DETERMINATION NO. 16.08.01

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant

and

Respondent

I, Cameron Ford, determine on 16 January 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 $166,599.68, inclusive of GST being the amount owing of $158,172.30 plus interest of $2,366.38 to today and costs of $6,061.00. Interest accrues on the sum of $160,373.30 at the rate of $46.13 per day from today, 16 January 2008. The sum of $166,599.68 is payable immediately. 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:

Application and response

1. By application dated 17 December and served 19 December 2007, the applicant seeks an adjudication of a payment dispute over project management fees for rectification work to a building.

2. On 31 December 2007 a director of the respondent ("director 1")attempted to e-mail me a bundle of documents. That e-mail was rejected by my e-mail server and on 2 January 2008 that director delivered a bundle of documents to my chambers. Of some importance is the covering e-mail, a copy of which was provided on 2 January 2008 with the bundle of documents. That email says:

> Thank you for your correspondence regarding the above matter.
>
> We attach our response to the application for your consideration.

3. A covering letter dated 31 December 2007 was also included with the bundle of documents received on 2 January 2008. That letter is on the respondent's letter head and signed by director 1. It states:

> We refer to correspondence regarding this matter dated 21 December 2007.
>
> To assist you in your consideration of this matter we attach copies of the following documentation:
>
> 1. JD agreement between [party 1] and [party 2] and the respondent dated 24 October 2001.
>
> 2. Minutes of the meeting dated 21 June 2006.
>
> 3. Advice received from [firm of lawyers] date 21 August 2006.
>
> Please contact us if you have any queries.

4. On 7 January 2008 I received a letter from a different director of the respondent ("director 2) on his own letterhead in which he said:

> I refer to your e-mail of 7 January 2008 and to your previous advice that the last date for submissions to be lodged was 8 January 2008.
>
> Please find enclosed a copy of [the respondent's] responses to [the applicant's] Application for Adjudication and supporting documentation. The supporting

documentation will be delivered to your Chambers tomorrow, ie the last day for the documentation to be provided to you.

You will note that the matter is very complex and if you require further documentation or information, please do not hesitate to ask.

I otherwise look forward to hearing from you in due course.

[Signed as a director of the respondent]

5. On 8 January 2008 I received an e-mail from the Chairman of the board of directors of the respondent in which he said:

> I am the chairman of the respondent company.
>
> I have today received a copy of the document entitled "Response to application for adjudication" of which one of the respondents directors has forwarded to you.
>
> I should advise that the views/submissions as set out in that document are his own and have not been made with the authorities/approval of (the respondent)"

6. On 9 January 2009 I received a letter from director 2 in which he said:

> The chairman advised you yesterday afternoon that the response that I provided to you as a Member of the [entity] Management Committee and a Director of [the respondent] is my own views/submissions and has not been made with the authority/approval of [the respondent]. You will note that [the Chairman] has not disagreed with any of the submissions outlined in the response.
>
> The reason that I provided the response to you was to protect the interests of [the respondent and another entity] as it had become obvious that no other response was going to be given to you before the expiry of the time limit. The documents that were provided to you on 31 December 2007 were just that, ie copies of documents.
>
> From the extensive material that I have provided; you would be aware of the complexities and conflicts of interest etc that surround this matter and had immobilised [the respondent] from defending a claim from one of its own directors, albeit an alternate director, against the [entity].

> I look forward to your adjudication and have previously advised all other parties that I will abide by your decision provided a proper response and supporting documents have been considered by you.

7. That same day, the solicitor for the applicant emailed me and said that:

> Given the indication from [the chairman] that whatever response you received yesterday from [director 2] is not a response on behalf of [the respondent], I ask that you disregard the said document and proceed with your determination based on the materials and information provided by [the respondent] on 31 December 2007.

8. My first task them used to determine to what and whom I may have regarded in making my determination.

9. Under s 29 of the Act, the respondent must deliver its response within 10 working days of service on it of the application. There is no provision in the Act for the applicant or respondent to provide further material unless requested to do so by the adjudicator.

10. The documents attempted to be e-mailed to me on 31 December 2007 and in fact delivered on 2 January 2008 under cover of the e-mail as set out above are expressed to be the response of the respondent. I have received nothing from the respondent or its chairman since then to indicate that e-mail or those documents were provided without the authority of the respondent. Indeed, the documents provided by the director on 7 January 2008 indicate, but do not expressly state, that the documents provided on 2 January 2008 accorded with the respondent's position on the application.

11. Sections 128 and 129 of the *Corporations Act* (Cth) entitles anyone dealing with a company to assume that its internal procedures and requirements have been complied with and that a director purporting to act on behalf of the company has the authority to do so. This is a statutorily enshrinement of the common-law indoor management rule.

12. Thus, in the absence of anything suggesting the documents of 2 January 2008 were delivered without authority, I must assume that they were provided with authority. It follows that the documents were the response of the respondent.

13. That in itself means I cannot have regard to the "response" and documents provided on 7 January 2007 made by the director 2. However that same position is reached by another route.

14. Until I received the e-mail from the Chairman on 8 January 2008, I was entitled to assume that the "response" received on 7 January was authorised by the respondent. However that presumption was rebutted by the chairman's e-mail of 8 January. Importantly, director 2 tacitly accepted in his letter of 9 January that the "response" was provided without the authority of the respondent. In the words quoted above, he does not assert that he had the authority of the respondent to deliver the "response" but provides his reason for so doing.

15. For two reasons, therefore, I am of the view that I cannot by law have regard to the "response" and documents provided by director 2 on 7 January 2008. I must disregard them for the purpose of making my determination.

16. The materials upon which I make my determination are the application itself dated 17 December 2007 and the documents attached to the respondent's letter and e-mail of 31 December 2007, set out above, received by me on 2 January 2008.

17. My determination is due 10 working days after service of the response – it is therefore due today, 16 January 2008.

Jurisdiction

18. While the respondent has not challenged my jurisdiction to determine the application, I should advert to it briefly. I believe I have jurisdiction in this application because:

    18.1 The contract is a construction contract – it is a contract for management services of rectification work on a building and therefore within s 5(1)(c) or (d).

18.2 the work is within s 6(1)(c) or (e) and is therefore construction work;

18.3 the contract was entered into after 1 July 2005;

18.4 the application is within time, having been served within 28 days after the money became due under the agreement (20 days from the date of the invoice of 5 December 2007); and

18.5 there has been no previous order, judgement or determination of the dispute.

19. Before accepting the appointment as adjudicator, I notified the parties that I knew well some of the directors of the respondent. I also informed them that I had undertaken legal work for director 2 and his companies a number of years ago but that I was not aware of any information obtained during the course of those cases which would prejudice or advantage either party in this adjudication. Neither party objected to my accepting the appointment as adjudicator and accordingly I accepted it.

Merits

20. The applicant alleges an agreement with the respondent for his provision of management services in return for a payment of professional fees by the respondent. The application is set out in the form of but not identical to a pleading with a tax invoice and a monthly summary of time sheets for the work said to be done by the applicant attached.

21. Crucially, the respondent has not disputed the:

21.1 existence of the agreement;

21.2 amount of hours alleged to have been worked by the applicant;

21.3 hourly rate claimed by the applicant; or

21.4 total amount claimed by the applicant.

22. On the face of the invoice rendered by the applicant, the work has been done and charged at the agreed rate of $130 per hour. There is nothing to suggest the work has not been done.

23. In response, the respondent provides a copy of the relevant resolution and a solicitor's advice that the resolution was valid. That resolution by the respondent resolved to pay the applicant and director 1 $130 per hour for management services provided. The respondent (in the documents to which I may regard) provides no comment on the applicant's claim nor does it provide any evidence to counter the amount claimed. If there was something to be said on those or other matters, the respondent is uniquely placed to say it.

Conclusion

24. On the face of the application the amount is due as defined by the Act. It was due from 25 November 2007. There is nothing to suggest the applicant is not entitled to the amount claimed.

25. I therefore award the applicant $158,172.30 plus interest thereon at 10.5% per annum from 25 November 2007 to date, 16 January 2008, which is $2,366.08. The total amount due today is therefore $160,538.38.

26. Interest accrues on $158,172.30 at the rate of $45.50 per day.

27. For three reasons, and I will consider whether my determination would have been different if I had considered the "response" provided by director 2 on 7 January 2008. Those reasons are, firstly, if the matter is reviewed and set aside by a court it may not have to be referred back to me or another adjudicator; secondly, potentially to save the parties costs of a review by a court, and thirdly because of director 2's statement that he has advised all other parties that he would abide by my decision provided a proper response and supporting documents had been considered by me.

28. I think the answer is very shortly found in a letter of 21 December 2007 from one of the members of the management committee to director 2 in which it is said:

> You will recall that, at its meeting on 11 October 2007, the management committee of [the respondent] agreed to pay [the applicant] $150,000 in full settlement of his claim for management fees, subject to [director 2] inspecting the documentation relating to the management fees.
>
> …
>
> As you are aware, neither of these matters are of concern to us. [The writer] has previously inspected the relevant records and is satisfied that a payment of $150,000 in settlement of [the applicant's] claim is appropriate. It is immaterial to us whether the management fees are invoiced by [the applicant] or [another company]. From our point of view, that is an internal matter which should be resolved by the [other parties] and should not delay payment of the management fees.
>
> We are annoyed and concerned that the dispute between the [other parties] has delayed payment to [the applicant] of the amount agreed in principle by the management committee and led to the issue of the Application.
>
> We believe that the agreed amount of $100,000 should be paid by [the respondent], subject to review arrangements agreed at the management committee.

29. This letter reflects minutes of the meeting of the management committee on 11 October 2007, a draft of which is included in the "response".

30. In my view, those minutes and the letter show an acceptance by the respondent of the applicant's claim and provide no reason why it should not be allowed. I do not think it is material that they refer only to the amount of $150,000 instead of the full amount claimed by the applicant. One would expect that to be a merely commercial matter, and in fact indicates an acceptance of a liability for the claim.

31. By at least the resolution of 11 October 2007, and probably also by the resolution of 21 June 2006, the respondent corporation has accepted the applicant's entitlement to be paid for the work in his application. The real dispute in this case is between one director and the remaining directors of the respondent. That is a matter which I cannot go into on this application – I cannot look behind the corporate resolutions.

32. That being the case, my conclusion would be no different if I had regard to the materials in the "response" than if I disregarded them. I hope this may satisfy the parties and avoid the further incurrence of costs.

Costs

33. On the materials provided in the response, the respondent had no answer to the application, and no reason was provided as to why the invoice was not paid.

34. In my view, the non-payment of the invoice, the respondents forcing the applicant to bring this application, and the materials provided in the response fall within s 36 of the Act as frivolous or vexatious conduct (non-payment and requiring adjudication) and unfounded submissions (the material in the response). In my view, this is an appropriate case for the respondent to pay all of the costs of the applicant, including the applicant's share of my costs of the adjudication (s 46).

35. To the amount of the claim, then, must be added the $550 the applicant has paid for my costs of the adjudication, together with $3,861 for the applicant's legal costs, a total of $4,411. I enquired of his solicitor as to the amount of those costs and was provided with that figure, which in my experience and view is a fair and reasonable figure for preparing the application and dealing with the various documents and correspondence received in response. It amounts to 117 units of 6 minutes (therefore 11.7 hours) at the rate of $30 per unit, plus GST.

36. This figure for costs is obviously what would be referred to in litigation as solicitor-client costs. In my view there is clear power in the Act to award costs at this level given the wording of s 36 that "the adjudicator may decide that the other party must pay some **or all** of those costs" (emphasis added). That view is also supported by the preconditions to an award of costs, similar to those applicable before an order for solicitor-client or indemnity costs may be made in litigation.

37. I am therefore of the view that it is appropriate to award the full costs of the applicant, given that they seem reasonable and justifiable both as to the hours spent and the rate at which they are charged. These are not simple matters,

being reasonably technically complex, and must be prepared quickly. This matter also produced some unusual questions, with the different responses being delivered by different directors.

38. I sought from the respondent $1,650 for my costs of the adjudication, being 6 hours at $250 per hour plus GST of $150. I initially sought the costs of two hours each from the parties, however it then took me a further four hours to consider the "response", the various correspondence from the different directors within the respondent and the issues they raised. For the reasons given above, it is appropriate that the respondent pay all of those costs.

39. However the respondent did not pay that amount by 16 January 2008, the date by which my determination was due. I was therefore forced to exercise the power given under section 46 (3) of the Act which says:

> Despite subsection (1), an appointed adjudicator may refuse to give notice of the adjudicator's decision or determination under section 33(1) or 36(2) or subsection (9) until the adjudicator has been paid and reimbursed in accordance with subsection (1).

40. On 16 January 2008 I also invited the applicant to pay those costs indicating that if he did, I would add that amount to any amount found to be owing by the respondent to the applicant. The applicant accepted that invitation and accordingly to the amount owing by the respondent must be added the amount of $1,650, making the total costs $6,061 and the total amount owing to be $166,599.68.

41. The calculations are therefore:

Claim:	$158,172.30
Interest:	$ 2,366.38
Costs:	$ 6,061.00
Total:	$166,599.68

42. I draw the parties' attention to the slip rule in s 43(2) if I have made a miscalculation or some other correctible error.

Determination

43. In accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) I determine that the amount to be paid by the respondent to the applicant is $166,599.68, inclusive of GST being the amount owing of $158,172.30 plus interest of $2,366.38 to today and costs of $6,061.00.

44. As to future interest, section 41(2) says:

> Unless the determination provides otherwise, interest at the rate prescribed by the Regulations must be paid on the part of the amount that is unpaid after the date stated in the determination.

45. I think this subsection requires interest to be paid on that part of the costs which have been already paid. The applicant has paid $550 for his own costs of the adjudication plus $1,650 for the respondent's costs of the adjudication. For calculating future interest, I should add the total of those figures, $2,200, to the sum of $158,172.30. Future interest is therefore calculated $160,373.30. I do not add to that figure the professional costs of the applicant's solicitors as, to my knowledge, those costs have not yet been paid. I was provided with a draft bill when I requested evidence of the amount of those costs.

46. For the purposes of s 41(2) I expressly state that I do not award post-determination interest on the applicant's professional costs not yet paid to his solicitors ($3,861) nor on interest on the amount outstanding to the date of determination ($2,366.38). This determination therefore "provides otherwise" in terms of s 41(2).

47. Interest of 10.5% per annum accrues on the sum of $160,373.30 at the rate of $46.13 per day from today. The sum of $166,599.68 is payable immediately.

Dated: 16 January 2007

Released: 18 January 2008

[signed]

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CAMERON FORD
Registered Adjudicator