

Adjudicator's Determination

Pursuant to the Northern Territory of Australia Construction Contracts (Security of Payments) Act 2004

Adjudication 18.07.05

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, determine that the Application is dismissed.
2. The Applicant and Respondent shall each bear 50% of the Adjudicator's costs

Appointment of Adjudicator

3. I was invited to adjudicate this matter by the Territory Construction Association 1 November 2007.
4. I accepted the invitation and was appointed as adjudicator by the Territory Construction Association 1 November 2007. The parties were notified of the appointment the following day.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act*.

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*.
 - 6.2 Application from the Applicant dated 31 October 2007.
 - 6.3 Response from the Respondent dated 14 November 2007.
 - 6.4 Adjudicator's request to Respondent for documents dated 15 November 2007.
 - 6.5 Applicant's Invoice #00000157 dated 13 June 2007.

- 6.6 Supreme Court Decision *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007].
- 6.7 Adjudicator's invitation for submissions on the question of admissibility of requested documents dated 15 November 2007.
- 6.8 Claimant's submission on admissibility of documents dated 16 November 2007.
- 6.9 Respondent's submission on admissibility of documents dated 16 November 2007.

Documents Set Aside

7. In the Response the Respondent makes reference to four documents:
 - 7.1 Applicant's Invoice #00000157 dated 13 June 2007
 - 7.2 Respondent's Letter dated 7 July 2007
 - 7.3 Applicant's Solicitor's letter dated 30 July 2007
 - 7.4 Supreme Court Decision *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007]
8. The Response includes quotations from these documents however the documents themselves were not attached. I issued a request for a copy of these documents and the Respondent advised they had been inadvertently omitted from the Response.
9. The Applicant contested the admissibility of each of the documents.
10. In order to equitably consider the issues raised I requested submissions from the parties on this question. Both parties responded to this request.
11. Section 29(2)(c) of the Act provides that;
The response must state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.
12. The Applicant argued that the interpretation of Act would be subject to the "Literal Rule" and then argues the key words are "must", "have attached", "documents" and "on which the party ... relies".
13. The Respondent countered that the presence of the terms "state" and "or" clearly suggest an alternative proposition that the documents must be either nominated or attached.
14. With respect to the Applicant's Invoice #00000157, there is a direct reference to this document in the Application at Attachment 5 which is a letter from the Respondent to the Applicant dated 22 October 2007. The letter refers to "your invoice of 13 June 2007, in the amount of \$487,857.87".
15. Given that both the Application and the Response include a reference to the same document I am of the view the Adjudicator is entitled to exercise discretion under

Section 32(2)(a) to discover this invoice.

16. I am persuaded by the Respondent's argument that the Supreme Court decision document exists in the public domain and is hence legitimately discoverable under Section 32(2)(a).
17. In respect of the two letters sought it is sufficient for this determination to accept the Respondent's description of those documents without verifying the veracity of those remarks by personal inspection. Hence I confine myself specifically to the information about those letters which is included in the Response.
18. Accordingly, in making the determination I have set aside and not considered two of the documents I requested from the Respondent 15 November 2007. The two documents are the Respondent's letter dated 7 July 2007 and the Applicant's Solicitor's letter dated 30 July 2007.

The Adjudication Application

19. The Adjudication Application was served on the Respondent and the Prescribed Appointer on 31 October 2007 and consists of the following documents;
 - 19.1 Adjudication Application document complete with 8 attachments bound into one document;
 - 19.2 Payment Claim dated 8 October 2007 with 4 Annexures bound into one document;
 - 19.3 Five volumes 1A, 1B, 2, 3, and 4 which seek to support and clarify the claims.

The Response

20. The Response to the Application was served on the Adjudicator and the Applicant on 14 November 2007, within the period defined by the Act, and consists of the following documents;
 - 20.1 Response document;
 - 20.2 Four statutory declarations from employees of the Respondent providing sworn statements to support the Respondent's position,
 - 20.3 A statutory declaration from the Respondent with 13 supporting annexures detailing various events on the project.

Clear Jurisdiction

21. The contract is for work on a site in the Northern Territory and is a contract undertaking construction work as defined in Section 6 of the Act. The contract was executed 17

January 2006, after the commencement date of the Act and is therefore a construction contract according to the Act.

22. At a preliminary conference 8 November I advised the parties that I had no prior association with them and hence and no conflicts of interest to declare. The parties have not contested that declaration.
23. The parties have provided no advice of the dispute being “subject of any other order, judgment or other finding”.

Contested Jurisdiction

24. The Respondent contested jurisdiction on the following points.
- 24.1 The Claimant lodged a payment claim with the Respondent dated 13 June 2007. On 7 July 2007 the Respondent advised the Applicant that the claim was disputed. The Respondent alleges this disputed claim relates to the same matters presented in the Applicant’s claim dated 8 October 2007 albeit with revised quantum. On this basis the Respondent alleges the Application for adjudication has not been submitted in accordance with Section 28 of the Act.
- 24.2 The Respondent alleges that the claim is one by a principal against a contractor and that neither the Act nor the contract confers such a right on the principal and hence the Act does not apply.

The Payment Claim

25. The payment claim referred to in the Application is dated 8 October 2007. The amount claimed is \$1,026,801.26 inclusive of GST.
26. The summary details of the 8 October 2007 claim (GST inclusive) are:

Tiling completion costs	\$291,786.55
Tiling rectification costs	\$183,817.69
Kitchen completion costs	\$275,520.08
Bathroom completion and repairs	\$61,014.64
Direct and indirect delay costs	<u>\$500,587.71</u>
Sub Total (Applicant Claims)	\$1,312,726.67
Less unpaid contract value as varied	<u>\$285,925.41</u>
Net Claim	\$1,026,801.26

Admissibility of Claim

27. The Respondent's argument contesting the validity of the Applicant's October claim and the Applicant's right to claim must be determined.
28. With respect to the Applicant's right to claim Clause 12.6 (b) of the subcontract incorporates the following provisions;
Contractor may deduct from moneys otherwise due to the Subcontractor any claim to money which Contractor may have against the Subcontractor whether for damages (including liquidated damages) or otherwise, whether under the subcontract or otherwise at law relating to the Works.
29. Clause 12.6 (b) clearly contemplates the potential for the contractor (Applicant) to raise a claim against the subcontractor (Respondent). The clause does not specify any limits on the extent of its application. In other words it does not prohibit the possibility of the contractor presenting a claim which would require the subcontractor to make a payment to the contractor as distinct from simply accepting a reduction in a payment from the contractor to the subcontractor.
30. Section 4 of the Act provides that
"payment claim" means a claim made under a construction contract ... by the principal (Applicant) to the contractor (Respondent) for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.
31. I determine that the contract does confer a right to claim upon the contractor and that such claims are payment claims as defined in the Act
32. The summary details of Invoice #00000157 dated 13 June 2007 (GST inclusive) presented in a similar format as for the October claim at paragraph 26 above would indicate the following:

Tiling completion costs	\$288,973.30
Tiling rectification costs	\$171,757.48
Kitchen completion costs	\$188,476.39
Bathroom completion and repairs	\$0.00
Direct and indirect delay costs	\$156,915.00
Sub Total (Applicant Claims)	\$806,122.17
Less unpaid contract value (indicative)	\$318,264.30
Net Claim	\$487,857.87

33. The Variation Summary attached to the June invoice lists Variation Nos. 9, 12, 13, and 14 all relating to tiling work and all dated 27 April 2007. That summary also lists Variation Nos. 15, 16, 17 and 18 covering kitchen joinery, further tiling work and a delay claim. These variations are dated 7 June 2007. It is presumed these variation

values were determined by the Applicant pursuant to Contract Clause 11.2 which provides that failing agreement with the subcontractor, the contractor determines the variation price.

34. The Variation Reconciliation attached as Annexure D to the October Claim excludes any reference to Variation Nos. 9, 12, 13, 14, 15, 16, 17, and 18. This Reconciliation introduces Variation Nos. 19, 30, 31, and 32 all dated 19 September 2007. There are no explanatory notes relating to any of the missing numbers in the sequence 1 – 32.
35. Comparing the two claim summaries at paragraphs 26 and 32 there is a difference in the unpaid contract value. There are two contributing factors. In the June calculation the total progress claim retention of \$25,458.95 is treated as unpaid value. The October calculation allows for the additional 4 variations dated 19 September 2007 with a net value of -\$6,879.93.
36. There is an increase in the Applicant Claims from June to October of about \$500,000 with \$350,000 of this in revised delay costs, \$90,000 in additional kitchen costs and the additional inclusion of \$60,000 in bathroom costs. It appears that the Applicant initially considered its preferred method of recovering costs under the contract would be to treat these costs as negative variations. Subsequently in the October claim this approach was abandoned in favour of an aggregated contra charge. It is reasonably apparent from the submissions of the parties that whilst the quantum and the details of the two claims vary the underlying circumstances and assertions of contractual rights and responsibilities remain the same.
37. Following receipt of the 13 June 2007 claim the Respondent wrote to the Applicant 7 July 2007 to dispute the claim with the statement "...your invoice is rejected utterly...". The dispute is then acknowledged in subsequent correspondence from the Applicant's solicitor and the Respondent dated 30 July 2007. That letter suggests resolution by arbitration under the terms of the contract. Neither party has provided any information on any attempt to resolve this dispute in the period to 8 October 2007 when the Applicant presents the second claim.
38. The Act provides that a payment dispute exists when a payment is not made on the due date or when the claim has been rejected or wholly or partly disputed. The required time for payment of the June invoice could possibly be subject to the implied conditions of Division 5 of the Act, with the claim effectively in dispute as early as 20 days after the claim or 3 July 2007.
39. I conclude on the balance of probabilities that the 8 October 2007 claim is a revision of the 13 June 2007 claim which went into dispute not later than 7 July 2007. The 31 October 2007 Application was submitted 116 days after the date of dispute. I therefore determine that the Applicant's claim has not been served in accordance with Section 28 of the Act.

Dismissal of Application

40. Under Section 33(1)(a) of the Act the Adjudicator, having determined that the Application has not been prepared and served in accordance with Section 28 of the Act, must dismiss the application without making a determination of its merits.
41. I therefore dismiss the application and proceed only with a determination on costs.

Costs

42. Clause 36 (1) of the Act requires the parties to bear their own costs.
43. 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.
44. Taking into account the complexities of the various issues in this matter, the value of the claim, and the fact that the dispute remains unresolved I am satisfied that the conduct of the parties has not been frivolous or vexatious.
45. I therefore determine that;
 - 45.1 The parties shall share the Adjudicators costs equally

Conclusion

46. I have concluded as follows:
 - 46.1 The Application is dismissed.
 - 46.2 The Applicant and Respondent shall each bear 50% of the Adjudicator's costs.

Brian J Gallagher
NT Registered Adjudicator No 18.
26 November 2007