

Adjudicator's Determination

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

Adjudication 18.10.01

(Applicant)

And

(Respondent)

1. I, Brian J Gallagher, as the Appointed Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act*, dismiss the Application, served 4 February 2010, as follows;
 - 1.1. The Application in relation to Items 1-3 of the claim dated 26 October 2009 is dismissed under Section 33(1)(a)(iv) of the Act.
 - 1.2. The Application in relation to Items 4-8 of the claim dated 26 October 2009 is dismissed under Section 33(1)(a)(ii) of the Act.
2. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Appointment of Adjudicator

3. The Applicant served the Adjudication Application on the Institute of Arbitrators and Mediators Australia 4 February 2010.
4. I was appointed as Adjudicator by the Institute of Arbitrators and Mediators Australia 9 February 2010. The Institute notified the parties of the appointment that same day.
5. The Adjudicator has been properly appointed in accordance with the *Construction Contracts (Security of Payments) Act 2004*.

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 2004*. (as in force 24 June 2009)
 - 6.2. The provisions of the *Interpretation Act*. (as in force 18 June 2009)
 - 6.3. Application from the Applicant dated 4 February 2010.
 - 6.4. Response from the Respondent dated 18 February 2010.

The Adjudication Application

7. The Adjudication Application for the June claim was served on the Respondent 4 February 2010. The Respondent contests this date of service. The Application consists of the following documents;
 - 7.1. Adjudication Application, and
 - 7.2. 14 Attachments of supporting documentation.

The Responses

8. The Adjudication Response was served on the Applicant and the Adjudicator 18 February 2010 and consists of the following documents;
 - 8.1. Respondent's reply to the Application, and
 - 8.2. 3 Annexures totaling 53 Attachments of supporting documentation.

Jurisdiction

9. The dispute arises out of a contract between the parties for the Respondent to provide ceilings and partitions on a building project in the Northern Territory for the Applicant.

10. The parties are satisfied that the Adjudicator's statements of no conflict to declare are reasonable within the meaning of the Act.
11. The parties agree the payment dispute is not the "subject of any other order, judgment or other finding".
12. The Respondent contests the Adjudicator's jurisdiction on the following bases;
 - 12.1. The Application for adjudication of the payment dispute was not served within the time prescribed by the Act
 - 12.2. 5 of the 8 items in the claim are the subject of repeat or reformulated claims which are out of time for the purposes of Section 28 of the Act.
 - 12.3. A Deed of Release signed by the parties in November 2009 is subject of allegations duress by the Applicant. The Respondent claims this raises the issue of complexity which cannot be resolved on the papers and the Adjudicator should dismiss the Application.
 - 12.4. It is claimed there is no payment dispute which can be the subject of adjudication.

Payment Claim 26 October 2009

13. The Invoice No 00636 presented to the Respondent on or around 26 October 2009 summarises the claim as follows:

Item 1. VQ 25 – Podium Level	\$36,062.75
Item 2. P50 Shadow line	\$31,423.68
Item 3. Scaffold Hire	\$3,913.58
Item 4. Balcony Soffits	\$7,717.86
Item 5. VQ 14 – Bulkheads	\$991.50
Item 6. VQ 16 – Flush screw holes	\$3,945.00
Item 7. VQ 17 – Stair Infill	\$480.00
Item 8. Patching & Repairs	<u>\$17,016.00</u>
Sub Total	\$103,550.37
GST	<u>\$10355.04</u>
Total Claimed	\$113,905.41

Contested Jurisdiction – Date Application Served

14. The parties agree that for the purpose of Section 28 of the Act due date for the submission of the Application was 4 February 2005.
15. The Respondent, correctly in my view, cites the time reckoning guidelines of the *Interpretation Act* and nominates 11:59 pm on 4 February 2010 as the latest permissible time for service of the written application.
16. The Respondent acknowledges that the Applicant sent the Application via 7 emails to two email addresses – one to the NT based "Subcontract Administrator"

nominated in the contract and the other to Respondent's general email address managed by the reception desk of the interstate head office. It is further acknowledged that these 7 emails were logged on the company email server as sent between 5:26 PM and 6:55 PM on 4 February 2010.

17. The Respondent details the circumstances surrounding the receipt of the emails claiming that whilst the Subcontract Administrator was made aware of them via his portable email device, that device did not enable him to read the documents in the electronic attachments. Since the transmission occurred outside normal business hours the reception desk message was not read until 8.00 am 5 February 2010.
18. The Respondent relies on the interpretations of Austin J in *Austar Finance v Campbell* in relation to Section 459G of the Corporations Act (Cth) and the position expressed by Young J in *Howship Holdings P/L v Leslie*. Both interpretations relate to "personal service". Austin J states:

"In my view electronic transmission whether by facsimile or email cannot constitute service for the purposes of Section 459G(3) unless either it is shown that the documents electronically transmitted have actually been received in a readable form by the person being served; or the case falls into one of the special exemptions permitted by rules of court"
19. Austin J is expressing a view on what constitutes personal service of documents which is a requirement of Section 459G. Section 459G is not a definition of what constitutes service of documents. In the Northern Territory such definition is provided by the *Interpretation Act*.
20. Section 28 of the *Construction Contracts Act* requires the Application to be in writing. Under Section 26 of the *Interpretation Act* writing includes "any mode of representing words, figures or symbols in visible form whether or not an optical, electronic, mechanical or other means or process must used before they can be perceived".
21. Section 25(3) of the *Interpretations Act* states "Subject to evidence to the contrary, a document served under subsection (1)(c) is taken to be served when it was **sent** (emphasis added) to a current fax number of the recipient." This is a substantively differently requirement to that that expressed by Austin J above. Note that neither the *Construction Contracts Act* nor the *Interpretation Act* requires personal service of documents.
22. The *Interpretation Act* does not expressly nominate email as a form of document service however Austin J treats this medium as similar to facsimile transmission. Hence for the purposes of the *Interpretation Act* I would rely on Section 25(3) and consider the documents attached to the e-mails as served from the time they were recorded as sent; subject to contrary evidence.
23. Since the Respondent acknowledges the email messages with file attachments were sent to two Respondent email addresses prior to the appointed time and there is no

contrary evidence provided such as evidence of corrupted or otherwise illegible file attachments, I determine the Application was properly served on the Respondent.

Contested Jurisdiction – Repeat or Reformulated Claims

24. The Respondent provides evidence that items 4-8 inclusive as listed on the claim dated 26 October 2009 had previously been invoiced in May or June 2009. Those claims were wholly or partly rejected at that time and hence the time for submission of Applications for Adjudication of any resultant payment disputes had expired in August or September of 2009.
25. Supporting this position the Respondent cites Mildren J in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA who held as follows; *"In my opinion, the Act does not envisage that a payment claim which includes a claim which has already been the subject of a previous claim, but which is out of time for the purposes of Section 28 to be available for adjudication"*
26. From the above I must conclude that I have no jurisdiction to consider items 4-8 inclusive and dismiss these items of the claim under Section 33(1)(a)(ii) of the Act.

Contested Jurisdiction – Allegations of Duress

27. The Applicant claims that the negotiated settlement agreement, made on or about 27 May 2009 and documented in a letter signed by both parties, was entered into under duress.
28. The Respondent, via email dated 23 June 2009, required the Applicant to complete a Deed of Release in order to "facilitate your final payment".
29. The Applicant executed the Deed of Release dated 25 June 2008 and returned it to the Respondent 25 June 2009 (note date discrepancy). The Applicant claims this deed was executed under duress.
30. The Respondent rejects the claims of duress saying the Applicant had recourse, prior to signing anything, to both the *Construction Contracts Act* and the Dispute resolution provisions of the contract.
31. The Applicant claims that when under the terms of the contract he sought release of retention monies he was required to enter into a Second Deed of Release on or about 13 November 2009. He claims this second deed was executed under duress.
32. The Applicant also claims that the Deeds of Release are an attempt to exclude, modify or restrict the operation of the Act and under Section 10 of the Act any purported waiver has no effect. I find I must concur with the Respondent that the Deeds of Release contain no provisions which mention the Act. The signed Deeds simply state that all claims disputes that existed on the contract have been resolved and that no new claims based on historic events will be raised. If there were no claims of duress, the adjudication could proceed under the Act and any agreements

or deeds would be considered along with all other relevant factors in the determination considerations on the balance of probabilities. I therefore reject the assertion that the Deeds be considered void under Section 10 of the Act.

33. The Respondent, in email dated 10 November 2009), states the second deed was required because:

“The Deed of Release provides both parties surety that all contractual matters have been determined, and whilst we are prepared to make a commercial decision now and conclude the matter we are not prepared to release any further monies without receipt of a Deed of Release from (the Applicant), indeed we reserve all rights under the contract in that regard until receipt of the signed Deed.”

34. Apart from the dates the two Deeds of Release are worded identically.

35. The demand for the second deed arose when the Applicant inquired about release of 50% of the security under Clause 9(d) of the contract between the parties viz:

“The (Respondent) must release one-half of any security then held under clause 4 when the Head Contract Works reach Practical Completion.”

36. This contract provision does not require a claim to be submitted by the sub contractor, let alone a Deed of Release. Why then was the second Deed demanded when the parties had already executed an identical Deed (albeit with an obvious date error) some 5 months earlier?

37. These facts suggest there could well be some substance to the Applicants claims of duress.

38. The Respondent also seeks dismissal of the Application on the basis of Section 33(1)(a)(iv) of the Act – “satisfied it is not possible to fairly make a determination because of the complexity of the matter”.

39. It is apparent any consideration of items 1-3 of the claim cannot proceed until the question of duress is resolved both on the basis of the legal complexity of the arguments and on the adjudicator’s authority to consider the validity of an agreement made in relation to a construction contract.

40. The issue then is a fundamental question of jurisdiction. In *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4, at paragraph 13 Mildren J states “I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. . . . In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits”. He then presents a quote from Marshall CJ in *Marbury v Madison* “It is, emphatically the province and duty of the judicial department to say what the law is.”

41. As the adjudicator cannot err in this regard and the correct interpretation of the Act is a matter for the Courts, I see no alternative to dismissing the Application in relation to Items 1-3 of the claim under Section 33(1)(a)(iv).

Contested Jurisdiction – No Payment Dispute

42. The Respondent's claim of No Payment Dispute is based on the presumption that the letter of agreement and deeds of release signed by the parties are in fact binding agreements. As the second deed of release post dates the disputed claim the second deed would serve to extinguish that claim and hence the dispute. I have not considered those issues as I have dismissed the Application for the reasons provided. Any referral to the Local Court for review of the decision provided will of necessity obviate any further requirement to consider jurisdiction on this basis.

Adjudicator's Costs

43. Clause 36 (1) of the Act requires the parties to bear their own costs.
44. 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.
45. I am satisfied that the submissions from both parties have merit and are neither frivolous nor vexatious.
46. I therefore determine that adjudicator's costs are to be shared equally by the parties.

Conclusions

47. For the reasons set out in the Adjudication, I determine as follows;
- 47.1. The Application in relation to Items 1-3 of the claim dated 26 October 2009 is dismissed under Section 33(1)(a)(iv) of the Act.
- 47.2. The Application in relation to Items 4-8 of the claim dated 26 October 2009 is dismissed under Section 33(1)(a)(ii) of the Act.
- 47.3. The Adjudicator's costs are to be shared equally between the Applicant and the Respondent.

Brian J Gallagher
NT Registered Adjudicator No 18.
4 March 2010