1954, section 39 or the provisions of any other law about the service of notices. (my underlining)

31. Accordingly, I am satisfied that the EPA falls within s103(2) of the Act and the notices have been properly served.
32. I have therefore found that the basic and essential requirements of the Act having regard to the case of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 have been satisfied by my finding a construction contract, the service of a payment claim, the making of an adjudication application, and the reference to an eligible adjudicator and therefore I proceed to adjudicate the amount of the payment claim.

Amount of the payment claim

33. The Respondents did not provide a payment schedule, which precluded them from identifying in any adjudication response reasons for non-payment regarding the quantum of the claim because this would have contravened s24(4) of the Act. This means I have nothing from the Respondents to provide alternative values for the work.
34. I am satisfied that the unit price for the removal of termite damaged timber was agreed between the parties as the 7 March 2009 email from the Respondents said that \$600 was quoted. I find that GST was additional to the amount quoted as the GST amount is collected for the Federal Government, and is additional to the cost of the work.
35. Having regard to there being nothing from the Respondents about quantum, and the significant extent of the work done at the Lota site identified in the payment claim to:
 - a. prop ceilings,
 - b. removal of plasterboard,
 - c. cleating bottom plates,
 - d. re-sheeting the walls,
 - e. setting plaster joints,
 - f. re-attaching skirting boards,
 - g. removal of rubbish; and
 - h. the travel to site and the removal of a brick to carry out a termite inspection,I find that an amount of \$2,872.00 for this work is reasonable.
36. Without any allowable controverting evidence from the Respondents:
 - a. I find that to repair a hole in an asbestos wall in a hall, a bedroom and fixing a door in a hallway cupboard could reasonably cost \$350.00; and
 - b. I find that the amounts of \$389.40 each for the two items of work at the Cleveland site are reasonable for the extent of the work carried out at that site.
37. Accordingly, I find that the amount of \$5,720.00 including GST is a reasonable amount for the work carried out by the Claimant.

Due date for payment

38. I have already found the due date for payment to be 6 May 2009.

Interest

39. In his submissions the Claimant claims the maximum amount of interest he is entitled to. I must consider whether the contract is a *building contract* to which s67P of the QBSA Act applies. This provision is in Part 4A of the QBSA Act which deals with building contracts other than *domestic building contracts*. A *domestic building contract* is defined in Schedule 2 of the QBSA Act as having the meaning in the *Domestic Building Contracts Act 2000*.
40. s7(1)(a) of the *Domestic Building Contracts Act 2000* ("DBCA") provides that a *domestic building contract* is a contract to carry out *domestic building work*. *Domestic building work* is defined in s8 of the DBCA as *the renovation, alteration, extension, improvement or repair of a home*. A *detached dwelling* is defined in Schedule 2 of the DBCA as a single detached dwelling or a duplex, and I find that the Lota site and the Cleveland site are *detached dwellings*. This means that it is a *domestic building contract* and s67P of the BSAA does not apply.
41. Accordingly, s15(2)(a) of the Act 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*.
42. I therefore find interest at the **rate of 10% on the unpaid payment claim**.

Authorised Nominating Authority and Adjudicator's fees

43. 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.
44. 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

30 June 2009