

## Adjudicator's Dismissal

### Pursuant to the Construction Contracts Act 2004

Adjudication Number	<b>34.14.03</b>
Prescribed Appointor	<b>RICS Dispute Resolution Service.</b>
Adjudicator	<b>Colin Bond (Adjudicator 34)</b>
Applicant:	<b>[redacted]</b>
Respondent:	<b>[redacted]</b>
Project:	[redacted]
Amount to be paid by Respondent	<b>Nil</b>
Due Date For Payment	N/A
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	22 <sup>nd</sup> December 2014
Payment Claim	Claimed Amount : <b>\$977,211.50</b> including GST Dated : 25 <sup>th</sup> July 2014 served on respondent 5 <sup>th</sup> August 2014
Notice of Dispute	Dated: 19 <sup>th</sup> August 2014
Adjudication Application	Dated: 7 <sup>th</sup> November 2014 served on respondent 10 <sup>th</sup> November 2014
Adjudicator Acceptance	Dated: 13 <sup>th</sup> November 2014
Adjudication Response	Dated: 24 <sup>th</sup> November 2014

**Table of Contents:**

The Determination or Dismissal ..... 3

Background..... 3

Appointment..... 3

Material ..... 3

Jurisdiction..... 4

1 a. Clause 14.1 of the Subcontract governs the making of payment claims under the Subcontract. 5

2 b. The applicant did not comply with the requirements of clause 14 in submitting the payment claim and the applicant does not contend that it did 5

3 a. The applicant does not assert that the respondent ever represented to it that it was not required to comply with clause 14 of the Subcontract. 5

4 b. I agree with the evidence provided by the respondent that the fact that respondent appears to have proceeded to process and pay claims submitted otherwise than in accordance with the requirement of the Subcontract when it was not required to do so, may be characterised as indulgence and cannot ground an estoppel. 5

5 a. The applicant submits that the respondent has waived its right to rely on the strict terms of the Subcontract. 5

6 b. I prefer the respondent’s arguments and evidence because: 5

7 • if in the past the respondent had proceeded to process and pay claims submitted otherwise than in accordance with the requirement of the Subcontract, the respondent granted an indulgence and did not waive the clause; 5

8 • the applicant’s obligation to comply with clause 14 of the Subcontract arises each month concerning each payment claim under the Subcontract and any waiver concerning past monthly claims is not an election concerning later payment claims or the payment claim the subject of this adjudication; and 5

9 • clause 4.3 of the Instrument of Agreement of the Deed of Variation and Restatement provides that any waiver: 5

10 1. must be in writing signed by the party giving the waiver; and 5

11 2. of a right on one or more occasions does not operate as a waiver of that right if it arises again. 6

12 'This deed can only be amended, supplemented, replaced or novated by another document signed by the parties, or in the case of a waiver, waived by another document signed by the party whose rights are waived'. 6

Adjudication costs ..... 6

Confidential information ..... 7

## The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), for the reasons set out in this dismissal, determine that:
  - a. The amount to be paid by the respondent to the applicant is **Nil**
  - b. Interest is not applicable

## Background

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the provision of [*works description and project site details redacted*] (the Project).

## Appointment

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 12<sup>th</sup> November 2014 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 13<sup>th</sup> November 2014.

## Material

6. The following material was provided to me:
  - Adjudication Application dated 7<sup>th</sup> November 2014 served on respondent 10<sup>th</sup> November 2014
  - Adjudication Response dated 24<sup>th</sup> November 2014
7. On 19<sup>th</sup> November 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties. The following responses were received:

- 
- The respondent's further submission dated 19<sup>th</sup> November 2014
  - The applicant's further submission dated 19<sup>th</sup> November 2014
8. On 26<sup>th</sup> November 2014 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties in respect of the service of the adjudication application on the respondent. The following responses were received:
- The applicant's further submission dated 27<sup>th</sup> November 2014
  - The respondent's further submission dated 28<sup>th</sup> November 2014

### **Jurisdiction**

9. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
10. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
11. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
12. The respondent has stated in its response the its primary contention is that the adjudicator is required by section 33(1)(a) of the Act to dismiss the Adjudication Application without making a determination of the merits because the payment claim was not submitted in accordance with and does not comply with the contractual pre-conditions in clause 14 of the Subcontract. The respondent states that the applicant does not dispute that it did not comply with clause 14. As a result, "no payment dispute" under the Act to be adjudicated has arisen and therefore the respondent considers the Adjudication Application must be dismissed.
13. At paragraph 54 of the Adjudication Application the applicant confirms that throughout the course of the Project only 3 payment claims were dated on the 5<sup>th</sup> business day of the month (payment claims 8, 17 and 32).
14. On my own analysis of the Subcontract conditions, clause 14.1(a) states that the Subcontractor may submit payment claims on the date in each month stated in Schedule 1. Schedule 1 states the Subcontractor to submit Payment Claims "the 5<sup>th</sup> Business Day of each calendar month".
15. Both the applicant and the respondent agree that it is a condition to the making of a valid adjudication application that a 'payment dispute' has arisen within the 90 days prior to the submission of the adjudication application<sup>1</sup>.

---

<sup>1</sup> Refer to applicants submission at paragraph 31(b) of the Adjudication Application

- 
16. Under section 8(a) of the Act a *'payment dispute'* arises *'when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed'*.
17. I agree with the respondent's statements in the Adjudication Response that the applicant does not dispute that the payment claim did not satisfy the requirements of clause 14 of the Subcontract
- a. Clause 14.1 of the Subcontract governs the making of payment claims under the Subcontract.
  - b. The applicant did not comply with the requirements of clause 14 in submitting the payment claim and the applicant does not contend that it did<sup>2</sup>.
18. I agree with the respondent's statements in the Adjudication Response in relation to estoppel
- a. The applicant does not assert that the respondent ever represented to it that it was not required to comply with clause 14 of the Subcontract.
  - b. I agree with the evidence provided by the respondent that the fact that respondent appears to have proceeded to process and pay claims submitted otherwise than in accordance with the requirement of the Subcontract when it was not required to do so, may be characterised as indulgence and cannot ground an estoppel.
19. I agree with the respondent's statements in the Adjudication Response in relation to waiver
- a. The applicant submits that the respondent has waived its right to rely on the strict terms of the Subcontract.
  - b. I prefer the respondent's arguments and evidence because:
    - if in the past the respondent had proceeded to process and pay claims submitted otherwise than in accordance with the requirement of the Subcontract, the respondent granted an indulgence and did not waive the clause;
    - the applicant's obligation to comply with clause 14 of the Subcontract arises each month concerning each payment claim under the Subcontract and any waiver concerning past monthly claims is not an election concerning later payment claims or the payment claim the subject of this adjudication; and
    - clause 4.3 of the Instrument of Agreement of the Deed of Variation and Restatement provides that any waiver:
      1. must be in writing signed by the party giving the waiver; and

---

<sup>2</sup> See paragraph 52 of the Adjudication Application

- 
2. of a right on one or more occasions does not operate as a waiver of that right if it arises again.
20. I agree that the applicant is obliged to comply with clause 14 every month in relation to the submission of every payment claim. However I consider that by processing and paying a non-compliant payment claim concerning one month the respondent waived the requirement to comply with clause 14 concerning that month, an election was made only concerning that particular payment claim and not the payment claims to be submitted in future months.
21. The claimant has not identified any evidence that suggests that the respondent has waived compliance with clause 14 generally or concerning the submission of future payment claims.
22. Clause 3.1 of the Instrument of Agreement of the Deed of Variation and Restatement provides: 'This deed can only be amended, supplemented, replaced or novated by another document signed by the parties, or in the case of a waiver, waived by another document signed by the party whose rights are waived'.
23. I agree with the respondent's position in that the Deed of Variation and Restatement is an example of a document which varied the terms of the Subcontract. The parties have never executed a document which varied or waived clause 14.
24. The applicant has produced no evidence which could be said to constitute a waiver of the obligation to comply with clause 14 concerning this payment claim.
25. In conclusion I therefore agree with the respondent's stated primary contention in that I should dismiss the Adjudication Application without making a determination because the payment claim was not submitted in accordance with and does not comply with the contractual pre-conditions in clause 14 of the Subcontract.

### **Adjudication costs**

26. Pursuant to section 36(1) of the Act I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.
27. The adjudication costs for this determination amount to 36.25 hours @ \$325.00 plus GST = \$12,959.38 including GST and as stated in paragraph 26 above, is to be paid equally by both parties. Tax invoices will be issued accordingly.

**Confidential information**

28. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
- a. The identity of the parties.
  - b. The identity and location of the project.



Signed: .....

Colin Bond – Registered Adjudicator No. 34

Dated: 22<sup>nd</sup> December 2014