

Adjudicator's Determination

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

Adjudication 18.09.09

(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 2 November 2009, under Section 33(1)(a)(iii) 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 Law Society of the Northern Territory 2 November 2009.
4. I was appointed as Adjudicator by the Law Society of the Northern Territory 2 November 2009. The parties were notified of the appointment by the Law Society 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 8 January 2008)
 - 6.2. The provisions of the *Interpretation Act*. (as in force 17 May 2007)
 - 6.3. Application from the Applicant dated 2 November 2009.
 - 6.4. Response from the Respondent dated 16 November 2009.

The Adjudication Application

7. The Adjudication Application for the June claim was served on the Respondent 2 November 2009 and consists of the following documents;
 - 7.1. Adjudication Application, and
 - 7.2. 10 A4 lever arch files of supporting documentation.

The Responses

8. The Adjudication Response was served on the Applicant and the Adjudicator 16 November 2009 and consists of the following documents;
 - 8.1. Respondent's reply to the Application, and
 - 8.2. 5 A4 lever arch files of supporting documentation.

Jurisdiction

9. The dispute arises out of a contract between the parties for the Respondent to provide painting services on a building project in the Northern Territory for the Applicant.

10. The parties agree the following;
- 10.1. The contract is subject to the *Construction Contracts (Security of Payments) Act 2004*.
- 10.2. There is a payment dispute in relation to a claim submitted by the Applicant to the Respondent 22 July 2009
- 10.3. The Application for adjudication of the payment dispute has been served within the time prescribed by the 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 Applicant contests jurisdiction on the basis of the dispute being "subject of any other order, judgment or other finding".

Adjudication Determination No. 23.09.02

13. The Applicant submitted an Application for Adjudication of a payment dispute with the Respondent in relation to a payment claim dated 8 May 2009. The amount in dispute was \$654,828.14 and defined as the "Amount due to the Applicant pursuant to Clause 23.3 being the net result of the Applicant's costs less the Contract Value of the Works completed". The claimed is clearly annotated as being up to 8 May 2009 and the Respondent "reserved the entitlement to recover further amounts as and when they can be reasonably identified".
14. This amount relates to defect rectification expenses incurred by the Applicant and sought as debt recoverable from the Respondent. The adjudicator determined the amount payable at nil. Supporting this determination the Adjudicator stated that the Applicant had failed to establish any liability on the part of the Respondent because the Respondent could not be shown to have breached its obligations under the contract and absent any breach, no damage could apply.

Payment Claim 22 July 2009

15. The Invoice No 1091 presented to the Respondent on or around 22 July 2009 summarises the claim as follows:

Costs, losses, expenses and damages incurred executing subcontract works 13 February 2009 to 22 July 2009	\$2,585,117.34
Amount other wise payable to the Applicant (under the terms of contract) for subcontract works 13 February 2009 to 22 July 2009	<u>\$825,344.64</u>
Amount claimed	\$3,410,461.98

Claim value referred for adjudication

16. The Applicant acknowledges determination 23-09-02 and now seeks determination on the value of costs, losses expenses and damages from 8 May 2009 to 22 July

2009. This is calculated as the value of the 22 July Claim less the value of the 8 May claim.

22 July 2009 Claim	\$3,410,461.98
Less 8 May 2009 Claim	<u>\$654,828.14</u>
Value referred for Adjudication	\$2,755,633.84

Contested Jurisdiction

17. The difference between the May Claim determined in Adjudication 23-09-02 and the July Claim presented for this adjudication is the time period in which the expenditure was incurred. In essence the argument presented by the Applicant to support entitlement remains the same with some additional evidence presented in the form of statutory declarations which reply to the statutory declaration provided by the Respondent in the Response to the May Claim.
18. For this adjudication the Respondent argues that the basis of claim has been determined in Adjudication 23.09.02 and that this Determination constitutes a “finding” by an “other person” such that Section 33(1)(a)(iii) of the Act applies and the Adjudicator must dismiss the application without making a determination of its merits.
19. The Respondent also seeks dismissal of the Application on the basis of Section 33(1)(a)(iv) of the Act – “satisfied it is not possible to fairly make a determination because of the complexity of the matter”. It is contended that complexity ought to include all forms including legal as well as factual.
20. The Applicant argues: “It is a matter for the Adjudicator to look to the July Payment Claim and determine its adequacy as a payment claim and that enlivens the operation of the Act. The adjudicator’s jurisdiction is not ousted by virtue of this being potentially a jurisdictionally defining decision on his part.” The Applicant goes on to support this contention citing *Mildren J in Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46.
21. I am prepared to accept the Respondent’s contention there is complexity in the legal question of whether Adjudication Determination 23.09.02 is sufficient to dismiss this application under Section 33(1)(a)(iii).
22. 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”. He then presents a quote from Marshall CJ in *Marbury v Madison*: “It is, emphatically the province and duty of the judicial department to say what the law is.”

23. Based on the arguments presented by both parties there is at the very least some doubt with regard to the applicability of Determination 23.09.02 to the present Application. 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)(iii) and opening the option for the Applicant to refer that decision to the Local Court under Section 48 of the Act.
24. If, on review, the Court sets aside the above decision and refers the matter back to the adjudicator, the court will have effectively removed the issue of legal complexity. Accordingly I see no necessity to dismiss this application under Section 33(1)(a)(iv).

Adjudicator's Costs

25. Clause 36 (1) of the Act requires the parties to bear their own costs.
26. 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.
27. I am satisfied that the submissions from both parties have merit and are neither frivolous nor vexatious.
28. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Conclusions

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

Brian J Gallagher
NT Registered Adjudicator No 18.
30 November 2009