

Adjudicator's Decision
Pursuant to the Building and Construction Industry
Payments Act (QLD) 2004

DAVID MOREY (Claimant)

and

NASH GLASS AND ALUMINIUM PTY LTD (Respondent)

I, Warren David FISCHER, as the Adjudicator pursuant to *the Building and Construction Industry Payments Act 2004* (the Act), for the reasons set out in this decision, decide that:

- a) the adjudicated amount in respect of the Adjudication Application dated 15 December 2004 is \$3,041.50 (including GST);
- b) the date on which the amount becomes payable is 12 November 2004; and
- c) the applicable rate of interest payable on the adjudicated amount is the rate prescribed under the *Supreme Court Act 1995*, section 48(1) for debts under a judgment or order, and
- d) the Respondent is responsible for the Adjudicator's fees and expenses.

BACKGROUND

1 This adjudication arises from a disputed Payment Claim made by David Morey (referred to in this decision as "the Claimant", "the Sub-Contractor" and "Morey") on Nash Glass and Aluminium Pty Ltd (referred to in this decision as "the Respondent", "the Contractor" and "Nash"). The subject matter of the claim centres upon glazier fixing work for which the Claimant has claimed payment and the Respondent has proposed to pay less than the claim amount. The work first commenced on 6 October 2004 and subsequently numerous payments have been claimed and made. The work has been carried out at various locations in Queensland and is the subject of an oral contract.

APPOINTMENT OF ADJUDICATOR

- 2 The Claimant lodged an Adjudication Application, dated 15 December 2004, with the Institute of Arbitrators and Mediators Australia on 17 December 2004.
- 3 By letter, dated 21 December 2004, the Institute of Arbitrators and Mediators Australia referred the Adjudication Application to me. The Institute of Arbitrators and Mediators Australia is an Authorised Nominating Authority under the Act, Registration Number N1057859.
- 4 By letter, dated 22 December 2004, addressed to the Claimant and to the Respondent I accepted the Adjudication Application and thereby became the appointed Adjudicator. I am a Registered Adjudicator under the Act, Registration Number J1055362.

SCOPE OF THIS DECISION

- 5 The Act at Section 26(1) requires that I am to decide:
 - 5.1 the amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount);
 - 5.2 the date on which any such amount became or becomes payable; and
 - 5.3 the rate of interest payable on any such amount.
- 6 The Act at Section 34(3)(b) gives me the discretion to decide the proportion of the contribution to be made by the Claimant and by the Respondent to the authorised nominating authorities fees. I will consider that discretion after dealing with the substantive issues.
- 7 The Act at Section 35(3) gives me the discretion to decide the proportion of the contribution to be made by the Claimant and by the Respondent to the adjudicator's fees and expenses. I will consider that discretion after dealing with the substantive issues.

Matters Regarded in Making the Decision

8 Section 26(2) restricts the matters which I may consider in deciding an Adjudication Application. Section 26(2) provides:

“In deciding an adjudication application, the adjudicator is to consider the following matters only:

- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
- (b) the provisions of the construction contract from which the application arose;*
- (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
- (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates”.*

9 In making this decision I have had regard to the following:

- (i) The provisions of the *Building and Construction Industry Payments Act 2004*;
- (ii) To the extent they are relevant the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
- (iii) Those provisions of the oral contract which have been provided by the Claimant from which the Adjudication Application arose;
- (iv) The Payment Claim dated 3 November 2004 to which the application relates;
- (v) That no Payment Schedule was issued by the Respondent;
- (vi) The Adjudication Application dated 15 December 2004 and enclosed submissions;
- (vii) That no Adjudication Response was issued by the Respondent.

10 While within the adjudicator's discretion, by Section 25(4) of the Act, no further written submissions, conference or inspection were requested or conducted.

Contract

11 The Adjudication Application included a written submission by the Claimant and copies of several documents including invoices and correspondence from the Respondent.

12 Section 3(1)(a) of the Act provides:

“(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3—

(a) whether written or oral, or partly written and partly oral; and”

13 The Claimants’ written submission requires an inference that there was an oral contract between the parties.

14 The Claimant in its submission details a telephone call with the Respondent during which terms of a contract were discussed and, the Claimant submits, agreed.

15 The Claimant concedes that three invoices (91, 94 and 95) were paid in full by the Respondent when due. This information and the included correspondence from the Respondent corroborate the Claimant’s submission of the details of the telephone call with the Respondent.

16 Based on the unopposed submission of the Claimant, I consider that there was an oral contract in place between the parties, satisfying that criteria of Section 3(1)(a) of the Act.

17 Subordinate Legislation 2004 No. 091 provides, inter alia:

“1. The following provisions commence 1 July 2004—

- section 9*
- parts 4 and 5*
- sections 104 to 106*
- sections 108 to 113*
- schedule 1 to the extent it amends the Commercial and Consumer Tribunal Act 2003*
- schedule 2.*

2. The provisions that are not in force and not otherwise commenced under this proclamation commence 1 October 2004.”

18 The Claimants' written submission includes the statement "... *work commencing on the 6th October 2004.*"

19 I infer from that unopposed statement of the Claimant that the contract between the parties was entered into after 1 October 2004, satisfying that criteria of Section 3(1)(a) of the Act.

20 Section 3(3)(a) of the Act provides:

"(3) This Act does not apply to a construction contract to the extent it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied;"

21 The Claimants' written submission includes the statement "*I David Morey work as a subcontractor.*"

22 The Claimant's submission includes copies of invoices (as opposed to timesheets) in corroboration of the Claimant's statement.

23 I consider, based on the Claimant's unopposed submission, that the work the subject of the contract was sub-contract work and not work as an employee of the Respondent in satisfaction of Section 3(3)(a) of the Act.

24 Section 3(4) of the Act provides:

"(4) This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland."

25 The submissions enclosed with the Adjudication Application included invoice

numbers: 91, dated 12 October 2004 71 Hrs, \$2733.50

94, dated 19 October 2004 22 Hrs, \$847.00

95, dated 26 October 2004 76 Hrs, \$2926.00

96, dated 2 November 2004 79 Hrs, \$3041.50

97, dated 3 November 2004 79 Hrs, \$3041.50

26 The submitted invoices provided a list of dates and locations. Those locations included: Chermside, Highgate Hill, Kenmore, Pullenvale, Windsor, New Farm, Jindalee, South Brisbane and Richlands. It is within my knowledge that all of those locations are suburbs of Brisbane and I therefore infer that the works the subject of the Contract were carried out inside Queensland, in satisfaction of Section 3(4) of the Act.

27 Section 10(1)(a) of the Act provides:

“(1) “Construction work” means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;”

28 The Claimants’ written submission includes the statement “... *I saw an advertisement in the paper for Glazier Fixers needed and responded ...*”

29 I consider, based on the Claimant’s unopposed submission, that the work the subject of the contract was “Construction work” within the definition provided in Section 10(1)(a) of the Act.

30 There is no further information provided within the submissions to be considered with respect to the application of the Act to this Application.

31 It is my decision that the contract is within the jurisdiction of the Act.

32 Schedule 2 of the Act provides:

“reference date”, under a construction contract, means—

(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or

(b) if the contract does not provide for the matter—

(i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and

(ii) the last day of each later named month.

33 The Claimants' written submission includes the statement "*I then asked how paydays worked, normal agreement is subcontractors invoice on Wednesday and payment is made on the following Friday via direct debit or cheque. The respondents arrangement was standard, invoice Wednesday paid on Friday via direct debit this was agreed prior to work commencing on Wednesday 6th October 2004*".

34 Based on the Claimant's unopposed submission, I accept that the contract does provide for a "reference date" and that date occurs each Wednesday.

35 Section 13 of the Act provides:

"The amount of a progress payment to which a person is entitled in relation to a construction contract is—

- (a) the amount calculated under the contract; or*
- (b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract."*

36 All of the submitted invoices are in the same form, a list of dates, locations and hours with a total number of hours and an invoice total. An arithmetical check provides that all invoices are based on a charge of \$35.00 + GST per hour. While no submission was made by either party as to the valuation of the works, I infer that the contract agreed between the parties provided for the calculation of progress payments at a rate of \$35.00 per hour plus GST. I consider that Section 13(a) of the Act prevails.

37 Section 15(1) of the Act provides:

"(1) A progress payment under a construction contract becomes payable—

- (a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W10—on the day on which the payment becomes payable under the provision; or*
- (b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building*

Services Authority Act 1991, section 67U or 67W—10 business days after a payment claim for the progress payment is made under part 3.”

- 38 Neither party has made a submission that the contract was subject to the provisions of the *Queensland Building Services Authority Act 1991*.
- 39 The Claimants' written submission includes the statement "*I then asked how paydays worked, normal agreement is subcontractors invoice on Wednesday and payment is made on the following Friday via direct debit or cheque. The respondents arrangement was standard, invoice Wednesday paid on Friday via direct debit this was agreed prior to work commencing on Wednesday 6th October 2004*".
- 40 The Respondents' enclosed correspondence also provides "... *PLEASE NOTE THAT NEXT WEEKS PAYMENT WILL BE PAID ON MONDAY 15TH NOVEMBER.*" I find this of assistance in inferring that the "following Friday" is 'Friday of the next week'
- 41 Based on the Claimant's unopposed submission, I consider that the contract does contain a provision about when a progress payment becomes payable and that provision is that, following submission of an invoice on a Wednesday, payment is to be made on the Friday of the following week. I consider that Section 15(1)(a) of the Act prevails.

Payment Claim

- 42 On Wednesday 3 November 2004, Morey served a Payment Claim, invoice 97 dated 3 November 2004, on the Respondent.
- 43 The Respondent has not disputed the date of service of the Payment Claim.
- 44 The Payment Claim provided "TOTAL INCLUSIVE OF G.S.T. \$3041.50"

45 The Payment Claim is made up as set out in the following table:

Quantity	Description	Price	G.S.T.	Total
Wed	27/10/04 Shed Kenmore Tom Burke 14 Hrs			
Thurs	28/10/04 Tom Burke 15 Hrs			
Fri	29/10/04 Shed Highgate Hill Kenmore Tom Burke 16 Hrs			
Mon	1/11/04 West End Tom Burke Walley 18 Hrs			
Tues	2/11/04 Walley Shed 16 Hrs			
				Total 79 Hrs
Wed	3/11/04 Amount Received			1500.00
	Amount Owed			1541.50
TOTAL INCLUSIVE OF G.S.T.				\$3041.50

46 The Claimant issued invoice number 97, dated 3 November 2004, includes the endorsement "This is a payment claim made under the Building and Construction Industry Payments ACT 2004 (QLD)".

47 Invoice number 97 otherwise included the same information as invoice number 96 with the exception of two additional lines which provide "3/11/04 AMOUNT RECEIVED \$1500.00" and "AMOUNT OWED \$1541.50". The Payment Claim identified that the claimed amount included GST.

48 Section 17(2) of the Act provides that a payment claim:

"(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the "claimed amount"); and

(c) must state that it is made under this Act."

49 I consider that the payment claim to which the adjudication application relates (invoice 97 issued 3 November 2004), satisfies the requirements of Section 17(2) the Act.

50 The Claimant submitted that the amount of \$1,500.00 (including GST) has been paid by the Respondent to the Claimant, and therefore I will forward that amount to collection.

51 **To collection: \$1,500.00**

Payment Schedule

52 The Respondent did not serve a Payment Schedule on the Claimant in response to the Payment Claim dated 3 November 2004.

53 Section 21(1)(b) of the Act provides that a Claimant may apply for adjudication of a payment claim (an “adjudication application”) if:

“the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.”

54 Section 21(2) of the Act provides that:

“An adjudication application to which subsection (1)(b) applies can not be made unless—

(a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim; and

(b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant’s notice.”

55 The Payment Claim was served on Wednesday 3 November 2004, therefore the due date for payment was 12 November 2004. The twentieth business day, in Brisbane, following 12 November 2004 was 10 December 2004.

56 The Claimant served notice on the Respondent, dated 8 December 2004, giving notice of the Claimant’s intention to apply for adjudication of the payment claim and giving further notice of the opportunity to provide a payment schedule.

57 The Claimant served further notice on the Respondent, dated 10 December 2004, giving notice of the Claimant’s intention to apply for adjudication of the payment claim and giving further notice of the opportunity to provide a payment schedule.

58 The Claimant served further notice on the Respondent on 15 December 2004, giving notice of the Claimant’s intention to apply for adjudication of the payment claim and giving further notice of the opportunity to provide a payment schedule.

59 The Respondent did not issue a Payment Schedule.

60 I consider that the Claimant has fulfilled the requirements of Section 21(2) the Act in respect to giving notice of its intention to make an adjudication application and the opportunity for the Respondent to serve a Payment Schedule.

WITHHELD PAYMENT

Claimed: \$1541.50 Proposed: \$0.00

61 The Claimant has served a Payment Claim on the Respondent and the Respondent has not served a Payment Schedule at all.

62 Section 18(4) and 18(5) of the Act provide:

“(4) Subsection (5) applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”

63 The Claimant has submitted that the work to which this claim relates has been completed and that the money claimed is due.

64 The Claimant also submitted, *“I then made a phone call and spoke to the respondent who once again told me he had no money but I would be paid on 15th November.”* The Respondent has made no submission contesting this statement.

65 Based on the information before me, I find that the Payment Claim is valid and that, by virtue of Section 18(5) of the Act, the Respondent is liable to pay the claimed amount.

66 It is my decision that the Claimant has made good its submission that it is entitled to payment of its outstanding claim in the amount of \$1,541.50.

67 **To collection: \$1,541.50**

THE ADJUDICATED AMOUNT

68 Section 26(1)(a) requires that I am to decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount).

69 The adjudicated amount (including GST) payable to Morey in this progress payment is \$3,041.50.

70 The calculation of the adjudicated amount is set out in the Collection below:

Collection (all amounts including GST)

Payable to Morey in this progress payment

PAYMENT MADE	\$1 500.00
Payment withheld	\$1 541.50
Progress payment due to Morey (including GST)	\$3 041.50

DUE DATE FOR PAYMENT

71 Section 26(1)(b) requires that I am to decide the date on which any amount became or becomes payable.

72 Section 15(1) of the Act provides:

“(1) A progress payment under a construction contract becomes payable—

(a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W—on the day on which the payment becomes payable under the provision; or

(b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W—10 business days after a payment claim for the progress payment is made under part 3.”

73 Neither party has made a submission that the contract was subject to the provisions of the *Queensland Building Services Authority Act 1991*. In any event, the terms the Claimant has submitted were included in the contract would not be void by Section 67U or 67W of that Act.

- 74 The Claimants' written submission includes the statement "*I then asked how paydays worked, normal agreement is subcontractors invoice on Wednesday and payment is made on the following Friday via direct debit or cheque. The respondents arrangement was standard, invoice Wednesday paid on Friday via direct debit this was agreed prior to work commencing on Wednesday 6th October 2004*".
- 75 Based on the Claimant's unopposed submission, I accept that the contract does contain a provision about when a progress payment becomes payable and that provision is that, following submission of an invoice on a Wednesday, payment is to be made on the Friday of the following week. I consider that Section 15(1)(a) of the Act prevails.
- 76 It is my decision that the due date for payment for the progress payment to which the Payment Claim relates is Friday of the week following the Wednesday on which the Payment Claim was made. The Payment Claim is dated, and was served on, Wednesday 3 November 2004. I therefore decide that the due date for payment is Friday 12 November 2004, being the Friday of the week following the submission of the Payment Claim.

RATE OF INTEREST

- 77 Section 26(1)(c) requires that I am to decide the rate of interest payable on any amount. Section 15(2) and Section 15(3) of the Act provide:
- "(2) *Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—*
- (a) *the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;*
 - (b) *the rate specified under the contract.*
- (3) *For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section".*

78 Neither party has made a submission that the contract was subject to the provisions of the *Queensland Building Services Authority Act 1991* and such a conclusion is not clear from the documents with which I have been provided.

79 The parties have not made any submission with respect to the rate of interest applicable, I am unable therefore to determine if the oral contract included any such provision.

80 From the information before me there is only one provision of that Act with respect to interest that I can conclude is applicable to this adjudication application, that provision being Section 15(2)(a).

81 The *Supreme Court Regulation 1998* provides:

“For section 48(1)1 of the Act, the prescribed rate is 10% a year.”

82 It is my decision that the rate of interest payable on any amount due is the rate prescribed under the *Supreme Court Act 1995*, section 48(1) for debts under a judgment or order.

AUTHORISED NOMINATING AUTHORITY'S FEES

83 Section 34(3)(b) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of any Authorised Nominating Authority fee in equal proportions or in the proportions the adjudicator to whom the Adjudication Application is referred may decide.

84 The Authorised Nominating Authority does not currently charge an application fee for applications of this value, it is therefore unnecessary to exercise my discretion for this application.

ADJUDICATOR'S FEES

85 Section 35(3) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.

86 The Claimant has been entirely successful in its claims in this adjudication. The Claimant put in effort and the claims were not unfounded or unmeritorious. The respondent failed to submit any defence of the claim.

87 I therefore exercise my discretion and decide that the Respondent is liable for the adjudicator's fees and expenses.

DECISION

88 For the reasons set out above, I decide that:

- the adjudicated amount in respect of the Adjudication Application dated 15 December 2004 is \$3,041.50 (including GST),
- the date on which the amount becomes payable is 12 November 2004,
- the applicable rate of interest payable on the adjudicated amount is the rate prescribed under the *Supreme Court Act 1995*, section 48(1) for debts under a judgment or order, and
- the Respondent is responsible for the Adjudicator's fees and expenses.

Signed

Witnessed

Warren Fischer

Jan Fletcher

Registered Adjudicator J1055362

4 January 2005