

*M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor*  
[2014] NTSC 25

PARTIES: M & P BUILDERS PTY LIMITED

v

NORBLAST INDUSTRIAL  
SOLUTIONS PTY LTD

AND

BREARS, John

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 36 of 2014 (21422889)

DELIVERED: 27 June 2014

HEARING DATE: 3 June 2014

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

JUDICIAL REVIEW – decision of an adjudicator – construction of contract  
– extension of prescribed time for determination – availability of merits  
review –procedural fairness

*Construction of Contracts (Security of Payments) Act 2004* (NT) s 20, s 27,  
s 33, s 33(1)(b), s 33(2), s 33(3), s 34(2), s 34(2)(a), s 34(3)(a), s 34(3)(b),  
s 34(4), Schedule Division 5 6(2)(a), Division 5 6(2)(b)  
*Interpretation Act 1978* (NT) s 24(2)

*A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 1; *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20; *Musico v Davenport* [2003] NSWSC 977; *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd and Another* (2008) 23 NTLR 123; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40, referred to

**REPRESENTATION:**

*Counsel:*

|                  |           |
|------------------|-----------|
| Plaintiff:       | W Roper   |
| First Defendant: | C Cureton |

*Solicitors:*

|                  |                     |
|------------------|---------------------|
| Plaintiff:       | De Silva Hebron     |
| First Defendant: | Squire Patton Boggs |

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|-----------------------------------|---------|
| Judgment category classification: | B       |
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor*  
[2014] NTSC 25  
No. 36 of 2014 (21422889)

BETWEEN:

**M & P BUILDERS PTY LIMITED**  
**(ACN 009 627 383)**  
Plaintiff

AND:

**NORBLAST INDUSTRIAL**  
**SOLUTIONS PTY LTD**  
**(ACN 110 217 671)**  
First Defendant

AND:

**JOHN BREARS**  
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 27 June 2014)

**Introduction**

- [1] This is an application for judicial review of a determination of the second defendant as an adjudicator appointed under the *Construction of Contracts (Security of Payments) Act* (the Act).
- [2] On 21 April 2104 the second defendant determined that the plaintiff should pay the first defendant the sum of \$195,360.00 in respect of invoice 9258,

\$193,966.00 in respect of invoice 9305 and \$127,215.00 in respect of invoice 9454, being a total of \$516,571.00, on or before 21 May 2014. He did so on the basis that the plaintiff was liable to make those payments in accordance with implied condition 6(2)(b) of Division 5 of the Schedule to the Act because the plaintiff did not give the first defendant notices of dispute for each of the three invoices in accordance with implied condition 6(2)(a) and (3) of Division 5 of the Schedule to the Act.

[3] Condition 6(2) of the Schedule to the Act states:

The party must –

(a) Within 14 days after receiving the payment claim –

(i) Give the claimant a notice of dispute; and

(ii) If the party disputes part of the claim – pay the amount of the claim that is not disputed; or

(b) Within 28 days after receiving the payment claim, pay the whole of the amount of the claim.

[4] The plaintiff seeks either an order in the nature of certiorari quashing the determination or, alternatively, a declaration that the determination is void and of no force and effect. The plaintiff contends that the determination of the second defendant is void and of no force and effect on the following grounds:

(a) The prescribed time for the delivery of the second defendant's determination expired on 9 April 2014 and the application was automatically dismissed under s 33(2) of the Act.

- (b) The second defendant failed to undertake the merits review of the payment dispute in accordance with s 33(b) of the Act and wrongly determined the application on the basis that no notices of dispute had been provided in accordance with Division 5 of the Schedule to the Act.
- (c) The second defendant failed to accord the plaintiff procedural fairness because the plaintiff was not given an opportunity to be heard on the first defendant's response that the plaintiff was liable to pay the first defendant because the first defendant did not receive any notice of dispute to its payment claims in accordance with implied condition 6(2)(a) of Division 5 of the Schedule to the Act.
- (d) There was no payment dispute about invoice 9454.

[5] The plaintiff concedes that the conditions specified in condition 6(2) and (3) of Division 5 of the Schedule to the Act are implied in the construction contract it has with the first defendant and that it did not give the first defendant any notices of dispute in accordance with implied conditions 6(2)(a) and (3) of the Schedule.

[6] The first defendant concedes that there was no payment dispute about invoice 9454.

### **The background facts**

[7] Spotless Facilities Services Pty Ltd is engaged by the Australian Department of Defence to manage certain repairs and maintenance contracts on their behalf. The plaintiff is subcontracted to Spotless Facilities Services Pty Ltd for corrosion prevention works upon the RAAF Air Traffic Control Tower in Darwin. The first defendant is subcontracted to the plaintiff to provide access scaffolding and associated encapsulation and carry out blasting and

repainting of steel works being part of the RAAF Air Traffic Control Tower in Darwin.

- [8] The first defendant started providing the services it subcontracted to undertake on 11 July 2013. However, the works were seriously interrupted from time to time and the site is now in indefinite shutdown.
- [9] On 11 September 2013, which was during the final stages of the erection and encapsulation of scaffold to the East side of the tower, workers reported experiencing a stinging eye sensation. On 12 September 2013 work on the East side of the tower was put on standby by Spotless Facilities Services Pty Ltd to enable any health issues to be investigated by an Occupational Hygienist. Work continued on the West side of the tower and the works in that location were completed by 20 November 2013.
- [10] On 22 November 2013 due to an imminent issue of a cyclone warning and watch the Cyclone Action Plan for the site necessitated the removal of the encapsulation and the boards from the remaining scaffold, leaving only scaffolding tubing in place. On 26 November 2013 the first defendant started rebuilding the scaffold on the East side of the tower.
- [11] On 28 November 2014 the first defendant rendered invoice 9258 which charged for stand down at RAAF Darwin ATC corrosion prevention works. In the top right hand corner of the invoice there appears the following statement: TERMS: Net 30, which means that the total amount outstanding in the invoice was to be paid and received by the first defendant within

30 days. For the stand down of the UHP Hydro Blaster the first defendant charged a daily rate of \$1,500.00. For stand down of the East side scaffold and encapsulation the first defendant charged a daily rate of \$1,000.00. For labour stand down the first defendant charged an hourly rate of \$100.00. For labour to remove the scaffold and planks the first defendant charged an hourly rate of \$140.00.

[12] On 2 December 2013 the Occupational Hygienist received a report from an employee of the first defendant who had developed a skin rash. The site was closed and the first defendant was put on standby while an investigation was carried out.

[13] On 20 December 2013 Spotless Facilities Services Pty Ltd instructed the plaintiff to stand-down for the Christmas break and to make the site safe and secure in accordance with the site Cyclone Action Plan. On 20 December 2013 the first defendant advised the plaintiff that it would be on stand down from 20 December 2013 to 2 January 2014. On 23 and 24 December the first defendant again stripped the scaffold and removed the planks from the site.

[14] On 31 December 2013 the first defendant rendered invoice 9305 which charged the same rates as invoice 9258 for stand down at RAAF Darwin ATC corrosion prevention works.

[15] On 11 December 2013 the plaintiff questioned some of the charges that the first defendant had rendered in invoice 9258 for the stand down of the East side scaffolding on the basis that the first defendant was charging for seven

days a week instead of five days a week.<sup>1</sup> The first defendant responded by saying that the scaffold and all equipment was located on site for seven days a week.

[16] On 3 January 2014 the first defendant started reconstructing the scaffold to the East side of the tower. On 6 January 2014 Spotless Facilities Services Pty Ltd instructed the plaintiff to remove the boards from the scaffold and all plant and equipment from the site and that the site would remain in full stand down until further notice.

[17] On 14 January 2014 there was a telephone conversation between Mr Todd McCourt on behalf of the first defendant and Mr Bruce Panting on behalf of the plaintiff about invoices 9258 and 9305 and the rates charged in the invoices. On 17 January Mr McCourt sent Mr Panting an email which explained the charges in the invoices and asked to be informed if the plaintiff would agree to the payment of labour, equipment and scaffold rates by Wednesday 22 January 2014.<sup>2</sup>

[18] On 13 February 2014 Mr Panting sent Mr McCourt an email attaching the plaintiff's reply regarding stand down rates and invoice requirements and attaching correspondence from quantity surveyors, QS Services, and various scaffolding quotations and asking the first defendant to revise its costings.<sup>3</sup> On 14 February 2014 Mr McCourt sent Mr Panting an email disagreeing

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<sup>1</sup> Page 275 of the affidavit of Nigel Bruce panting sworn on 13 May 2014.

<sup>2</sup> Page 279 of the affidavit of Nigel Bruce Panting sworn on 13 May 2014.

<sup>3</sup> Pages 281 to 283 of the affidavit of Nigel Bruce Panting sworn on 13 May 2014.



with Mr Panting's request and stating that the plaintiff was in breach of its obligations to the first defendant.

[19] On 18 February 2014 Mr Panting sent Mr McCourt an email stating that in light of the first defendant's refusal to negotiate, the plaintiff had no choice but to proceed to adjudication.<sup>4</sup> On 19 February 2014 the first defendant made the plaintiff a without prejudice offer which was not accepted by the plaintiff.

[20] On 3 March 2014 the solicitors for the plaintiff sent the first defendant a letter stating that the plaintiff's primary position is that there is no contractual basis for the first defendant to claim delay and stand down costs. Nonetheless, the solicitors stated that the plaintiff remained prepared to submit the first defendant's claims to Spotless Facilities Services Pty Ltd and would pass through any payment received less the applicable margin.

[21] Under the subcontract between the plaintiff and the first defendant, the first defendant is entitled to be paid during any periods of stand down and standby. However, the subcontract does not specify any rates for such periods.

[22] On 5 March 2014 the plaintiff applied for adjudication in accordance with the Act and the second defendant was appointed as adjudicator. On 14 March 2014 the second defendant held a pre-adjudication conference and the parties agreed that: (1) they had entered into a construction contract;

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<sup>4</sup> Page 284 of the affidavit of Bruce Panting sworn on 13 May 2014.

(2) construction work was carried out in the Northern Territory; and (3) a payment dispute had arisen.

[23] On 26 March 2014 the first defendant provided its response to the plaintiff's application for adjudication. On the second page of its response the first defendant states:

No notices of dispute have been received in respect to the three invoices that are the subject of the application in accordance with implied provision Division 5 section 6 of the Schedule to the Act. Accordingly M & P Builders must pay within 28 days of receipt, the whole amount of each invoice

[24] In paragraph 27 of its response the first defendant further stated:

Norblast Industrial Solutions have not been paid for any of the invoices which are the subject of its application. Norblast did not receive any response to claim for payments as required under the Act – implied Provisions, Division 5 (6)(2,3) Norblast claims full payment of the outstanding invoices which are subject of this adjudication ...

[25] It appears that the first time that the first defendant claimed that it was entitled to be paid in accordance with those implied conditions was in its response to the plaintiff's application for adjudication.

[26] Despite the emphasis placed on the implied conditions by the first defendant in its response, the plaintiff did not contact the adjudicator after it received the first defendant's response and ask to make any submissions about the first defendant's reliance on the implied conditions contained in Division 5 of the Schedule to the Act. Nor did the second defendant call for any

submissions from the plaintiff about the application of Division 5, further to s 34(2)(a) of the Act or otherwise.

[27] As the first defendant's response was provided on 26 March 2014, the second defendant was required to deliver his determination by 9 April 2014 unless the time for delivery was extended. An adjudicator cannot extend time for delivery of his determination without the consent of the Registrar.

[28] On 7 April 2014 the second defendant sought the Registrar's consent for an extension of time until 21 April 2014 to deliver his determination. In his email the second defendant stated:

I have been appointed as the Adjudicator for a dispute between M & P Builders and Norblast.

Unfortunately due to other urgent commitments, I will not be able to complete and issue my decision within the 14 days and seek your approval to extend the adjudication period to Monday 21 April 2014.

Your approval would be appreciated.

[29] The Registrar provided the necessary consent on 8 April 2014 and on 11 April the second defendant sent the other parties an email which stated:

I have been unable to complete the writing of my decision, within the 14 day period, and have requested from the Registrar (see below) an extension of time until Monday 21 April 2014. This request has been granted.

[30] The plaintiff has not paid any amount in respect of the three invoices, not even the amount it considers to be a reasonable amount.

**Did the time for delivery of the adjudicator's determination expire?**

[31] In my opinion, the time for the delivery of the second defendant's determination of the payment dispute did not expire. The submission of the plaintiff to this effect cannot be sustained.

[32] As at 7 April 2014 the second defendant had determined that, due to other urgent commitments, he would not be able to complete his determination within the time stipulated by the Act. In other words, the second defendant decided that time would need to be extended to 21 April 2014. Having decided to extend time to 21 April 2014, the second defendant sought approval from the Registrar to extend the adjudication period to Monday 21 April 2014. Seeking the Registrar's approval is no different to seeking the Registrar's consent. On 8 April 2014 the Registrar stated in his email to the second defendant, "Extension granted". That was all that was required for there to be an extension of time and the extension of time occurred within the time stipulated by the Act.

[33] There is nothing in the terms of s 34(3)(a) of the Act which requires an adjudicator's decision to extend the time for adjudication to be communicated to the parties to the payment dispute within the time prescribed by s 33(3) of the Act. All that is required is the consent of the Registrar.

**Was the second defendant required to undertake a merits review?**

[34] An adjudicator's functions are specified in s 33 of the Act. Subsection

33(1)(b) of the Act states:

otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine –

- (i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and
- (ii) the date on or before which the amount must be paid or the security must be returned.

[35] Whether a party to a payment dispute is liable to make a payment or to return any security is to be determined within the parameters of the application and the response, the terms of the relevant construction contract, including all implied terms, and the applicable law.

[36] In this adjudication there were three main issues that potentially fell for determination by the second defendant.

1. Was the first defendant entitled to payment in accordance with the implied conditions contained in Division 5 of the Schedule to the Act?
2. Are the stand down rates claimed by the first defendant reasonable?
3. Is the stand down time claimed by the first defendant correct?

- [37] The first main issue was squarely raised by the first defendant in its response to the plaintiff's application for adjudication and, if established, was a complete answer to the dispute raised by the plaintiff.
- [38] The Act does not provide that, regardless of the payment terms of the relevant construction contract, a party is entitled to have a dispute that it has raised resolved. The object of the Act is to facilitate timely payments between the parties to construction contracts and provide for the rapid resolution of payment disputes arising under construction contracts. To that end, s 20 of the Act implies certain conditions into a construction contract that does not have written provisions about: (a) when and how a party must respond to a payment claim made by another party; and (b) by when a payment must be made. Those contractual terms are critical to the achievement of the object of the Act and, subject to any question of waiver or estoppel, a party to a construction contract is liable to make payments in accordance with them. A party is not entitled to avoid that liability by making an application for adjudication.
- [39] In my opinion, subject to resolving the issue about procedural fairness, the second defendant was not in error in determining the adjudication in accordance with the implied contractual conditions contained in Division 5 of the Schedule to the Act. He was bound to do so. He did not thereby misconceive his function or fail to take into account relevant considerations and/or disregard matters which the Act required he must have regard or conduct the adjudication in an unreasonable or irrational manner.

**Did the second defendant fail to accord the plaintiff procedural fairness?**

[40] The plaintiff contends that the second defendant should have informed the parties of the basis on which he was intending to determine the adjudication because the Act does not provide for a reply by an applicant and the first defendant's reliance on the implied conditions in Division 5 of the Act was not foreseen by the plaintiff and the plaintiff was deprived of an opportunity to deal with this issue. The plaintiff submits that it was thereby denied procedural fairness.

[41] This Court has held in a number of cases that the rules of procedural fairness apply to adjudications under the Act and that failure to accord procedural fairness will give rise to judicial review.<sup>5</sup> The question in this case is whether there has been a substantial denial of natural justice. In this regard, the plaintiff placed considerable reliance on cases such as *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*<sup>6</sup> and *Musico v Davenport*.<sup>7</sup> However, the gravamen of those cases was that the parties did not have proper notice of the basis of the decision of the adjudicator or could not have reasonably anticipated that the adjudicator would make his decision on such a basis and were thereby deprived of an opportunity to be heard.

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<sup>5</sup> *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd and Another* (2008) 23 NTLR 123; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 1; *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at [34] and [35].

<sup>6</sup> [2014] WASC 40.

<sup>7</sup> [2003] NSWSC 977.

[42] In my opinion, it was within the reasonable anticipation of the plaintiff in this case that the first defendant would rely on the implied conditions contained in Division 5 of the Schedule to the Act. While there was some correspondence between the plaintiff and the first defendant about the rates in the invoices, by the time the plaintiff decided to go to adjudication it was clear that the first defendant was maintaining it was entitled to be paid the full amount under each invoice. If it was not anticipated by the plaintiff, the plaintiff was given clear notice of a matter which squarely fell for determination by the adjudicator. The conditions contained in Division 5 of the Schedule to the Act were at the forefront of the first defendant's response. In the circumstances, the onus was on the plaintiff to contact the second defendant and request that he exercise his powers under s 34(2) of the Act and request the plaintiff to provide further information and make further written submissions. There is nothing in the Act which precluded the plaintiff from making such a request.

[43] In my opinion, there has been no substantial denial of procedural fairness in this case.

**Does the second defendant's error in relation to invoice 9454 void the whole of his determination?**

[44] It is apparent from the three invoices which are the subject of this case that there were three payment claims and three payment disputes. The invoices are not cumulative invoices. Each invoice makes a payment claim for a discrete period of time.



[45] In his determination, the second defendant found that the due date for payment for invoice 9454 was 17 March 2014. The consequence of that finding was that there was no payment dispute before the second defendant about invoice 9454 at the time the plaintiff's application was lodged. A further consequence of there being no payment dispute about invoice 9454 is that the plaintiff wrongly joined that payment claim in its application for adjudication and the second defendant did not have jurisdiction to determine it.

[46] The plaintiff seeks to rely on its own error to argue that the whole of the determination of the second defendant is therefore void. The plaintiff submits that the legislature contemplated that there must be a separate application for each payment dispute and that by rolling up the payment disputes in a manner never envisaged by the legislature the plaintiff has effectively tied the validity of the payment disputes together. Consequently, if the application is vitiated by jurisdictional error in respect of any one payment dispute, the whole application is vitiated by jurisdictional error.

[47] In my opinion, there is nothing in the Act which precludes more than one payment dispute being included in a single application provided the parties consent to the simultaneous adjudication of each dispute: s 34(3)(b) of the Act. Further, the joinder of two or more payment disputes in an application does not tie them together. They remain discrete disputes. Subsection 34(4) of the Act is facultative. It does not require that there be separate applications for each payment dispute. Under s 27 of the Act the words

‘payment dispute’ also include the plural. Under s 24(2) of the *Interpretation Act* words in the singular include the plural.

[48] It follows that if there is a jurisdictional error in relation to one payment dispute the jurisdictional error does not affect the other payment disputes contained in a single application

[49] In this case, the plaintiff chose to include three payment disputes in one application. The plaintiff thereby consented to the payment disputes being adjudicated simultaneously. The first defendant did not object to such a course, it joined each payment dispute. By its conduct, the first defendant consented to the simultaneous adjudication of each of the payment disputes.

[50] In the circumstances, there was no bar to the simultaneous adjudication of these three payment disputes and the jurisdictional error which arises in the payment dispute about invoice 9454 does not vitiate the other payment disputes. However, as there was a jurisdictional error in the payment dispute about invoice 9454 the second defendant’s determination that the plaintiff was liable to pay \$127,215.00 to the first defendant for that claim and his determination that the plaintiff was liable to pay \$918.39 interest on that amount should be quashed.

### **Conclusion**

[51] In the circumstances, I make the following orders:

- (i) The second defendant's determination that the plaintiff should pay the first defendant \$127,215.00 in respect of invoice 9454 is quashed.
- (ii) The second defendant's determination that the plaintiff should pay the first defendant interest of \$918.39 on the amount of \$127,215.00 is quashed.
- (iii) The plaintiff's application to quash the determinations of the second defendant in respect of the payment disputes involving invoices 9258 and 9305, or alternatively declarations that those determinations are void and of no affect, is dismissed.

[52] I will hear the parties further as to costs and any ancillary orders

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