

DETERMINATION NO. 16.09.01

Adjudicator's Determination

pursuant to the

Construction Contracts (Security of Payments) Act 2004 (NT)

Applicant

and

Respondent

I, Cameron Ford, determine on 25 February 2009 in accordance with s 38(1) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that the amount to be paid by the respondent to the applicant is nil. There is no information in this determination which is unsuitable for publication by the Registrar under s 54 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

Contact details:

Applicant:

Respondent:

Appointment as adjudicator

1. On 29 January 2009 the applicant applied for an adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT) (the Act), consequent upon which I was appointed adjudicator by the Law Society of the Northern Territory to determine this application. The Society is a prescribed appointed under reg 5 of the *Construction Contracts (Security of Payments) Regulations*, as required by s 28(1)(c)(iii) of the Act.

Documents received by adjudicator

2. I received and have considered the application supported by the documents 1 to 21 listed in the index to the application, together with the response and the documents attached thereto.
3. The response was delivered on 12 February 2009 making my determination due on 26 February 2009.

JURISDICTION

4. Jurisdiction is contested by the respondent on the basis that an application for adjudication has already been made by the applicant in respect of the payment dispute the subject of this application, contrary to s 27 of the Act which says:

27 Who can apply for adjudication

If a payment dispute arises under a construction contract, any party to the 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 section 39(2); or

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

5. Section 39(2) says:

(2) If, under section 33(2), an application for an adjudication of a payment dispute is taken to be dismissed –

(a) this Part does not prevent a further application being made under this Part for an adjudication of the dispute; and

(b) any further application must be made within 28 days after the previous application is taken to be dismissed.

The first application and determination

6. This is the second application the applicant has made for prolongation costs arising out of the same construction contract. On 31 October 2008 the applicant made an application which included a claim for prolongation costs (the first application) which I rejected by Determination 16.08.05 on 28 November 2008 (the first determination).
7. The respondent contends that the payment dispute founding this second application is the same as that upon which the first application was based. Therefore, says the respondent, the applicant does not have the right to apply for an adjudication as “an application for adjudication has already been made by a party” within the meaning of s 27(2)(a).
8. There is no doubt that the amounts sought in the second application are for the same prolongation costs included in the first application and rejected in the first determination. They are for the same work in the same period. While the amounts and method of calculation are different, they are in respect of the same prolongation costs. In the first application the applicant based its claim on calculations rather than actual costs, leading me to say in the first determination at [49]:

Without going further, it is readily apparent that the calculations for both the “prolongation costs” and “direct additional costs” are not the actual costs caused by delays. They may be a very accurate estimate, but they are not the actual costs. They are not costs based, for example, on actual invoices or prices or interest rates.

9. I then went on to reject the application, saying at [59]-[60]:

In any case, the applicant’s claim is under the contract in that restricted sense. Clause 6(f)(ii) clearly gives an express right to recover actual costs; the applicant is not left to the general law of remedies for breach of contract. It only fails in this case because of a lack of proof of those actual costs, not a lack of entitlement to them under the contract.

In the event I find that the applicant is not entitled to its “prolongation costs” or “direct additional costs” because it has failed to prove those actual costs.

10. The applicant relies on my words at the close of [59] that it has an entitlement to prolongation costs under the contract. That does not answer the question, however, as to whether the application is precluded by s 27(2)(a).
11. The payment dispute the subject of this second application arose, according to the applicant, on 5 November 2008 when the respondent failed to pay payment claim No 10 served 22 October 2008. That payment claim included amounts claimed in previous payment claims which had not then been paid. The respondent concedes at [8] of its response that the applicant was entitled to include in later payment claims unpaid amounts from earlier payment claims.
12. The sequence of events is:

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| 7 October 2008 | Notice claiming prolongation costs of \$484,252.87 |
| | Payment claim 9 claiming those prolongation costs |
| 22 October 2008 | Payment claim 10 including the prolongation costs of \$484,252.86 claimed in payment claim 9 |
| 31 October 2008 | First application claiming prolongation costs of \$484,252.87 based on payment claim 9 |
| 28 November 2008 | First determination rejecting those prolongation costs |
| 29 January 2009 | Second application claiming prolongation costs of \$484,252.86 based on payment claim 10. |
13. It is clear that the dispute over prolongation costs has already been the subject of an application, and rejected. However the wording of s 27(2)(a) is not that clear. Repeating the relevant part, it says:

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless –

(a) an application for adjudication has already been made by a party ...
14. The section does not make clear precisely which applications preclude further applications. It does not say, for example, in paragraph (a) “an application for

adjudication has already been made by a party *in respect of that dispute*". It could possibly be read as saying "an application for adjudication has already been made by a party *in respect of that construction contract*".

15. There may be other possibilities, however in my view it can only mean that an application cannot be made in respect of a dispute where an application has already been made *in respect of that dispute*. It would make the scheme unworkable if only one application was permitted for each contract, but it is consistent with the scheme if only one application may be made for each payment dispute. If that were not the case, there would be no finality to determinations and a party could harass another with multiple applications for the same dispute.
16. How does this work with the ability of an applicant to include amounts unpaid from earlier payment claims in later claims? In my view, where a party has that right under the contract, it may include unpaid claims in successive claims but it cannot make successive applications for those same claims. Even though each unpaid payment claim gives rise to a payment dispute which in turn gives rise to a right to apply, that right is lost where a payment dispute has been the subject of an application.
17. I therefore reject the application for prolongation costs.
18. Included in this second application was a claim for unpaid interest on the first determination and interest on the amount claimed in payment claim No 10. The respondent has admitted both claims for interest and I have been informed by the parties that they have been paid. However, I do not consider non-payment of an amount under a determination gives rise to a right to make a further application for that same amount. Instead, the remedy lies in s 45 which enables a determination to be enforced as a judgment for a debt in a court of competent jurisdiction. Where the determination includes an amount for interest, including a daily rate for interest from the date of determination to payment, in my view that amount may be enforced under s 45.
19. Since I think part of the interest claim cannot be dealt with in this application, and since all of the interest has been paid, I will make no determination in respect of interest.

20. The respondent also contended that I should dismiss the application under s 27(2)(b) set out above, however I do not consider that that paragraph applies in this case. In my view, it applies to rulings (to use a generic term) of other than adjudicators. Paragraph (a) deals with adjudications and paragraph (b) with others, as does s 33(1)(a)(iii).
21. In case I were against the respondent on the jurisdictional points, it also addressed the merits of the claim. I do not think there is any utility in my dealing with them, mired as they are in seemingly intractable factual disputes and not necessary for this determination.

DETERMINATION

22. In accordance with s 38(1) of the Act I determine that the amount to be paid by the respondent to the applicant is nil.
23. Neither party sought payment of its costs and I make no order as to costs.
24. I draw the parties' attention to the slip rule in s 43(2) if I have made some correctible error.

Dated: 25 February 2009

CAMERON FORD

Registered Adjudicator