Determination 02.07.01

IN THE MATTER of an Adjudication
pursuant to the Construction Contracts
(Security of Payments) Act (NT) (**"The Act"**)

BETWEEN:

Applicant

and

Respondent

RULING ON PRELIMINARY ISSUE

The Background to This Adjudication

1. This adjudication was first commenced by application served on the respondent on 24 August, and on the prescribed appointor, the Institute of Arbitrators and Mediators Australia (**"IAMA"**), on 27 August, 2007. IAMA appointed a registered adjudicator, Mr Charles Wright, to adjudicate on the dispute for the parties and served him with the application on 31 August 2007.

2. On 11 September 2007 the applicant's solicitors wrote to Mr Wright calling upon him to disqualify himself pursuant to section 31 of the Act and threatening to apply to the Registrar under section 31(3) if he did not do so. On the same day, Mr Wright advised all interested parties that under section 31(1) of the Act he disqualified himself from continuing as adjudicator. On 18 September 2007, the applicant's solicitors wrote to Mr Wright asking him to comply with section 31(6)(c) and notify the parties under section 31(6)(a) that his appointment as adjudicator had ceased. I have no evidence that Mr Wright complied with that request but, on 20 September 2007, the applicant again served its application for adjudication on the respondent and IAMA, seeking from the latter appointment of a replacement adjudicator. By letter dated 26 September 2007, IAMA appointed me as replacement adjudicator.

3. Following telephone contact, on 2 October 2007 I held a telephone conference with the parties, in which Mr John Pilley of Pilley McKellar Pty Ltd,

participated as solicitor for the applicant and Mr Wade Roper of Clayton Utz, Darwin, participated as solicitor for the respondent. The parties having advised me, inter alia, of the sequence of events set out above and that the respondent wished to raise a preliminary issue, alleging that the present application is out of time pursuant to section 28(1) of the Act, the following timetable was agreed:

3.1 Mr Roper will email me the respondent's submissions on all issues, together with the documents in support of his submissions on jurisdiction, by Thursday, 4 October. He will forward the remaining documents, in support of the response on the merits, by Monday, 8 October.

3.2 Mr Pilley will deliver the applicant's submissions in reply on the jurisdictional issues by Wednesday, 10 October.

3.3 I will deliver my decision on the jurisdictional issue by Monday, 15 October.

3.4 If I decide the jurisdictional issue in favour of the applicant, both parties consent to my having 10 days from 15 October in which to deliver my determination on the merits of the application. I will approach the Registrar for his consent, pursuant to section 34(3)(a) of the Act, in anticipation of that eventuality. The parties will confirm their agreement to this course in writing.

The parties have complied with paragraphs 1 and 2. Some confusion as to the ambit of the preliminary issue has been clarified by email correspondence. The Registrar has given his consent to an extension of time for my determination, pursuant to section 34(3)(a) of the Act. The parties now seek my ruling on the preliminary issue.

4. The parties agree that, for the purposes of section 28(1) of the Act, the dispute arose on 18 July 2007. Section 28(1) allowed the applicant 28 days from that date within which to take the steps therein set out, essentially to prepare and serve the application. The 28 days expired on 15 August 2007 but the parties agreed to extend the time to 29 August 2007, which was 42 days from the date on which the dispute arose. The solicitor for the respondent has now, understandably half heartedly, raised the question of whether the parties were permitted by the Act to reach that agreement. If they were not, then even the original application would have been out of time. For reasons that will become apparent, I do not pursue that suggestion further; it did not, in my view, reach the level of a submission. As the

respondent concedes, “the parties rightly or wrongly proceeded on the basis that such an extension of time was valid”.

5. In correspondence between the parties after 11 September 2007, issues arose between the parties as to how the material provisions of section 31 should be interpreted. It is to those issues that the respondent directs its submissions; the applicant, on the other hand, has now approached the interpretation of the section from an entirely different direction. The respondent submits that the second application, served on the respondent and IAMA on 20 September 2007, was out of time. The submission assumes that Mr Wright disqualified himself pursuant to section 31, a proposition the applicant now disputes. I propose to first consider the operation of section 31, on the assumption that Mr Wright’s disqualification was effected pursuant to section 31(1), and then consider the impact of the applicant’s submissions.

The Respondent’s Submission

6. For the purposes of the respondent’s submissions, the material dates are as follows:

18 July 2007	Dispute arose.
29 August	Time, for purposes of section 28 (as agreed) expires.
24 August	Application served on respondent.
27 August	Application served on prescribed appointor.
31 August	Application served on adjudicator.
11 September	Adjudicator disqualifies himself under section 31(2).
18 September	Time expires under section 31(6)(a).
20 September	Second application served on all interested parties.

7. The respondent describes the drafting of section 31(6) as “somewhat less than felicitous”, which I believe understates the problems created for those seeking to make sense of its terms. While the correct construction of the sub-section could not be free from doubt, in my view it should be viewed in the following way. The starting point is the number of days between the date on which the dispute arose and the date of the second application. Here, that period is 64 days. From that period must be deducted the time calculated by

reference to section 31(6)(c) as not to "count for section 28(1)". The parties agreed that the applicant should have 42 days from the date on which the dispute arose to serve its application. If the resultant period is more than 42 days, on the respondent's submission, the application was out of time and must be dismissed.

8. In my view, the words in sub-section 31(6)(c), "the date when the adjudicator was served with the application" are clear and unambiguous; here, that date was 31 August and not 27 August, 2007, the date on which it was served on the prescribed appointor. The logic of the draftsman escapes me but, short of absurdity, that is not for an adjudicator to pursue. The words in section 31(6)(c), "the date when the adjudicator notifies the parties under paragraph (a)" cause me greater concern. Section 31 requires an adjudicator, upon becoming aware that a material personal interest as defined in sub-section (1) disqualifies him from proceeding as adjudicator, to give written notice of that disqualification to the parties, with reasons. By paragraph (6)(a), the parties then have 5 working days in which to authorise the adjudicator to proceed, despite the disqualification effected by operation of sub-section (1). If they do not do so, at the expiration of those 5 working days the adjudicator's appointment ceases. It is clear from those terms that the adjudicator's appointment subsists until the expiration of the 5 working day period. The term "disqualified" in sub-section (1) is qualified to that extent; the adjudicator is at that point disqualified *de facto*, but not *de jure*. It is consequently anomalous that the draftsman should end the excluded period of time at a point prior to the cessation of the adjudicator's appointment, but that appears to be what he or she has done.

9. The alternative construction, that paragraph (c) contemplates a notice under sub-section 31(6)(a) cannot, in my view, be correct. First, there is no reference in paragraph (a) to a requirement for a notice under that provision, only to a notice under sub-section (2). Secondly, under such a construction, if the retiring adjudicator did not give the notice, as appears to be the case here, then the excluded period of time would be indefinite. In my opinion, that result would be an absurdity and self-evidently not intended by the draftsman. I can only speculate that the reference to "paragraph (a)" in paragraph (c) is a mistake on the part of draftsman or printer and that

"subsection (2)" was intended. Recognition of such a possible error does not eliminate the anomaly of the period to be excluded omitting 5 days in which the first adjudicator remains in place, but it seems to me to be the most likely of two unsatisfactory choices.

10. On that reading of the sub-section, the period to be excluded is 31 August to 11 September 2007, a period of 11 days. Take 11 days from 64 days and the resultant 53 days exceeds 42 days by a wide margin. It is only if every material factor is viewed in favour of the applicant that the period is reduced to 42 days. Thus, if the "date when the adjudicator was served" is taken to be 27 August and not 31 August, 2007 and the date "when the adjudicator notifies the parties under paragraph (a)" is taken to be 18 September, which was the end of the 5 day period, the excluded time would be from 27 August to 18 September, 2007, a period of 22 days. When that period is deducted from 64 days, the resultant 42 days is just within the permitted time. However, neither of those two constructions is, in my view, reasonably open.

The Applicant's Submissions

11. In its submissions, delivered on 10 October 2007, the applicant appears to have recognised the inevitability of that result. It has now abandoned its previous position, to the effect that section 31, properly construed, worked in its favour. It now submits that the procedures and strictures set out in section 31 apply only where the adjudicator disqualifies himself for a reason set out in sub-section (1) and that was not the case here. Alternatively, the applicant submits that the adjudicator's notice of disqualification was invalid and ineffective; his appointment subsists still. I will consider each of these submissions in turn.

12. The applicant summarises its first argument as follows.

"12.1 Section 31 is not a code for disqualification of adjudicators.

12.2 That section and its peculiar procedures only apply where the adjudicator is disqualified for the reasons set out in s 31(1).

12.3 Those reasons are not exhaustive of the circumstances compelling a decision-maker to disqualify himself. There are other important grounds for disqualification.

12.4 In the absence of clear words, the Legislature cannot have intended to exclude the other important bases for disqualification.

12.5 Where the disqualification is on the grounds in s 31(1), the procedures in ss 31(2)-(8) apply.

12.6 Where the disqualification is on grounds other than those in s 31(1), the procedures of ss 31(2)-(8) do not apply.

12.7 Instead, the appointment remains on foot until a replacement adjudicator is appointed. This is the same as in litigation where a judge is disqualified.

12.8 This approach works because the time for an adjudicator's determination runs from his appointment, whereas the time for a respondent's response runs from service of the application.

12.9 There is thus no need for an applicant to reapply for adjudication under s 28(1) within the unrealistic time of 28 days from the occurrence of the payment dispute."

13. I accept that material personal interest in not exhaustive of the grounds on which an adjudicator may be disqualified. It appears to me to be obvious that there are a number of other bases on which an adjudicator could and should be disqualified from proceeding and the authorities support that view. It does not necessarily follow, as the applicant submits, that section 31 does not cover the field, as one would expect in a statute of this nature, on a topic such as this. First, if one is attempting to determine the intention of the draftsman objectively, the omission of the words "under sub-section (1)" following "(If) an appointed adjudicator is disqualified" in sub-section (2) may well have been intentional in order to draw in to the section disqualifications other than for material personal interest. The applicant draws a firm distinction between material personal interest and conflict of interest generally. While I am aware of the rule of construction which precludes

reference to headings in the construction of statutes, since the applicant has raised the distinction, the heading to section 31 may nonetheless be impossible to ignore. I will return to this question.

14. It is in the logical consequences of accepting the applicant's submission that it runs into difficulty. What happens to an adjudication when the adjudicator is disqualified for a reason other than material personal interest? On the applicant's argument the procedures set out in sub-sections (2)-(8) do not apply. The applicant thus has no right to again apply for adjudication in accordance with section 28(1). In paragraph 28 of its submissions the applicant argues that in those circumstances the adjudicator's appointment continues on foot but any determination he makes would be liable to be set aside; that is, in my view, the equivalent of having no adjudicator at all. The applicant would be left in a position where it has an adjudicator in place who it cannot displace and who is incapable of making a valid determination. The applicant contends that the important aspect to all this is that even though the adjudicator's functions are suspended, it does not affect the validity of the application.

15. That situation is clearly untenable, as is the alternative procedure set out in paragraph 32 of the applicant's submissions. The alternative procedure the applicant proposes ignores the fact that the prescribed appointor would be unable to appoint a replacement adjudicator if, as the applicant contends, the first person appointed was still validly in place. If section 31 does not cover the field of disqualification of adjudicators, there would be a most regrettable lacuna in the statute. A tribunal construing the statute must, if possible, attempt to avoid such a result.

17. In my view, section 31 is intended to prescribe the consequences that follow where an adjudicator is required to disqualify himself from proceeding, for any reason. The heading correctly describes the purport of the section and the draftsman intended sub-section (2) to apply to situations where "an appointed adjudicator is disqualified".

16. In any event, even if I am wrong in that conclusion, I am unable to accept that Mr Wright's disqualification fell outside the purview of section 31(1). The terms of Mr Pilley's letter of 11 September 2007 to Mr Wright, referred to by

the applicant in paragraph 33 of its submissions, makes it very clear that the applicant was seeking his disqualification on the grounds of material personal interest and that, in the applicant's view, such grounds existed. It is not persuasive, after the event, for the applicant to suggest that the applicant's solicitor was misdescribing the situation at the time and that I should view the circumstances now, when it no longer suits the applicant's purposes to allege material personal interest, in a different light. From the little disclosed by the documents referred to me on the reasons behind Mr Wright's disqualification, it does appear to have been his personal connections to one of the parties from which the problem arose.

17. Finally, the applicant submits that Mr Wright's notice of disqualification of 11 September 2007 was invalid because it failed to give reasons. I reject that submission, on two alternative grounds. First, subsection 31(2) requires a disqualified appointed adjudicator to do two things: first, to give written notice to the parties and Registrar and, secondly, to give reasons for the disqualification. Mr Wright unarguably complied with the first requirement. If the applicant is correct in contending that he failed to give reasons, what are the consequences? The Act does not prescribe any consequence of a failure to give reasons for disqualification but the failure, if it occurred, was procedural in nature. In my view, the notices remain valid.

18. Secondly, I do not accept that Mr Wright failed to give reasons for his disqualification. References by the applicant to authorities on the obligation of courts, arbitrators, and even adjudicators, to give reasons for their decisions on the issues before them are not, in my view, to the point here. Mr Wright was simply required to advise the parties as to why he was disqualifying himself. He did that quite adequately; he referred to objections raised by one of the parties that were known to both parties and to matters raised in a letter the applicant had sent him on the same day. He simply stated, in effect, that for the reasons raised by the applicant's solicitor in his letter, if I continue as adjudicator a possible conflict of interest might arise and I disqualify myself from continuing. The reasons, while succinct, are perfectly intelligible and understandable. There can have been no misunderstanding on the part of either party or the Registrar as to why

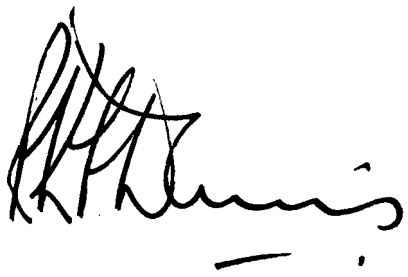
Mr Wright had taken that step. No further reasons for decision, in the judicial or arbitral sense, were required.

19. For these reasons I reject the applicant's construction of section 31 and its submission that the adjudicator's notice of disqualification was ineffective. In my view the second application was delivered to the respondent and IAMA outside the time limited by section 28(1) of the Act. The application must, therefore, be dismissed pursuant to section 33(1)(a)(ii) of the Act.

20. I dismiss the application.

21. I make no decision pursuant to section 36(2) of the Act. The parties must bear their own costs of this adjudication.

DATED: 15 October 2007



R K F Davis
Adjudicator