

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) ("**The Act**")

BETWEEN:

Applicant

and

Respondent

REASONS FOR DECISION

1. On 28 May 2014 I was appointed by the Construction Registrar under section 30(2) of the Act to adjudicate the payment dispute between the parties.
2. On the same day I received the Application by hand and by email from the Applicant's solicitors Clayton Utz and also spoke with them in regard to my appointment.
3. On 28 May 2014 I also contacted the Respondent and spoke with Mr [SB] who advised me that solicitors Ward Keller were acting for the Respondent. I then spoke with Ward Keller and advised them of my appointment.
4. On 29 May 2014 I wrote to the parties advising of my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

5. On 30 May 2014 I received the Response by hand.
6. On 2 June 2014 I received correspondence from the Applicant generally advising that:
 - (a) they had been served with a document at 4:55pm on Friday, 30 May 2014, purporting to be the Respondent's response; and
 - (b) the purported response was, in their view, served out of time under section 29 of the Act and I therefore held no jurisdictional power to consider the document.
7. On 2 June 2014 I wrote to the parties requesting further submissions in relation to service of the documents of the Adjudication as follows:
 - (a) *"I put to proof the service of the documents in relation to both the Application and the Response of the Adjudication; and*
 - (b) *I also request submissions in relation to the requirements for service of these documents on the Applicant and Respondent to the Adjudication."*

I requested submissions be returned not later than 3:00pm CST on Thursday, 5 June 2014.
8. On 5 June 2014, and in time, I received submissions from the Applicant in relation to my two questions, however I did not receive any submissions from the Respondent. To ensure that there had been no communication breakdown, I contacted Ward Keller and was informed they were seeking an extension for the Respondent's submissions. The Respondent subsequently wrote to me requesting an unspecified extension of time for their submissions.

9. On 5 June 2014 I also wrote to the parties setting out the circumstances of the Respondent's request and asked for urgent submissions, by 10:00am CST 6 June 2014, as to whether or not to grant an extension of time to the Respondent.
10. On 6 June 2014, and within time, the Applicant objected on two bases:
 - (i) the Respondent's request was made after the deadline had passed and after the Applicant had already served its submissions; and
 - (ii) It would be unfair and prejudicial to allow the Respondent additional time for submissions when in receipt of the Applicant's submissions.
11. On 6 June 2014 I wrote to the parties granting the Respondent an extension of time until 4:00pm CST 7 June 2014. In doing so I also allowed the Applicant to make further submissions in respect of any new matters raised by the Respondent.
12. On 7 June 2014 I confirmed to the parties that the Applicant would be allowed to make further submissions to any new matters raised by the Respondent in their submissions up to noon on Monday, 9 June 2014, at which point I would not consider any further submissions from the parties.
13. I received the Applicant's further submissions on 8 June 2014.

Introduction

14. This adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to build a shed at [project site] in the Northern Territory ("the Contract").

15. The Applicant claims it is entitled to be paid its final instalment of \$44,250 including GST for reaching Practical Completion ("PC") of the Contract plus the interest owing on that sum under the Contract.
16. The Applicant also claims an award of costs be made by the Adjudicator under section 36 of the Act.
17. The Respondent claims that PC had not been achieved and therefore no payment was due under the Contract.
18. The Respondent also seeks an award of costs be made by the Adjudicator under section 36 of the Act.

Procedural Background

The Application

19. The Application is dated 15 May 2014 and comprises a general submission and 7 listed attachments. The attachments, *inter alia*, include the following:
 - (a) a statutory declaration by Mr. [PW];
 - (b) a copy of the construction contract;
 - (c) a notice of suspension;
 - (d) an agreed defects list of the building work on the shed;
 - (e) photographs of the building work on the shed at various stages of completion;
 - (f) a copy of Tax Invoice 022/2014 dated 9 February 2014, the payment claim;
 - (g) a transmittal email covering the payment claim; and
 - (h) a letter of demand for payment dated 7 April 2014.
20. The payment claim was submitted to the Respondent on 9 February 2014 in the sum of \$44,250.00 including GST. The Respondent did not dispute or pay the Applicant's payment claim.

21. The Applicant says the Application was served on 15 May 2014.

The Response

22. The Response is dated 30 May 2014 and comprises a general submission and 11 listed attachments. The attachments, *inter alia*, include the following:

- (a) a statutory declaration by Mr.SB;
- (b) a sketch plan of the shed;
- (c) copies of receipts for prior payments made;
- (d) a design and condition report prepared by Irwin Consult;
- (e) copies of electrical compliance certificates for the shed;
- (f) email correspondence and prior tax invoice payment claims;
- (g) a defects listing for the building works on the shed; and
- (h) a cost estimate for repairs prepared by Rider Levett Bucknall.

23. The Response was served on 30 May 2014.

Adjudicator's Jurisdiction and the Act

24. The following sections of the Act apply to the contract for the purposes of the Adjudicator's jurisdiction.

25. Section 29 of the Act – **Responding to Application for Adjudication**
In relation to my jurisdiction and the making of a determination in this Adjudication under section 34 of the Act, there is a substantive issue to consider in relation to the time of service of the Response under section 29(1) of the Act.

26. The "Adjudication Procedure" of the Act provides that the appointed Adjudicator, under section 34(1)(a), in making a determination must act informally and 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.....”*

27. The Adjudicator, when making a determination, must ensure this provision of the Act has been fulfilled to establish his or her jurisdiction to consider the documents of the Application and the Response.
28. A failure to prepare and serve the Application in accordance with section 28 of the Act would be grounds for dismissal by the Adjudicator under section 33(1)(a)(ii). However, failure to prepare and serve a Response, or for that matter, failure to respond to a correctly prepared and served Application would not cause a dismissal or prevent a determination being made under section 34 of the Act.
29. On this issue I sought further submissions from the parties as set out in paragraphs 6 to 13 in this determination.
30. On the issue of time of service of the Response under section 29(1) of the Act, relevantly the “...10 working days...” that a party served with an Application “...*must prepare a written response to the application and serve it....*”, the Respondent, by its own admission, submits that the Response was served out of time.
31. In making this admission, the Respondent also submits that:

“An adjudicator’s power to make a determination is not affected by a party’s failure to make a submission or provide information or documents within time (Section 34(5)).”

which suggests that the Adjudicator has a discretion under section 34(5) of the Act when making a determination for a Response not prepared and served in accordance with section 29 of the Act.

32. The Applicant submits that this view fails to:

“...recognise the primacy of the Adjudicator’s duty and function in section 34(1)(a).....to put before the Adjudicator a response which is not prepared and served in accordance with section 29...”

33. The Applicant also submits that section 34(1) is mandatory for the making of a determination and *“...the Adjudicator is not permitted to act contrary to it in making the determination”* and that the Adjudicator should *“...have no regard to it in performing his duties and functions under section 34.”*

34. It is a matter of fact that the Response was served out of time pursuant to section 29(1) of the Act. The issue for me to determine here is whether or not section 34(5) provides the Adjudicator jurisdictional discretion to allow a Response that has not been *“...prepared and served in accordance with section 29...”*, per section 34(1)(a)(ii), to be considered in the making of a determination.

35. In reaching a landing on this issue, I turned to the meaning of the word “must” and the possibility of discretion flowing from a sentence that contained such a directive. I consulted both The Concise Oxford Dictionary and the Macquarie Dictionary and found the word “must” holds the meaning “to be obliged or bound to”.

36. Accordingly, an Adjudicator’s jurisdiction under section 34(1)(a) of the Act, for making a determination, binds or obliges him or her to make the determination on both the Application and the Response if they have been prepared and served correctly.

37. In this instance, the Response has not been prepared and served in accordance with section 29 of the Act. I support the view of the Applicant on this issue that section 34(1) is mandatory on the

Adjudicator in making a determination and that an Adjudicator is not permitted to act contrary to it when making a determination.

38. In reaching this conclusion I also considered His Honour Justice Barr's comments in *Haul Contracting Pty Ltd v MacMahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at 42 where the Adjudicator in that instance denied the plaintiff natural justice by not considering all the relevant evidence and did not give the plaintiff an opportunity to make submissions.
39. I concluded that this issue is not a matter of denial of natural justice or procedural fairness: it is an issue of failure by the Respondent to comply with a mandatory requirement of the Act, that is section 29(1) which states:
- "Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party **must prepare a written response to the application and serve it** [emphasis added]..."*
40. As to section 34(5) of the Act and the discretion this section provides an Adjudicator, this discretion applies only to the further submissions that an Adjudicator may request under section 34(2) of the Act "...to *obtain sufficient information to make a determination...*". This discretion does not and cannot extend to the mandatory compliance requirements of section 34(1) and section 29(1) of the Act.
41. I am satisfied that the Response was not prepared and served in accordance with section 29 of the Act and I therefore cannot have regard to the Response in making a determination in this Adjudication.
42. Section 4 of the Act – **Site in the Territory** – the site is a site located at [project site], Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

43. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the contract documents at Attachment Tab 1 of the Application. I am satisfied that the Contract is a construction contract for the purposes of the Act.
44. Section 6 of the Act – **Construction Work** – the work is to erect and build a shed on [the project site] and section 6(1)(c) of the Act specifically provides for this type of civil work. I am satisfied that the work is construction work for the purposes of the Act.
45. Section 4 of the Act - **Payment Claim** – means 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; or
(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.”*
46. The Applicant lodged a claim in the form of a Tax Invoice 022/2014 on 9 February 2014 in the sum of \$44,250.00 including GST. The Applicant submits that this claim was a payment claim correctly made under clause 5, “*Payment Claims, Interest*”, of the Contract.
47. In attending to clause 5 of the Contract and the Applicant’s Tax Invoice 022/2014, I am satisfied that the payment claim made by the Applicant was a valid payment claim made under the contract. I am also satisfied that the Applicant’s payment claim is a valid payment claim for the purposes of the Act.
48. Section 8 of the Act - **Payment Dispute** – 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; or

(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or

(c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.”

49. The Applicant made a valid payment claim on 9 February 2014 under clause 5 of the Contract. The Applicant submits that payment of the payment claim was due either within 5 days under contract clause 5 or alternatively 7 days under contract clause 18. The Respondent did not dispute the payment claim and did not pay the payment claim.

50. A careful reading of the Contract shows that the making of a payment claim arises under clause 5 *“Payment Claims, Interest”* of the Contract, however the payment claim made by the Applicant on 9 February 2014 was also characterised as a final account payment claim made for reaching PC in the Contract.

51. Contract clause 18 *“Practical Completion, Handover”* states:

“18.1 When the work reaches practical completion, we will give you a final account.

18.2 Within 7 days you must:

18.2.1 inspect the work together with us.

18.2.2 write down anything that is defective or incomplete in a Certificate of Practical Completion, and sign it and give it to us; and

18.2.3 pay the final account in full (that is, with no set off or reduction) by cash or bank cheque.

18.3 Then we will hand over the work, and return possession of the site, to you.

18.4 So far as we accept responsibility, we must fix the items written in the Certificate of Practical Completion within a reasonable time after handover.”

52. While complying with clause 5 of the Contract in making a payment claim, the Applicant made the claim for reaching PC under clause 18 of the Contract and in doing so gave the Respondent seven days to:

- (i) inspect the works with the Applicant;
- (ii) list the defects on a Certificate of PC and give it to the Applicant;
- and
- (iii) Pay the Applicant’s claim in full.

53. The Respondent did not pay the claim within seven days or at all under clause 18.2.3 and did not dispute the claim under clause 5.4 of the Contract.

54. The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 at 20 Barr J stated:

“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 (non-payment, rejection or 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.”

55. In this matter a payment dispute arose between the Applicant and the Respondent on 16 February 2014 and I am satisfied that there is a payment dispute for the purposes of the Act in which the Applicant has applied for an adjudication of the dispute under section 27 of the Act.
56. Section 28 of the Act – **Applying for Adjudication** – By reference to the Applicant’s documents of the Application dated 15 May 2014 served on the Construction Registrar under section 30(2) of the Act on 28 May 2014.
57. Section 28(2) of the Act states:
- (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.*
58. Turning to the Application, it has been prepared in accordance with requirements of section 28(2) and contains the relevant information prescribed by Regulation 6.
59. There was, however, an issue with service of the documents to this Adjudication and I put to proof the service of both the Application and the Response as set out in paragraphs 6 to 13 of this determination.

60. Attending to the Applicant's further submissions of 5 June 2014 and the statutory declaration of Ms Jacqui Alana Harrison made on 4 June 2014, contained in those submissions, I am satisfied that the Application was prepared and served on 15 May 2014 and within the prescribed time of 90 days after the dispute arose, under section 28(1) of the Act.
61. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

Merits of the Claims

62. The claims made by the Applicant are as follows:
- (a) Claim for completion of the works to PC - \$44,250.00 (including GST);
 - (b) Interest at the Contract rate of 15% from 16 February 2014; and
 - (c) Costs in favour of the Applicant under section 36 of the Act.
63. The Response was not considered and there are no counterclaims.

The claim for completion of the works to PC

64. The Applicant claims the sum of \$44,250.00 including GST for having completed the works to PC under the Contract.
65. The definition of PC is set out at clause 1.10 of the Contract and is:
- “Practical Completion: when the work is substantially complete and reasonably fit for use.”*

66. At paragraph 5.2 of the Application the Applicant says it achieved PC on 9 December 2013 and a list of defects was prepared and signed on 13 December 2013 in accordance with clause 18.2.2 of the Contract. Both parties signed the defects list.
67. The Applicant also says at paragraph 5.4 of the Application that it attended to all items on the defect list, other a minor issue of mortar joints and colour matching.
68. The Applicant, at paragraph 3.5 of the Application, states that: “[*the Respondent*] did not pay the amount of the Payment Claim within 5 or 7 days or at all” (the reference to 5 or 7 days arises from the distinction between clause 5 and clause 18 of the Contract).
69. The Applicant also states, at paragraph 5.6 of the Application, that “*There is no basis under the Contract or otherwise for [the Respondent] to refuse to pay the amount of the Payment Claim.*”
70. In considering the Applicant’s claim for PC I turned to the decision of His Honour Justice Southwood in *Ray Laurence Constructions Pty Ltd & Anor v Nolks* [2010] NTSC 37 at 43:
- “Practical completion is a question of fact to be determined on the material evidence. Unless the contract provides otherwise a certificate of practical completion is not essential for practical completion to be reached. The meaning of practical completion will be determined in most cases by the definition found in the subject contract. It is not necessary for the works to be defect free in order for practical completion to be reached.”*
71. The requirement to issue a PC Certificate fell to the Respondent, under clause 18.2.2 of the Contract. The Respondent was prepared to attend to and sign a defects listing dated 13 December 2013. The Respondent failed to issue the PC Certificate that was required by the

Contract, however the parties performed in the defects listing of 13 December 2013 as if it were a PC Certificate for the purposes of clause 18.2.2 of the Contract.

72. By attending to the statutory declaration of Mr [PW] made on 15 May 2014, and attached to the Application, at paragraphs 15 to 19, it is clear that the Respondent failed to pay any amount towards the Applicant's claim and attempted to use the relatively minor issue of mortar joint colour matching to prolong the non payment between 9 February 2014 and 20 March 2014. When common ground could not be reached, the Respondent refused to pay any monies at all despite the Applicant sending a letter of demand dated 7 April 2014 (Attachment Tab 7).
73. I am satisfied that the Applicant's payment claim was validly made and that the Respondent's refusal to pay that claim was not and could not be supported by any contractual entitlement. In fact, I am of the view that the Respondent was and remains in breach of contract as there is no entitlement in the contract that would support, in the circumstances, the Respondent's failure to pay the Applicant's claim.
74. Accordingly, I award the Applicant payment of their claim in full in the sum of \$44,250.00 including GST.

Interest on the claims

75. The payment claim amount the Respondent is to pay the Applicant is \$44,250.00 including GST.
76. The interest rate payable on the payment claim amount under clause 5.3 of the Contract is 15% per annum as set out in the Application at paragraph 6.1.

77. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an amount awarded in a determination under Goods and Services Tax Determination 2003/01.
78. I award interest of \$1,934.22 on the sum payable of \$40,227.27 excluding GST from 16 February 2014, the date of due payment, to 13 June 2014, the date of determination, pursuant to section 35 of the Act.

Summary

79. In summary of the material findings, I determine:
- (a) the Response was not prepared and served under the Act;
 - (b) the Application was prepared and served under the Act
 - (c) the contract to be a construction contract under the Act;
 - (d) the work to be construction work under the Act;
 - (e) the site to be a site in the Northern Territory under the Act;
 - (f) the claim to be a valid payment claim under the Act;
 - (g) the dispute to be a payment dispute under the Act;
 - (h) the PC payment claim to stand in the sum of \$44,250.00 including GST;
 - (i) Interest awarded in the sum of \$1,934.22.
80. Accordingly, I determine that the amount to be paid by the Respondent, to the Applicant, is **\$46,184.22** (including Interest and GST).
81. This sum is to be paid to the Applicant, by the Respondent, on or before 20 June 2014.

Costs

82. Notwithstanding that the Response was not prepared and served in accordance with section 29 of the Act, the Respondent unlawfully

withheld payment from the Applicant without any entitlement or rights under the terms of the Contract.

83. This withholding action by the Respondent caused the Applicant to lodge an Application for payment of their PC payment claim and in the circumstances of this matter I find the Respondent's action vexatious.
84. Accordingly, I award the full costs of the Adjudication under section 36(2) to be paid by the Respondent.

Confidential Information

85. The following information is confidential for the purposes of section 38(1)(e) of the Act:
- (a) the identity of the parties;
 - (b) the identity of the principal; and
 - (c) the location and nature of the works.

DATED: 13 June 2014



Rod Perkins
Adjudicator No. 26