

DETERMINATION NO. 23.18.01

Adjudicator's Decision pursuant to the
Construction Contracts (Security of Payments) Act

[Redacted]

Applicant

and

[Redacted]

Respondent

DETERMINATION

I, David Alderman, Registered Adjudicator 23, on 26 April 2018 in accordance with section 33(1)(a) of the *Construction Contracts (Security of Payments) Act*, dismiss the application.

I determine there is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the Act.

Amendment to the Determination

Date of the Amendment - 27 April 2018

I decide that the amount to be paid by [*the Respondent*] to the Applicant is \$7,911.75 pursuant to Section 46(1A)(9) of the *Construction Contracts (Security of Payments) Act*. The sum of \$7,911.75 is to be paid within 14 days of 27 April 2018.

Details

Applicant

[Redacted]

Respondent

[Redacted]

Appointment

The Applicant purported to apply on about 29 March 2018 pursuant to the *Construction Contracts (Security of Payments) Act* (the CC Act), for the adjudication of a payment dispute. It delivered a written application to the Law Society the Northern Territory for the appointment of an adjudicator. Consequent upon that application I was appointed adjudicator on 6 April 2018 by the Law Society to determine this application. The Society 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 CC Act.

Application

1. On 6 April 2018 I was appointed adjudicator of an adjudication application dated 29 March 2018.
2. On 9 April 2018 I received a folder of documents prepared by the solicitors for the Applicant.
3. The folder contained the following:
 - 3.1. A letter dated 29 March 2018 address to the Law Society Northern Territory.
 - 3.2. An order of the Supreme Court dated 12 March 2018.
 - 3.3. The document entitled adjudication application 29 March 2018.
 - 3.4. A tax invoice dated 18 January 2018.
 - 3.5. An email from the Applicant to the Respondent dated 18 January 2018 9:21am
 - 3.6. An email from the Respondent to the Applicant 1 February 2018 11:42 AM

- 3.7. An email from [redacted] to the Respondent dated 1 February 2018 1:17p.m.
- 3.8. Various documents stated to be the contract.
4. This was the adjudication application.
 5. The document is entitled “adjudication application” and sets out the details of the application.
 6. The adjudication application does not contain any information as to service of the application upon Respondent.
 7. The document states the name of the Respondent and an address for service being the [its] solicitors, [redacted].
 8. I requested on 10 April 2018, pursuant to section 34 of the Act, information from the Applicant as to the date the Respondent was served and how the Respondent was served.
 9. I received a reply from the Applicant on 16 April 2018.
 10. I was advised that the application had been served on the Respondent on 29 March 2018 by email to the solicitor for the Respondent and by hand to the office of the solicitor for the Respondent. The solicitors were [redacted].
 11. I was advised by further submissions, requested by me on 10 April 2018, as to service that the application had been express posted to the Respondent’s PO Box and that it had been sent by email to the superintendent, being the enquiries contact in the contract. The Applicant also advised that the Applicant had arranged for service of the application on [a related entity to the Respondent] as a precautionary measure.
 12. I am not advised as to when the Applicant sent the application by express post but I assume it was after 12 April when the other party to the contract advised the Applicant that it had not been served with the application, but before the email of 16 April. I am not advised as to when the application was served on the [related entity to the Respondent]. I assume it was after 16 April. Nothing turns on those incidents for those dates.
 13. I also asked the Respondent to provide submissions with respect to the Applicant’s reply of 16 April 2018 so far as it related to the question of service. This request was an attempt to comply with the requirement of natural justice that pervades adjudications pursuant to the CC Act.

Requirements of the CC Act

14. Section 4 of the Act defines an Applicant for an application, as a person who under section 28 makes an application for the adjudication.
15. Section 26 provides that the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.
16. Section 27 provides that if a payment dispute arises under a construction contract, any party to the contract may apply to have a dispute adjudicated.
17. Section 28 sets out what the Applicant has to do to have a payment dispute adjudicated.
18. The section states a party must do certain things within 90 days after the dispute arises.
19. In this matter a previous application for adjudication was dismissed per force of section 33(2) CC Act. In such a case pursuant to section 39(2) CC Act the application must be made within 28 days after it was dismissed per force of section 33(2) CC Act.
20. Section 28 requires, in this instance, the Applicant to comply with the matters set out in section 28 within 28 days as required by section 39(2) CC Act.
21. The application in this matter is dated 29 March 2018 and was delivered to an appointor on that day.
22. If the date of the application was 29 March 2018 then the application was made within time.
23. Section 28 requires the Applicant to do 4 things before it can have its payment dispute adjudicated.
 - 23.1. The Applicant has to prepare a written application for adjudication,
 - 23.2. The Applicant has to serve that document on each other party to the contract, and,
 - 23.3. The Applicant has to serve the document on a prescribed appointer.
 - 23.4. The application has to be prepared in accordance with and contain the information prescribed by, the regulations.

The Regulations

24. Section 28 (2) requires (in the terms of must) that the application be prepared in accordance with and contain the information prescribed by, the regulations, and, it is to state the details of or have attached to it the construction contract involved or relevant extracts of it and any payment claim that has given rise to the payment dispute.
25. The application must be prepared in accordance with and contain the information prescribed by the regulations. (28(2)(a) CC Act)
26. Regulation 6 requires an application for adjudication to contain:
 - 26.1. the name and contact details of the appointed adjudicator or prescribed appointer; and
 - 26.2. the Applicant's name and contact details; and
 - 26.3. the name and contact details of each other party to the contract.
27. There is a problem with the contact details.
28. Section 28 (2) requires, in the terms of “must”, that the application be prepared in accordance with and contain the information prescribed by, the regulations.
29. The regulations require the application to contain the name and contact details of each other party to the contract.
30. The application in this matter may contain the contact details for the Respondent. What could be a better place of contact than the address for service?
31. However, in the documents accompanying the adjudication application clause 13 of the Condition of Contract states: “notices must be hand-delivered or sent by prepaid post or by electronic means to the recipient’s address for notices set out in the contract”.
32. The principal’s address for service of notices is nominated in the annexure to the Conditions of Contract contained in the documents served on me.
33. Looking at the annexure, the address for service of notices is [redacted].
34. The letter of 6 February 2018 from [*the Respondent’s solicitors*] (see later) could be an amendment to the contract.

35. Although, the Applicant has provided what it calls an address for service that may be sufficient to be the contact details required by the regulations.
36. It appears that there is room for an argument as to what the phrase “contact details” means, which is disappointing for an Act that demands great precision in complying with its other requirements which are necessary for an Applicant to follow so as to reach the stage of receiving a non-contestable determination.

Service on the Appointor

37. There has been service on the appointor. The application document was served on a prescribed appointor. The Law Society Northern Territory is a prescribed appointor under regulation 5 of the *Construction Contracts (Security of Payments) Regulations*.

Written Application

38. The Applicant has prepared a written application for adjudication.

Service

39. There is a problem with proof of service of the application document on the other party to the contract as required by section 28 CC Act.
40. Section 28 of the CC Act provides that an Applicant must within a strict time period serve the written application for adjudication on each party to the contract or else it cannot have its payment dispute adjudicated.
41. The Act further provides that an adjudicator must within a strict time period decide whether the application has been served or not in accordance with section 28. If the application has not been served in accordance with section 28 the adjudicator must dismiss the application without making a determination of its merits (S33(1)(a)(ii) CC Act). There is no provision for extensions of time in the Act or elsewhere.

Information

42. To make a determination the adjudicator must look at the application and its attachments. S34.1.a.ii. CC Act.

43. Section 4 CC Act provides that the word determination means a determination made on an adjudication under Part 3 of the merits of a payment dispute. The word “determination” is not used with respect to the adjudicator making a decision as to whether there has been service or not.

Section 33 and section 34 distinguish between making a decision as to service and making a determination of the merits of the application.

44. The adjudicator may, in order to obtain sufficient information to make a determination, request a party to make a, or a further, written submission or to provide information or documents. S34.2. CC Act. I note there is no equivalent power to obtain information in relation to a decision that is not a determination.
45. What is the adjudicator to consider when making the decision as to service?
46. It cannot be more than what the adjudicator is required to look at if the adjudicator were to make a determination. That means the adjudicator may look at not more than the application and its attachments and the information provided pursuant to a request made pursuant to section 34. Could it be less? What else can the adjudicator look at with respect to service? Since the question of whether there is service or not is within the jurisdiction of the adjudicator to decide and is not a jurisdictional question and the Act only refers to the application and submissions and the information provided on request, the adjudicator can only look at the same information
47. I will consider the information contained in the documents that have come from those sources. I will not consider additional information.

What is service of an application?

48. The contract does not contain a clause relating to service of an application for adjudication.
49. The CC Act also does not contain any provision as to the address at which an application for adjudication can be served upon the Respondent except that the Act states that the document “must” be served on the Respondent.
50. Section 25 of the *Interpretation Act* can be relied upon to find a proper means of service on the Respondent as can other relevant accepted means of service upon a [redacted]. *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [36]; *Match Projects Pty Ltd and Arcccon (WA) Pty Ltd* [2009] WASAT 134 at [76].

Section 25 Interpretation Act

51. Section 25 of the *Interpretation Act* in this matter required service:
 - 51.1. By giving it to:
 - 51.1.1. The executive officer of the body, or
 - 51.1.2. A person authorised by the recipient to receive the document
 - 51.2. By sending it by pre-paid post to the recipient at the recipient's address
 - 51.3. By sending it to the recipient by fax
 - 51.4. By leaving it addressed to the recipient at the recipient's address with somebody who has appears to be at least 16 years old.
52. The address of the recipient is the business address of the recipient.
53. [Redacted].
54. Service on solicitors who do not have instructions to accept service of an adjudication application is not service. It is the case that service on solicitors is not service pursuant to the *Interpretation Act* when neither actual authority in the plaintiff's solicitors to receive a copy of the adjudication application nor ostensible authority is proved in that regard. *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited* [2003] NSWSC 903 at [58]; *Penfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77.
55. This is especially so where the solicitors in question deny having those instructions and there is no proof from the Applicant that the solicitors had those instructions.
56. Service on an agent is not service in accordance with the Interpretation Act as it makes no provision for service on an agent. *Match Projects Pty Ltd and Arcccon (WA) Pty Ltd* [2009] WASAT 134 at [77]; *Penfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77 at [199]; *Howard v Farrell* [2012] WASAT 169 at [77];
57. The CC Act requires strict compliance with its provisions as to service. *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited* [2003] NSWSC 903 at [39, 59] referring to *Lucas Stuart Pty Ltd v Council of the City of Sydney, Metacorp*; *Taylor Projects Group Pty Ltd v Brick Dept (Pty) Ltd* and *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd*; *Penfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77 at [121, 196, 247]; *Match Projects Pty Ltd and Arcccon (WA) Pty Ltd* [2009] WASAT 134.

58. Further, Section 10(3) of the CC Act provides that a purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect. This means the allegations as to the behaviour of the solicitors creating an estoppel with respect to service cannot be relied on.

Service in this Matter

59. The application contained no information as to service of the application for adjudication on the other party to the contract.
60. An adjudicator could have decided without more that the Applicant had not proved service and that the application must be dismissed.
61. The Applicant was requested by the adjudicator pursuant to section 34 the Applicant to provide the information it had with respect to service.
62. The Applicant provided that information but also without request made submissions as to whether there had been service of the application on the other party to the contract or not. It is doubtful that I should consider that information. However, the information was “out there” and possibly could have had an effect on my mind and so in the interests of natural justice I requested submissions from the other party to the contract as to the submissions made by the Applicant. It is only fair now that I take into account both sets of submissions.
63. The Applicant submitted that the application had been served on the Respondent on 29 March 2018 by email to *[its solicitors]* and by hand to the office of those solicitors. An affidavit deposing to service upon a solicitor at the offices of *[redacted]* was provided to the adjudicator on 16 April 2018.
64. The affidavit stated: “I did on Thursday the 29th day of March 2018 tween the hours of 11:00 and 12:00 in the forenoon, and *[redacted]*. Affected service of the adjudication application dated 29 March 2018 by handing same to a female who identified herself as *[redacted]*”.
65. The Applicant in its unrequested submissions in relation to service says *[the solicitor’s address]*, was the address for service because:
- 65.1. The solicitors on 6 February 2018 advised the Applicant that “we confirm that we act for the *[the Respondent]* in relation to the above contracts. I would be grateful if you would please direct any correspondence in those matters to myself and *[redacted]*”.
- 65.2. Correspondence from the appointor said the Respondent’s legal representative was *[redacted]*.

- 65.3. Subsequent dealings by the solicitors with the adjudicator and with the solicitors for the Applicant created some form of estoppel to the effect that even if the solicitors were not the address the subsequent behaviour of the solicitors meant the other party to the contract could not deny it had been served.
- 65.4. The behaviour of the solicitors when one of them received the application created a representation that the solicitor's office was the correct address for service.
- 65.5. [Redacted].
- 65.6. The contract does not disclose [who] is authorised by the Respondent to receive the application and provides only a PO Box address and therefore direct service is required by section 25 of the *Interpretation Act*.
66. The application document states [*the Respondent's solicitor's address*] is the address for service of documents on the Respondent. It is possible the Applicant thought [*the Respondent's solicitor*] was the address for service because of points 1 and 5 of the reasons given above as to why [*the solicitor*] was listed in the application as the address for service.

Address for service

67. The Applicant says that the application has been served in accordance with section 25 of the *Interpretation Act*.
68. It appears to me that the solicitors have not proved service on the Respondent.
69. "The Respondent is not required to dispute service; the onus is on the Applicant to comply with the statutory regime." *Penfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77 at [121]; *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited* [2003] NSWSC 903 at [59].
70. The contract does not provide for service of an adjudication application it provides an address for service of notices required under the contract.
71. The application has not been given to the [*person noted in the address for service provision in the contract for the Respondent*] nor to a person authorised by the [*Respondent*] to receive the document.
72. The application has not been sent by prepaid post to the recipient's address or by fax.

73. The application has not been left at the address of the [*Respondent*].
74. The business address of the [*Respondent*] can be found on the Internet just the same as the Applicant submitted a means of service could be found on the Internet. A telephone call could have provided the information.
75. The name of [*the person on whom service on the Respondent can be effected under the contract*] can be found on the Internet. His address can be found on the Internet. A telephone call could have provided the information.
76. I assume the fax number of the [*Respondent*] could be found on the Internet. A telephone call could have provided the information.
77. The application has been served on solicitors who are the agents of the [*Respondent*] for the purposes of the contract but there is no information to establish that they had been authorised by the [*Respondent*] to receive the document. In fact the solicitors have denied they had instructions to receive service of the documents that made up the application.

Applicants Submissions

78. It appears to me the reasons that the Applicant states for not serving the application on the business address of the Respondent or the [*person named in the contract*] but rather on the solicitors, are not sufficient to avoid the conclusion that service on the solicitors was not service of the application on the Respondent.
79. The email from the Appointor. The email of the prescribed appointor to the Applicant had an address for notices but that appears to be a copy of the information provided by the Applicant in the application and was wrong. How would the appointor have any independent way of obtaining that knowledge? The only correspondence that I am privy to that came from the appointor is dated 6 April 2018 so that correspondence cannot have any effect on the legitimacy of service made on 29 March 2018 anyway.
80. That representation cannot have an effect on the requirement of the CC Act that the Respondent be served with the application.
81. The Applicant makes an allegation that the silence of a solicitor about an error when she received a notice from a third party that contains an error, is enough to be a representation from the Respondent that service on the solicitors is proper service.

82. Blaming the recipient of a document for not saying that they have no authority to accept service when the question is not proved to have been asked by the server is not a representation that the recipient had authority to accept service. Silence can sometimes be a misrepresentation but normally when a situation has changed after an initial representation or there is a duty of some sort not to remain silent. There is no duty in this matter and no initial representation. Generally, representations from an agent as to authority is not sufficient to give the agent the authority represented anyway. That is the case here.
83. The behaviour of [*the Respondent's solicitor*] after the purported service is said to be proof of the authority of [*the Respondent's solicitor*] to accept service or that the Respondent was served. The behaviour described is equally evidence of the solicitors being engaged after service. The solicitors deny they had instructions to accept service. Bearing in mind the Applicant has to strictly prove service, unsubstantiated inferences are not strict proof of service.
84. The Applicant says the Respondent does not publicly or in the contract disclose the details of the [*person on whom service may be effected*] or the details of a person that is authorised by the Respondent to receive the application so as to allow direct service as required in section 25(1)(a) of the *Interpretation Act*. This is not a reason to effect service in an improper fashion.
85. A quick search of the Internet indicates [*redacted*] [*holds the position of the person on whom service can be effected*] and after a 2 minute search an address for him is found to be at [*redacted*]. The Applicant refers to a web page in its application for another reason, so I do not see that it can object to my reference to a web page without it being given a right of reply.
86. The application could have been served on the [*redacted*] office at that address pursuant to section 25 of the *Interpretation Act*.
87. The Applicant refers to a webpage which describes how service of legal documents can be effected on the [*Respondent*].
88. The web page states in part if the [*Respondent*] is represented by a legal practitioner, other than [*redacted*], service is to be effected on that practitioner.
89. The Applicant says that service of the application on [*the solicitors who*] represented the [*Respondent*], is therefore good service on the Respondent.
90. The webpage refers to [*redacted*].
91. [*Redacted*] actually says that the solicitor has to be already acting for the [*Respondent*] in relation to the proceedings. As the application is, if it is even a proceeding, the beginning of the proceedings a solicitor could not be acting for the Respondent until after service of the initiating application.

92. The Web page reference does not apply to this adjudication application.

The Timing of Service

93. Section 28 says the Applicant must, so as to be entitled to a determination on the merits, prepare a written application for adjudication, serve the document on each party and serve the document on the prescribed appointed, in this case within 28 days, of the application being previously dismissed.

94. If the application is not served what is the adjudicator to do?

95. Section 33 says the appointed adjudicator must, if there is not proper service in accordance with section 28 dismiss the application without making a determination on its merits.

96. The section says that decision must be made:

96.1. If a response is served: within 10 working days after that date

96.2. If a response is not served: within 10 working days after the last date on which a response is required to be served.

97. There is a conundrum presented by the legislation. If there is no service, a response does not have to be filed. If that is the case then the adjudicator's decision does not need to be made until just before the expiration of the 90 days, or in this case the 28 days from when the application can be made, plus 10 working days. Fortunately, I do not have to worry about that conundrum here.

98. To allow this to occur would conflict with the principle in this legislation that time is of the essence. Time periods in an adjudication are both tight and critical. *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 at [115]; *Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited* [2003] NSWSC 903 at [35] and [38]; *Howard v Farrell* [2012] WASAT 169 at [25, 52]; *DPD Pty Ltd -V- McHenry* [2012] WASC 140;

99. I am only required to look at the information and submissions in the application and the further information of the Applicant provided on 16 April 2018 and I am not required to continue to engage with the Applicant until it proves service.

100. I am satisfied on the basis of that information that the application was not served correctly and so the Applicant does not have a right to a determination on the merits.

101. My decision as to the material I have to consider also disposes of a further argument the Applicant may have.
102. The Applicant's submission of 16 April 2018 states the application has been express posted to the Respondent's PO Box and emailed to the superintendent and the Respondent (SIC) has arrange for service to the [redacted].
103. Given that scenario the application may have been properly served by service on the [redacted] but there is no proof that service has occurred.
104. As previously explained I am only required to look at the application and the submissions of the Applicant provided up to 16 April 2018. I am not required to look at any information provided past 16 April 2018.

Decision

105. The Applicant is only entitled to a determination on the merits if the application has been served properly on the other party to the contract.
106. The Respondent says it served the application on the solicitors for the other party to the contract and that was good service because of the representation made by the solicitors in a letter of 6 February and because of a faulty representation on the website.
107. As solicitors deny they had instructions to accept service of the application and there is no proof that they had those instructions. Service on the solicitors is not service as required by the CC Act.
108. The subsequent forms of service the Applicant advised me, in its submission of 16 April 2018, it had carried out are also not service pursuant to section 25 of the *Interpretation Act* or the contract (which actually does not provide for service of an application for adjudication pursuant to the CC Act) or otherwise allowed by the Act.
109. For the reasons described above I have decided that the application has not been prepared and served in accordance with section 28 of the Act.
110. For the reasons described above I am satisfied that the application does not comply with the requirement of section 28 of the CC Act and the Applicant is not entitled to have the dispute adjudicated pursuant to the CC Act.
111. I dismiss the application pursuant to section 33 (1)(a)(iii) CC Act on the following grounds:

111.1. the Application has not been prepared and served in accordance with section 28 of the Act.

Merits of the Claims

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

Interest on the claims

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

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.

Other Matters

There are no confidential matters as described in section 54 of the Act.

David Alderman
Adjudicator

Dated: 26 April 2018

Amendment to the Costs Decision made 27 April 2018

1. On 27 April 2018 the Applicant represented to me that it had paid to me the sum of \$15,824.60 as being 100% of my fee.
2. My Fee was \$14,385.00 plus GST. The GST on that sum is \$1,438.50. My fee inclusive of GST is \$15,823.50.

3. Section 46(1A)(9) provides that if a party involved in a dispute has paid more than that party's share of the costs the adjudicator may decide the other party must pay a sum so that the parties to the dispute pay an equal amount of the costs.
4. That situation appears to be the case in this matter.
5. Half my fee plus GST is \$7,911.75.
6. I decide pursuant to Section 46 CC Act, that the [*Respondent*], must pay the Applicant. \$7,911.75 within 14 days of 27 April 2018.

David Alderman
Adjudicator No. 23

Dated: 27 April 2018