

DETERMINATION NO. 16.09.02

**Adjudicator's Determination
pursuant to the
Construction Contracts (Security of Payments) Act 2004 (NT)**

Applicant

and

Respondent

I, Cameron Ford, determine on 17 March 2008 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is nil. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

Applicant:

Respondent:

Appointment as adjudicator

1. On 20 February 2009 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment.

Documents received by adjudicator

2. I received and have considered the application supported by the documents 1 to 4 listed in the index to the application, together with the response being documents 1 (submissions), 2 (with annexures A to T), 3, 4 and 5.

3. The response was delivered on 6 March 2009 making my determination due on 20 March 2009.

JURISDICTION

4. The respondent contests jurisdiction on one ground only, namely that a construction contract does not exist between the parties, as required by s 27 of the Act. I find that I otherwise have jurisdiction because:
 - (a) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;
 - (b) the application was made in the time prescribed – s 28; and
 - (c) the dispute was not the subject of an order, judgment or other finding – s 27(b).

Was there a contract?

5. The applicant alleges an oral contract made between a director, XX, on its behalf and YY, a director of the respondent on or about 20 October 2008. The applicant says it was agreed in a telephone conversation between them that the applicant would take over a contract held by another entity, ZZ (the previous company), with the respondent for the supply and fixing of roofs on a certain construction project. That company was facing serious financial difficulty and there was real doubt as to its ability to continue performing the contract.
6. In the response, YY swore a statutory declaration stating that no such agreement was made. He agrees that a conversation took place in which XX said he was starting a new company because the previous company was facing bankruptcy, and asked if the respondent would agree to the new company taking over the contract. YY says that he expressly refused that request because of difficulties the previous company had performing the contract, and that he told XX there was “no way” he would agree to a new company taking over the contract because of the “dramas” he had had with the previous company. He says that at least twice the previous company agreed for the respondent to pay suppliers directly because of the previous company’s inability to pay, and he annexes letters on the previous company’s letterhead giving its consent to those payments.

7. I have to decide whether an agreement was made in that telephone conversation. On the one hand I have the unsworn allegations of the applicant, and on the other the sworn response of the respondent. Unless there was contradictory objective evidence, or something inherently improbable or implausible in the sworn allegations, and all other things being equal, the fact of their being sworn would normally tip the balance of probability in their favour.
8. In this case there is more to persuade me that no agreement was formed. It is inherently improbable that the respondent would agree to “transfer” the contract to a new company when it had such difficulties with the previous company, and when on all the evidence the personnel behind the two companies would be the same. YY for the respondent attests to considering terminating the previous company’s contract before the question of a transfer arose, and it is highly unlikely he would have agreed to a new (yet to be created) company performing the contract.
9. The respondent raises the further point of the new company not being incorporated at the time the conversation took place, and points to s 131 of the *Corporations Act* (Cth) which states that a corporation may only benefit from a pre-incorporation contract if it ratifies the contract post-incorporation. As the respondent says, there is no evidence of ratification.
10. One matter which might have favoured the applicant is the fact that the respondent paid invoices rendered by the applicant in its own name after the date of the alleged agreement. In its sworn evidence, the respondent says its directors were unaware of the applicant’s name on the invoices and at all times until 4 March 2009 thought it was paying invoices of the previous company. The respondent admits that its accounts administrator knew of the new company’s name on the invoices and that processing of the invoices thereafter was an administrative error.

11. In my view, the fact that the respondent paid invoices submitted in the applicant's name, does not of itself unequivocally indicate a contract between those parties. There could be a number of explanations for such a practice, one of which is the respondent's non-awareness. The applicant has not suggested the respondent is estopped from denying the alleged contract because of the payments, nor is there remotely sufficient evidence in the application to indicate such an estoppel.

Conclusion

12. I am of the view, therefore, that on the material before me and for the purposes of this adjudication, on the balance of probabilities no contract was formed between the parties as alleged by the applicant, and that I do not have jurisdiction to adjudicate the dispute.
13. If I had jurisdiction I would be persuaded by the respondent's argument that the invoices founding the application do not appear to be calculated by reference to the written contract with the precious company, as required by s 5(2)(b) of Division 4 of the Schedule to the Act.

Preliminary point

14. A preliminary point arose during the time for service of the response, when, immediately after I wrote to the parties advising of receipt of the application and detailing administrative matters, a director of the respondent replied by email setting out certain factual contentions and asking if it was worthwhile pursuing the adjudication.
15. I invited submissions from the parties as to whether I was obliged to consider that email to be the respondent's response, and, if I was, whether s 29 precluded the respondent from serving further material unless I sought it under s 34. Because there is no procedure under the Act for dealing with preliminary matters, I said I would provide reasons in the determination for continuing as I did.

16. Initially the applicant said:

The applicant submits that the legislative procedure is unambiguous. The applicant seeks strict compliance with the legislated procedure and therefore does not consent to any further and additional material of any kind be taken into consideration by the Adjudicator.

17. A day later the applicant said:

1. The Applicant concurs with the adjudicators' construction of the Act, namely that the Respondent is only entitled to make one response (section 29 of the Act)

2. Notwithstanding paragraph 1. above the Applicant consents to the Respondent being able to provide additional material on or before 6 March 2009.

3. The Applicant invites the Adjudicator (pursuant to section 34(2)(a) of the Act) to request the Applicant to provide by 6 March 2009 further information or documents directed to the question of whether there was a construction contract between the Applicant and the Respondent.

The Applicant has further documentary material to hand evidencing the performance of the construction contract by the Respondent.

18. Lawyers for the respondent submitted that the email was not intended to be the response, but rather an observation as to the efficacy of the adjudication. If the email was to be considered the response, it was submitted that the Act does not require the response to be comprised of documents served together.

19. In my view, the email was not and was not intended to be the respondent's formal response. It came directly from the respondent rather than from its lawyers who prepared the response, it was sent only a few hours after I sent my initial administrative letter, it did not profess to be the response, and it contained nowhere near the amount or type of information required of a response by the Act.

20. For those reasons I disregarded all of the information in the email and have considered only the information provided in the formal response served by the respondent's legal advisers. I do not have to, and I do not, decide whether all parts of a response must be served contemporaneously.

21. I did not accede to the applicant's suggestion that I accept material from the respondent and then request further information from the applicant. In my view, the effect of s 28(2) is that an applicant should include all the required information in the application, and not rely on the adjudicator possibly seeking further information to bolster the application. Particularly is this so of information going to the existence and terms of the contract, a fundamental of jurisdiction. There may be cases where an applicant could not reasonably anticipate facts or submissions in a response and it would be appropriate to seek further information from the applicant, but this is not one of them. (Of course, that is not the only circumstance in which an adjudicator could seek further information from a party under s 34(2)). Section 28(2) says:

- (2) The application must –
 - (a) be prepared in accordance with, and contain the information prescribed by, the Regulations;
 - (b) state the details of or have attached to it –
 - (i) the construction contract involved or relevant extracts of it; and
 - (ii) any payment claim that has given rise to the payment dispute; and
 - (c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

DETERMINATION

22. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is nil.
23. Neither party sought payment of its costs. There is nothing in the conduct or submissions of either party to attract the operation of s 36(2).
24. I draw the parties' attention to the slip rule in s 43(2) if I have made a correctible error.

Dated: 17 March 2009

[signed]

CAMERON FORD

Registered Adjudicator