Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor [2014] NTSC 22

PARTIES:	AXIS PLUMBING N.T. PTY LTD (ACN 158 330 459) v OPTION GROUP (NT) PTY LTD (ACN 142 817 767) AND BALDRY, David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 128 of 2013 (21356780)
DELIVERED:	6 June 2014
HEARING DATES:	17 & 21 February 2014
JUDGMENT OF:	HILEY J

CATCHWORDS:

ADMINISTRATIVE LAW – Construction – Security of payment – Determinations – Validity of – Jurisdictional error – Review by Supreme Court – Functions of Court on judicial review - *Construction Contracts (Security of Payments) Act 2004* (NT) ss 27, 33(1)(a), 48(3)

ADMINISTRATIVE LAW – Construction – Security of payment – Adjudicators – Jurisdiction – Jurisdictional error – Statutory Criteria – Satisfaction as to – Must be reasonable – Must be legally correct – *Construction Contracts (Security of Payments) Act 2004* (NT) ss 33(1)(a), 48(3)

CONSTRUCTION – Security of payment – Determinations – Whether there is a "construction contract" - *Construction Contracts (Security of Payments) Act 2004* (NT) s 33(1)(a)(i)

CONSTRUCTION – Security of payment – Determinations – Whether contract subject to condition precedent – Whether there is a payment dispute - *Construction Contracts (Security of Payments) Act 2004* (NT) s 33(1)(a)(ii)

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Anor [2009] NTCA 4; (2009) 25 NTLR 14; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 – applied

K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor [2011] NTCA 1; (2011) 29 NTLR 1 – considered

Gedeon v Commissioner of the NSW Crime Commission (2008) 236 CLR 120; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd & Anor* (2012) 31 NTLR 139; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113; *Re Carey; Ex Parte Exclude Holdings Pty Ltd & Ors* [2006] WASCA 219; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 – referred to

Constructions Contracts (Security of Payments) Act 2004 (NT) ss 27, 28, 28(1), 33, 33(1), 33(1)(a), 33(1)(a)(i), 33(1)(a)(i), 34, 48, 48(1) & 48(3)

REPRESENTATION:

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First Defendant:	Paul Maher

Judgment category classification:	B
Judgment ID Number:	Hil1408
Number of pages:	29

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

Axis Plumbing N.T. Pty Ltd v Option Group (NT) Pty Ltd and Anor
[2014] NTSC 22

BETWEEN:

AXIS PLUMBING N.T. PTY LTD (ACN 158 330 459)
Plaintiff

AND

OPTION GROUP (NT) PTY LTD (ACN 142 817 767)
First Defendant

AND

DAVID BALDRY
Second Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 6 June 2014)

Introduction

[1] The plaintiff, Axis Plumbing N.T. Pty Ltd (**Axis**), is challenging a determination made on 19 November 2013 (the **Determination**) under the *Constructions Contracts (Security of Payments) Act 2004* (NT) (the

Act) by the second defendant (the **Adjudicator**).[1] The plaintiff seeks an order in the nature of certiorari that the Determination be called up and quashed, alternatively a declaration that the Determination is void and of no force and effect.[2]

[2] The first defendant (**Option Group**) applied for an adjudication under the Act on 21 October 2013. It contended that it had entered into a construction contract with Axis on 27 or 28 April 2013 to hire 4 dump trucks to Axis, and that a payment dispute had arisen following Axis' refusal to pay the amount of $141,900 that was due under the contract.[3] The Adjudicator found in favour of Option Group and determined that $143,601[4] was payable immediately (on 19 November 2013), and that interest accrues from that date.[5]

[3] The plaintiff contends that the Determination should be set aside for the reason that there was no contract, and hence no "construction contract", alternatively that if there was a contract there was no "payment dispute" because any obligation to make payment under the contract was subject of a condition precedent that was never met, namely that the vehicles had first to be approved by JKC.

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1 A copy of the Determination is annexed to the Affidavit of Anthony Perkins filed 13 December 2013 at pp 51-68.

2 Originating Motion Between Parties filed 13 December 2013 paragraphs [1] and [2].

3 "Construction contract" is defined in s 6 of the Act. "Payment dispute" is defined in s 8 of the Act.

4 This comprised the $141,900 plus interest of $1,701 for the period between 1 October and 19 November 2013.

5 Determination [44] – [45].

[4] The first defendant contends that the plaintiff has not demonstrated any reviewable error on the part of the Adjudicator, and that even if the Court was entitled to make its own determination on the merits the same conclusion would result.

Main facts

[5] Axis had been contracted to provide plumbing works for the INPEX Blaydin Point LNG Plant by the head-contractor for the project, JKC Australia LNG Pty Ltd (**JKC**).

[6] The main people involved in the dispute between Option Group and Axis were Gerard Breen (**Breen**) a director of Option Group and Errol Alley (**Alley**) of Axis. Each of them made statutory declarations for the purposes of the adjudication, Breen on 10 October 2013 and Alley on 7 November 2013.

[7] On 15 March 2013, following discussions between representatives of the parties about Axis hiring dump trucks from Option Group, Breen sent an email to Axis setting out hire rates for various machinery including but not confined to dump trucks. Then followed discussions about Axis also using some of Option Group's drivers and the need for them to be inducted by Axis.

[8] On 23 April 2013 Alley met Breen and others and discussed the hiring of vehicles from Option Group. Alley and Breen provided different accounts about what was said at that meeting.

(a) In his statutory declaration (of 10 October 2013) Breen says that there were discussions about obtaining necessary tickets for dump truck drivers which would be acceptable to JKC.[6]

(b) Alley went into a lot more detail in his statutory declaration (of 7 November 2013).[7] He said that he explained to Breen "the step-by-step process about how plant would be deployed on the project site" and set out the effect of what he said. This included that:

(i) "There are a few steps to work through here, with everything to be approved by the head contractor JKC before anything goes on site"

(ii) "… A risk assessment for each plant will need to be completed and submitted to JKC for approval …"

(iii) "If the plant is approved JKC will issue equipment labels and stickers."

(iv) "Then and only then can the trucks be permitted on the project site. That is when the hire period commences."

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6 Affidavit of Anthony Perkins filed 13 December 2013 p 9 [11].
7 Affidavit of Anthony Perkins filed 13 December 2013 pp 33-4 [5] – [7].

(c) Alley said that Breen said that he understood (that) and that Option Group would work with Axis to get the necessary approvals from JKC. Alley says that he went on to explain to Breen that the commencement of the hire period would be conditional upon satisfying JKC.

[9] Axis relied heavily upon these assertions by Alley to support its contention that the vehicles had to be approved by JKC before any contract was entered into. It seems that Breen did not have the opportunity to respond to these assertions made by Alley.[8]

[10] On 26 April 2013 Alley sent a Purchase Order (the **Purchase Order**) to Option Group with an email.

[11] The Purchase Order referred to the dry hire of 4 dump trucks at specified rates per hour and included the words "minimum 200 hours months each", "hire to commence as personnel are enabled and inducted" and "payment terms 30 days EOM". It said nothing about any other conditions, such as the prior approval of the vehicles by JKC.

[12] The email included the following:

(a) a reference to 6 weeks hire;

[8] The nature of the jurisdiction conferred under the Act was such that there was no opportunity for oral evidence or cross examination, and limited if any opportunity for Breen to respond to Alley's statutory declaration.

(b) "As soon as personnel have been enabled and inducted we will take on the hire of plant."

(c) "As agreed on the phone can you look into getting 2 of my truck drivers ticketed next week … so I can commence hire of the trucks sooner."

(d) A request to complete and return "the JKC Heavy Plant Checklist so that I can commence the paperwork from my end."

(e) A request for confirmation as to "the location of all plant so that JKC can come out and do the inspections."

[13] Breen said that within a day or two of receiving the Purchase Order he telephoned Alley, confirmed that his drivers were "ready to go" and "were all now ticketed". He said that Alley said that he "had to organise a VOC (Verification of Competency to be carried out by JKC mechanical engineers to ensure the machines are up to standard) and medical examinations" and would organise those as soon as possible.

[14] On 29 April 2013, Alley wrote an email to Breen which said:

> "Further to our meeting on 23 April 2013 and the purchase order dated 26 April 2013 I wish to clarify that the hire period of the plant will commence as soon as both the personnel and plant are approved and enabled by JKC for site."

[15] The Adjudicator accepted that Breen never received that email, and found that it had no legal effect because the offer made in the Purchase

Order had already been accepted on 27 or 28 April 2013. He also concluded that the email appeared to have been "an ex post facto attempt to correct a badly stated offer in the order dated 26 April 2013".[9]

[16] On 1 May 2013 Eileen Breen, OHS & Office Manager of Option Group, sent an email to Alley attaching four documents entitled "Clearance Certificate – Heavy Plant and Equipment Inspection Checklist", one for each of the four dump trucks (the **Checklists**). The email said: "Please find attached the JKC heavy plant checklists as requested."

[17] On 15, 22, 23 and 29 May Eileen Breen sent emails to Axis enquiring about when the "JKC inspections of the dumpers" would take place. On 12 June Alley informed Breen that "[W]e can't take the dump trucks because they are too heavy for the bitumen road on the Inpex site."[10]

[18] On 9 August 2013 Option Group issued a Payment Claim claiming the amount of $141,900 (inclusive of GST).[11]

[19] On 20 August 2013 Axis wrote to Option Group referring to the Payment Claim and the Purchase Order.[12] The letter went on to say:

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9 Determination [35]
10 Affidavit of Anthony Perkins filed 13 December 2013 pp 10-11 [21] & [22].
11 Affidavit of Anthony Perkins filed 13 December 2013 p 25.
12 Affidavit of Anthony Perkins filed 13 December 2013 p 26.

> "To date Axis have not issued any mobilisation instruction to NTEX for the above-mentioned vehicles and subsequently have never been utilised on site.
>
> NTEX were advised by Axis that the vehicles would not be required on site.
>
> On this basis Axis rejects the Payment Claim dated 9 August 2013 for $141,900 including GST in its entirety."

[20] On 21 October 2013 Option Group's lawyers sent to Axis an "Application for Adjudication of Payment Dispute" dated 18 October 2013 which included Breen's statutory declaration and supporting documentation (the **Application**).[13]

[21] The Adjudicator was appointed on 24 October 2013 to determine the Application.

[22] On 7 November 2013 Axis' lawyers sent to Option Group's lawyers "The Respondent's Response to the Adjudication Application" which included Alley's statutory declaration and a copy of the email of 29 April (the **Response**).[14] In the Response Axis asserted that:

(a) the details provided to Breen at the meeting on 23 April "made it perfectly clear that any hire period would only commence upon JKC granting approval to declare the applicant's plant on the project site";

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13 Affidavit of Anthony Perkins filed 13 December 2013 pp 4-26.
14 Affidavit of Anthony Perkins filed 13 December 2013 pp 28-37.

(b) Option Group did not accept the terms of Axis' purchase order (on 27 or 28 April or otherwise);

(c) "the terms of the agreement were still being worked through and clarified";

(d) "The email correspondence of 29 April 2013, sent three days after the purchase order, was unequivocal in its terms. It clearly demonstrated that the applicant's offer would proceed on a conditional footing. That is to say, the applicant was aware that it would not be entitled to trigger the commencement of any hire period until certain conditions were met."

[23] As Alley's email of 29 April had not been referred to in the Application the Adjudicator sent an email to the parties' solicitors on 11 November 2013 requesting further information about that email. Both solicitors responded soon thereafter.

[24] In the Determination the Adjudicator considered the respective contentions, particularly in relation to the conversation between Breen and Alley on 23 April. He said that:

> "The critical finding I am therefore left to determine is whether Mr Alley's version of what was supposed to have been stated about plant approval by JKC at the site meeting on 23 April 2013 is correct or whether Mr Breen's version of what was supposed to have been discussed at that site meeting was correct

> and … essentially complete regarding the essence of what was discussed at the meeting."[15]

He concluded that "it was more likely than not that Mr Breen's evidence is likely to be correct".[16]

[25] Option Group contended, and the Adjudicator found, that the offer made in the Purchase Order was accepted by Option Group on 27 or 28 April 2013, that is when Breen telephoned Alley. The Adjudicator found that at that point Option Group "had fulfilled as much of the pre-condition in the offer as it was required to fulfil for the hiring of the plant to commence" and that "therefore, the hiring period commenced on 27 or 28 April 2013."[17]

[26] The Adjudicator considered s 33(1)(a) of the Act and concluded that he had jurisdiction, having satisfied himself of the matters referred to in paragraphs (i) and (iii) thereof and that the requirements of s 28 were complied with.[18] He found that Axis' letter of 20 August 2013 was a notice of dispute and that the payment dispute arose then.[19]

Judicial review of determinations under the Act

[27] Although there was discussion during the hearing as to whether s 27 of the Act could also form the basis of an application for judicial review

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15 Determination [35(c)].
16 Determination [35(e)].
17 Determination [36].
18 Determination [10] – [26].
19 Determination [23] - 25].

the plaintiff's submissions and the main authorities discussed focussed upon s 33(1)(a) of the Act, and in particular ss 33(1)(a)(i) and (ii), and the effect of the privative provisions in s 48(3).

[28] Section 48 of the Act provides as follows:

> "(1) A person who is aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision.
>
> …
>
> (3) Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed."

[29] Section 33(1) of the Act includes the following:

> "(1) An appointed adjudicator must …:
>
> (a) dismiss the application without making a determination of its merits if:
>
> (i) the contract concerned is not a construction contract; or
>
> (ii) the application has not been prepared and served in accordance with section 28; or
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> (iii) an arbitrator or other person … makes an order, judgment or other finding about the dispute that is the subject of the application; or
>
> (iv) satisfied it is not possible to fairly make a determination -
>
> (A) because of the complexity of the matter; or
>
> (B) because the prescribed time or any extension of it is not sufficient for another reason; or

(b) otherwise - determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment …"

[30] These provisions have been the subject of judicial consideration, particularly by the Court of Appeal in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Anor*[20] and *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor*.[21]

[31] In *AJ Lucas*, Mildren J said, at [13]:

> "Section 48(3) of the Act contains a privative clause. Except as provided by s 48(1) (which applies only where the adjudicator dismisses the application under s 33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act. 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."

[32] The other two judges in *AJ Lucas*, Riley J (at [16]) and Southwood J (at [51]), agreed with Mildren J that s 48(3) of the Act does not prevent the Supreme Court from declaring that a determination of an adjudicator is void for jurisdictional error where the adjudicator wrongly construed the Act.

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20 *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Anor* [2009] NTCA 4; (2009) 25 NTLR 14 (***AJ Lucas***).

21 *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Anor* [2011] NTCA 1; (2011) 29 NTLR 1 (***K & J Burns***).

[33] Section 33(1)(a) was discussed by Southwood J in *AJ Lucas*, Riley J agreeing. At [32] – [34] his Honour said:

> "[32] The structure of s 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication for an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met.[22] The prescribed criteria being those set out in s 33(1)(a)(i)-(iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.
>
> [33] The statutory criteria set out in s 33(1)(a)(i)-(iv) are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of jurisdiction if he made a determination of an application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists.[23]
>
> [34] Such a construction of s 33(1) of the Act is based in the first instance upon the text of the section. Section 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s 33(1)(a)(i)-(iv) are not fulfilled. The criteria themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. The express purpose of the Act is confined to promoting the security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts;

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22 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

23 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [127] per Gummow J.

> providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible."

[34] In *K & J Burns*, after quoting what Mildren J had said in *AJ Lucas* at [13] and what Southwood J had said in *AJ Lucas* at [32], Kelly J said, at [104]:

> "*AJ Lucas* is therefore authority for the proposition that a decision of an adjudicator is not reviewable merely because he wrongly decides that the prescribed criteria in s 33(1) (and by extension s 28) are met, but that that if an adjudicator wrongly construes the Act on a matter going to his jurisdiction, then his purported determination is not a determination and is amenable to judicial review."

[35] And, at [107]:

> "That is to say, 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 precondition for the exercise of that power, and hence for the existence of a valid adjudicator's decision or determination. That will not include errors in determining whether or not the provisions of s 28 of the Act have in fact been complied with, provided the adjudicator acts reasonably and in good faith because, as Mildren J said in the passage of *Independent Fire Sprinklers* quoted above, deciding these matters is a core function conferred on the adjudicator by the Act. (I have one caveat to add. It is not necessary to decide in this case, but I would leave open the question of whether it is a necessary precondition of the exercise of power by an adjudicator that the contract concerned is in fact a construction contract, given the scope and purpose of the legislation.)

[36] In *K & J Burns* Southwood J qualified what he had previously said in *AJ Lucas* about the ability of the Court to review the adjudicator's consideration of the criteria contained in s 33(1)(a)(i)-(iii) of the Act. At [30] he said:

> "… the text of each of the criteria contained in s 33(1)(a)(i)-(iii) of the Act suggests that those criteria are quite discrete. The existence of each of those criteria is an essential condition of an adjudicator's jurisdiction to adjudicate a payment dispute on the merits."

[37] However, Southwood J was in the minority in that matter and no other judge expressed agreement with His Honour's qualification of what he had previously said in *AJ Lucas*. Rather (from [125]) Kelly J discussed the qualification in some detail and provided persuasive reasons why she disagreed with it and why she considered that "the approach in *AJ Lucas* was correct".[24] At [144] her Honour affirmed that in her view the correct construction of s 33(1) is that set out by Southwood J at [32] of *AJ Lucas*. The other judge, Olsson A-J, did not express a view on this point. I consider that the approach espoused by Southwood J in *AJ Lucas*, with the agreement of Riley J, is binding on this court.

[38] Needless to say I agree with the submission made on behalf of the first defendant that it is for the adjudicator to determine if the matters in s 33(1)(a) exist and that judicial review is only available in respect of those matters where he made an error of law in reaching his state of

[24] See particularly [135], [139], [140], [142], [143] and [145].

satisfaction or where his satisfaction was unreasonable. A mere error of fact would not invalidate a determination unless it is demonstrated that the adjudicator's state of satisfaction in relation to that fact was unreasonable.

[39] I also note and agree with both counsel that nothing turns on the possible distinctions between an "essential precondition" and "jurisdictional error" for the purposes of this deciding matter.

Plaintiff's contentions

[40] The plaintiff's primary contention was that there was no contract and hence no "construction contract". The plaintiff conceded that if there was in fact a contract it would have been a construction contract within the meaning of the Act. Accordingly the Adjudicator should have dismissed the Application pursuant to s 33(1)(a)(i).[25] Counsel for the plaintiff also contended that s 33(1) did not apply because the Adjudicator did not have jurisdiction to determine whether or not there was a contract in the first place.

[41] The plaintiff's alternative contention was that if there was a contract, it was subject to a condition precedent, namely that the vehicles had first to be approved by JKC, a condition which was never satisfied. Consequently there was no "payment dispute" because there was no

[25] Plaintiff's Submissions [49].

valid "payment claim"[26] and even if there was, the amount claimed was not "due to be paid under the contract". The plaintiff contended that the Adjudicator should have dismissed the Application pursuant to s 33(1)(a)(ii) because "no 'Payment Dispute' could arise for the purposes of s 8 of the Act and no valid application could be made further to s 28."

[42] I did raise with counsel for the plaintiff my doubt as to whether the very existence of a payment dispute could be challenged in this way as s 28(1) seems to be premised on the assumption that there is a payment dispute,[27] and therefore whether such a challenge should be attempted under s 27, rather than s 33(1)(a)(ii).[28] In light of my conclusions about the contract, it is not necessary for me to consider this question further.

[43] The plaintiff contended that the Adjudicator's conclusions on these two matters, which were said to be jurisdictional facts, constituted jurisdictional errors which this court could review. Axis contended that this Court should determine whether the intention of the parties, objectively ascertained, was to be immediately and contractually bound once the Purchase Order was accepted by Option Group.[29]

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26 "Payment claim" is defined in s 4 of the Act.

27 Most of the authorities concerning ss 28 and 33(1)(a)(ii) to which I was referred assumed the existence of a payment dispute.

28 Indeed s 27 was the main provision relied on in *Northern Territory of Australia v Urban and Rural Contracting Pty Ltd & Anor* (2012) 31 NTLR 139.

29 Plaintiff's Submissions [34] & [65].

[44] Counsel for the plaintiff referred to a number of other decisions, including *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd,*[30] a decision of the New South Wales Court of Appeal involving similar legislation in New South Wales, the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**BCISPA**"). McDougall J provided a convenient summary of relevant principles from [163] onwards. He pointed out, at [164]:

> "A 'jurisdictional fact' is in general terms 'a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question' …[31]"

[45] From [166] His Honour said:

> "166 Whether something is a jurisdictional fact is ascertained by a process of construction, undertaken in the usual way. The court will have regard to the full statutory context and to the object that the legislation seeks to achieve. One asks, in essence, whether the legislature intended that the presence or absence of the factual condition should invalidate an attempted exercise of power …[32]
>
> 167 A jurisdictional fact may be the existence or non-existence of a specified state of affairs. For simplicity, I will talk only of a jurisdictional fact as the existence of a specified state of affairs. The legislature may specify that the existence of that state of affairs – the jurisdictional fact – is essential to the exercise of statutory power. Or it may go further, and specify as well that the donee of the power is authorised to decide, authoritatively, the existence of the jurisdictional fact.

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30 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 (***Chase***).

31 Citing *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [43].

32 Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

> 168 In the former case, if the exercise of power is challenged on the basis that the jurisdictional fact does not exist, the court must itself inquire into the existence of that fact. It may grant relief against the exercise of jurisdiction if it finds that the jurisdictional fact did not exist.
>
> 169 In the latter case, the court enquires into the primary decision maker's decision that the jurisdictional fact exists, but does not itself inquire into the existence of that jurisdictional fact."

[46] McDougall J then referred to the following observations by Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte* :[33]

> "It cannot be denied that, if the legislature sees fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of [an inferior] court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the [inferior] court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary [inferior] courts of justice should receive such an interpretation unless the intention is clearly expressed."

[47] Referring particularly to the last few lines of that passage McDougall J said, from [171]:

> "171 In the absence of such a clear intention, the better approach is to construe the statutory requirement as one, the satisfaction of which is a matter for the court whose jurisdiction depends on the existence of that fact to decide.

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[33] (1938) 59 CLR 369 at 391.

> 172 In short, the proper approach to construction, where some fact is specified as a precondition to the exercise of jurisdiction by a court, is to regard it as a matter for that court to decide whether or not the fact exists, unless the statute clearly precludes approach."

[48] His Honour added that although Dixon J was referring to inferior courts, the analysis could also be applied to tribunals. Dixon J's statement of those principles has also been applied to other tribunals.[34]

[49] McDougall J went on to point out (at [176] – [177]) that even if the relevant court or tribunal did have power to decide jurisdictional facts, "it does not follow that a decision by a court or tribunal on a jurisdictional fact is, in all circumstances, immune to review." He noted some of the usual grounds of review such as misconstruing legislation, forming opinions irrationally, capriciously or in bad faith, or acting "upon an assumption which had no basis in the evidentiary material which was contrary to the overwhelming weight of that material".[35]

[50] There are two fundamental differences between *Chase* and the present matter. Firstly, the particular fact in *Chase* was held to be a jurisdictional fact that must exist in fact (that is objectively) because the relevant statutory provision, s 17(2) of the BCISPA, expressly

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34 See for example McLure JA in *Re Carey; Ex Parte Exclude Holdings Pty Ltd & Ors* [2006] WASCA 219 at [190].

35 Referring to *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [23] – [24]. See too, Basten JA in *Chase* at [102], in relation to challenges to opinions of an adjudicator.

provided that an adjudication application could not be made unless that particular fact (specified in s 17(2)(a) of the BCISPA) existed. The relevant fact in *Chase* fell within the first of the two kinds of cases referred to in [167] and discussed in [168] of *Chase*, that is a fact which must actually exist.[36] By contrast, although s 28 of the Act imposes certain requirements in relation to an application for adjudication, there is no analogous provision expressed there or elsewhere in the Act prohibiting the making of an application for adjudication, for example where a respondent asserts that there is no construction contract.

[51] Secondly, the court in *Chase* concluded that the adjudicator did not have the power to determine compliance with that provision.[37] However, s 31(1)(a) of the Act expressly confers upon the adjudicator the power to determine whether or not the "contract concerned" is a construction contract and whether or not the application has been prepared and served in accordance with s 28. These are jurisdictional facts of the second kind referred to in [167] and discussed in [169] of *Chase*, namely facts the existence of which are to be determined by the adjudicator, not a court on review.

[52] Counsel for the plaintiff contended that the Adjudicator did not have jurisdiction to determine the threshold question as to the existence, and

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[36] *Chase* per Basten JA at [96] and McDougall J at [121], [180] – [183] and [226] – [231].
[37] *Chase* per Basten JA at [97] – [101] agreed with by McDougall J at [183].

nature of, the contract relied upon in the Application. Counsel referred to the caveat expressed by Kelly J at [107] of her decision in *K & J Burns* (quoted above) in relation to whether the contract concerned was in fact a construction contract. But this caveat only concerned the question as to whether such a question was a jurisdictional fact in the objective sense, not whether or not the Adjudicator had power to decide the question.

[53] I consider that it is part of an adjudicator's function under s 33(1)(a), and within his or her jurisdiction, to determine whether or not the "contract concerned", namely the contract alleged by an applicant, is in fact a construction contract.[38] A necessary part of that exercise would be to determine whether the "contract concerned" is in fact a contract. In most cases, as here, this would depend upon findings of fact to be made by the adjudicator, based upon such materials as were provided to him.

[54] There is nothing in the Act that implies that the existence and nature of the contract alleged in an application made under the Act is a jurisdictional fact in an objective sense. Referring back, for example, to the passages in [171] and [172] of *Chase*, there is no "clear intention" in the Act that the questions (including as to the existence

[38] Recall Southwood J's comments at [34] of *AJ Lucas* that "(t)he criteria [in s 33(1)(a)] themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of the payment claim made under a construction contract …"

and terms of the contract) should be determined otherwise than by the adjudicator to his or her satisfaction.

[55] Further, if an adjudicator did not have jurisdiction to form a (reasonable and legally correct) opinion and to make a final and valid determination as to whether or not there is a contract of the kind asserted in the application and whether payment is due under that contract, the primary purposes of the Act, namely the security of payments and the timely resolution of disputes under construction contracts,[39] could be easily frustrated by a respondent simply denying the existence of the contract and leaving the applicant with no satisfactory remedy under the Act.

[56] The applicant might then have to abandon its statutory rights, or apply to a superior court for a declaration, before continuing with its application under the Act. Apart from the additional delay and cost involved, additional complications would arise if one or both parties wished to rely on the laws of evidence, object to the court considering evidence and other material that had been used by the Adjudicator, adduce additional evidence, call and cross-examine witnesses and so on, notwithstanding the more flexible and informal procedure set up by the Act, particularly s 34.

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[39] Cf *AJ Lucas* at [34]. See too Southwood J in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [40] where His Honour also noted that "a payment made in accordance with the adjudicator's determination is a payment on account. It is a payment made without prejudice to the parties' ultimate contractual rights." See too the observations by McDougall J in *Chase* at [231] – [237].

[57] I conclude that the appropriate forum for a respondent's challenge to the jurisdictional facts contained in s 33(1)(a), including the existence of the construction contract alleged in the application, is the adjudicator. If the adjudicator determines that such a jurisdictional fact does not exist, the applicant has a right of appeal under s 48(1). Otherwise, the effect of s 48(3) is that an adjudicator's positive determinations of the matters in s 33(1)(a) are not jurisdictional facts that can be challenged on an objective basis. The only basis for challenge is that identified in *AJ Lucas*.

[58] Accordingly I proceed to consider whether the Adjudicator's satisfaction was unreasonable or legally erroneous.

Was there a contract, and if so was there a relevant condition precedent?

[59] The contentions of Axis, both before the Adjudicator and before this court, start with the proposition that JKC was to "approve" the vehicles before any contract came into existence, alternatively before there was any obligation on either party to perform under such a contract.

[60] The Adjudicator considered this question at length and made factual findings particularly as to what was and was not said at the meeting of 23 April and also during the telephone conversation between Alley and Breen on 27 or 28 April. He relied upon those findings, and upon the

wording in the Purchase Order, in rejecting the contention that it was agreed that JKC had to "approve" the vehicles before the contract came into existence, alternatively as a pre-condition to performance under the contract.

[61] These were all factual findings that the Adjudicator was entitled to make in the exercise of his jurisdiction, primarily to determine the existence, terms and nature of the contract that was the subject of the Application.

[62] Further, there was a factual basis for each of the essential facts found by the Adjudicator, and nothing to lead to the conclusion that his findings as to the existence and terms of the contract were not reasonable and legally correct.

[63] It was quite reasonable for the Adjudicator to make the findings set out in paragraph 36 of the Determination. Indeed there was ample basis for findings to the effect that the Purchase Order of 26 April 2013 constituted an offer by Axis and contained all relevant terms of the offer (including that the hire would "commence as personnel are enabled and inducted") and that the offer was accepted by Breen when he telephoned Alley on 27 or 28 April and told him in effect that the condition in the Purchase Order was satisfied – ie that his 3 drivers and he were "ready to go".[40] These were all factual findings open to the

[40] Affidavit of Anthony Perkins filed 13 December 2013 p 9 [14].

Adjudicator, which supported the conclusions that there was a contract of the kind alleged in the Application, and that it did not contain the pre-condition asserted by Axis.

[64] Counsel for Axis relied heavily upon Mr Alley's version of the discussions on 23 April to the effect that JKC had to approve of the vehicles before any contract came into effect, particularly in support of the contention that the Purchase Order was at best a conditional offer the acceptance of which could not give rise to a binding agreement. But, as I have said, the Adjudicator gave due consideration to the materials before him regarding the discussions and was entitled to reject this contention.

[65] Counsel also referred to other materials including the email of 26 April 2013 that attached the Purchase Order and also the Checklists that were emailed to Mr Alley on 1 May 2013. However, although the email of 26 April referred to Checklists and to inspections of plant by JKC, there was nothing there to infer that that process had to occur before any contract came into being, or before performance under it was to commence. Rather, the email contained references to the "enabling and inducting" and "ticketing" of the drivers following which the hire would commence, wording similar to that in the Purchase Order.

[66] Counsel for the plaintiff also relied on subsequent conduct between the parties including the email of 29 April that Breen did not receive, and

later communications. Even if such (post contract) communications were admissible and relevant, none of them in my view leads to a conclusion that the Adjudicator was wrong about the existence and terms of the contract, let alone that his conclusions were not reasonable and legally correct. Indeed some of them, for example the absence of references to the alleged pre-condition in many of the emails, would seem to support the conclusions reached by the Adjudicator.

Conclusions

[67] There is no basis for concluding that the Adjudicator wrongly construed the Act (on a question going to his jurisdiction to decide the adjudication on the merits).[41]

[68] I consider that the Adjudicator did have jurisdiction to make a final and valid determination regarding the existence and terms of the contract, including as to whether it was a construction contract and whether it contained the condition precedent alleged.[42]

[69] The Adjudicator's opinions and conclusions in relation to the criteria prescribed in s 33(1)(a)(i) and (ii), in particular as to the existence and terms of the contract, are both reasonable and founded upon a correct

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41 Cf *AJ Lucas* at [13], [16] & [51] and references in paragraphs [31], [32] and [34] above.
42 See paragraph [40] above.

understanding of the law.[43] He acted reasonably and in good faith in considering and deciding these issues.[44]

[70] Consequently, there was no reviewable jurisdictional error, either in relation to the existence of the contract or the conclusion that performance under it was not conditional. Thus there is no basis for concluding that there was not a valid payment claim that is due and payable,[45] this otherwise being a non-jurisdictional fact for the Adjudicator to decide, and consequently a payment dispute.

[71] Even if, contrary to my conclusions, the existence and terms of a contract alleged in an application under the Act are jurisdictional facts in the objective sense and thus examinable by this court, I am not persuaded that the Adjudicator erred in his findings regarding the existence and relevant terms of the contract alleged in the Application. Although additional or different facts and inferences may have emerged if there was an oral hearing and cross-examination, procedures not contemplated for the purpose of adjudications under the Act,[46] there was evidence before the Adjudicator upon which he was entitled to make the findings that he did, particularly as to what was said and not said during the conversations of 23 April and 27 or 28 April. These were findings of fact that enabled him to conclude that there was

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43 Cf *AJ Lucas* at [32] – [33]. See paragraphs [33] and [38] above.
44 See paragraph [62] above.
45 Cf *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [67] – [72].
46 See for example s 34.

a contract and that it did not contain the condition precedent asserted. Nothing put before me indicated that the Adjudicator reached the wrong conclusion about this, even if the materials were considered objectively.

[72] On the basis of the materials that were before the Adjudicator and for reasons similar to those stated by the Adjudicator, I consider that the Purchase Order constituted an offer and contained all relevant terms, the only condition being the enabling and induction of personnel, and that the offer was accepted when Breen advised Alley that his drivers were “ready to go” and “were all now ticketed”. However, contrary to what the Adjudicator said at [35(c)] of the Determination about the consequences of Mr Alley’s version of the 23 April discussions being correct, I consider that whatever was said on 23 April was superceded by the clear wording of the Purchase Order, which made no mention of any conditions regarding approval of the vehicles. Accordingly, I consider that this was a construction contract and payment was due under the Payment Claim dated 9 August 2013.

[73] The Adjudicator was entitled to find that there was a construction contract, a valid payment claim, a payment dispute and valid application under the Act. He was entitled to make the Determination.

[74] Accordingly I refuse the relief sought in paragraphs [1] and [2] of the Originating Motion. I will hear the parties further on costs.