DETERMINATION NO. 16.07.02

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act (NT)

I, Cameron Ford, determine on 2 August 2007 that the amount to be paid by the respondents to the applicants is $32,789.76 being the amount owing of $32,163.93 plus interest to 2 August 2007 of $625.83. That amount is payable immediately. Interest accrues at the rate of $13.22 per day from 2 August 2007. 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:

Applicants: Respondents:

c/- Ward Keller
DARWIN NT 0801
T: 8981 2971
F: 8983 3532
E: nicoledunn@wardkeller.com.au

Appointment as adjudicator

1. On 23 July 2007 I was appointed adjudicator by the Institute of Arbitrators and Mediators to determine this application under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act). That Institute is a prescribed appointer under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

2. I wrote to the parties advising of and inviting any objections to my appointment. The parties did not object and, knowing of no reason why I should refuse, I accepted the appointment.

Time for determination

3. The application was served on 2 July 2007 and a response was served on 16 July 2007. A determination was therefore due 10 working days after that last date, which was 31 July 2007 (because of an intervening public holiday). Due to administrative difficulties, I did not receive the documents supporting the application until 30 July and so sought and obtained from the Registrar an extension of time to 3 August 2007 to provide the determination.

Documents received by adjudicator

4. I received from the applicants and have considered a document entitled "Application" dated 2 July 2007 and the supporting documents set out in the attached list of documents.

5. On 16 July 2007 the respondents served on the applicants' solicitors by facsimile a document entitled "Response" which included some answers to allegations in the Application, a "Summary of our view" and a list of documents.

6. On the cover sheet of the facsimile and directly under the date 16 July 2007, the respondents wrote "Full documents will be delivered tomorrow". Those documents were in fact delivered the next day.

7. The difficulty for the respondents is that the Act only allows them 10 working days in which to serve a response, and any document served after that time cannot be considered.

8. Section 29 of the Act requires the respondent to serve its response within 10 working days after service on it of the application. Subsection (2) says:

> "(2) The response 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, any rejection or dispute of the payment claim that has given rise to the 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."

9. Three things may be noted – the word "must" in the opening phrase, the requirement to include details of rejections or disputes, and the requirement to have attached **all** the information, etc.

10. Reference should also be made to s 34(1) which states:

> "(1) For making a determination, an appointed adjudicator –
>
> (a) must act informally and if possible make the determination on the basis of –
>
> (i) the application and its attachments; and
>
> (ii) if a response has been prepared and served in accordance with section 29, the response and its attachments; …"

11. A response being "served in accordance with s 29" is therefore a precondition to its being considered. If that condition is not met, I cannot consider materials extraneous to the response in making my determination: *Reiby Street Apartments v Winterton Constructions* [2006] NSWSC 375 at [69].

12. Combining the requirements of ss 29(2) and 34(1), I do not believe I have the power to consider material provided by the respondents after 16 July 2007.

13. Accordingly, the only material from the respondents which I have considered in making this determination is the document entitled "Response" referred to at [5] above.

14. That does not mean, however, that the applicants are automatically entitled to the amount they claim. I must consider the materials and make a determination of the claim on the balance of probabilities: *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 at [82]; *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [35].

Jurisdiction

15. Neither party addressed my jurisdiction to make a determination. I consider I have jurisdiction because:

    (a) there was a construction contract – ss 5 & 6;

    (b) the contract was entered into after the Act commenced – s 9(1);

    (c) the site of the work or provision of materials was in the Territory – ss 5(1)(a), s 6(1) and s 4;

    (d) a payment dispute had arisen – s 8;

    (e) the application had been served within 28 days after the payment dispute arose – s 28(1); and

    (f) the dispute was not the subject of an order, judgment or other finding – s 27(b).

Merits

16. The applicants contracted to build a dwelling house for the respondents at Howard Springs in the Northern Territory. In the application they claim:

The final payment	$30,018.00
A variation payment less amount conceded	$ 2,143.95
A further variation	$ 7,445.60
Legal costs to date	$ 5,500.00
Total	$45,107.55

Final payment $30,018

17. The final payment of $30,018 was invoiced to the respondents on 5 June 2007. Under the contract it was due to be paid on 15 June 2007. The respondents refused payment on the basis that the invoice was premature and that the work invoiced had not been completed. They paid the final payment to the trust account of the applicants' solicitors, but are refusing to authorise payment from the trust account to the applicants on the same basis.

18. The respondents say that the work was not complete until 25 June 2007, with the following remaining to be done at 5 June 2007:

> One missing louvre to be replaced
> Silicon under the mirrors
> Glass doors needing decals
> A missing knob
> A missing light switch cover
> Ceiling to be cut to complete solar installation

19. The respondents say that because these items had not been completed, the building had not reached practical completion and the applicants were not entitled to seek the final payment.

20. This argument misunderstands the contract. Under cl 3.3, the final payment was able to be claimed at substantial completion of painting, plumbing and electrical 'fitoff'. Practical completion is irrelevant to the final payment. In any case, "practical completion" is not "perfect completion" – it is defined in cl 1 to be "when the work is substantially complete and reasonably fit for use". If necessary I would find that practical completion was reached by 5 June 2007.

21. The painting, plumbing and electrical fitoff had been substantially completed at 5 June 2007. The applicants were entitled to seek the final payment on that date. That amount was due under the contract on 15 June 2007 and it has not yet been received by the applicants.

22. The respondents are liable to pay the applicants $30,018 by authorising the release to them of that amount in the applicants' solicitors' trust account.

Variation $2,143.95

23. By invoice dated 15 June 2007 the applicants sought $3,411.15 from the respondents for variations to the contract. By letter dated 22 June 2007 the respondents disputed certain amounts in that claim, some of which the applicants conceded, reducing the amount to $2,143.95.

24. The items claimed in the invoice are supported by prior correspondence between the parties (letter respondents to applicants 23 February 2007, email applicants to respondents 4 March 2007, letter applicants to respondents 4 March 2007, further letter applicants to respondents 4 March 2007) and a list of variations dated 4 March 2007.

25. In their letter of 22 June 2007, the respondents included a variation list which agreed with some but disagreed with other items in the applicants' claim. This variation list is unsupported by any documents which I can consider and provides no, or little, basis on which to make a determination. There may well be supporting information in the material provided by the respondents after 16 July 2007, however as I have endeavoured to explain, I am prohibited from considering that material.

26. I have to make a determination on the balance of probabilities (s 33(1)(b)) and on the state of the information available to me, I find that the amount of $2,143.95 is owing by the respondents to the applicants in respect of the invoice dated 15 June 2007. That amount was due on 25 June 2007, 10 days after delivery of the invoice – cl 5.2 of the contract.

Variation $7,445.60

27. In the invoice of 15 June 2007 the applicants listed six items said to be "Variations to Contract (NOT CHARGED TO DATE)". It seems that the applicants were not invoicing the respondents for those items at that time, but informing them of the costs they had absorbed during the course of the contract and which they might invoice if agreement was not reached on the preceding variations. This is apparent from:

    (a) the placement of the six items at the end of the invoice, after the words "Total Amount Outstanding" which does not include the sum of $7,445.60;

    (b) the heading to the items as detailed above; and

(c) the applicants' letter of 19 June 2007 to the respondents where they say "We also enclosed [on 15 June] a statement for Variations which will become due for payment on 25 June 2007. We believe this statement to be fair and reasonable. You must also consider the variation costs we have absorbed up this [sic] date and are not currently charging you for '**at this point in time**'." (original emphasis).

28. I have seen no further invoice or claim for payment of the amount of $7,445.60. The result is that there is no "payment claim" under the Act and therefore no "payment dispute" to adjudicate.

29. "Payment claim" is defined in s 4 to mean relevantly "a claim made under a construction contract –

> (a) by the contractor to the principal **for payment of an amount** in relation to the performance by the contractor of its obligations under the contract" (emphasis added).

30. There is no evidence in the application of the applicants claiming payment of the amount of $7,445.60 prior to their serving the application. In the invoice of 15 June the applicants did not claim payment of that amount. In fact, when read closely the invoice does not even foreshadow such a claim – it can simply be taken as a veiled threat of a claim.

31. Neither does the applicants' letter of 19 June 2007 make a claim for payment. Again, like the invoice, it merely holds out, without actually making, a threat of a claim in undefined circumstances.

32. A valid payment claim is a necessary precondition to an adjudicable payment dispute. Payment dispute is defined relevantly in s 8:

> "A payment dispute arises if –
>
> > (a) 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;"

33. Without a valid payment claim, there can be no payment dispute, and without a payment dispute there can be no application for adjudication since s 27 says:

> "If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless …"

34. However, since the parties have not made any submissions on this point, I prefer to base my determination on other grounds.

35. The six further items were:

Kitchen glass splashback	$767.20
Framing and lining of storeroom ceiling	$880.00
Laundry, hot and cold water supply	$220.00
Labour of trenching, laying of cable and connection by electrician	$1,808.40
Handrail upgrade from painted steel pipe to powdercoated aluminium handrails	$3,000.00
Upgrade of storeroom doors from timber to steel	$770.00

Splashback

36. In a letter of 4 March 2007, the applicants said to the respondents "We will still absorb the $200 credit from the tiling allowance and the extra $500 paid towards the original stainless steel splashback but we will now also absorb the extra cost of $767.20 so there is no extra cost to you for the glass splashback."

37. Having said that unconditionally, it is now not open to the applicants to charge for the glass splashback.

Storeroom framing lining

38. In their document "Variations Now Being Claimed" the applicants say "The HIA Building Contract was based on a price with an unlined storeroom ….[the applicants] agreed to absorb the cost of lining the ceiling and battoning [sic] the walls for lining by [the respondent]. This cost was absorbed in good faith of the contract."

39. Again, on their own evidence having come to that agreement, the applicants cannot now make a claim for lining the ceiling and battening the walls of the

storeroom. There is no evidence that the agreement was conditional in any way.

Laundry, hot and cold water supply

40. In the "Variations Now Being Claimed" document, the applicants say they "agreed to absorb the cost for installing the plumbing in good faith of the contract."

41. Having agreed to do so unconditionally, the applicants cannot now claim for the plumbing.

Labour of trenching, laying of cable and electrician connecting

42. In the "Variations Now Being Claimed" document, the applicants say they were "prepared at that time to absorb the difference of [the respondents'] quote and our contractors price in good faith of the contract"

43. This is supported by a letter from the respondents to the applicants dated 23 February 2007 where the respondents wrote "NB. It was on the contract that the owner would provide the electrical trenching and electrical cabling & conduit to be hooked up by the electrician. For whatever reason the electrical contractor now wants to do the whole installation. [D of the applicants] stated to [R of the respondents] that [the applicants] would absorb any extra cost on this issue."

44. The applicants replied to that letter on 4 March 2007 saying "As pointed out in your letter 23/2/07 [D] has told [R] that [the applicants] will absorb the difference between the expense to yourselves to run the power to the house, and that charged by our electricians to do the same. Note that [the applicants] will be paying for labour that would otherwise have been provided by [R]."

45. In those circumstances, the applicants cannot now claim for these costs.

Handrail upgrade

46. In the "Variations Now Being Claimed" document, the applicants say they "agreed to absorb this cost in good faith of the contract." Again, the applicants

cannot charge when they unconditionally agreed to absorb the cost of upgrading the handrails.

Storeroom doors timber to steel

47. In the "Variations Now Being Claimed" document, the applicants say "Discussions between [the respondents, the applicants and the applicants' engineer] resulted in [the applicants] agreeing to a variation of the original contracted supply and installation of solid timber doors to upgrade to steel doors and absorb the cost in good faith in the contract."

48. In their variations list of 22 June 2007 the respondents say that steel storeroom doors were "as per plans, no variation".

49. An examination of the plans provided by the applicant reveals this to be so. Pointing to the storeroom, they say "new steel doors 50x50x3shs framing lined with 1.6mm thick galv sheet metal".

50. This is further supported by the respondents' letter to the applicants of 5 October 2006 which refers to the desire to use the ground floor storeroom as a cyclone shelter and which annexes part of a letter from the respondents to the applicants dated 5 September 2006. That letter says "Downstairs room to be cyclone proof … Roller doors or double strong metal doors possible, owner will concur with requirements."

51. Putting those matters together, each sufficient on its own, means that the applicants cannot now claim for the cost of the metal doors to the storeroom.

52. The result is that the applicants are not entitled to any of the amount of $7,445.60.

Legal costs $5,500

53. The applicants seek legal costs to date of $5,500. Legal costs are not a recognised head of damage from breach of contract in these circumstances. Furthermore, I have no evidence of the amount of those costs.

54. Under s 36 the parties to an adjudication bear their own costs of an adjudication unless there has been "frivolous or vexatious conduct on the part of, or unfounded submissions by, a party". I do not consider that to be the case here and each party should be their own costs.

Interest

55. The applicants seek interest under the contract at 15% per annum. Section 35 says:

> "(1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, the adjudicator may also determine that interest must be paid on –
>
> (a) if the payment is overdue under the construction contract – the payment in accordance with the contract;"

56. I have found that the final payment of $30,018 was due on 15 June 2007 and that it has not been paid to the applicants. The applicants are entitled to interest under the contract until payment is received. Clause 5.3 of the contract specifies interest at 15% per annum. There are 48 days from 15 June to 2 August 2007. Interest is therefore:

$30,018 x 15/100 x 48/365 = $592.32

57. I have found that the amount of $2,145.93 was due under the contract on 25 June 2007. There are 38 days from 25 June to 2 August 2007. Interest is therefore:

$2,145.93 x 15/100 x 38/365 = $33.51

Permit to Occupy

58. In their response the respondents sought an order for a Permit to Occupy and certain receipts. An adjudicator has no power under the Act to make orders of that nature.

Determination

59. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is $32,789.76 being the amount owing of $32,163.93 plus interest to 2 August 2007 of $625.83. Interest accrues on the sum of $32,163.93 at the rate of $13.22 per day from 2 August 2007.

60. The sum of $32,789.76 is payable immediately.

Dated: 2 August 2007

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CAMERON FORD
Registered Adjudicator