

Hightrade Debt to [REDACTED]

Year	Bal Owing	Interest Rate	Running Bal	Interest Balance		
2004	\$ 351,818	1.1399	\$ 401,037	\$ 42,218		
2005	\$ 401,037	1.1399	\$ 457,142	\$ 56,105		
2006	\$ 457,142	1.1399	\$ 521,097	\$ 63,954		
2007	\$ 521,097	1.1399	\$ 593,998	\$ 72,901		
2008	\$ 593,998	1.1399	\$ 677,098	\$ 83,100		
2008	\$ 677,098		\$ 527,098		Paid 2008	\$ 150,000
2009	\$ 527,098	1.1399	\$ 600,840	\$ 73,741	Under Economic Duress to Pay	[REDACTED]
2010	\$ 600,840	1.1399	\$ 684,897	\$ 84,057		
2011	\$ 684,897	1.1399	\$ 780,714	\$ 95,817		
2012	\$ 780,714	1.079	\$ 842,390	\$ 61,676		
2013	\$ 842,390	1.079	\$ 908,939	\$ 66,549		
2014	\$ 908,939	1.079	\$ 980,746	\$ 71,806		
2015	\$ 980,746	1.0839	\$ 1,063,030	\$ 82,285		
2016	\$ 1,063,030	1.0753	\$ 1,143,076	\$ 80,046		
2017	\$ 1,143,076	1.0753	\$ 1,229,150	\$ 86,074		
	Bal Owing as at 2017		\$ 1,229,150	\$ 1,020,331		
	Total Interest Paid					

[Supplier and subcontractors]

ATO	Phoenix Task Force	Salary Average	PA	
2004	12	\$ 180,000	\$ 2,160,000	Tax Loss from Hightrade
2004-2017	12	\$ 180,000	\$ 30,240,000	\$ 77,000,000

Outcomes			
Golf Course owned by Crown	216 units @ 945,0	\$	204,120,000
Golf Course		\$	15,000,000
Club house Pool Gym		\$	2,500,000
Asset Built		\$	221,620,000
Banks got Paid	They stood in front of Contractors		
Small Business did not	[REDACTED]	\$	1,449,242
ATO did not get paid			77,000,000
Cost of Phoenix T _a 2004-2017		\$	30,240,000
ATO Bill		\$	107,240,000

Still has personal loans covering the Debt for \$1,449,242 since 2004

Adjudication No [REDACTED]

Claimant: [REDACTED]

Respondent: Hightrade Constructions Pty Limited
(ABN 15 069 034 966) (“Respondent”)

Project: Hunter Valley Golf and Country Club

Adjudicator: Sean O’Sullivan

Payment Claim:
(date and amount) 13 July 2006 in the amount
of \$351,818.20 (incl. GST)

Payment Schedule (if any):
(date and amount) No Payment Schedule

Adjudication Application (date): [REDACTED] September 2006

Adjudicator’s Acceptance (date): [REDACTED] September 2006

Adjudication Response (date, if any): None

Adjudication Determination (date): [REDACTED] September 2006

Adjudicated Amount: \$309,633.20 (incl. GST)

Date for Payment: 12 August 2006

Rate of Interest: Supreme Court rate for unpaid judgments

Apportionment of adjudication fees: Respondent to pay 100%
Claimant to pay 0%


Determination


This is a determination made under the *Building and Construction Industry Security of Payment Act 1999* NSW (“Act”). In respect of the Claimant’s payment claim served 13 July 2006, I determine that:

- The amount of the progress payment to be made by the Respondent to the Claimant is \$309,633.20 (incl. GST).
- The date upon which the payment became due is 12 August 2006.
- The rate of interest payable on that amount is the Supreme Court rate for unpaid judgments.
- The adjudication fees (both the fees of the Authorised Nominating Authority and the fees and expenses of the Adjudicator) to be paid in the following proportions:

The Respondent: 100%

The Claimant: 0%


Adjudicator

 September 2006

REASONS

Under section 22 (2) of the Act I am allowed only to consider the following matters in determining an adjudication application:

- (a) The provisions of the Act;
- (b) The provisions of the construction contract from which the application arose;
- (c) The payment claim to which the application relates, together with the parties’ submissions (including relevant documentation);
- (d) The payment schedule to which the application relates, together with the parties’ submissions (including relevant documentation); and
- (e) The results of any inspection that I carry out.

Preliminary Issues

Given the reasons on which my determination is based, I decided that a conference or site inspection would not be of any assistance and therefore exercised my discretion not to schedule any such conference or site inspection.

In preparing this determination, I have carefully read and considered all the submissions and supporting documentation prepared by the Claimant.

I have also carefully considered the terms of the construction contract from which the application arose, even if I have not expressly mentioned a particular provision in the below reasons.

Construction Contract

The parties originally entered into a contract on or about 4 November 2004 in the amount of \$1,534,000.00 (plus GST) when the Respondent issued a letter to the Claimant dated 1 November 2004 which was accepted by the Claimant on 4 November 2004. The letter from the Respondent dated 1 November 2004 was a counter offer to the quotation issued by the Claimant to the Respondent dated 28 October 2004.

Subsequent to this initial contract, in February 2005 the parties executed a more comprehensive subcontract agreement for the supply and installation of [REDACTED] [REDACTED] to villas at the Hunter Valley Golf and Country Club (“Revised contract”).

The Revised Contract was dated 1 November 2004 and was signed on behalf of both the Claimant and the Respondent. Notwithstanding that the document was apparently backdated, I am satisfied in any event that the execution by both parties of the Revised Contract supersedes the original contract and has effect of governing the parties’ contractual relationship from its commencement.

Therefore, I am satisfied that it is the Revised Contract to which I must have regard in determining this matter. The Claimant has included a copy of the Revised Contract at Attachment H to the adjudication application. I am also satisfied that the Revised Contract is a construction contract within the meaning of the Act.

Chronology

On the 13 July 2006, the Claimant served a payment claim on the Respondent under the Act in the amount of \$359,818.20. The claimed amount of \$351,818.20 was made up of \$47,549.40 relating to the original work under the contract and the balance of \$304,268.80 (including GST) for variations to the contract works.

Once the Claimant issued the payment claim on 13 July 2006, the Respondent had the option of serving a payment schedule on the Claimant within ten (10) business days, that is, on or before 27 July 2006.

It appears that the Respondent did provide a written response to the Claimant on 15 July 2006 by annotating the front page of the payment claim noting that the claim has been rejected. I am not satisfied that this was intended to be or is a payment schedule within the meaning of the Act.

Accordingly, the Respondent issued no payment schedule by that date or at all.

For the reasons set out further below, the due date for payment of the progress payment (if any) was 12 August 2006.

On 17 August 2006, (within twenty (20) business days after the due date for payment as required by the Act) the Claimant forwarded a notice by hand (which it appears was also notified by facsimile) to the Respondent pursuant to section 17(2) of the Act notifying of its intention to proceed to adjudication and providing a further 5 day period in which to provide a payment schedule.

Accordingly, the Respondent was provided with a second opportunity to provide a payment schedule under the Act on or before 24 August 2006. Again, it appears that the Claimant received no payment schedule from the Respondent by that date or at all.

The adjudication application was lodged with Adjudicate Today (an Authorised Nominating Authority under the Act) on 7 September 2006 within the timeframe required by the Act.

I am therefore satisfied that I have jurisdiction to determine the matter.

Determination of Amount Payable

Pursuant to section 9 and 10 of the Act I am required to determine the amount of the progress payment to which the Claimant is entitled with reference to the amount calculated in accordance with the terms of the contract or if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of the construction work carried out or undertaken by the Claimant under the contract.

I am satisfied that there are no express provisions within the construction contract which sets out how the amount of a progress payment is to be calculated. Accordingly I consider that I am required to calculate the amount due to the Claimant in accordance with sections 9(b) and section 10 (1)(b) of the Act.

During the course of the contract, the Respondent paid the Claimant \$2,085,063.00 as set out in the document “summary of invoices and payments” dated 5 September 2006. That summary also sets out the amounts alleged by the Claimant to be unpaid. The claimed amount of \$351,818.20 is made up of the following:

1.	\$44,651.20	– Submitted invoice 144 (balance);
2.	\$2,898.20	– Submitted invoice 244;
	\$47,549.40	Subtotal (incl GST)
3.	\$39,600.00	– #1 Type 1 [REDACTED];
4.	\$12,443.00	– # 2 Type 2 [REDACTED];
5.	\$62,550.00	– #3 Type 1 [REDACTED];
6.	\$17,593.00	– #4 Type 2 [REDACTED];
7.	\$14,631.00	– #5 [REDACTED];
8.	\$19,080.00	– #6&7 Type 3 [REDACTED];
9.	\$12,240.00	– #8 Type 3 [REDACTED];
10.	\$10,175.00	– #9 Type 3 [REDACTED];
11.	\$11,236.00	– #10 Type 3 [REDACTED];
12.	\$13,579.00	– #11 Type 3 [REDACTED];
13.	\$54,240.00	– #12 Type 1 – [REDACTED];
14.	\$9,241.00	- #13 Miscellaneous
	\$276,608.00	Subtotal Variations (excl GST)
	\$27,660.80	GST
	<u>\$304,268.80</u>	Subtotal Variations
	\$351,818.20	Total (incl GST)

In respect of the unpaid variations, the Claimant has provided very detailed submissions and supporting documentation to substantiate the valuations of each of these variations. Additionally, there is also contemporaneous directions and correspondence between the Claimant and the Respondent evidencing agreement in relation to these variations. At Tab L to the adjudication application, the Claimant has also attached five (5) pieces of correspondence which evidence discussion between the parties regarding contract variations with various different types of variations and the rates applicable to the identified variations. At annexure M, N, O, and P to the adjudication application there is also further correspondence between the parties evidencing acknowledgement of the variations issued by the Claimant.

In respect of the valuation of the variations, there appears to have been some attempt at settlement in relation to a lump sum payment for the variations (for which there is correspondence from both parties at attachment O), however from the submissions of the Claimant and from the correspondence itself, I am satisfied that the agreement was conditional upon a number of payments and issues that were not met by the parties.

Accordingly, I am not satisfied that there was an agreement between the parties regarding the valuation of these variations although I am satisfied that the Respondent has agreed that these were variations.

Behind the tab in the adjudication application titled “Unpaid variations 1 – 31” the Claimant has provided a very comprehensive breakdown, justification and photographic record referring to drawings of the additional work undertaken by the Claimant. Each variation item is sufficiently particularised and referenced to previous rates detailed in previous correspondence between the parties (particularly Tab L).

Having carefully reviewed the submissions of the Claimant and the supporting documentation in relation to the claimed amount, subject to my comments below, I am satisfied regarding the fact that the variations were agreed by the Respondent and I am satisfied with the Claimant’s valuation of the variations noting that due to the failure by the Respondent to issue a payment schedule despite two (2) opportunities to do so, there are no alternative submissions or valuations for me to consider.

As noted above, the Claimant has not deducted retention monies from the claimed amount despite the Revised Contract plainly including an amount for retention.

The Claimant has made submissions to the effect that it did not agree to the deduction of the retention monies, however I am satisfied by the Claimant's execution of the Revised Contract that it did agree to such a deduction.

The Revised Contract clearly provides the Respondent with the contractual right to deduct retention monies of 5% of the contract sum (being \$1,534,000.00 excluding GST) which amount is reduced to 2.5% of the original contract sum at practical completion of the construction contract.

There is evidence provided by the Claimant at attachments Tabs R to U whereby the Claimant and the Respondent have signed off guarantees and certifications regarding satisfactory completion of the work by the Claimant. The works also appears to have been certified by a third party (City Plan Services) certifying the satisfactory nature and completion of the work under the contract.

Clause 1.5 in Part D Standard Conditions to the Revised Contract states that 50% of the retention will be released at practical completion with the balance to be released upon the contractors request after project completion.

Having regard to the construction contract as I am required to do pursuant to section 22(2)(b) of the Act, I am satisfied that the Respondent is entitled to retain 2.5% of the original contract sum of \$1,534,000.00 (plus GST), being the amount of \$38,350.00 (plus GST). I am not satisfied that this clause extends to deducting retention monies from variations.

Therefore, based upon the submissions of the Claimant, I am satisfied that the contract work has been completed and that it undertook variations with the agreement of the Respondent, which variations have also been completed.

I therefore determine that the Claimant is entitled to the claimed amount of \$351,818.20 (incl GST) save that there should be an amount of \$42,185.00 deducted for retention. The total progress payment due to the Claimant is therefore \$309,633.20.

SUMMARY

Amount of Progress Payment

Based on the above reasons, the amount of the progress payment that should be made by the Respondent to the Claimant is \$309,633.20 (incl. GST).

Due Date for Payment

The due date for payment of progress payments is not clearly set out in the contract. The contract at Part C - Claiming Schedule includes milestone payments for the original contract sum of \$1,534,000.00, however I cannot find any provision within the construction contract governing payment of variations to the work under the contract. The contract summary at page 2 of 33 of the Revised Contract states payment terms of thirty (30) days which is consistent with the quotation provided by the Claimant (which is also included as a contract document).

Based on the above I am satisfied that the parties intended that progress payments be paid thirty (30) days after submission of an invoice and absent a provision in the contract governing claim dates for variation works, I am satisfied that the Claimant has an entitlement to make a claim for payment under the Act on and from the last business day of each month. Accordingly, given that the payment claim was served on 13 July 2006, I am satisfied that the due date for payment of any progress payment determined was 12 August 2006 (being thirty (30) days after service of payment claim).

Interest

The Act provides under section 11(2), that a claimant is entitled to interest in accordance with the contract or at the rate prescribed under the *Supreme Court Act 1970* in respect of unpaid judgment of the Supreme Court of New South Wales, whichever is the greater.

I can find no provision within the contract that provides an interest rate for overdue payments. Accordingly, I determine that the interest rate applicable to the amount determined is the rate prescribed under the Supreme Court Act in respect of unpaid judgments.

Adjudication Fees

Given my finding that the Claimant has been substantially successful, I also determine that the costs of the adjudication, being both the fees of the Authorised Nominating Authority and the Adjudicator, should be paid 100% by the Respondent.

████████████████████

Adjudicator

██████████ September 2006