Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor
[2012] NTSC 22

PARTIES:	NORTHERN TERRITORY OF AUSTRALIA, ACTING THROUGH THE DEPARTMENT OF CONSTRUCTION AND INFRASTRUCTURE CONSTRUCTION DIVISION v URBAN AND RURAL CONTRACTING PTY LTD (ACN 116 492 203) And DAVIS, Roger
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	13 of 2012 (21206241)
DELIVERED:	3 April 2012
HEARING DATES:	1 March 2012 and 21 March 2012
JUDGMENT OF:	BARR J

CATCHWORDS:

CONSTRUCTION LAW – SECURITY OF PAYMENT – ADJUDICATOR'S DETERMINATION – ERROR OF LAW – JURISDICTION – *Construction Contracts (Security of Payments) Act* (NT) – interpretation of s 8(a) – when a "payment dispute" arises – jurisdiction to adjudicate – absence of "payment dispute" in present case – whether adjudicator's determination reviewable by the Court – adjudication declared void for jurisdictional error

Construction Contracts (Security of Payments) Act (NT) s 3, s 4, s, 8, s 8(a), s 27, s 28, s 33
Construction Contracts Act 2004 (WA) s 6(a)

K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor (2011) 29 NTLR 1; *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Another* (2009) 25 NTLR 14, followed.

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; *R v JS* [2007] NSWCCA 272, applied.

Blackadder Scaffolding Services (Aust) Pty Ltd v Mirvac Homes (WA) Pty Ltd [2009] WASAT 133; *South Coast Scaffolding v Hire Access Pty Ltd* [2012] WASAT 5; *Fuel Tank & Pipe v Decmil* [2010] WASAT 165, distinguished.

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill
First Defendant:	R Fenwick Elliott

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
First Defendant:	Fenwick Elliott Grace

Judgment category classification:	B
Judgment ID Number:	Bar1203
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd & Anor [2012] NTSC 22
No. 13 of 2012 (21206241)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA, ACTING THROUGH THE DEPARTMENT OF CONSTRUCTION AND INFRASTRUCTURE, CONSTRUCTION DIVISION
Plaintiff

AND:

URBAN AND RURAL CONTRACTING PTY LTD
(ACN 116 492 203)
First Defendant

AND:

ROGER DAVIS
Second Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 3 April 2012)

[1] The plaintiff, faced with a Determination under the *Construction Contracts (Security of Payments) Act* that it pay an amount of $692,414.27 to the first defendant, argues that the adjudicator (the second defendant) who made the Determination did not have jurisdiction to adjudicate because, at the time

the first defendant applied for adjudication, there was no "payment dispute" between the parties within the meaning of the Act.

[2] Relevantly, s 8(a) of the Act provides that a "payment dispute" arises if: "when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed."

[3] There is no issue that a "payment claim" was made by the first defendant under the contract between the parties. That payment claim was made on 2 December 2011.[1] I have not been required to examine in any detail the contract documents, the payment claim itself or any subsequent exchange of correspondence between the plaintiff and the first defendant, but I have been informed by counsel and will proceed on the basis that the payment claim made on 2 December 2011 was "due to be paid under the contract" on 1 January 2012.

[4] On 14 December 2011, the plaintiff's contract superintendant wrote a letter rejecting the payment claim or at least disputing it in part. The adjudicator described the effect of the superintendant's letter in these terms:-

> "While the Superintendent has rejected the claim, he has not disputed the figures in substance. He has not challenged the veracity of the

[1] The first defendant attempted in 'late Reply' to argue an alternative position based on an asserted payment claim made on 9 September 2011. However, the first defendant's argument was inconsistent with the abandonment or withdrawal by the first defendant of its 9 September payment claim at the time of its payment claim made on 2 December 2011. It was also inconsistent with concessions made by counsel for the first defendant at the start of the hearing (see par 65 of written submissions filed on behalf of the first defendant).

> base figures nor any of the calculations. He has simply asked for some largely irrelevant further information."

[5] In order to decide the issues argued before me I will proceed on the basis that, on 14 December 2011, the first defendant's payment claim was "rejected or wholly or partly disputed" within s 8(a) of the Act.

[6] The first defendant's response to the letter of 14 December 2011 was to make an application on 19 December 2011to have the "payment dispute" adjudicated. The application for adjudication was thus made 12 days before the amount claimed in the payment claim was "due to be paid under the contract".

[7] The first question I have to decide is whether or not there was a "payment dispute" in respect of which the first defendant could have applied for adjudication under s 27 of the Act.

[8] On the plaintiff's contentions, the existence or otherwise of a payment dispute could only be determined at the time when the amount claimed in the payment claim was due to be paid under the contract, that is on 1 January 2012. That was the date at which the existence of a payment dispute had to be established in order for the definition to be satisfied. No payment dispute had arisen as at 19 December 2011. The first defendant therefore had no entitlement under s 27 of the Act to apply for adjudication when it did. Because the fact of a "payment dispute" having arisen under the Act is the foundation of the adjudicator's jurisdiction, the adjudicator did not have

jurisdiction. Accordingly, the plaintiff contends, the only course open to the adjudicator was, under s 33(1)(a)(ii) of the Act, to dismiss the application without making a determination of its merits on the basis that the application had not been prepared and served in accordance with s 28 of the Act.

[9] The first defendant contends that, on the proper interpretation of s 8(a) of the Act, a "payment dispute" between the parties arose as soon as the payment claim was "rejected or wholly or partly disputed", and that it was not necessary to wait until the date on which payment was due under the contract for a "payment dispute" to arise. The first defendant was therefore entitled to apply under s 27 of the Act to have the dispute adjudicated under the Act, and the adjudicator consequently had jurisdiction.

[10] Alternatively, the first defendant contends that the adjudicator's decision to proceed to a determination of the merits, whether correct or otherwise as a matter of law, is not reviewable by this Court.

[11] I propose to decide the correct interpretation of the s 8(a) of the Act, and to then consider the first defendant's alternative contention.

Payment dispute

[12] As Southwood J explained in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Another*,[2] the object of security of payments legislation is to facilitate timely payment between parties to construction contracts and

[2] (2011) 29 NTLR 1 at [1].

thereby overcome cashflow problems faced by many contractors and sub-contractors during the course of fulfilling their contractual obligations.

[13] The object and the means to achieve the object are made clear in s 3 *Construction Contracts (Security of Payments) Act*. The object, namely to promote security of payments under construction contracts, is to be achieved by facilitating timely payments between the parties to such contracts, and by providing for the rapid resolution of payment disputes arising under those contracts.

[14] The second reading speech referred to the importance of the building and construction industry to the economy of the Northern Territory and went on to say: "The failure to pay at any stage in the contracting chain can have disastrous effects for those further down the chain awaiting payment." The second reading speech described the process established by the Act as a "rapid adjudication process" and a "process for speedy adjudication outside the court system".[3]

[15] Notwithstanding these statements, consideration of the general legislative purpose should not detract from the need to give proper attention to the text of the relevant provision. The task of statutory construction must begin with a consideration of the text itself, bearing in mind that "the language which has actually been employed in the text of legislation is the surest guide to

[3] Hansard 5 October 2004, Presentation and Second Reading Speech for the Construction Contracts (Security of Payments) Bill (Serial 259) by Dr Toyne, Minister for Justice and Attorney-General.

legislative intention."[4] The courts must determine what the legislature meant by the words it used. The courts do not determine what the legislature intended to say.[5]

[16] On my reading of s 8(a) of the Act, the introductory phrase "when the amount claimed in a payment claim is due to be paid under the contract" applies to and qualifies each of the described circumstances which then follow, namely, "the amount has not been paid in full" and "the claim has been rejected or wholly or partly disputed".

[17] The first defendant argues that, because of the separate reference to rejection or dispute, s 8(a) should be interpreted so as to allow for an "early date construction" such that there would be two possible dates when a payment dispute arises, depending on whether it arises from non-payment or from rejection/dispute: (1) the due date for payment under the contract, if payment has not been made by that date, and (2) the earlier date on which the claim has been rejected or disputed (if it has).

[18] The first defendant's argument requires a different meaning to be given to the introductory phrase "when the amount claimed in a payment claim is due to be paid under the contract" in the case of non-payment to that in the case of rejection/dispute. In the case of non-payment, the required meaning is 'on the due date for payment, the amount has not been paid in full', but in the

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4 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47], [51].

5 *R v JS* [2007] NSWCCA 272 at [142], per Spigelman CJ.

case of rejection/dispute, the required meaning would be '*on or before* the due date for payment, the claim has been rejected/disputed'.

[19] The need to assign different meanings to the same introductory phrase in order to accommodate the construction contended for by the first defendant suggests that it is the wrong construction.

[20] In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment.

[21] The construction I favour is the one which more accurately reflects the actual text of s 8(a). Further, it provides clarity and certainty in relation to the start date for the 90-day limitation period specified in s 28 of the Act for making an application for adjudication, and avoids the possible mischief that a "payment dispute" might arise, without a party being aware, as a result of (what is subsequently characterized as) the rejection or partial dispute of that party's payment claim before the due date for payment of that claim under the contract.

[22] It must be acknowledged that the construction in par [20] means that in some cases, such as the present, a party whose payment claim has been

rejected or disputed at a relatively early time may have to 'mark time' and hold off applying for adjudication until the due date for payment under the contract, even though it may be clear that that party's payment claim will not be accepted or agreed to in the intervening period. However, the potential waiting period could be no more than 50 days, the maximum permissible period in a construction contract for payment of a payment claim,[6] and would more likely be a shorter period,[7] given that the rejection or dispute may not be communicated for some weeks after the payment claim is made. These waiting periods do not seem disproportionately long in the statutory context that an applicant for adjudication has 90 days after the payment dispute arises within which to apply.[8]

[23] Moreover, whatever limited delay might be imposed on a party wishing to apply for adjudication, the disadvantage of such is offset by the greater clarity and certainty provided by the preferred construction, as explained in par [21] above. Clarity and certainty are important in achieving the policy objective of a workable process for speedy adjudication outside the court system. The greater the degree of clarity and certainty, the greater the probability that the processes set up by the Act will function effectively without the need for court intervention on jurisdictional grounds.

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6 *Construction Contracts (Security of Payments) Act* (NT), s 13.

7 For example, under the express terms of a compliant construction contract. Alternatively, *Construction Contracts (Security of Payments) Act* (NT) provides for implied contractual conditions in the Schedule. Division 5, condition 6(2)(b) requires payment in full within 28 days after receipt of the payment claim.

8 *Construction Contracts (Security of Payments) Act* (NT), s 28.

[24] The first defendant sought to support its contentions by reference to a number of decisions of the Western Australian State Administrative Tribunal, in which a very similar provision to s 8(a), that is, s 6(a) of the *Construction Contracts Act 2004* (WA), was construed in a manner consistent with the first defendant's contended construction set out by me in par [17] above.[9] In deference to the first defendant's submissions I make the following brief observations to explain why I have not applied the Western Australian decisions.

[25] The Western Australian provision reads relevantly as follows:

> "Payment dispute
>
> For the purposes of this Act, a payment dispute arises if –
>
> by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed; ...".

[26] In my opinion, the words "*by the time when* the amount claimed in the payment claim is due to be paid under the contract" are materially different to the Northern Territory legislation relevant to the issue which I have had to decide. In my opinion, the words "by the time when" mean that the introductory phrase in the West Australian legislation is at least open to the construction "on or before the due date for payment" when applied to the second situation then described: "the claim has been rejected or wholly or

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[9] *Blackadder Scaffolding Services (Aust) Pty Ltd v Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133 at [33] to [39]; *South Coast Scaffolding v Hire Access Pty Ltd* [2012] WASAT 5 at [55] to [56]; *Fuel Tank & Pipe v Decmil* [2010] WASAT 165 at [13] to [21].

partly disputed". The words "by the time when" invite consideration of the period leading up to the due date for payment under the contract, as distinct from consideration of the actual due date for payment required by the Northern Territory legislation.

[27] In the decisions referred to in par [24] and the footnote thereto, the Western Australian State Administrative Tribunal considered that there were alternative constructions available under the Western Australian legislation, and therefore that recourse to extrinsic material, including the second reading speech, was permissible and appropriate in order to resolve ambiguity. The extrinsic material was considered to be significant in *Blackadder Scaffolding*[10] and provided justification for the Tribunal in that matter to construe the provision in a manner which resulted in the lesser delay to an unpaid party seeking to enforce timely payment.

[28] A second aspect to which the Tribunal had regard in *Blackadder Scaffolding* and *Fuel Tank & Pipe v Decmil*[11] was the need to give effect to the words "or a claim has been rejected or wholly or partly disputed" at the end of s 6(a) *Construction Contracts Act 2004* (WA), to ensure that those words were not redundant. In *Fuel Tank & Pipe*, reference was made to *Project Blue Sky Inc v Australian Broadcasting Authority*[12] for the proposition that a court construing a statutory provision must strive to give meaning to every word of the provision.

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[10] [2009] WASAT 133 at [37] to [38].
[11] *Fuel Tank & Pipe v Decmil* [2010] WASAT 165 at [19].
[12] (1998) 194 CLR 335.

[29] It may be noted, however, that a principal may make a "payment claim" against a contractor for defective work performed under a construction contract or for non-performance of work required to be performed under a construction contract.[13] It is possible for a principal's payment claim to be paid in full, if the contract so provides, by deduction from monies otherwise payable under the contract or by the application of retention monies, or possibly by way of set-off under the general law. With reference to s 8(a) *Construction Contracts (Security of Payments) Act* (NT), it is thus conceivable that an amount claimed in a payment claim may be rejected or disputed, even though paid in full. Theoretically there is no redundancy of the kind which concerned the Western Australian State Administrative Tribunal in *Blackadder Scaffolding* and *Fuel Tank & Pipe v Decmil*.

Conclusion

[30] When s 8(a) *Construction Contracts (Security of Payments) Act* (NT) is construed as explained in par [20] and applied to the facts stated in par [6] above, the conclusion must be that the first defendant applied for adjudication before a "payment dispute" had arisen under the Act.

[31] To the extent that the adjudicator decided that s 8(a) allowed two possible dates when a payment dispute might arise, the first being the due date for payment under the contract, if payment has not been made by that date, and the second being the presumably earlier date when the claim has been rejected or disputed, he erred in law. That error led the adjudicator to find

[13] *Construction Contracts (Security of Payments) Act* (NT), s 4, definition of "*payment claim*".

that a payment dispute had arisen within s 8(a) in the present case, when it had not. Again he erred in law. In my opinion, that was an error of law going to the jurisdiction of the adjudicator. The existence of a payment dispute is the foundation of the adjudicator's jurisdiction. In my view it is a jurisdictional fact such that, in the absence a payment dispute, the adjudicator did not have jurisdiction. The adjudicator determined the merits of the application for adjudication when he did not have jurisdiction.

[32] In *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another*,[14] Mildren J referred to the privative clause in s 48(3) of the Act and held that that provision did not prevent the court from declaring a determination void for jurisdictional error of a kind where the adjudicator wrongly construes the Act and assumes jurisdiction as a result of an error of law going to jurisdiction. His Honour said:

> "… I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*,[15] I held that the decision of an adjudicator who wrongly determined whether the 90-day time-limit had been complied with, was not void. The judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits."

[33] Both Riley J at par [16] and Southwood J at par [51] of *A J Lucas* agreed with Mildren J that s 48(3) of the Act does not prevent the Supreme Court

[14] [2009] NTCA 4; 25 NTLR 14 at [13].
[15] *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15.

from declaring a determination of an adjudicator void for jurisdictional error where the adjudicator wrongly construes the Act.

[34] In the facts of the present case, I consider that I am bound by the decision of the Court of Appeal in *A J Lucas*. I therefore propose to make an order declaring the adjudication void for jurisdictional error.

[35] The first defendant has submitted that the adjudicator's decision to proceed to a determination of the merits, whether correct or otherwise as a matter of law, is not reviewable by this Court. The first defendant refers to the test for review of an adjudicator's determination stated by Kelly J and Olsson AJ in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*,[16] a somewhat different test to that stated by any of the members of the Court in *A J Lucas*. In *K & J Burns Electrical*, both Kelly J and Olsson AJ followed the decision of the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*.[17] Kelly J said:

> "… a purported determination by an adjudicator is reviewable by the court if, by reason of misconstruing the provisions of the Act which confer power upon him, or (possibly) for some other reason, the adjudicator has failed to observe an essential pre-condition for the exercise of that power, and hence for the existence of a valid adjudicator's decision or determination. …"

[16] *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Another* [2011] NTCA 1; (2011) 29 NTLR 1 at [107] per Kelly J and at [249] per Olsson AJ.

[17] *Brodyn Pty Ltd (d (t/as Time Cost and Quality) v Davenport* (2004) 61 NSWLR 421 at 441, per Hodgson JA.

[36] Olsson AJ stated the test in almost identical terms: “whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination.”

[37] In the facts of the present case, the existence of a payment dispute at the date the first defendant applied for adjudication satisfies the tests stated in both *A J Lucas* and *K & J Burns Electrical*; it was both a jurisdictional fact and an essential pre-condition for the existence of the power to adjudicate. To the extent that the tests are different, it makes no difference to the result in this case.

Order

[38] I make an order declaring the adjudication void for jurisdictional error. I will hear the parties on the question of costs.
