

Adjudication Application no. 30328

Authorised Nominating Authority	Institute of Arbitrators & Mediators Australia
Adjudicator	Chris Lenz
Registration Number	J622914
Claimant	Nyholt Constructions Pty Ltd
Respondent	Pradella Developments Pty Ltd
Project	Waters Edge Stage 2 Development, WEST END QLD
Payment Claim	Served 25 June 2013 for an amount of \$210,884.33 including GST
Payment schedule	Served 9 July 2013 for amount of \$121,747.26 including GST
Adjudication Application	23 July 2013
Adjudicator's Acceptance	26 July 2013 (email & letter)
Adjudication Response	30 July 2013
Adjudication Decision	6 August 2013
Adjudicated Amount	N/A
Due Date for Payment	N/A
Rate of Interest	N/A
Apportionment of Adjudication Fees	Claimant 50%
	Respondent 50%

A. DECISION

My decision under the *Building and Construction Industry Payments Act 2004* ("BCIPA") is that regretfully I am unable to adjudicate this matter because I find I do not have jurisdiction.

B. REASONS

I. Background

1. The claimant served a payment claim on the respondent on 25 June 2013 for the sum of \$210,884.33. In the adjudication application (dated 23 July 2013) it stated that this amount was excluding GST, but having regard to the payment claim in appendix B of the adjudication submissions, it is clear that it included GST.
2. Appendix C of the adjudication submission included the payment schedule, which identified that the respondent proposed to pay \$121,747.26 excluding GST. However, it appears from paragraph 42 of the adjudication response that this amount includes GST, because that is consistent with page 3 of the claimant's IAMA adjudication application form that the amount was \$110,679.33 excluding GST.
3. The claimant asserted at page 3 of its adjudication application submissions under the heading of "The Reference Date" that it served the claim on 25 July 2013. However, it was evident from the context of the application is that the claimant meant 25 June 2013.
4. In the submission under this heading, the claimant identified that the payment claim "*comprises of works completed in the month of June 2013.*"
5. The payment schedule identified the reference date of contract as "28th" and that the payment claim was received on 25 June 2013, but unfortunately made no further comment about this anomaly.
6. However, in the adjudication response (dated 30 July 2013) the respondent identified (at paragraphs 25 through to 40 of the submissions) that the payment claim was premature and was not made pursuant to a valid reference date. In support of its submissions it provided copies of some cases including 2 Queensland cases of *F. K. Gardner and Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10 and *Skinner v Timms* [2009] QSC 46.
7. At paragraphs 30 and 40 of the response submissions, the respondent asserted that I had no jurisdiction to decide the adjudication application.

II. Request for and receipt of submissions from the parties

8. Jurisdiction is fundamental to adjudication, and it is appropriate for an adjudicator to consider their jurisdiction before descending into the merits of the dispute.
9. Jurisdiction was put in issue by the respondent and on 1st July 2013 I sought submissions from the claimant by 2 August 2013 as follows (the "claimant's further submissions"):
 1. "On page 3 of the submissions, the applicant states, "*Within the Contract the reference date for submission of Payment Claims is the 25th day of the month for which work is completed.*" Please could you provide reference to where in the contract the reference date is identified as the 25th of the month?
 2. Provide submissions in response to those in the Respondent's Response, Heading 4, paragraphs 25 to 40, allegedly demonstrating the adjudicator's lack of jurisdiction."
10. I also sought submissions from the respondent in response by 5 August 2013 as follows ("the respondent's further submissions"):

"Its submissions in reply to requested submissions 1 and 2 from the Applicant."

11. On 2 August 2013, I received 10 pages of submissions from the claimant's solicitors, a 9 page statutory declaration of Michael Blair Williams (the "MBW statement") including some attachments and copies of 3 decisions of Mr Justice Vickery in the Victorian Supreme Court.
12. On 5 August 2013 I received 7 pages of submissions from the respondent's solicitors, together with copies of 6 cases in support, 2 of which had been provided previously.
13. I am grateful to the parties for the assistance provided by their respective solicitors' submissions to allow me to consider the important issue of jurisdiction.

III. The parties' further submissions

Claimant's further submissions

14. At paragraph 3 of the claimant's further submissions, in response to my 1st request the claimant asserted 3 points:
 - (i) the reference date recorded in the contract of the 28th of the month had been varied by the parties' conduct to the 25th of the month;
 - (ii) if the contract was not varied by conduct, the claimant used the date in error wrongly believing it to be correct, until receipt of the adjudication response submissions;
 - (iii) it conceded that Annexure part A of the contract provided the *time for making a payment claim as the 28th day of each month.*
15. At paragraphs 5 through to 16, the claimant argued that the payment claim:
 - (i) was made pursuant to a valid reference date of 28 May 2013;
 - (ii) and that the adjudicator was asked to only adjudicate on the amount of \$110,225.50 (inclusive of GST) which consisted of work undertaken prior to 28 May 2013; and in support of that assertion
 - (iii) it referred to paragraphs 16 to 32 of the MBW statement.
16. In paragraphs 16 through to 33 the claimant sought to distinguish the cases provided by the respondent.
17. In paragraphs 34 through to 41, the claimant asserted that I was able to sever the payment claim to only consider the works undertaken prior to 28th of May 2013.

Respondent's further submissions

18. In paragraphs 1 through to 9 of the respondent's submissions, the respondent reiterated that a premature payment claim was invalid.
19. In paragraph 10 through to 19 of the respondent's submissions, the respondent asserted that I should not consider the MBW statement as it was not a document properly made by the claimant in support of its claim.
20. In paragraphs 20 through to 24, the respondent asserted that the reference date was not varied by conduct.
21. In paragraph 25 through to 27 in response to the reference date being used in error, the respondent stated that strict compliance with the requirements of the Act were necessary and cited *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.
22. In paragraphs 28 through 235, the respondent referred to the *earlier reference date submissions* of the claimant and said that it was not possible to separate the work done prior to 28 May 2013 from that done after that date.
23. In paragraphs 36 through to 39, in response to the severance issue, the respondent said that:
 - (i) it was impossible to identify which work was completed before 28 May 2013 and which afterwards;
 - (ii) Vickery J's finding in *Gantley* related to "excluded amounts" which are a particular feature of the Victorian Act, which is not present in Queensland;

- (iii) the claimant had sought to claim the full amount of the claim, and not part of it;
 - (iv) Vickery J in a case decided after *Gantley*, in *Seebay Properties Pty Ltd v Galvern Construction Pty Ltd* [2011] VSC 183, at [67] that there were essential conditions for the existence of a valid determination by an adjudicator.
24. In paragraph 40 the respondent reiterated that I had no jurisdiction to decide the claim.

IV. Decision on jurisdiction

Reference Date

25. I do not agree with the respondent's submissions in paragraphs 10 through to 17 that I may not have regard to MBW's statement because it is not a document contemplated by the Act, and that I am essentially only entitled to have regard to documents that were in the payment claim.
26. The respondent's reasons for such an interpretation is based on the fact that the wording of section 25(4) of the Act does not contemplate the provision of "further relevant documents".
27. I cannot agree with such a narrow interpretation of the statute. Providing the documents are properly made *in support of the payment claim* [section 26(2)(c) of the Act] to which an adjudicator must have regard, I see no reason to confine those documents to only those *provided in the payment claim*.
28. In my view, if an adjudicator seeks submissions, and documents which are provided are properly in support of the payment claim in those submissions, then an adjudicator is entitled to consider them.
29. For example, if an adjudicator needs to be satisfied that a payment claim or payment schedule was properly served, and requests submissions, and submissions are provided asserting that service has been effected together with an affidavit of service, but the other party denies service in its submissions, in my view the adjudicator is obliged to have regard to the affidavit. The contending submissions are equivocal, and therefore it is necessary for the adjudicator to decide whether service has occurred or not, and it is appropriate to have regard to the affidavit, as a document properly made in support of the payment claim or payment schedule (whichever is applicable).
30. Accordingly I have looked at the MBW statement to determine whether or not there was an agreed change to the reference date, which is the key issue at hand.
31. My request for submissions was for the claimant to identify where in the contract the reference date was made the 25th of the month, and the claimant asserted at paragraph 3 (a) of its further submissions that the reference date was varied by the conduct of the parties.
32. I therefore considered whether the MBW statement provided any evidence that such a variation had occurred and I was unable to find any.
33. In paragraph 35 of the MBW statement it is evident that Mr Williams concedes the submission of the payment claim on the 25th day was an error in the context of working with Hyder Consulting on 8 other contracts where this date was used, and in paragraph 36 he goes on to say that the respondent never raised the issue of reference date in the past dealings.
34. It is not clear to me whether the claimant asserts that there are up to 8 contracts with the respondent as well, and I therefore only find that the claimant and respondent are involved in this one project, and that this is the 2nd payment claim that has been made on this project.

35. I do not consider that the failure by the respondent to not challenge the reference date, apart from its identification of the reference date of the 28th in the payment schedule, signifies that it had agreed to a change in a contractual reference date.
36. Accordingly, I find that the reference date in the contract is identified in Annexure Part A to the AS2124-1992 General Conditions of Contract to be the 28th of each month.

Reference date of 28 May 2013

37. The claimant submits that the reference date applicable to this adjudication is 28 May 2013 in that the work for which it is making a claim occurred prior to 28 May 2013.
38. It says that the amount for assessment by me is \$110,225.50 inclusive of GST.
39. It further essentially says that I am entitled to sever any claims in the payment claim for work carried out after 28 May 2013 which is a valid reference date for this adjudication.
40. I have considerable difficulty with this submission because the claimant in its payment claim alluded to the reference date being 25 June 2013 as it contained work that had been carried out in June 2013.
41. The key issue for an adjudicator regarding reference dates is to my mind a question of a jurisdictional fact. In the case of *Chase Oyster Bar* referred to by the respondent, McDougall J, at paragraph 164 said that:
"A "jurisdictional fact" is, in general terms, "a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question" (Gideon v Commissioner of the New South Wales Crime Commission (2008) 236 CLR 120 at 139 [43])."
42. In my view it is an essential requirement for the adjudicator to determine whether they have jurisdiction before descending into the merits of the dispute. I appreciate that it is not possible for an adjudicator to consider this jurisdictional fact in a vacuum, and it is necessary for the adjudicator to have regard to the material before him or her.

Jurisdiction

43. However, until the adjudicator has jurisdiction, I do not consider it is within an adjudicator's power to descend into the material; and in the face of a payment claim which identifies the reference date as 25th June 2013 for an amount of \$231,972.76 including GST to then:
- (a) find another appropriate reference date of 28 May 2013;
 - (b) sever the payment claim to only consider a claim of \$110,225.50 for work allegedly carried out prior to 28 May 2013;
 - (c) on the basis of the MBW statement;
 - (d) thereby creating jurisdiction for the adjudication to proceed.
44. To my mind the payment claim as submitted needs to establish the jurisdictional fact of the correct reference date before adjudication can commence.
45. In answer to my request for submissions as to whether the contract identified the reference date as 25 June 2013 and not 28 June 2013, the claimant was unable to satisfy me that 25 June 2013 was the reference date, and in my view that is the reference date for this particular payment claim because it includes work carried out in June 2013.
46. Until I have jurisdiction, to my mind I cannot descend into the payment claim and make a finding that another reference date of 28 May 2013 applied to the payment claim whilst also having to sever parts of the payment claim off that relate to work carried out in June 2013.

47. Section 12 of the Act provides that:
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.
48. *F.K. Gardner and Sons* case together with *Skinner's* case referred to by the respondent require me to consider section 12 of the Act as a matter of jurisdiction in this context.
49. In the face of the payment claim before me in which the claimant has served the claim on 25 June 2013 for work completed in June 2013, with the *reference date* as provided by section 12, and schedule 2 to be that identified in the contract, which I have found is the 28th of each month, I can only find that the claim for the June 2013 work was premature.
50. In *F.K. Gardner*, Her Honour considered the possibility of the parties having agreed to change the progress claim date, but found that there was no change in that case, and I am not satisfied that the parties had changed the agreed reference date, for the reasons identified above.
51. Accordingly, I am unable to find that I have jurisdiction to adjudicate, and therefore I am prevented from descending further into the material, to establish another reference date whilst also severing off part of the claim, and I make no finding about the merits of the dispute.
52. I appreciate the claimant's submission in paragraph 42 that the fundamental objective of the Act is to provide a speedy resolution of payment disputes, and this lack of jurisdiction slows down the process of having the merits of the dispute adjudicated. However, there is no useful purpose served by an adjudicator, in the face of no jurisdiction determining the merits of the case because such a decision is made without jurisdiction.
53. McDougall J in *Chase Oyster Bar* at paragraph 209, said that the New South Wales equivalent of the Act laid down clear specifications of time and other requirements to be observed and that it was not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements involved in their creation. After canvassing some of the adverse consequences of an adjudication of not being made, His Honour said at paragraph 215 that the rights are not lost but merely postponed in effect for a month.

Costs of the adjudication

54. I appreciate that both parties have had to go to the expense of applications, responses and further submissions, and I need to consider whether the apportionment of my fees and those of the ANA should vary from the default option in s35(3) of the Act of the parties sharing equally in those fees.
55. This has not been an easy decision, however, in my view it is likely that if the payment schedule had not only identified the reference date as the "28th" but also stated that the payment claim was defective or premature, may have prevented the unnecessary expenditure of costs for both parties.
56. Accordingly, in my discretion I do not consider that I should deviate from the default provision and find that the party should equally share in my fees and those of the ANA.

Chris Lenz
Adjudicator
6 August 2013

