

Adjudication Application no. 262

Authorised Nominating Authority	Queensland Law Society
Adjudicator	Chris Lenz
Registration Number	J622914
Claimant	Timothy Beacham t/a Freestyle Concreting
Respondent	Superior Garages and Industrial
Project	Labour hire for concreting at Holcim Mooloola Sand Quarry, Mooloola Connection Road, Queensland 4553
Payment Claim	Served 4 July 2013 for an amount of \$4,620 including GST
Payment schedule	None served
Adjudication Application	13 August 2013
Adjudicator's Acceptance	22 August 2013 (email & letter)
Adjudication Response	None
Adjudication Decision	2 September 2013
Adjudicated Amount	\$4,620.00 including GST
Due Date for Payment	18 July 2013
Rate of Interest	10%
Apportionment of Adjudication Fees	Claimant 0% Respondent 100%

A. DECISION

I have made a decision under the *Building and Construction Industry Payments Act 2004* ("BCIPA"), and in respect of the claimant's payment claim, that:

- the amount of a progress payment be made by the respondent to the claimant is the adjudicated amount,
- the date upon which the payment claim is due,
- the rate of interest at the rate of interest, and
- the parties are liable to pay the adjudication fees (being the fees of the adjudicator and the authorised nominating authority) in the proportions, are as shown on the first page of this decision.

B. REASONS

I. Background

1. Timothy Beacham trading as Freestyle Concreting (referred to in this adjudication as the "claimant") was engaged by Superior Garages and Industrial (referred to in this adjudication as the "respondent") to carry out concreting work at Holcim Mooloolooloo Sand Quarry, Mooloolooloo Connection Road in Queensland 4132 (the "work").
2. The contract was oral.
3. The work was carried out between 20 November 2012 and 23 November 2012.
4. The claimant was paid \$5,500 of its claim in January 2013, but has not been paid the balance.
5. The claimant issued a payment claim for the balance on 4 July 2013, and no payment schedule was provided.

II. Application to an ANA and appointment of Adjudicator

6. The claimant applied to the Queensland Law Society ("QLS") on 13 August 2013 for adjudication. By email on 22 August 2013 QLS referred the adjudication application no. 262 for me to determine.
7. QLS is an Authorised Nominating Authority under BCIPA and I am a registered adjudicator under BCIPA with registration number J622914.
8. By letter dated 22 August 2013 sent by email and post to the claimant and to the respondent, I accepted the Adjudication Application and thereby became the appointed Adjudicator.
9. On 27 August 2013, after having reviewed the adjudication application, it was not clear to me that the adjudication application had been served on the respondent and I sent an email to the claimant and the respondent requesting submissions, requesting the claimant provides submissions as to whether the adjudication application had been served, and for the respondent to provide its submissions in reply.
10. I requested the submissions be provided by 28 August 2013 and 29 August 2013 respectively.
11. I received submissions from the claimant demonstrating that he had served the adjudication application, but I receive no submissions from the respondent.

III. Material provided in the adjudication

12. I only received an adjudication application, and no adjudication response was received from the respondent.

a. Claimant's Material

The adjudication application documents comprised the following:

- (i) Adjudication Application dated 13 August 2013 for \$4620 including the signed claimant's checklist (the "application");
- (ii) 3 pages of submissions;
- (iii) a letter dated 29 July 2013 described as a notice under section 21 (2) of the *Building And Construction Industry Payments Act 2001* (sic) (Queensland);
- (iv) payment claim dated 4 July 2013;
- (v) 3 tax invoices from Wise Guys, Aidan King, and One Steel;
- (vi) an email from Jeremy Hunter of the respondent dated 23 January 2013, stating that an amount of \$5500 would be paid after deductions of \$4200 excluding GST;
- (vii) 2 photographs;
- (viii) an email dated 28 August 2013 attaching a copy of a registered post lodgement receipt in response to my 27 August 2013 request for submissions of service of the adjudication application.

b. Respondent's Material

13. The respondent provided no adjudication response and did not respond to my request for submissions of 27 August 2013 in response to the claimant's allegations of service of the adjudication application.

IV. The Construction Contract

14. On page 1 of the submissions, the applicant submits that the contract between him and the respondent was an oral agreement which was entered into before Tuesday, 20 November 2012.
15. The claimant contends that he was responsible for labour and supply of reinforcing steel to pour the concrete at the site.
16. The claimant said that he was not responsible for concrete costs or excavation or the supply of equipment to carry out any excavation.
17. The claimant said that he was told that the site was ready to go and had been levelled and surveyed.
18. On 20 November 2012 at the site it was discovered that it was not level, surveyor's pegs had been moved and 1 was missing, and there was no operator for an excavator that was on site.
19. The claimant said that he contacted Jeremy Hunter and told him about the lack of preparation and poor organisation for the work and was told by Jeremy to proceed with his work.
20. In order to carry out his work the claimant had to borrow an excavator and loader from the site manager at Holcim Quarry (Mr Kirk Mathews) to carry out some levelling of the site and excavate the trenches for the footings.
21. There was no auger attachment for the excavator, so the footing trench was excavated wider and longer to allow the steel cages assembled by the claimant to be laid in the footings trench.
22. Concrete was poured on 21 November 2012, 22 November 2012 and 23 November 2012 in 2 separate locations at the site and the work was completed.
23. I need to decide whether these documents demonstrate that there is a "construction contract" under BCIPA.

24. Schedule 2 of BCIPA states that a **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."
25. Before analysing the issue of a *contract, agreement or other arrangement*, I first turn to the issue of whether the claimant carried out *construction work*.
26. *Construction work* is defined in section 10 of BCIPA and I find that the levelling and excavation together with the concrete work in the foundations falls within the meaning of section 10(1)(e) of BCIPA which provides:
 "(i) site clearance, earthmoving, excavation, tunnelling and boring; and
 (ii) the laying of foundations;"
27. I need to decide whether the contract whereby the claimant undertook to carry out this work is a *construction contract* within the meaning of BCIPA.
28. Turning again to the definition in schedule 2 contract a **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."
29. I am satisfied that from his submissions the claimant agreed with the respondent to provide labour and reinforcing steel for construction of concrete foundations. There is nothing from the respondent to controvert this finding, and there is in fact recognition in the 23 January 2013 email from the respondent that there was an agreement by the respondent acknowledging the bill for \$9200 from the claimant and then deducting an amount of \$4200.

V. Payment Claim

30. I have found the payment claim invoice 138 amounting to \$4620 including GST in which he acknowledged receipt of \$5500 from his claim of original \$10,120 for concrete work and the provision of steel.
31. I am satisfied that this payment claim complies with section 17 (2) of BCIPA and is a valid payment claim.
32. In the claimant's checklist, the claimant signed that it had sent the payment claim on 4 July 2013 and that it had been received on 5 July 2013, and there is nothing from the respondent to controvert this fact, so I am satisfied that the payment claim was served on the respondent.

VI. Payment Schedule

33. In the claimant's checklist I note that the claimant said that he sent a section 21 (1) (b) notice to the respondent on 29 July 2013 and that it was received on 30 July 2013, and there is no reference to a payment schedule ever having been received.
34. I am satisfied that the claimant sent the requisite notice requesting a payment schedule, and that no payment schedule was received.

VII. Adjudication application

35. Before I could adjudicate the matter, I needed to be satisfied that the adjudication application had been served on the respondent
36. The claimant provided me with a registered post lodgement receipt on 28 August 2013 which was dated 14 August 2013 and was addressed to the respondent, and the claimant advised that this was the receipt for the adjudication application documents.

37. I have no submissions from the respondent to controvert this assertion, and I am satisfied that the adjudication application was served by registered post and that adjudication could proceed.

VIII. The amount of the progress payment

38. Adjudication requires me to value the work done under a construction contract either by means of specific provisions under the contract or by reference to contract price, rates and variations under section 13 and 14 of BCIPA.
39. It is not clear from the submissions that a particular amount was agreed at the time the contract was entered into, and in my view I can draw the inference that the claimant was required to provide his labour for a particular rate (unknown from the material provided) together with reinforcing steel to carry out the work.
40. An adjudicator must rely upon the material before them to value the work, and I refer again to the email from Jeremy Hunter dated 23 January 2013 in which the respondent deducted from the claim of \$9200 some deductions amounting to \$4200 which were broken down into:
- (i) additional concrete costs of \$2801.60;
 - (ii) 3 days drive hire of excavator amounting to \$2400;
 - (iii) half a day 972 loader hire of \$600;
 - (iv) less an allowance of \$1600 for reasonable machine hire from a concreter;
 - (v) resulting in a deduction of \$4200 excluding GST.
41. The respondent did not challenge the amount of \$9200 on 23 January 2013 and I'm therefore satisfied therefore that the respondent agreed that this was a reasonable sum for this work because it appeared that the respondent paid the sum of \$5500 to the claimant (after deducting \$4200) and this payment was identified in the payment claim.
42. I therefore find that the payment claim of \$9200 excluding GST is a reasonable sum for the total amount of work carried out by the claimant, from which \$5500 was deducted for the amount paid by the respondent. This leaves an amount of \$4620 including GST.
43. I am not prepared to accept that the deductions in the 23 January 2013 email are valid because they were not provided in a payment schedule which the respondent was entitled to provide. In fact the respondent was given a notice inviting a further opportunity to provide a payment schedule and declined to do so.
44. Under section 26 (2) of BCIPA, as regards the valuation in this context I am essentially confined to the payment claim and payment schedule and submissions in relation to both.
45. It was entirely open for the respondent to explain why the deductions it had made in the 23 January 2013 email were valid, which were related to additional concrete and dry hire of machines. It has not done so.
46. The claimant explained why additional concrete was used and that was because:
- (i) he had to use an excavator with a larger bucket (and no auger attachment) to carry out the footing excavation;
 - (ii) in addition, it appears as if some excavation was required to find solid ground, which I infer meant that excavation was deeper;
 - (iii) the site was not level.
47. I am satisfied that the terms of the concrete did not require the claimant to either supply or pay for the concrete used, as he was only required to provide a labour rate and steel for the concrete work.

48. I conclude that in the circumstances of the respondent not providing a level site and not providing appropriate machinery for the excavation to be carried out, the respondent took the risk of additional concrete being required to carry out the work. I'm satisfied that Mr Hunter told the claimant to proceed in those circumstances, and therefore am not satisfied that any of those deductions are appropriate.
49. Accordingly, I value the adjudication amount as \$4620.

IX. Due date for payment

50. s15 of BCIPA deals with the due date for payment, and I have been unable to find any agreement between the parties regarding the due date for payment in the oral contract, which means I must refer to section 15(1)(b) to find that it is 10 business days after the payment claim.
51. **I find that the due date for payment was 18 July 2013.**

X. Rate of interest

52. I do not find that the contract provides an interest rate.
53. I find that the relevant provision is 15(2)(a) of BCIPA which refers to section 59 (3) of the *Civil Proceedings Act 2011* and this section provides:
- 59 Interest after money order**
- (1) *This section does not apply in relation to a proceeding for a cause of action arising before 21 December 1972.*
- (2) *Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.*
- (3) *The interest is payable at the rate prescribed under a practice direction made under the Supreme Court of Queensland Act 1991 unless the court otherwise orders.*
54. , I am satisfied that the interest is at the rate prescribed by the practice direction of the Supreme Court, and practice direction number 22 of 2012 provides the interest rate to be 10%.
55. **I find the rate of interest is 10% interest payable on the adjudication amount.**

XI. Authorised Nominating Authority and Adjudicator's fees

56. The default provision contained in s34(3)(b) of BCIPA makes the parties liability for the ANA's fees is in equal proportions, unless I decide otherwise. The same approach applies to the adjudicator's fees in s35(3) of BCIPA, with equal contributions, unless I decide otherwise.
57. The claimant has obtained all of what he claimed and there was no payment schedule and no adjudication response, and no response to my request for submissions.
58. The claimant has been forced to seek adjudication in the face of silence from the respondent.
59. I therefore am satisfied that the respondent is liable to pay the ANA's fees under s34(3)(b) and my fees under 35(3) of the Act.

Chris Lenz

Adjudicator



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