JUDGMENT OF: MILDREN J : Supreme Court of the Northern Territory exercising territory jurisdiction, at Darwin. 14th November 2008

[1] This is an application by summons on originating motion to set aside a judgment registered in this Court on 17 October 2008 in favour of the defendant against the plaintiff in the sum of $362,160.20.

Factual background

[2] The plaintiff and defendant contracted on the terms set out in a written contract dated 6 November 2006 for the installation by the plaintiff of the fire protection system at the Evolution on Gardiner project in Darwin of which the defendant, Sunbuild, is the builder.

[3] In or about June 2007 disputes arose between the parties. The plaintiff, IFS, contends that Sunbuild requested IFS to agree to variations to the contract which were the subject of certain instructions issued by Sunbuild. IFS claims it agreed to consider the variations if design drawings were provided by Sunbuild's project certifier. It says that the design drawings were not provided by Sunbuild which nevertheless demanded that the variations be performed. When IFS declined to perform the variations until the drawings were provided, Sunbuild arranged for other contractors to do the work. Sunbuild claims that IFS wrongfully abandoned the work under the sub-contract. IFS claims that it accepted Sunbuild's repudiation of the sub-contract when Sunbuild stated that it would get someone else to do the work.

[4] IFS complains that in these circumstances the contract was either repudiated by Sunbuild or discharged by agreement.

[5] Sunbuild commenced proceedings in action No 35 of 2008 on 14 March 2008 claiming sums due under three invoices for the increased costs of completing the works and for damages for breach of contract. IFS has entered a defence to these proceedings.

[6] On or about 11 June 2008, Sunbuild served a further notice under cl 23 of the contract in the sum of $321,649.16. No claim has yet been made in relation to this invoice in action No 35 of 2008. On 17 September 2008, Sunbuild made an application for adjudication of its claim under this invoice and the three earlier invoices under the provisions of the Construction Contracts (Security of Payments) Act. Mr Cameron Ford was appointed adjudicator. Mr Ford issued his determination on 1 October 2008. He found that the first three invoices were outside the 90 days specified in s 28(1) of the Act and hence could not be adjudicated upon. In relation to the invoice dated 10 June 2008, Mr Ford ruled that it was a payment claim made under cl 23 of the contract, that the payment dispute arose 28 days after 11 June 2008, that under cl 6(2)(b) of Div 5 of the Schedule to the Act, IFS must dispute the claim within 14 days or pay it within 28 days and as there was no notice of dispute served by IFS the application was within time and that IFS was obliged by cl 6(2)(b) of Div 5 of the Schedule to the Act to pay the whole amount. Accordingly, Mr Ford ruled that Sunbuild was entitled to be paid $321,649.16 plus interest. That determination has been registered as a judgment of this Court on 17 October 2008 in accordance with s 45 of the Act.

[7] In these proceedings, IFS contends that the adjudicator had no jurisdiction to make the determination which has led to the judgment because the payment dispute arose on 11 June 2008 and hence was outside of the 90 day time limit provided for by s 23(1) of the Act.

The structure of the Act

[8] The preamble of the Act provides it is "an Act to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts, and for related purposes".

[9] Section 3 sets out the objects of the Act, namely, to promote security of payments under constructions contracts which is to be achieved by facilitating timely payments between the parties to construction contracts, to provide for the rapid resolution of payment disputes arising under construction contracts and to provide mechanisms for the rapid recovery of payments under construction contracts.

[10] The Act provides that the Act applies to construction contracts as defined by s 5. There is no dispute that the contract in this particular case is a construction contract.

[11] Section 4 defines a "payment claim" to mean:

"a claim made under a construction contract –

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract."

[12] Section 8 of the Act relevantly provides:

"A payment dispute arises if –

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;..."

[13] Section 19 provides:

"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] Section 20 provides:

"*The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:*

(a) when and how a party must respond to a payment claim made by another party;

(b) by when a payment must be made."

[15] Section 28 relevantly provides:

"*To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b) –*

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract..."

[16] Section 28(2) states the basic requirements of an application and the details required. Section 29 provides for the basic requirements of and manner of response to the application.

[17] Section 33(1) provides:

An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –

(a) dismiss the application without making a determination of its merits if –

(i) ...

(ii) the application has not been prepared and served in accordance with section 28..."

[18] Section 40 provides:

"*An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even if other proceedings relating to the payment dispute have been started before an arbitrator or other person or a court or other body.*"

[19] Section 45(1) provides that:

"*A determination may be enforced as a judgment for a debt in a court of competent jurisdiction.*"

[20] It is apparent that an adjudication under the Act does not finally determine the rights of the parties.

[21] Section 47 provides that the provisions of Part 3 dealing with the adjudication of disputes:

"*... does not prevent a party to a construction contract from starting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.*"

[22] Section 47(4) provides:

"*An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract –*

(a) must, in making any award, judgment or order, allow for any amount that has been or must be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make an order for the restitution of the amount paid and any other appropriate order relating to the determination."

[23] Section 26 provides that the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.

[24] Clause 23.3 of the construction contract provided as follows:

"*23.3 Adjustment to sub-contract sum*

When any of the Subcontract Works execute (sic) by others as referred to in clause 23.2 have been completed, the Builder shall assess the cost, losses, expenses and damages it has thereby incurred and shall notify the Subcontractor of those amounts, and the difference between the sum of those amounts and the amount which would otherwise have been paid to the Subcontractor had the Subcontractor completed those Subcontract Works, which difference is a debt due and payable upon such notice by the Subcontractor to the Builder."

[25] It is not in dispute that Sunbuild relying on cl 23.3 of the contract notified IFS of the difference between the cost, losses, expenses and damages it claimed and the difference between the sum of those amounts and the amount which would otherwise have been paid to the sub-contractor had the sub-contractor completed the sub-contract works.

[26] Counsel for the plaintiff submitted that cl 23.3 is a draconian provision. That may well be so and it is difficult to comprehend why a subcontractor would agree to be bound by such a provision. However, a subcontractor in the position of IFS is not necessarily without remedies if the Builder does not employ this provision honestly and fairly. Be that as it may, no issue was raised by IFS in these proceedings seeking to attack either the validity of this clause or the propriety of Sunbuild's reliance upon it.

The plaintiff's submissions

[27] Counsel for the plaintiff submitted that the invoice in question was a payment claim within the meaning of that term as defined by s 4.

[28] Further, it was submitted by the plaintiff, that the amount claimed in the payment claim was due to be paid under the contract because cl 23.3 provides that the "*difference is a debt due and payable upon such notice by the Subcontractor to the Builder*". It is not in dispute that the amount has not been paid. Therefore, counsel for the plaintiff submitted that the payment dispute arose immediately or within a very short time after service of that

notice. It was submitted that a contractual obligation to pay an amount immediately, upon notice being received, has been enforced by the courts, the only qualification being that the debtor has "*a reasonable time*" in which to pay. However, it was put that "*a reasonable time*" means only enough time to obtain the money from "*a convenient place*" such as a desk drawer or a bank.[1]

[29] Therefore, the plaintiff submitted that the dispute arose on or about 11 June 2008. As the defendant's application for an adjudication was not made until 17 September 2008, the plaintiff contended that the adjudicator had no jurisdiction to make the determination.

The defendant's submissions

[30] The adjudicator found that, because the contract made no specific provision relating to responding to payment claims and time for payments, the provisions of Division 5 of the Schedule to the Act are implied into the contract pursuant to s 20 of the Act. Under cl 6(2) of the Schedule, the plaintiff had 14 days after receiving the payment claim to give notice of dispute, or within 28 days after receiving the payment claim, pay the whole amount of the claim. The plaintiff did not give notice of dispute or make payment within 28 days. Therefore, time did not begin to run for the purposes of s 28(1) of the Act until 28 days after 10 June 2008, i.e. until 8 July 2008. As the application for the adjudication was made on 17 September 2008, which is within 90 days from 8 July 2008, the adjudicator held that he had jurisdiction to entertain the application. The defendant supports and relies upon the adjudicator's reasoning. Alternatively, the defendant submitted that the question of when a payment claim falls due for payment and hence when a payment dispute arises for the purpose of assessing compliance under s 28(1) is a matter for the adjudicator to determine. So long as the adjudicator acts bona fide and in accordance with the rules of natural justice, the defendant submitted that this Court could not interfere, or alternatively, should accept the decision of the adjudicator unless it was clearly wrong.

[31] Counsel for the plaintiff submitted, in response to this submission, that the requirement to apply for the adjudication within 90 days was an essential pre-condition to the adjudicator's jurisdiction.

Is the 90 day time limit a condition precedent to jurisdiction?

[32] There is no authority precisely on this point. The question must be answered by reference to the terms of the Act and in accordance with well established principles of statutory interpretation.

[33] Section 33(1)(a)(ii) specifically provides that *"an appointed adjudicator must ... dismiss the application without making a determination of its merits if ... the application has not been prepared and served in accordance with section 28"*. Section 28(1) provides, inter alia, that "*to apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises ... serve [the written application for adjudication] on the other party to the contract and on ... a prescribed appointer chosen by the party"*. (In this case, the prescribed appointer was the Law Society of the Northern Territory.)

[34] Counsel for the plaintiff contended that the intention of the legislature is clear. If the 90 day time limit is not observed, the adjudicator has no choice but to dismiss it. Reliance was placed upon the word "must" in both s 33(1)(a)(ii) and s 28(1).

[35] The use of the word "*must*" by the draftsman establishes a prima facie intention that compliance with the provisions is obligatory; but whether non-compliance leads to invalidity, depends upon whether there can be discerned a legislative purpose to invalidate an adjudication which is not brought within the 90 days prescribed.[2] The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and object and the consequences for the parties of holding void every act done in breach of the condition.

[36] The statute specifically provides that the adjudicator must dismiss the application if there is a failure to prepare and serve the application in accordance with s 28. So far as service is concerned, the Act makes no provision enabling the adjudicator to extend the time for service, even by consent of the parties. The Act does not prescribe **how** a document is to be served; that is covered by s 25 of the Interpretation Act.

[37] The purpose of the legislation is as stated in s 3 and s 26. In s 3(2)(b) there is reference to "*rapid resolution of payment disputes*". Section 26 refers to the objective of determining payment disputes "*fairly and as rapidly, informally and inexpensively as possible*".

[38] As noted before, an adjudication does not finally resolve the rights of the parties under the contract. By holding that the 90 day time limit goes to the adjudicator's jurisdiction, the only consequence is that the applicant loses the opportunity to obtain security for payment under the contract.

[39] As noted in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in ***Project Blue Sky*** [3]:

"Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority."

[40] However, I think that it is clear that the adjudicator did have jurisdiction to decide the question of whether or not the provisions of s 28 had been complied with, because s 33(1)(a)(ii) commands him to dismiss the application if

[1] See ***Bunbury Foods Pty Ltd v National Bank of Australasia Ltd*** (1984) 153 CLR 491 at 503; ***Cripps & Son v Wickenden*** [1973] 1 WLR 944 at 12.
[2] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 388–389 [91].
[3] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 389 [92].

those provisions have not been complied with. How else will the adjudicator be able to comply with s 33 if he had no jurisdiction at all? A similar conclusion was reached in ***Parisienne Basket Shoes Pty Ltd & Ors v Whyte***.[4]

[41] If the adjudicator had jurisdiction to decide this question, he also had jurisdiction to decide it wrongly. Suppose the adjudicator had dismissed the application upon the ground that it was out of time, s 39(1) requires the adjudicator to give written notice of the decision and the reasons for it to the parties and the Registrar. Further, the adjudicator has power to make an order for costs under s 46(b) read with s 36(2). Also, the decision to dismiss the application is reviewable by the Local Court under s 48(1).

[42] Section 48(3) provides:

"Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed."

[43] If the adjudicator had jurisdiction to decide this question wrongly that can hardly mean that the decision is void.

[44] In ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor***,[5] the Court of Appeal of New South Wales gave consideration to the circumstances under which an adjudicator's determination was void. Hodgson JA, with whom Mason P and Giles JA agreed, said [6]:

"However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order [in] the nature of certiorari."

[45] His Honour then identified the provisions which he regarded as essential [7]; but when it came to considering s 17 of the NSW Act dealing with the time when an adjudication application can be made and as to its contents, he held that a failure to comply strictly with that provision was not a jurisdictional error of law. His Honour further held that, first, so long as the adjudicator made a bona fide attempt to exercise the relevant power and the adjudicator substantially complied with the rules of natural justice, the determination would not be void.[8] Further, to the extent that the decision was voidable, the remedy of certiorari was not available.[9]

[46] There are very significant differences between the Building and Construction Industry Security Payment Act 1999 (NSW) and the Construction Contract (Security of Payments) Act (NT). There is no equivalent s 33(1)(a) of the NT Act and there are a number of other important differences. The NT Act is modelled on the Construction Contracts Act 2004 (WA). Structurally, the WA Act and the NT Act bear little resemblance to the NSW, Victorian or Queensland Acts. Great care must be exercised in relying on decisions from those jurisdictions as to the interpretation to be given to the NT Act. Nevertheless, I consider that there is much guidance to be had on questions of statutory interpretation and jurisdictional error.

[47] It was submitted by the plaintiff that the question of whether or not the application is made in time is clearly, under the NT Act, a "*condition laid down by the Act as essential for there to be a determination*". Section 33(1)(a)(iii) has the result that non-compliance cannot lead to a determination, only to dismissal. The other factors to be considered also support this conclusion. If the time limit was non-essential, there would be no pressure to apply within time. This would not support the objective of a "*rapid resolution*" of payment disputes. The lack of any power to extend time, also points to this conclusion. No permanent prejudice to any party is involved by holding that the time limit is essential. The NT Act is so markedly different from the NSW Act that I ought not follow ***Brodyn's*** case on this particular point. If there was in fact no claim served within 90 days as required by the Act, the determination is void.

[48] I reject this submission. If the adjudicator has jurisdiction to determine whether or not the 90 day time limit has been complied with, his decision cannot be void. I note that under the NSW Act there were also time limits which had to be complied with.[10] In ***Brodyn***, Hodgson JA specifically held that the legislature did not intend that exact compliance with that provision was essential to the existence of a determination.[11] I consider that the structure and purposes of the Act do not support a conclusion that an adjudication is void if the adjudication wrongly concludes that the time limits have been complied with.

[49] I also agree with Hodgson JA in ***Brodyn*** [12] that if the adjudicator did not make an honest attempt to decide whether or not the application should be dismissed under s 33(1), his decision would be void; and the same would apply if the adjudicator substantially denied natural justice to the party affected by his decision. There may also be other grounds leading to the same result, but it is not necessary to discuss them here. In this case there is no question that Mr Ford did not make an honest attempt or denied natural justice to IFS.

4 ***Parisienne Basket Shoes Pty Ltd& Ors v Whyte*** (1937–1938) 59 CLR 369.
5 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421.
6 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 441 [52].
7 See ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 441 [53].
8 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 441–442 [55].
9 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 443 [58].
10 See Construction Industry Security Payment Act 1999 (NSW), s 17.
11 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 441–443 [54]–[58]; ***Brodyn*** has been followed and applied by Southwood J in ***Trans Australian Construction Pty Ltd v Nilsen (SA) Pty Ltd*** [2008] NTSC 42 at [42].
12 ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 442 [55].

[50] Similarly, I agree with the conclusion expressed by Hodgson JA in *Brodyn*[13] that relief in the nature of certiorari does not lie, for the reasons that he gave and for the additional reason that the Act provides only for a limited appeal if the adjudicator dismisses the application and not otherwise[14] and specifically provides that his decision is otherwise not subject to appeal or review.[15]

[51] In case I am wrong in reaching this conclusion I will also express my view as to whether Mr Ford was correct in his conclusion that the application was brought in time.

Was the claim served within 90 days?

[52] The starting point is s 8(a). There is no dispute that the defendant made a "*payment claim*" as defined by s 4. The "*payment claim*" was "served" on 11 June 2008. The amount claimed has not been paid in full or rejected or wholly or partly disputed. It is not disputed that the amount claimed "is due to be paid under the contract", although the parties may not be ad idem as to precisely what that expression means. The word "*due*" can have different meanings depending on the context. In the context of this Act, I think that what is meant is that the amount claimed in the payment claim is **claimed to** be due to be paid under the contract. Whether it is actually due or not, is a matter which may still be left to be resolved as a later time and possibly in other proceedings.

[53] The next question is, when did the payment dispute arise? Section 8(a) does not specifically deal with that question, other than to say, for example, "*when the amount claimed ... has not been paid in full ...etc*". Section 19 of the Act provides:

*"**Making payment claims***

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."

[54] The learned adjudicator held that cl 23.3 satisfied s 19. I have no doubt that the adjudicator was correct. It is not suggested otherwise. Therefore, by reference to cl 23.3, the amount claimed was by the giving of the notice on 11 June 2008. Does this mean, as the plaintiff contends, that one must turn to the contract to find out **when** the amount claimed was required to be paid? In my opinion, the answer to that question, in this case, is no.

[55] Section 20 of the Act provides that if the contract does not have a written provision about when and how a party must respond to a payment claim and by when a payment must be made, the provisions in the Schedule, Division 5 apply. Counsel for the plaintiff submitted that paragraphs (a) and (b) of s 20 were conjunctive, so that, if the contract provided for when a payment was made, s 20 did not apply. I do not accept this analysis.

[56] The purpose of s 20 is to ensure that building contracts contain a mechanism dealing with how and when a party must respond to a payment claim. It would not advance the purposes of the Act if the contract had no such provision and if payment could be demanded immediately without any mechanism for responding to a payment claim. In my opinion, the words "*by when a payment must be made*" in s 20 refer to the time when a payment must be made in **response** to a payment claim. Clause 6(2) of Division 5 of the Schedule specifically deals with the time within which a party must pay the amount of the payment claim and this time is calculated by reference to a date 14 days after receiving the payment claim. In my opinion, s 20 applies if either, or both, of paragraphs (a) and (b) are not provided for by a written provision in the contract.

[57] The learned adjudicator held that the provisions in the Schedule, Division 5 were implied into the contract. In my opinion he was right and therefore he correctly concluded that the payment dispute arose 28 days after service of the payment claim and that the defendant had complied with s 28(1) of the Act.

Conclusion

[58] The summons is dismissed with costs.

J Sexton SC with A Young for the plaintiff instructed by Ward Keller
A Wyvill for the defendant instructed by Minter Ellison

[13] ***Brodyn Pty Ltd trading as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 at 443 [58].
[14] Construction Contract (Security of Payments) Act (NT), s 48(1).
[15] Construction Contract (Security of Payments) Act (NT), s 48(3).