GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd [2010] NTSC 34

PARTIES:	GRD GROUP (NT) PTY LTD v K & J BURNS ELECTRICAL PTY LTD and BRIAN GALLAUGHER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 44 of 2010 (21014265)
DELIVERED:	28 June 2010
HEARING DATES:	13 May 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CONTRACTS – subcontract – construction of contracts – payment claims and security – criteria for valid payment claim – retention monies in subcontract for security – late completion of subcontract – reconciliation statements – time for payment of payment claims – whether tax invoices amount to payment claims – strict compliance for valid payment claim – whether repeat claims can be authorised by contract – motion for a declaration that the determination is void – stay of the judgment

ADMINISTRATIVE LAW – JURISDICTION – ADMINISTRATIVE TRIBUNAL – adjudicator's jurisdiction – jurisdictional error – adjudication of construction of contracts – claim for declaration that determination by adjudicator void – time to have payment dispute adjudicated in contracts –

whether adjudicator wrongly construed the Act – whether the adjudicator fell into jurisdictional error on construing the Act

Construction Contracts (Security of Payment) Act, s 8(a), s 12, s 19 , s 28, s 28(1), s 33(1)(a)(ii), s 33(1)(a)(iv)(A), s 45, s 48(1), s 48(3)
Supreme Court Act (NT)
Supreme Court Act 1970 (NSW), s 69(3), s 69(4)
Supreme Court Rules, O.56, O.56.01

Ford, *(In) Security of Payments* (2010) 1 NTLJ 165

Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd (2008) 23 NTLR 123; *Craig v South Australia* (1995) 184 CLR 163; applied

A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (2009) 25 NTLR 14; followed

Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531; referred to

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	A Wyvill SC

Solicitors:

Plaintiff:	Hunt & Hunt
Defendant:	Ward Keller

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

GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd [2010] NTSC 34
No 44 of 2010 (21014265)

BETWEEN:

GRD GROUP (NT) PTY LTD
Plaintiff

AND:

K & J BURNS ELECTRICAL PTY LTD and BRIAN GALLAUGHER
Defendants

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 28 June 2010)

Introduction

[1] On 25 February 2009, K & J Burns Electrical Pty Ltd (Burns) entered into a subcontract with GRD Group (NT) Pty Ltd (GRD) to undertaken electrical works on land situated at Lot 7100 Brewery Lane, Woolner, Northern Territory for a lump sum price of $354,860 (the Subcontract).

[2] Throughout the course of the Subcontract, Burns submitted 13 invoices to GRD for progress payments totalling $393,274.51, which sum included claims for extras or variations totalling $38,414.50.

[3] GRD made progress payments in relation to the first seven invoices totalling $309,959.47, leaving a balance allegedly payable under the Subcontract of $83,315.04.

[4] Under the terms of the Subcontract (clause 4), GRD was entitled to retain a portion of the monies payable under the Subcontract as security. GRD withheld $17,743.00 relying upon clause 4.

[5] Disputes arose between Burns and GRD, which resulted in claims by GRD for back charges for the cost of remedial works and for liquidated damages for late completion.

[6] On 8 February 2010, Burns served upon GRD a summary invoice (SI) No ST4289 dated 25 January 2010 entitled "PAYMENT CLAIM IN ACCORDANCE WITH CLAUSE 12.2 OF THE CONTRACT". The SI listed the 13 invoices previously rendered, the amount claimed under each invoice, the amount paid in respect of each invoice and the total amount owing. It also set out a summary of the amounts held in retention and how much of the retention monies could be retained under clause 4 of the Subcontract. The SI appears to be claiming $83,315.04 less retentions of $9,831.86, leaving a balance of $73,483.98. The SI does not include any amounts not previously the subject of an invoice.

[7] On 2 March 2010, GRD sent a reconciliation statement to Burns, which asserted that Burns was actually indebted to GRD in the sum of $19,989.07.

[8] On 23 March 2010, Burns lodged an application with the Law Society of the Northern Territory applying for an adjudication under the *Construction Contracts (Security of Payment) Act* (the Act) and served the application on GRD on 24 March 2010. On 31 March 2010, the Law Society of the Northern Territory appointed the defendant Brian Gallaugher (the Adjudicator), to adjudicate the dispute. After receiving submissions from the parties, the Adjudicator delivered his Determination on 23 April 2010 (the Determination). The Adjudicator determined, in favour of Burns, an adjudicated amount of $73,922.75 including GST, plus interest of $1,254.66 to the date of the Determination, plus interest accruing at the rate of $21.27 per day until payment is made.

[9] GRD has commenced this action by Motion for a declaration that the Determination is void and of no effect and for a stay of the judgment Burns has obtained following registration of the Determination pursuant to s 45 of the Act. Notwithstanding the decision of the High Court on *Kirk v Industrial Relations Commission of New South Wales*,[1] GRD has not sought to amend the Notice of Motion to seek an order in the nature of certiorari under O.56.01 of the *Supreme Court Rules*.

The grounds for GRD's application to this Court

[10] Counsel for GRD, Mr Roper, developed three arguments in support of the claim for a declaration:

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1 (2010) 239 CLR 531.

1. The Adjudicator had no jurisdiction to entertain the application because it was not prepared and served within 90days after the dispute had arisen[2] and the Adjudicator wrongly interpreted the Act in finding that he had jurisdiction. This argument was put in different ways, to which I will come.

2. The Adjudicator had no jurisdiction to entertain the application because he ought to have been satisfied that it was not possible to fairly make a determination because of the complexity of the matter.[3]

3. The Adjudicator had no jurisdiction because the SI was not a valid payment claim. This argument was also put in different ways, to which I will also come.

GRD's first argument

[11] Clauses 12.2 and 12.4 of the Subcontract provide:

> **"12.2 Payment Claims.** The Subcontractor must give GRD Group NT Pty Ltd claims for payment of the Subcontract price:
>
> (a) at the times stated in the Subcontract Particulars;
>
> (b) in the format GRD Group NT Pty Ltd requires;
>
> (c) which include the evidence reasonably required by GRD Group NT Pty Ltd of the value of work completed in accordance with the Subcontract and the amount claimed;

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[2] s 33(1)(a)(ii) and s 28(1) of the Act.
[3] s 33(1)(a)(iv)(A).

(d) which sets out the total value of work completed in accordance with the Subcontract to the date of the claim, the amount previously paid to the Subcontractor and the amount then claimed;

(e) which are based on the Schedule of Rates and Prices to the extent it is relevant; and

(f) which includes such documentary evidence that GRD Group NT Pty Ltd may require that all persons engaged or employed by the Subcontractor in connection with the Works have been paid all monies due and payable to them in connection with their work, as at the date of the payment claim.

12.4 Payment. Subject to clauses 4.1 and 12.6 and CONTRACTOR'S receipt of payment from the Principal for the items claimed, CONTRACTOR must within the time period stated in the Subcontract Particulars of receiving payment from the Principal in respect of the works specified in the payment statement, pay the Contractor the amount set out as then payable in the payment statement."

[12] It is common ground that clause 12.4 is void because it is a provision prohibited by s 12 of the Act. The time for payment of a payment claim is therefore within 28 days of receipt of the payment claim.[4] The time to apply to have a payment dispute adjudicated is limited by s 28 to 90 days after the payment dispute arises. A payment dispute arises under s 8(a) if, "when the amount claimed in a payment claim has not been paid in full or the claim has been rejected or wholly or partly disputed".

[13] Section 19 of the Act provides:

[4] See s 20 and clause 6(2)(b) of the Schedule.

> "The provisions in the Schedule, Division 4 are implied in a construction contract that does not have a written provision about how a party must make a claim to another party for payment."

[14] Division 4 of the Schedule then sets out the requirements for the making of a payment claim in those circumstances.

[15] However, in this case clause 12.2 of the Subcontract did make provision for the making of a payment claim. The Act clearly contemplates that such a provision in a construction contract is valid.

[16] The approach taken by the Adjudicator was to consider clause 12.2 of the Subcontract and see if the requirements of that provision had been met on each occasion that an invoice had been delivered by Burns. This was because GRD submitted that: (1) each of the invoices submitted by Burns were payment claims; (2) the SI was not a payment claim; and (3) in any event, a repeat claim cannot be made; (4) the payment disputes in relation to the tax invoices each arose more than 90 days after the payment disputes arose. There is no dispute that this is so if the tax invoices amounted to payment claims.

[17] The Adjudicator found that each of the tax invoices complied with clauses 12.2(a), (b), (c), (e) and (f) of the Subcontract but not clause 12.2(d) because:

> "None of the invoices listed provides a total value of work completed in accordance with the contract or nominates the amount previously paid to then yield the amount claimed. Each of the invoices is a

> stand alone document relating solely to the work as listed or nominated for the relevant period."

[18] The Adjudicator also found that strict compliance with clause 12.2 of the Subcontract was necessary for a valid payment claim and as there had not been strict compliance, none of the invoices were payment claims.

[19] Mr Roper submitted that the Adjudicator was in error and it was an error going to jurisdiction. It was not contended that the finding that the invoices did not comply with clause 12.2(d) was wrong. Mr Roper submitted that strict compliance with clause 12.2 was not necessary to constitute a valid payment claim. For this proposition he replied upon the judgment of Southwood J in *Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd.*[5] All that was necessary to constitute a valid payment claim was for the five essential requirements, as explained by Southwood J in *Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd*[6] to be present and that therefore the payment claim (if it was one) contained in SI was out of time. This it was submitted was a fundamental jurisdictional error.

[20] Mr Wyvill SC submitted that the requirements for a valid payment claim enunciated by Southwood J in *Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* were the minimum requirements to invoke jurisdiction, but do not determine the answer to the question. The Adjudicator must look at the

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5 (2008) 23 NTLR 123 at [63]-[66].
6 (2008) 23 NTLR 123 at [67]-[71].

contract to see if it is a payment claim and, if so, whether it fell due.

Mr Wyvill SC referred to Southwood J's judgment[7] where his Honour said:

> "Issues about the intervals at which payment claims may be made under the relevant construction contract, the number of payment claims that can be made in any interval and the manner in which the amount claimed in a payment claim is calculated are all in truth matters going to whether the amount claimed in a payment claim is due and payable. Whether a payment claim is due and payable is a matter for the Adjudicator to determine. He or she may get their conclusion wrong.

[21] I do not think that the Adjudicator was of the opinion that, although the taxed invoices were "payment claims" the amounts claimed were not "due to be paid under the contract" because, before they fell due, there had to be strict compliance with clause 12.2. If that had been his finding, he would also have found, presumably, that no payment dispute had arisen in terms of s 8(a). The Adjudicator's finding was that they were not payment claims because they were non-compliant. There was no finding that no payment dispute had arisen.

[22] No submission was made that I should not follow *Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd*.[8] Mr Wyvill SC submitted that the five criteria for a valid payment claim identified by Southwood J were the minimum requirements for a valid payment claim. He did not dispute that the invoices met these criteria, but he submitted that the existence of those requirements does not decide the question of whether the invoices were valid payment

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7 *Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [72].
8 (2008) 23 NTLR 123.

claims. To determine that question, the Adjudicator needed to look at the terms of the Subcontract. The Adjudicator did this and no error was shown, or if he were in error, it was an error of fact and not a jurisdictional error.

[23] It must not be forgotten that s 48(3) of the Act contains a privative clause to the effect that, except to the extent provided by s 48(1), the decision or determination of an adjudicator on an adjudication "cannot be appealed or reviewed". In *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*,[9] the Court of Appeal held that this provision does not prevent this Court from declaring that the determination of an adjudicator is void for jurisdictional error where the adjudicator wrongly construed the Act. The question of whether errors on the face of the record could also be the subject of judicial review was not discussed. Unlike the *Supreme Court Act 1970* of New South Wales, s 69(3) and s 69(4), there is no provision in the *Supreme Court Act* (NT) specifically dealing with what is "the record". Nor is that subject dealt with in O.56 of the *Supreme Court Rules*. What is clear from the decision in *Kirk v Industrial Relations Commission of New South Wales*[10] is that the Legislative Assembly cannot validly take from a Supreme Court the power to grant relief on account of jurisdictional error. It may be that s 48(3) does not deny non-jurisdictional error either,[11] but it is not necessary to consider that question here.

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9 (2009) 25 NTLR 14 at [13], [16] and [51].
10 (2010) 239 CLR 531 at [100].
11 See *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [91].

[24] If the Adjudicator wrongly held that he had jurisdiction to adjudicate, that is clearly a jurisdictional error.[12] In this case, an error that the invoices did not amount to payment claims and that he therefore had jurisdiction to adjudicate is clearly an error as to jurisdiction. This is so whether the error is characterised as an error of law contrary to the Act, or an error of law in construing the contract, because in the latter case, an administrative tribunal's decision as to jurisdiction based upon an erroneous construction of the contract can be characterised as "an error of law which caused it to identify the wrong issue, [or] to ask itself the wrong question…"[13]

[25] In relation to the finding by the Adjudicator that the invoices were not payment claims within the meaning of the Act, following the reasoning of Southwood J in *Transcon*, the decision of the Adjudicator was in error. He ought to have found otherwise.

[26] However, the Adjudicator also found that the SI was a valid payment claim and that if he was wrong in his finding that the invoices were not payment claims, he still had jurisdiction. Mr Roper submitted that the Adjudicator was wrong in that conclusion because the SI was a repeat payment claim, which the Act did not recognise.[14]

[27] The reasoning of the Adjudicator was that clause 12.2(d) of the Subcontract not only permitted repeat claims, but also in fact required them to be made.

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12 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [67]-[72].

13 See *Craig v South Australia* (1995) 184 CLR 163 at 194; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [67].

14 *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14.

The issue in question is, assuming for the moment that the SI was a payment claim in the sense that it complied with the minimal requirements of the Act, whether a repeat claim could be authorised by the contract between the parties. Mr Roper submitted that repeat claims were not possible; relying on the decision of the Court of Appeal in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*.[15] Mr Wyvill SC submitted that the decision in that case was distinguishable.

[28] In *A J Lucas*, the contract in question did not permit repeat claims. The Court of Appeal unanimously held that the Act did not contemplate repeat claims. In my judgment, I said:[16]

> "The adjudicator found that the contract between the parties did not specifically preclude the re-submission of an unpaid claim. Whether he was right or wrong about that is irrelevant."

[29] Southwood J with whom Riley J agreed, said:[17]

> "The time when a payment dispute arises cannot be deferred or retriggered by the inclusion in a construction contract of clauses which make provision for the resubmission or reformulation of a payment claim. Section 8 of the Act does not contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims. The section makes no provision for repeat payment claims."

[30] Mr Wyvill SC submitted that in *A J Lucas*, the contract did not specifically provide for repeat claims and consequently the observations of Southwood J

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15 (2009) 25 NTLR 14.

16 *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [15].

17 *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [39].

in particular were obiter dicta and not binding. He submitted, relying upon the reasoning of Cameron Ford in an article, *(In) Security of Payments*[18] that the Act did not prevent the resubmission of payment claims if the parties to an agreement specifically provided for it in the construction contract. There is much to be said for Mr Ford's contention. Even if the observations of the majority in *A J Lucas* are obiter dicta, they are powerful persuasive authority. I consider that I, as a single Judge, should follow *A J Lucas*. Consequently, I find that the Adjudicator ought to have found that the invoices were payment claims and there was no jurisdiction to entertain the application in as much as the SI was based on the invoices because it was out of time. It does not follow that the Adjudicator had no jurisdiction at all if the SI could otherwise stand as a valid payment claim. In order to decide this question it is necessary to consider Mr Roper's third argument.

GRD's third argument

[31] Mr Roper submitted that the SI was not, in itself, a valid payment claim, notwithstanding that it complied, as the Adjudicator found, with clause 12.2 of the Subcontract. Prima Facie, even if the SI was not a payment claim in so far as it claimed the amounts allegedly owing on the unpaid invoices, it also claimed retention monies not previously the subject of any of the invoices. On the face of the SI, Burns claimed that, of the sum of $17,743.03 actually retained by GRD, only $9,831.86 should be withheld at the time of the SI. The Adjudicator found in Burns' favour on this issue.

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[18] (2010) 1 NTLJ 165.

[32] Mr Roper submitted that the SI did not comply with clause 12.2 because it did not properly claim the amount said to be then due, in that "it sets out the amount of the retention fund/security held and should be paid, however, makes no allowance for the balance properly retained". I do not accept this submission. The SI made it very clear that Burns was seeking payment of this amount from the retention monies. In my opinion, the SI was a valid payment claim for the difference of $7,911.17 and, to this extent, the adjudication was within jurisdiction.

[33] Mr Roper further submitted that the SI was invalid because clause 12.2(a) requires payment claims submitted at the times stated in the "Subcontract Particulars". The "Subcontract Particulars" provides for payment claims to be received by the 25th of each month. The SI was served on 8 February 2010, so it is difficult to see why it was not served by the 25th of the month of February. It was put that the payment claim was not in respect of any new work, but that does not mean a payment claim cannot be made for retention monies, even if no new work has been performed. This argument must be rejected.

GRD's second argument

[34] Mr Roper submitted that it must have been obvious to the Adjudicator that there was a heated dispute between the parties on a number of issues, which could not be resolved except by cross-examination of witnesses. Issues of waiver and estoppel were raised because GRD had previously accepted at least some of the invoices and made payments on them without insisting on

strict compliance with clause 12.2 on the subcontract. It was put that the Adjudicator's decision to proceed with the adjudication was void. He should have turned his mind to the provisions of s 33(1)(a)(iv)(A) of the Act which provide that the appointed adjudicator must dismiss the application "if satisfied it is not possible to fairly make a determination… because of the complexity of the matter".

[35] Mr Wyvill SC submitted that no submission was made to the Adjudicator that he should be satisfied in terms of s 33(1)(a)(iv)(A) of the Act. This was not disputed by Mr Roper. In the absence of such a submission, it is not surprising that the Adjudicator decided otherwise. I am not able to find that his decision to proceed in these circumstances was so unreasonable that no Adjudicator could have properly arrived at it. I would dismiss this ground.

Conclusions

[36] The result is that the Adjudicator did not have jurisdiction to entertain the SI, except for so much of the SI as related to the balance of the retention fund.

[37] GRD is entitled to a declaration that so much of the adjudication as relates to an amount in excess of $7,911.17 and interest thereon is void and for an order staying so much of the judgment obtained in this Court which exceeds that sum.

[38] I will hear the parties as to costs.