Determination 26.16.05

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 4 November 2016 I was served electronically with an Application for Adjudication dated 2 November 2016 to determine a payment dispute between the Applicant and the Respondent. This was the second application in the disputed matter and I had agreed to act as adjudicator under s.28(1)(c)(i) of the Act.
2. The first application dated 22 September 2016 was withdrawn under s.28A of the Act on 22 October 2016. Withdrawal 26.16.04 is a record of that withdrawal.
3. During the withdrawal process of the first application the parties sought my availability to act as adjudicator should a second application be lodged for adjudication in the disputed matter.
4. On 16 October 2016 I wrote to the parties agreeing to act as adjudicator under s.28(1)(c)(i) of the Act should a second application be lodged for adjudication and confirmed that I held no conflict of interest in relation to the parties to the contract or the contract under which the dispute had arisen.
5. On 6 November 2016, after being served with the second application, I wrote to the Construction Registrar, copied to the parties, and notified my appointment as Adjudicator under s.28(1)(c)(i) of the Act, effective as at 2 November 2016. I confirmed that I held no conflict of interest in relation to the parties to the contract, the site or the contract under which the dispute had arisen. I also indicated that, by my calculations, the Response would be due to be served on or before 16 November 2016.
6. On 18 November 2016 I received an email from the Applicant, copied to the Respondent, which advised that they had not received a Response from the Respondent and invited me to proceed to adjudicate the dispute under s.33 of the Act.
7. I also was not served with a Response on or before 16 November 2016.
8. Later that same day 18 November 2016 I received an email from the Respondent, copied to the Applicant and the Construction Registrar, seeking an extension of time up to 9 December 2016 within which to prepare and serve their Response.
9. On 18 November 2016 I responded to the parties, with a copy to the Construction Registrar, advising that an extension of time to prepare and serve a response is not within the jurisdiction of an adjudicator and that there are no provisions under the Act to extend the time for the making of an application or preparing and serving a response, as follows:

“*….Dear [sirs]*

*It is not within the jurisdiction of the Adjudicator to grant any additional time within which a Response under section 29 of the Construction Contracts (Security of Payments) Act (“the Act”) is to be prepared and served.  The object of the Act is clearly set out in section 3 of the Act and relevantly provides for the facilitation of timely payments, rapid resolution of payment disputes and rapid recovery of payments under construction contracts.*

*As such, there are no provisions made in the Act to extend time for the making of a Response.  Section 29(1) sets a strict timeframe of “…10 working days…” within which a Response must be prepared and served.  The word ‘must’ is an obligatory term and has been determined by Mildren J in Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd [2008] NTSC 46 at 35.   Should a Respondent fail to respond within time, an Adjudicator cannot consider any information put before him or her after that deadline has expired.*

*The Response in this matter, as I calculate it, was due on or before 16 November 2016 and it is now 18 November 2016 which is well past that deadline.*

*I must now proceed to determine the matter, within the prescribed time and on the evidence of the Application, under section 33 of the Act.*

*I thank you for your assistance in this matter……”*

1. I received no further contact from the Applicant or the Respondent in relation to their failure to prepare and serve a response.

***Introduction***

1. This Adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to provide shop fit out services to a tenancy [*in a Darwin shopping centre*] in the Northern Territory of Australia.
2. The Applicant claims that it is entitled to be paid its Payment Claim, dated 30 August 2016, in the sum of $15,795.00 (including GST) for a tiling variation instructed by the Respondent, which is the remaining balance of the Contract. The total contract value, including the tiling variation is $136,122.90 (including GST) plus the Joinery Installation done at an hourly rate of $90.00.
3. The Applicant has not sought Interest or Costs of the Adjudication.
4. The Respondent has not prepared and served a Response, however in the evidence provided by the Applicant in the Application the Respondent disputes the claim on the basis that “….*[the Respondent] was invoiced for final payment on 29 June and that’s what we have paid in full as per contract*….”
5. The Respondent has not sought Interest or Costs of the Adjudication.

***Procedural Background***

The Application

1. The Application is dated 2 November 2016 and was served on 4 November 2016. It comprises a general submission and 6 listed attachments. The attachments, *inter alia*, include:
2. a copy of the Contract including a copy of the Tender;
3. a copy of the Payment Claim in the form of a Letter of Demand dated 30 August 2016 enclosing a Tiling Invoice No. 14535 dated 10 June 2016 from the Applicant’s subcontractor and the Respondent’s email approval for the works dated 9 June 2016; and
4. supporting evidence by letter and email correspondence between the parties relied upon in the general submission.
5. The Payment Claim was submitted to the Respondent on 30 August 2016.
6. The Respondent disputed the claim on 30 August 2016 and has not paid the Payment Claim.
7. The Application was served pursuant to s.28 of the Act.

The Response

1. The Respondent has not prepared and served a Response under s.29 of the Act.

***Adjudicator’s Jurisdiction and the Act***

1. The following sections of the Act apply to the Contract for the purposes of the Adjudicator’s jurisdiction under the Act.
2. Section 4 of the Act – **Site in the Territory** – the site [*address details redacted*] the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.
3. Section 5 of the Act - **Construction Contract** - the Contract is a construction contract by reference to the Contract document and Tender documents which are bound together to form the Contract Agreement between the parties. The Contract is dated 10 May 2016 and is a “Commercial Building Shop Fit Out Contract” used for general building and interior fit out work where no architect is supervising and has been provided for the works by the Respondent. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.
4. Section 6 of the Act – **Construction Work** – the work is a tenancy fit out at [*address details redacted*]. The Contract describes the work as “….*to carry out and finish building work the subject of the contract*….”. I am satisfied that the work is construction work for the purposes of the Act.
5. 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.”*

1. The Applicant says that it has made a payment claim under the contract on 30 August 2016 for payment of a tiling variation to the contract, directed by the Respondent on 9 June 2016.
2. The terms of the contract that govern claims for payment of a variation are contained in clause 12 “*Variations*” and relevantly clause 12.7 of the contract which states:

*“.…12.7 The Builder may claim payment of the price for any extra work requested with the next progress claim following completion of the extra work….”*

1. To claim for payment of a variation under the contract the Applicant must claim for the extra work that was done as a variation as part of its next progress claim and not at the time the variational work may have been completed. In this respect the contract contemplates that there would be regular progress claims, generally each month, and that the variations done during that month would be claimed and then added to the progress claim amount for the month.
2. The terms of the contract that govern progress claims made for the work done is clause 18 “*Progress Payments*” and clause 18.5 prescribes what “*….A progress claim must show….*” which relevantly states:

“*18.5.1 The Builder’s valuation of the work done to that date;*

*18.5.2 The Builder’s valuations of any unfixed materials and/or goods intended for and delivered to and secured at or adjacent to the Work included in such claim;*

*18.5.3 The total amount already claimed;*

*18.5.4 The total amount now claimed by the Builder;*

*18.5.5 Owner will be charged interest on money not paid on time at the rate agreed in item K of the Schedule……”.*

1. The Applicant has submitted a payment claim for adjudication which comprises:
   1. a Letter of Demand dated 30 August 2016 in the sum of $15,795.00 (including GST);
   2. a Tiling Invoice No. 14535 dated 10 June 2016 from the Applicant’s subcontractor; and
   3. the Respondent’s email approval for the works dated 9 June 2016.
2. For a valid payment claim to arise under the Act the payment claim made by an applicant must comply with the stipulations of the construction contract under which the work is done. If the payment claim does not comply with the requirements of the construction contract, in this instance clause 18 of the contract, then the payment claim is not a valid payment claim under the Act that is capable of causing a payment dispute to be adjudicated.
3. The requirements of a valid payment claim under the Act was determined by Olsson AJ in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [250] to [252] where His Honour said:

*“…..[250] The issue to be addressed in this case in considering such a question was whether objective non-compliance with the contract stipulations, pre- requisite to the raising of valid payment claims in respect of the six unpaid invoices, had the practical effect that no relevant payment claims, within the meaning of the statute, had been presented to GRD prior to receipt of the SI and, thus, no payment disputes had previously been generated in respect of them. I consider that the inevitable conclusion must be that this was the situation.*

*[251]  To borrow an expression employed by Mr Wyvill SC, the invoices simply did not pass the requisite threshold test to constitute payment claims of the type envisaged by the statute, because, being non-compliant with clause 12.2(d) of the Subcontract, they were not, relevantly, payment claims under that construction contract, as envisaged by the statute. The "jurisdictional fact" upon the presence of which the jurisdiction of the adjudicator was conditioned, was therefore clearly demonstrated in relation to the payment dispute arising from the delivery of the SI and the non-payment of the monies claimed in it.*

*[252] The essential thrust of Mr Wyvill's submissions in that regard, as I have earlier outlined them, is compelling. They should be upheld….”.*

1. The contents of the Applicant’s Payment Claim at **Tab LN5** similarly do not pass the requisite threshold test for compliance with the stipulations of clause 18.5 of the construction contract and therefore is not a valid payment claim for the purposes of s.4 of the Act.
2. Absent a valid payment claim under the Act, there can be no payment dispute to adjudicate.
3. I am satisfied that the Application fails on the basis that there has been no valid payment claim made under the construction contract terms and therefore there is no valid payment claim under s.4 the Act.
4. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

*“….(a) 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*

*(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….”*

1. The Applicant has not made a valid payment claim under the terms of the construction contract. Absent a valid payment claim that would pass the threshold requirements of s.4 of the Act, no payment dispute can arise to be adjudicated.
2. I am satisfied that the Application fails on the basis that there has been no valid payment claim under s.4 the Act and therefore there is no payment dispute under s.8 of the Act.
3. Section 27 of the Act – **Who can apply for Adjudication** – If a payment dispute arises under a construction contract, any party to the construction contract may apply to have the dispute adjudicated under this Part unless:

*“…(a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or*

*(b) the dispute is the subject of an order, judgement or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract…”*

1. This is the second application lodged by the Applicant in relation to this payment dispute.
2. The first application dated 22 September 2016 was withdrawn under s.28A of the Act on 22 October 2016. Withdrawal 26.16.04 is a record of that withdrawal.
3. It has been reasoned at [35] to [48] above that there is no valid payment claim under the Act and therefore no payment dispute can arise that would allow an applicant to make an application for adjudication.
4. Had there been a payment dispute, however, the second application would fail under s.27(a) of the Act.
5. The making of a second application for an adjudication where the first application was withdrawn was determined by Kelly J in *Gwelo Developments Pty Ltd v Briery Limited* [2014] NTSC 44 at [39] to [41] where Her Honour said:

*“….[39] The principle is not in doubt, but I do not think it has particular application in the present case. Section 26 sets out the object of Part 3 of the Act (which deals with adjudication of disputes). It states that the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible. It is difficult to see how this object would be advanced by a construction of s 27 that allowed a party to withdraw an application for adjudication and then make as many further applications (within the time frames set out in the Act) as it chose. When pressed, the only particular utility Mr Wyvill could point to for acceptance of the proposed construction was that it might encourage respondents to be more reasonable in responding to requests by applicants for two or more payment disputes to be adjudicated together.*

*[40] The plaintiff relies on the literal meaning of the words in s 27: “any party to the contract may apply to have the dispute adjudicated under this Part unless ... an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to ss 31(6A) and 39(2).”*

*[41] There is nothing in the section to suggest that the prohibition on making an application where “an application for adjudication has already been made” is intended to be limited to the case where the previous application is still on foot. The plaintiff submitted that the meaning is plain on its face. If an application “has already been made” – at any time in the past – the party may not make another application, subject only to the two exceptions set out in the section. Section 31(6A) covers the case where an adjudicator has been disqualified, and s 39(2) covers the situation in which the time limited for the adjudicator to make a determination has expired without a determination having been made and the legislation deems the application to have been dismissed. In both cases the adjudication process has been brought to an end without a result through no fault of the parties….”*

1. However, in this matter there is no valid payment claim under the Act and no payment dispute can arise to allow an application for adjudication.
2. Section 29 of the Act – **Responding to Application for Adjudication** – there has been no Response prepared and served under s.29 of the Act.

The Adjudicator’s jurisdiction

1. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application, I find that I must dismiss the Application without making a determination of the merits under section 33(1)(a)(ii) on the following grounds:

**1.** the Application has not been prepared and served in accordance with section 28 of the Act in that there is no payment dispute under s.8 of the Act to allow an Application to be made; and

**2.** the payment claim made in the Application under section 4 of the Act was not recognised by the construction contract under which the work was done and could not have triggered a payment dispute under section 8 of the Act.

***Merits of the Claims***

1. I make no finding on the merits as I have dismissed the Application.

***Interest on the claims***

1. There is no requirement to consider interest as the Application has been dismissed.

***Summary***

1. In summary of the material findings, I determine the Application to be dismissed under section 33(1)(a)(ii) of the Act.
2. I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked it.

***Costs***

1. I have not found either the Application or the Respondent’s position without merit and I do not consider the Applicant’s conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.
2. I make no decision under either section 36(2) or 46(6) of the Act. The parties must bear their own costs.

***Confidential Information***

1. The following information is confidential:
2. the identity of the parties;
3. the identity of the principal; and
4. the location and nature of the works.

DATED: 30 November 2016



Rod Perkins

Adjudicator No. 26