

**DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL**

CITATION : 2019 WAIRC 00347

CORAM : SENIOR COMMISSIONER S J KENNER

HEARD : THURSDAY, 20 JUNE 2019

DELIVERED : FRIDAY, 5 JULY 2019

FILE NO. : RFT 2 OF 2019

BETWEEN : T&H WILKES PTY LTD
Applicant

AND

M.A. BUILDERS
Respondent

Catchwords : *Industrial Law (WA) – Owner-driver contract – Referral of dispute regarding outstanding payments – Principles applied – Order issued*

Legislation : *Civil Judgments Enforcement Act 2004*
Corporations Act 2001 (Cth)
Owner-Drivers (Contracts and Disputes) Act 2007, ss 3, 4(2), 5(2), 40(a)(i)
Owner Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010

Result : Declaration and order issued

Appearances:

Applicant : Mr A Dzieciol of counsel
Respondent : Mr M Daqui

Case(s) referred to in reasons:

Ram Holdings Pty Ltd v Kelair Holdings Pty Ltd [2018] WAIRC 00156; (2018) 99
WAIG 389

Reasons for Decision

- 1 A dispute exists between the applicant and the respondent in relation to the failure by the respondent to pay the balance of monies alleged to be owed under an owner-driver contract made in accordance with the terms of the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act). The applicant maintains that the total contract sum for work to be performed was in the amount of \$3,135. An amount of \$2,000 was paid by the respondent to the applicant on or about 4 October 2018. The applicant claims the balance of the contract sum in the amount of \$1,135.
- 2 Mr Wilkes is the owner/Director of the applicant. The applicant is engaged in cartage contracting, mainly carting sand for the use in building construction. The business runs five trucks. The trucks vary in capacity from 24 to 33 tonnes. Mr Wilkes, as a Director, and therefore an officer of a body corporate for the purposes of the *Corporations Act 2001* (Cth) gave evidence that his principal occupation is to drive one of the trucks for the applicant and to generally direct the work to be performed on behalf of customers. I am therefore satisfied that the applicant is an owner-driver for the purposes of s 4(2) of the OD Act.
- 3 I am also satisfied that in accordance with the decision of the Tribunal in *Ram Holdings Pty Ltd v Kelair Holdings Pty Ltd* [2018] WAIRC 00156; (2018) 99 WAIG 389, that despite the referral to the Tribunal under s 40(a)(i) of the OD Act being made after the termination of the owner-driver contract, the Tribunal has jurisdiction to deal with the applicant's claim.
- 4 Mr Wilkes further testified that in about July 2017 on the basis of a referral from another customer, A Plus Limestone, Mr Daqui of the respondent contacted him to supply sand for a building job in Darlington. (Mr Paul Smith from A Plus Limestone was also working on this particular job undertaking brickwork and the construction of a retaining wall). Mr Wilkes' evidence was that Mr Daqui contacted him by telephone and ordered building sand for the job. Mr Wilkes said that he quoted a price of \$17 per cubic metre, \$5 per cubic metre of which was for the sand and the balance, was for cartage.
- 5 It was Mr Wilkes' evidence that in accordance with the order placed by Mr Daqui, the applicant delivered building sand to the building site. Copies of invoices were tendered as exhibit A2. These tax invoices numbered 18515, 18516 and 18519 refer to the Darlington job address and record three deliveries of sand in the total amount of 190 square metres. Mr Wilkes testified that despite demanding payment, in accordance with a tax invoice dated 6 July 2017 tendered as exhibit A3, the respondent has only paid the sum of \$2,000. This amount was paid on about 4 October 2018.

- 6 Mr Daqui did not dispute the fact that he placed orders over the telephone for the applicant to deliver sand at the building site. It was Mr Daqui's contention, however, that Mr Smith of A Plus Limestone, who also ordered a finer sand from the applicant used for bricklaying, also used some of the sand ordered by the respondent to backfill the work performed in constructing the retaining wall. It was therefore Mr Daqui's view that his share of the purchase of the building sand of \$2,000 was a fair share and that Mr Smith of A Plus Limestone should be responsible for the balance.
- 7 Mr Smith also gave evidence. He said that he recalled the job in Darlington in July 2017. He was contracted to build a retaining wall. His evidence was that he did order 'brickie sand' from the applicant who he had used in the past for sand deliveries. His evidence also was he did not think that he ordered any other sand but was aware that Mr Daqui did pay for sand for his use on the building works. It was Mr Smith's evidence that he referred the respondent to the applicant and recommended the applicant as a supplier of sand. Mr Smith did say in his evidence that he used some of the sand that was delivered to the respondent on site. Mr Smith said that he received no contact from Mr Daqui about making any contribution towards the purchase price of the sand. This was confirmed by Mr Daqui, who said that he took no steps to contact Mr Smith either.
- 8 This case turns on the existence of an owner-driver contract, the parties to that contract and whether a debt under that contract is owing to the applicant. I am satisfied on the evidence that in or about July 2017 an oral owner-driver contract was entered into between the applicant and the respondent for the supply of building sand at the rate of \$17 per cubic metre. Furthermore, I am satisfied that the vehicles operated by the applicant were heavy vehicles for the purposes of s 3 of the OD Act and that whilst the contract entered into between the applicant and the respondent was for the supply of builders' sand, the services to be performed under the owner-driver contract predominantly related to the transportation of the sand for the purposes of s 5(2) of the OD Act. This is so given that of the total cost of \$17 per cubic metre, only \$5 per cubic metre of that amount was for the purchase of sand, with the balance being for cartage.
- 9 I am satisfied that the terms of exhibit A2 are evidence that the sand as ordered and transported to the Darlington building site were so delivered and the total value of the owner-driver contract was the sum of \$3,135. I am also satisfied on the evidence that on or about 4 October 2018, Mr Daqui paid to the applicant the sum of \$2,000, thus giving rise to an outstanding debt under the contract in the sum of \$1,135, as claimed by the applicant.
- 10 I appreciate that Mr Daqui felt somewhat aggrieved, given that it would appear on the evidence, that Mr Smith of A Plus Limestone did in fact use some of the builders' sand that was delivered to the site and that was ordered by the

respondent for the respondent's purposes. However, despite this, the Tribunal's jurisdiction is limited to enforcing owner-driver contracts entered into between owner-drivers and hirers. There is no capacity under the OD Act or the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* for the institution of third party proceedings to cover monies that may be owed by others in the present circumstances. There could be no argument that there was no owner-driver contract between the respondent and A Plus Limestone.

- 11 Therefore, despite some sympathy I have for Mr Daqui's position and that he feels aggrieved that Mr Smith ought to have made some contribution towards the cost of the purchase of the sand and its transport to the building site, I am only able to enforce the owner-driver contract I have found to have existed on the evidence. I am satisfied that the respondent does owe the applicant the outstanding sum of \$1,135 plus interest. Accordingly, the Tribunal will order the respondent to pay the applicant the sum of \$1,135 plus interest at the rate of six per cent in accordance with the *Civil Judgments Enforcement Act 2004*, from the due date of the tax invoice dated 6 July 2017 being 5 August 2017, to the date of the hearing in the sum of \$125.