

## **Adjudicator's Determination**

### **Pursuant to the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004**

#### **Adjudication 18.13.01**

**(Applicant)**

And

**(Respondent)**

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, dismiss the Application, served 11 October 2013, under Section 33(1)(a)(ii) of the Act
2. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

**Appointment of Adjudicator**

3. The Applicant served the Adjudication Application on the Master Builders Association Northern Territory 11 October 2013.
4. I was appointed as Adjudicator by the Master Builders Association Northern Territory 16 October 2013. The parties were notified of the appointment by the Master Builders Association that same day.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

**Documents Regarded in Making the Determination**

6. In making the determination I have had regard to the following.
  - 6.1. The provisions of the *Construction Contracts (Security of Payments) Act 2004*. (as in force 21 September 2011)
  - 6.2. Application from the Applicant dated 11 October 2013.
  - 6.3. Response from the Respondent dated 25 October 2013.

**The Adjudication Application**

7. The Adjudication Application for the September claim was served on the Respondent 11 October 2013 and consists of the following documents;
  - 7.1. Adjudication Application, and
  - 7.2. 3 A4 lever arch files of supporting documentation.

**The Responses**

8. The Adjudication Response was served on the Applicant and the Adjudicator 25 November 2009 and consists of the following documents;
  - 8.1. Respondent's reply to the Application, and
  - 8.2. 1 A4 lever arch file of supporting documentation.

**Jurisdiction**

9. The dispute arises out of a contract between the parties for the Respondent to [project description] at the [project site] in the Northern Territory for the Applicant.
10. The parties agree the contract is subject to the *Construction Contracts (Security of Payments) Act*.

11. The parties are satisfied that the Adjudicator's statements of no conflict to declare are reasonable within the meaning of the Act.
12. The Respondent contests jurisdiction on the basis of the dispute not being "in accordance with Section 28 of the Act".

### **Payment Claim dated 27 September 2013.**

13. The Applicant submitted an Application for Adjudication of a payment dispute with the Respondent in relation to a payment claim submitted in the form of a Tax Invoice dated 27 September 2013.
14. The Applicant and the Respondent agree that under the terms of the construction contract the 27 September 2013 Tax Invoice constitutes a payment claim due for payment within 30 days. The Respondent confirms the payment due date as 27 October 2013.

### **Contested Jurisdiction**

15. The Applicant argues that notice issued by the Respondent 30 September 2013 is sufficient to be defined as a notice of disputed payment and for the purposes of the Act defines the commencement of a payment dispute between the parties.
16. The Respondent cites *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor [2012] NTSC 22* where, at paragraph 20, Barr J states:

"In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (nonpayment, rejection, dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the 'payment dispute' does not arise until the due date for payment."

17. The Applicant submits that an application for adjudication in accordance with s 28 of the Act requires that a "payment dispute" as defined in the Act must exist.
18. The issue then is a fundamental question of jurisdiction. In *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd [2009] NTCA 4*, at paragraph 13 Mildren J states:

"I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction..... In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits".

19. The decisions cited provide a clear direction that in the circumstances of this application no payment dispute exists and the adjudicator does not have jurisdiction to determine on the merits. As the adjudicator cannot err in this regard and the correct interpretation of the Act is a matter for the Courts, I see no alternative to dismissing the Application under Section 33(1)(a)(ii) of the Act.

### **Adjudicator's Costs**

20. Clause 36 (1) of the Act requires the parties to bear their own costs.
21. Clause 36 (2) of the Act empowers the adjudicator to award costs if he is satisfied that the submissions of a party are unfounded or that the conduct of a party is frivolous or vexatious.
22. I am satisfied that the submissions from both parties are neither frivolous nor vexatious.
23. I therefore determine that adjudicator's costs are to be shared equally by the parties.

### **Conclusions**

24. For the reasons set out in the Adjudication, I determine as follows;
  - 24.1. The Application is dismissed under Section 33(1)(a)(ii) of the Act.
  - 24.2. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher  
**NT Registered Adjudicator No 18.**  
**28 October 2013**