

## DETERMINATION No 23.15.01

Adjudicator's Determination

pursuant to the

*Construction Contracts (Security of Payments) Act*

### Between

Applicant

and

Respondent

### DETERMINATION

I, David Alderman, Registered Adjudicator, determine on 28 March 2014 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act* ("the Act") that:

- A. The application for adjudication be dismissed under section 33(1)(a) of the Act, and
- B. The amount to be paid by the Respondent to the Applicant is \$nil, and
- C. I determine that pursuant to section 46(9) of the Act, the Respondent must pay the Applicant the sum of \$3,662.32 being the Respondent's equal share of the costs of the adjudication, such sum being payable on 8 April 2015.

## Contact Details

**Applicant**

[redacted]

**Respondent**

[redacted]

## **Appointment as Adjudicator**

1. [The Applicant] applied on about 3 March 2015 for an adjudication under the *Construction Contracts (Security of Payments) Act* (the Act), consequent upon which I was appointed adjudicator on 4 March 2015 by the Law Society of the Northern Territory to determine that application.
2. The Northern Territory Law Society is a prescribed appointed under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act. Neither party objected to my appointment, and I do not consider that any conflict of interest would prevent me from acting as the adjudicator.

## **Documents Received by Adjudicator**

1. I received and have considered the application dated 3 March 2015 supported by the Statutory Declaration of [AB] and the attachments thereto numbered 1 to 6 and the annexures to that Statutory Declaration that are the statutory declarations of [BC], [CD] together with annexures 9 & 10, [DE] and [EF].
2. I received and have considered the undated Adjudication Response and the attachments thereto numbered 1 to 15 which Adjudication Response was supported by the Statutory Declaration of [FG] dated 16 March 2015.
3. The receipt of the response on 16 March 2015 meant my determination was due on 31 March 2014.
4. On 17 March 2015 the Applicant expressed the desire to make further submissions on matters in reply to the Response. In accordance with the reasoning set out in the decision of *M & P Builders Pty Ltd v Norblast Industrial Solutions Pty Ltd* [2014] NTSC 25 at [42] I requested the Applicant to provide further submissions on the issues raised by it by close of business 20 March 2015.
5. The Additional submissions were delivered on 20 March 2014.

## The Circumstances

1. The Applicant's case is that on 17 September 2014, [GH] the Maintenance Manager of [subcontractor for the project] by email asked [DE] the operations manager of [*the Applicant*] to supply a quote for [*redacted*] works for the [project site]. PA[1]; exNB2. NB[3].
2. Accompanying that email was a site instructions dated 15 September 2014 from [*the head contractor*] . exNB2;
3. The site instruction noted that [*the subcontractor*] was the subcontractor to the head contractor in respect of [*specified works redacted*].
4. Attached to that document was a letter from [*the head contractor*] to [the subcontractor] dated 30 August 2014 for the attention of [HI], project manager of [*the subcontractor*]. It referred to the [*specified works*] plan and refers to the table contained in that letter as setting out the requirements. No Plan was attached.
5. [DE] in his statutory declaration of 3 March 2015 at PA[2], states that he inspected the [*site*] on 24 September 2014 prior to sending a quote. He estimated the total area of the works as 35,000 m<sup>2</sup> and sought and obtained the agreement of [GH] for [*the subcontractor*] that this was the areas to be covered. [GH] is referred to in the statutory declaration of [AB] at NB[3] as the maintenance manager for [*the subcontractor*].
6. The Respondent says an email was sent by [*the subcontractor*] to the Applicant on 25 September 2014 sending a map of the area [*redacted*]. The Applicant does not admit this was so. Nothing turns on this.
7. As a result of the request for a quote made by [*the subcontractor*], the Applicant sent a quote number 1002 dated 26 September 2014 (exNB3) addressed to [*the subcontractor*], [*address redacted*]. exNB3. No explanation is given as to why that address is used. This is the first time [*the Respondent's name*] is mentioned.

8. The quote refers to [*works on the project site*] as per specifications required, including labour [*specific materials redacted*] tools and equipment. exNB3. [AB] in his statutory declaration at NB[3] says this document was a quote directed to [*the Respondent*] and was sent on 29 September 2014 to [GH] of [the subcontractor]. NB[4]. exNB5.
9. [DE] says in his declaration PA[3] that the quote was sent to [GH], maintenance manager for [*the subcontractor*] on 29 September 2014.
10. [AB] at NB[3] says that on 3 October 2014 "[*the Respondent*]" accepted that quote by issuing purchase order number SA 3678 without qualification. exNB4. He says, The Purchase Order was an unqualified acceptance of the quote from [*the Applicant*] forming a valid and binding contract between the parties. NB[20].
11. [AB] says the purchase order came with an email addressed to [DE]. NB[6]. [AB] has not provided a copy of the email but states it was sent by [GH] on behalf of [*the Respondent*].
12. [DE] says he received the Purchase order from [GH] on 3 October 2014. PA[3]. No covering email is revealed.
13. [AB] says [*the subcontractor*] was managing the works for [*the Respondent*]. NB[4], NB[8] and NB[26]. [AB] at NB[9] says [*the subcontractor*] was not the party to the contract.
14. The Applicant gives no explanation nor supplies any details of the management arrangement [AB] refers to, nor as to how the [*subcontractor*] is managing the works for [*the Respondent*].
15. The purchase order is dated 3 October 2014 and has order number SA 3678 and the letterhead says it clearly comes from [*the Respondent*].
16. The document states that all invoices are to be sent to [*a processing address incorporating part of the name of the Respondent*]. The address is the same address the quote was sent to.

17. The purchase order is addressed to [the Applicant] as the supplier. The delivery instructions are, "[*the subcontractor*], [*project site*] and in the description of the product to be provided is [*work for the project site*]". exNB4.
18. The work was done by 10 October 2014.
19. The Applicant produced an invoice dated 10 October 2014 and addressed to [*the subcontractor at the processing address referred to in paragraph 16 above*], claiming \$194,523.45 which was sent on about 10 October 2014. exGW3. ("the October invoice").

The content of the 10 October invoice is as follows:

Tax Invoice 2319.

DATE 10/10/2014

TERMS Net 14

DUE DATE 24/10/2014.

Misc Sales

[*works and project site redacted*]:

1. Labour,
2. [*materials redacted*],
3. Tools & Equipment.

[*the Respondent*] Purchase Order No. SA3678

SUBTOTAL	\$176,839.50
GST TOTAL	\$17,683.95
TOTAL1	\$194,523.45
TOTAL DUE,	A\$194,523.45

20. On 13 October the Respondent emailed the Applicant referring to an email from the Applicant not included in the application or response.
21. On 14 October 2014 the Respondent emailed the Applicant saying the invoice cannot be paid until supporting documentation is provided.
22. On 18 October 2014 [FG] of the Respondent again stated documentation will be required before payment.
23. On 27 October 2014 asking for supporting documentation presumably relating to the invoice.
24. On 29 October 2014 [AB] for the Applicant emailed [FG] for the Respondent asking [*the subcontractor*] to pay its bills and saying no additional information would be produced at that time.
25. On 29 October at 7:45 PM an email was sent by the Respondent saying provision of documentation will expedite payment.
26. On a date not disclosed but before 7 November 2014 the Respondent paid the Applicant \$58,375.04.
27. On 6 November 2014 the Applicant issued an Adjustment Note addressed to [*the subcontractor*] at the same address as the quote. This notice stated a credit was given for the amount of the 10 October 2010 invoice.
28. The Applicant then produced an invoice dated 7 November addressed to the Respondent claiming \$136,166.41 being made up of the \$194,523.45 less the sum paid of \$58,357.04. exNB1. (“the November Invoice”).
29. The content of the November invoice is as follows:

INVOICE TO

[*the Respondent*]

Tax Invoice 2327

DATE 07/11/2014

TERMS 28 Days

DUE DATE 05/12/2014

Misc Sales \$176,839.50

[works and site project redacted] as per specifications required, including:

1. Labour,
2. [work specific materials redacted],
3. Tools & Equipment.

[Respondent] Purchase Order No. SA3678

This is a payment claim under the *Construction Contracts (Security of Payments) Act* and is due for payment within 28 days

SUBTOTAL	\$176,839.50
GST TOTAL	\$17,683.95
TOTAL	\$194,253.45
PAYMENT	\$58,357.04
TOTAL DUE	A\$136,166.41

30. The Application was served on the Applicant and the Law Society as a appointor on 3 March 2014.

## **Jurisdiction**

### **Section 27**

31. Section 27 of the Act precludes a party from making an application for adjudication pursuant to the *Construction Contracts (Security of Payments) Act* if:



- An application for adjudication has already been made, and
  - the dispute is the subject of an order, judgement or other finding about the a matter arising under the contract.
32. I have asked the parties if they are aware of any other application as to adjudication having been made and aware of any other body dealing with this matter. I said that if I received no reply I would assume that there are none. I have received no reply to that question
33. I determine that the matters as to jurisdiction contained in sub-sections 27 (a) & (b) have been complied with.

### **Section 33**

34. Section 33 of the Act requires the appointed adjudicator, within the prescribed time, to dismiss the application without making a determination of its merits if:
- (i) the contract concerned is not a construction contract; or
  - (ii) the application has not been prepared and served in accordance with section 28; or
  - (iii) an arbitrator or other personal recorder other body dealing with the matter arising under construction contract makes an order, judgement or other finding about the dispute that is the subject of the application; or
  - (iv) it is not possible to clearly make a determination because of:
    - (A) the complexity of the matter; or
    - (B) the prescribed time or any extension of it is not sufficient for another reason.

## Construction Contract

35. The Applicant submits the contract is a construction contract. It submitted in the information accompanying the application that this was because the description of the works falls within sub sections 6.1.f.i & v. of the description of what is a construction contract. The Respondent says it is not.
36. The Respondent says the description of the circumstances do not fall within the descriptions set out in the sub sections referred to by the Applicant. It also says there is no evidence the works relate to the work referred to in sub sections 6.1.a-e. The Applicant changes it's tack in its supplementary submissions and says the contract is covered by subsection 6.1.a.
37. What works does the contract require to be done and does the description of the works fit within any of the descriptions set out in the Act as to what amounts to a construction contract.
38. Section 33 refers to the contract concerned with the application as having to be a construction contract. What therefore is the contract involved in this application? Section 27 states that if a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated. The adjudication therefore must refer to a payment dispute which arises under the relevant contract.
39. The Applicant states the payment dispute in this matter refers to the failure of the Respondent to pay the sum claimed in the Applicant's payment claim being the tax invoice 2327 dated 7 November 2014. exNB1. NB[12].

40. The Tax invoice 2327 is addressed to the Respondent and refers to, “[*work and project site details redacted*] as per specifications required, including: labour, [*materials*], tools and equipment and refers to [*the Respondent*] purchase order number SA 3678.
41. This tax invoice clearly refers to the Applicant’s submission that there was a contract formed in writing on 3 October 2014 by delivery of the purchase order number SA 3678 which accepted the Applicant’s quote dated 26 September 2014.
42. The quote, it can be inferred from the Applicant’s material, was based on the request for a quote made 17 September 2014, exNB12, and the attached documents.
43. The written part of the contract therefore consists in part of:
  - (1) The purchase order dated 3 October 2014. exNB4.
  - (2) The quote 1002 dated 26 September 2014. exNB3.
  - (3) The email 29 September 2014 from [DE] to [HI] sending the quote. exNB5.
  - (4) The email and the attachments to the email dated 17 September 2014 from [GH] to [DE] asking for the quote. exNB2.
44. Reading the attachments to exNB2 it can be discerned that the contract involved is a contract for the provision of works for [*work and site details redacted*].
45. The attachments are a site instruction and a letter from the principal requesting [*redacted*] works.
46. The site instruction states “subject: [*work details redacted*]... ” and “description: subcontractor is instructed to immediately carry out the works for [*redacted*] outlined in contractor letter”.

47. The letter from the Principal dated 30 August 2014 states, “subject: [*required works and site details redacted*]”.
48. The description of the works relates to [*redacted*].
49. I now refer to the Legislation.

Section 5 of the Act states:

(1) A construction contract is a contract (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:

(a) to carry out construction work;

50. Section 6 states that construction work is any of the following work on a site in the Territory:

and includes:

(a) reclaiming land, draining land or preventing the subsidence, movement or erosion of land;

51. The annexures to the request for a quote dated 17 September 2014, exNB2, set out specifications of the works the subject of the contract.
52. The contract is for works relating to erosion control or “preventing....erosion of land.”, as provided for in subsection 6.1.a. and is hence the contract is a construction contract under the Act.

53. The Applicant may argue that I should have sought further submissions of the Respondent in relation to the supplementary submission of the Applicant referring to subsection 6.1.a. as the Applicant did not refer to that subsection in his application and put new material before me in the latter submission. I agree the Applicant put a new basis for its submission in its latter submission but I do not need to ask the Respondent for further submissions in respect of that submission because the Respondent was aware of the issue that stopping erosion was construction work under section 6.1.a, see GW[32]. Further the Respondent at GW[38] refers to section 6.1.a. and states the Applicant has not provided any evidence whatsoever that the work relates to any of the work referred to in sections 6.1.a.-e. of the Act.
54. It is clear that the Applicant did provide evidence in the application that the works related to preventing erosion of land referred to in section 6.1.a. It is clear the Respondent looked at the evidence produced by the Applicant and measured it against the factors set out in section 6 but came to the wrong conclusion. I would have come to the same conclusion had the Applicant not mentioned subsection 6.1.a. in its latter submission.
55. The Respondent's submission is wrong with respect to the contract involved not being a construction contract.
56. I am not required to dismiss the application pursuant to section 33.1.a.i.

### **Other Proceedings & Complexity**

57. I will deal with subsections 33.1.a.iii. & iv. here as they do not give rise to matters of controversy.
58. The questions to be asked are:
- (1) Has an arbitrator or other personal recorder other body dealing with the matter arising under construction contract has made or is likely to make an order, judgement or other finding about the dispute that is the subject of the application; and

(2) Is there such complexity in the matter or is the matter so difficult and voluminous or for some other reason it is not possible to clearly make a determination within the prescribed time or any extension thereof.

59. I have asked the parties if they are aware of any other body dealing with this matter and as I have received no reply I assume that there are none.

60. As to the second matter, it is my decision to make, and it is my view that this matter is not complex and nor is there any reason the determination cannot be made within time.

### **Preparation According to s28**

61. In order to comply with section 33 the application has to have been prepared and served in accordance with section 28 of the Act.

62. Section 28 sets out what a party to the contract is required to do to make a valid application to have payment dispute adjudicated.

63. The steps required must be carried out within 90 days after the payment dispute has arisen.

64. A party to the contract makes an application if the party:

- a) has prepared a written application;
  - i. which has been prepared in accordance with and contains the information prescribed by the regulations, and
  - ii. which states the details of or has attached to it any payment claim that has given rise to the payment dispute, and
  - iii. which states the details of or has attached to it the construction contract involved or relevant extracts of it, and
- b) has served the application on the other party to the contract, and

- c) has served the application on a prescribed appointer chosen by the party,  
and
- d) has paid any required deposit or security for the costs of the adjudicator.

### **Consideration - Section 28**

- 65. The application is written.
- 66. The Respondent says the application has not been served on the Respondent in accordance with the provisions of the Act.
- 67. I am informed by the Law Society and the Respondent admits that the application was served on the Respondent by Fax and by Email on 3 March 2015.
- 68. The Respondent alleges that service must be at its registered office in New South Wales or by service on a direct or company officer in accordance with section 109X of the *Corporations Act 2001*.
- 69. Section 25 of the *Interpretation Act* states that a person may serve a document on an individual or body by, amongst other things, sending it to the recipient by fax.
- 70. The admission by the Respondent that it received the application by fax on 3 March 25 2015 is sufficient for me to determine that the application has been served in accordance with section 28.
- 71. The Law Society Northern Territory is a prescribed appointor under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.
- 72. No deposit or security for the costs is required.
- 73. Regulation 6 requires an application for adjudication to contain:
  - (a) the name and contact details of the appointed adjudicator or prescribed appointer; and

- (b) the Applicant's name and contact details; and
- (c) the name and contact details of each other party to the contract.

74. Regulation 6 is complied with.

### **Payment Dispute**

75. The Respondent says the November invoice does not give rise to the relevant payment dispute as the relevant payment dispute which should be the subject of the application for adjudication arose after the delivery of the October Invoice. GW[42]. exGW3.

76. If it is assumed the October invoice is a valid payment claim on the Applicant's case a payment dispute would arise according to section 8 of the Act if :

- (i) the claim has been rejected or wholly or partly disputed; or
- (ii) when the amount claimed is due to be paid, the amount has not been paid in full; or ...

77. The Applicant says that Division 5 of the Act is implied into the contract and that provides that the Respondent must:

- (a) within 14 days after receiving the payment claim:
  - (i) give the claimant a notice of dispute; and
  - (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
- (b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

78. The Respondent in this matter gave the Applicant a notice of dispute by email on 14 October 2014 and paid the amount of the claim that is not in dispute. It may not have done so within 14 days but had done so by 7 November 2014.



79. So the claim was rejected in that the Respondent refused to pay the sum claimed on 14 October 2014. This is the date the payment dispute arose. The latest date the payment dispute could have arisen is 28 days after 10 October 2014 or 11 November 2014.
80. Section 28 requires the application for adjudication to have been made within 90 days after the payment dispute arose. In respect of the October invoice the date the application had to be made was at the latest 10 February 2014.
81. The application having been made 3 March 2015, based on the false premise that the November invoice is a valid payment claim, (as to which see below) is therefore out of time for the payment dispute arising out of the non-payment of the October invoice.
82. The steps a party to the contract has to take to make an application for a payment dispute to be adjudicated must be taken within 90 days of the payment dispute arising.
83. This condition requires the date to be determined when the relevant payment dispute as revealed by the facts surrounding the making and execution of the contract, arose.
84. A precursor to this question is the question of whether a payment dispute arose under the contract.
85. The Applicant submits it sent the Respondent a payment claim being the invoice dated 7 November addressed to the Respondent claiming \$136,166.41 being made up of the original \$194,523.45 less the sum paid of \$58,357.04. exNB1. ("the November Invoice").
86. The Applicant submits that because the Respondent did not pay the amount claimed in the November invoice within 28 days of its delivery the relevant payment dispute arose and it is that payment dispute which is the subject of the application.
87. Section 8 of the Act sets out when a payment dispute arises.

## Section 8

A payment dispute arises if:

- (c) a payment claim has been made under a contract and either:
  - (i) the claim has been rejected or wholly or partly disputed; or
  - (ii) when the amount claimed is due to be paid, the amount has not been paid in full; or ...

- 88. Section 8 of the Act requires there to be a payment claim made under a contract.
- 89. The Applicant submits it made a payment claim to [*the Respondent*] on about 7 November 2014 when it sent an invoice dated 7 November addressed to that company.
- 90. Is this invoice a payment claim?
- 91. I will consider the Applicant's case

### **Payment Claim**

- 92. A payment claim is defined in the Act as:

***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 under the contract; or  
...

- 93. On the Applicant's case the November invoice is a claim made under the contract made 3 October 2014 (See [43]) which is a construction contract (See [52]). The Applicant is the contractor and [*the respondent*] is the principal.

94. The claim is a claim for the balance of the contract price due to the Applicant by the Respondent for the works it carried out namely [*work and project site details redacted*] as per specifications required and the claim includes a claim for Labour, [*materials*], and Tools & Equipment and refers to the [*Respondent*] Purchase Order No. SA3678 which is dated 3 October 2014.
95. The November invoice seems to satisfy the requirement of the definition on the Applicant's case as being a claim for payment of an amount in relation to the performance by the contractor of its obligations under the contract.

### **Signature**

96. The Applicant claims that the contract did not have a provision as to how or by when a payment claim should be made and therefore Divisions 4 of the Schedule is incorporated into the contract by virtue of ss 19 of the Act.
97. The Applicant says the November Invoice is the payment claim in this application and that it complied with the requirements of Division 4 of the Schedule. NB[10].
98. I note that the November invoice is not signed as required by Division 4 at 5.1.h.
99. The Applicant is aware of this requirement as in its Additional Submissions the Applicant states that the 10 October 2014 invoice was not a payment claim. It submits it was not a payment claim in part as it was it was not signed (Div4.1.h.). Page 3.
100. If the lack of a signature means the invoice of 10 October 2014 is not a payment claim then the invoice of 7 November 2014 is also not a payment claim, as it also is not signed.
101. If the Applicant is right then neither of the claims are valid payment claims according to the Act. If the Applicant's invoice is not a payment claim then no payment dispute arose and so the Applicant was not entitled to make an application for adjudication. Section 27.

102. There being no valid payment claims, no payment dispute arose and so the Applicant did not have the right to apply for an adjudication and the application has not been made and served in accordance with section 28 of the Act and so the application must be dismissed pursuant to section 33(1)(a) of the Act.

### **Description**

103. Division 4 also requires the claim to itemise and describe the obligations the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim.

104. From the delivery of the October invoice the Respondent demanded delivery of the particulars relating to the work done.

105. The Applicant says that the contract was the quote and the purchase order and that no further description was necessary for the Respondent to assess the claim. I disagree.

106. The quote refers to [*work and project site details redacted*] as per specifications required. The specifications are included in the Site Instruction which states: Subcontractor to supply timesheets / locations / detail of Works undertaken In support of Subcontractor PPA item Schedule B Appendix 4 - 'Provisional Sum for Dayworks.

107. The contract required more detail as to what was done than the Applicant submits. The Respondent demanded details of what was done and refused to assess the works until that detail was provided.

108. The detail was not provided after the October invoice although demanded. The November invoice contained the same information as the October invoice and so neither of the invoices complied with Division 4 and they were therefore not payment claims as required by the Act.

109. There are therefore no payment claims that comply with the Act that could trigger a payment dispute and hence the Applicant has not right to make an application for an adjudication.

110. There being no valid payment claims, no payment dispute arose and so the Applicant did not have the right to apply for an adjudication and the application has not been made and served in accordance with section 28 of the Act and so the application must be dismissed pursuant to section 33(1)(a) of the Act.

### **Addressed to the Party**

111. If I am wrong that neither claim was a payment claim on the Applicant's submission relating to there being no signatures apparent on the invoices and the Respondent's claim the invoices did not provide sufficient information for the claim to be assessed then I must deal with the Applicant's submission that a payment claim has to be addressed to the party to which the claim is made.

112. Section 19 of the Act states that the provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment.

113. Division 4 of the Act at 5.1.b states that it is a term under this contract that a payment claim must be addressed to the party to which the claim is made. The claim has to be made to the principal. s4.

114. The November invoice is addressed as INVOICE TO: [*Respondent's name and address details redacted*].

115. This is clearly addressed to the Respondent, and the Applicant says that is the party to which the claim is made and is the principal in the Applicant's case.

116. The October invoice is addressed as, INVOICE TO: [*processing address incorporating parts of the names of both the subcontractor and the Respondent*].

117. This invoice is not so clearly "addressed" to the Respondent.

118. The Respondent says that if the Applicant's argument is accepted then [*the subcontractor*] was the disclosed agent for the Respondent which had authority to accept invoices for the Respondent and so the payment dispute arose out of the October invoice not the November invoice. GW[42].

119. Was it the intention of the parties to the contract that [*the subcontractor*] was a disclosed agent for the Respondent?
120. I do not accept the Applicant's submission that agency can only be determined from the contract itself. There are many cases that hold that the surrounding circumstances must be looked at to determine the intention of the parties that a particular entity is the disclosed agent of another.
121. Evidence of conversations and other extrinsic evidence occurring before and after the execution of the alleged contract is admissible to ascertain the intention of the parties. *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 (CA), at 332 and 337;
122. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 the High Court held at [40]:
- “This court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe”.
123. The evidence as to the disclosed agency is that the request for a quote from [*the subcontractor*] was a request from the Respondent. Further, the delivery of a quote addressed to [*the subcontractor*] is admitted by the Applicant as providing a quote to the Respondent. As a result of the quote being sent to [*the subcontractor*] the Respondent delivered the Purchase Order to the Applicant.

124. The address on the October invoice is the same as the address used on the quote. The Applicant states it provided the quote to [*the Respondent*]. NB[3]. If a quote addressed to [*the subcontractor*] is providing a quote to the Respondent then the Applicant provided the quote to the Respondent via the Respondent's disclosed agent. The Respondent by accepting the quote has represented to the Applicant that [*the subcontractor*] has authority to receive notices like quotes and invoices on behalf of the Respondent. Further, somehow unexplained the Applicant knew that the address on the quote was the proper way to direct quotes to the principal.
125. The Applicant also admits that it knew that [*the subcontractor*] was managing the [*site*] on behalf of the Respondent. This admission also supports the view that [*the subcontractor*] was the authorised disclosed agent of the Respondent.
126. The Applicant also says that [*the Respondent*] accepted the quote on 3 October 2014 by delivery of the Purchase Order to the Applicant. The Purchase Order required invoices to be sent to the same address that the quote was sent to.
127. In the Additional Submissions the Applicant submits that the purchase order was a counter offer from the Respondent. Para 1 page 1. I do not accept this submission. It is at odds with the content of the Statutory Declaration of the Applicant. I also note the equanimity with which the Applicant accepted the Purchase Order which would not have been the case if it was a counter offer from a different entity received out of left field so to speak.
128. The Applicant then sent the October invoice to the same address as the quote.
129. The Respondent then reacted to the delivery of the October invoice to the agent by denying that it had any liability to pay until further information was supplied.
130. The Applicant also states that [*the subcontractor*] was the manager for the Respondent in the management of the [*site*]. NB[4], NB[8] and NB[26]. [AB] at NB[9] also says [*the subcontractor*] was not the party to the contract.

131. The law in relation to delivering notices to an agent is that a notification given to an agent is effective service if the agent receives it within the scope of his actual or apparent authority. *Bowstead and Reynolds on Agency* 18th ed 2006 at p477.
132. Consideration of the course of conduct by the Applicant with respect to its dealing with the agent and its admission that it knew [*the subcontractor*] was the agent of the Respondent and the fact that the Respondent challenged the claim as proper particulars of the claim had not been provided means on the Applicant's case [*the subcontractor*] was the disclosed agent of the Respondent for the purpose of these works and as such was not a party to the contract as the Applicant admits and the Applicant knew that notice to the disclosed agent [*the subcontractor*] was notice to the principal.
133. I determine for these reasons that by addressing the October invoice to [*the subcontractor*], the disclosed agent, the Applicant addressed the invoice to the party to which the claim is made. It was a claim by the contractor to the principal.
134. If the lack of a signature and proper description of the works are not an impediment to the October and November invoices being a payment claim I determine that the name and address used in the October invoice meant the payment claim was addressed to the party to which the claim was made and was a claim made by the contractor to the principal and was thus for that reason not excluded from being a valid payment claim.

### **Repeat Claim**

135. What of the November invoice? Cannot that support the Application of 3 March 2015.
136. The answer to that question is no because the November invoice is a repeat claim.



137. Repeat claims are not contemplated by the Act. Section 8 of the Act does not contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims. The section (section 8) makes no provision for repeat payment claims. *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [11] CA.
138. The filing of a repeat payment claim comprised of claims for the identical amounts for the identical work cannot operate to revive a right which the Act Parliament has terminated or destroyed. *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [56], [124],[260] .
139. A repeat claim is one which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28 to be available for adjudication. *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [39] CA.
140. The November invoice claims the balance of the sums the Applicant says are due for the works carried out in October 2014 and which I determine were claimed in the October invoice. The claims made in the 2 invoices are identical save the latter gives credit for a payment made prior to its being issued. The November payment claim is a repeat claim and the contract does not allow for repeat claims.
141. The issuing of the November payment claim does not retrigger the payment dispute that arose from the October payment claim.
142. The adjudication application of 3 March 2015 was therefore made more than 90 days after the payment dispute arose either due to the Respondent complying with section 8 after having received the October payment claim or the 28 days having passed from receipt of that claim and the application therefore does not comply with section 28 of the Act and must be dismissed as required by section 33(1)(a) of the Act.

## **Estoppel**

143. The Applicant argues with respect to the Respondent's agency argument that the Respondent did not tell the Applicant that [*the subcontractor*] was the correct party to the contract and so the Respondent was responsible for the Applicant not bringing an application for adjudication of the October invoice within time.
144. I do not think the principles of estoppel can help the Applicant. The reason the application is out of time is due to the provisions of a statute that make the application invalid. I do not think any declaration by a Court as to the position to be taken by the Respondent as to the proper principal to the contract because of any unconscionable conduct would alter the circumstance created by the statute. The invoices would still be invalid as they were not signed and did not contain the proper information and because the November invoice was a repeat claim, and the attitude held by the Respondent would not alter those facts.

## **Other Matters**

145. The Applicant argues that as the payment claim was not paid in accordance with division 5 then in accordance with the terms implied into the contract an adjudicator must determine the whole of the sum claimed has to be paid. I do not agree.
146. In this matter the Respondent gave the Applicant a notice of dispute at the latest by 14 October 2014 just 4 days after the payment claim was delivered. It appears to have disputed the whole of the claim but also appears to have paid an amount toward the amount owing as the November invoice gives the Respondent a credit for a payment made toward the initial sum claimed. Further providing the debtor with a credit for the October invoice does not have any effect on the payment dispute having arisen when the notice of dispute was sent.

147. The Respondent has put submissions as to why the application should be dismissed. If I am wrong in relation to my decision, based on the Applicant's case, that the November invoice is a repeat claim, I determine that the application has to be dismissed based on the material put by the Respondent to the effect that the principal is ESS Larrakia and the October invoice was addressed to the principal and the party to which the claim is made and the October invoice was the payment claim which triggered the payment dispute and for the reasons set out above the application for adjudication was made out of time.
148. I am not required, nor able to assess on the balance of probabilities whether any party to the payment dispute is liable to make a payment due to my determination that the application should be dismissed as required by section 28 of the Act.

## **COSTS**

149. Section 36 (2) of the Act provides that "if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs."
150. I do not consider that the Applicant at any time throughout the course of the adjudication acted in a frivolous or vexatious manner, or that its submissions were unfounded.
151. Therefore, in relation to my fees and the other fees incurred by the parties, I adopt the standard position in s 36(1) of the Act that the parties to a payment dispute bear their own costs in relation to an adjudication (including the costs the parties are liable to pay under s 46 – i.e. the adjudicator's fees.

## **DETERMINATION**

I, David Alderman, Registered Adjudicator, determine on 28 March 2014 in accordance with section 38(1) of the *Construction Contracts (Security of Payments) Act 2004 (NT)* that:

- A. The application for adjudication be dismissed under section 33(1)(a) of the Act, and
- B. The amount to be paid by the Respondent to the Applicant is \$nil, and
- C. I make no orders as to the costs of the adjudication pursuant to section 36(2) of the Act

DATED: 28 March 2015.

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David Alderman  
Registered Adjudicator

### **Amendment to the Determination**

The Applicant has paid 100% of the costs of the adjudication and pursuant to section 46(9) of the Act. I determine that the Respondent must pay to the Applicant the sum of \$3,662.32 so that the parties involved pay an equal amount of the costs of the adjudication.

The Respondent must pay the Applicant the sum of \$3,662.32 referred to in the paragraph above on 8 April 2015.

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David Alderman  
Registered Adjudicator 23  
1 April 2015