CITATION:	*Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd & Smith* [2019] NTSC 52
PARTIES:	JEMENA NORTHERN GAS PIPELINE PTY LTD (ABN 12 607 928 790) AND: CIVMEC CONSTRUCTIONS AND ENGINEERING PTY LTD (ABN 98 137 816 025) AND: SMITH, Gordon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	No. 59 of 2019 (21924329)
DELIVERED ON:	1 July 2019
HEARING DATE:	27 June 2019
JUDGMENT OF:	Graham AJ

CATCHWORDS:

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004 (NT) – PAYMENT CLAIMS – PREROGATIVE REMEDIES – ORDER FOR MANDAMUS

Whether adjudicator under act has jurisdiction to determine application – whether mandamus compels adjudicator to dismiss application – extension of time – whether the court can interfere with statutory procedure.

*Multiplex Constructions Pty Ltd v Luikens & Ano*r (2003) NSWSC 1140; *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10; *R v Brisbane Justices: Ex Parte Treasurer of Queensland* (1901) 11 QLJ 11; *Re Barlow* (1861) 30 LJQB 271; *R v Smith* (1873) LR 8; *K&J Burns Electrical PTY Ltd v GRD Group* (NT) Pty Ltd (2011) NTCA 1; *Delmere Holdings Pty Ltd v Green* (2015) WASC 148; A*ustralian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* (2005) NSWSC 362; *CH2M Hill Australia Pty Limited and Anor v ABB Australia Pty Ltd and Anor* (2016) NTSC 42; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) HCA 4.

REPRESENTATION:

Counsel:

Plaintiff:	J Pizer SC with G Crafti
First Defendant:	A Wyvill SC with D Alderman
Second Defendant:	N/A

Solicitors:

Plaintiff:	Ward Keller as town agent for Hall & Willcox
First Defendant:	Hunt & Hunt as town agent for Mills Oakley

Judgment ID Number:	Grah1904
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd & Smith [2019] NTSC 52
No.59 of 2019 (21924329)

BETWEEN:

JEMENA NORTHERN GAS PIPELINE PTY LTD
Plaintiff

AND:

CIVMEC CONSTRUCTIONS AND ENGINEERING PTY LTD
First Defendant

AND:

GORDON SMITH
Second Defendant

CORAM: GRAHAM AJ

JUDGEMENT
(Delivered 1 July 2019)

Introduction

[1] This matter came before Kelly J on 19 June 2019 as an ex parte application for an interim injunction. The parties to the dispute are Jemena Northern Gas Pipeline Pty Ltd (Jemena) which is the plaintiff. Civmec Constructions and Engineering Pty Ltd (Civmec) which is the first named defendant and Gordon Smith, an adjudicator, who is the second named defendant (Smith).

[2] In November 2015, Jemena and the Northern Territory Government entered into an agreement pursuant to which Jemena was required to design and construct and operate the Northern gas pipeline (the project).

[3] On 20 September 2017 Jemena and Civmec entered a contract in regard to certain works to be carried out for the project (the Contract).

[4] On 25 February 2019 Civmec made a 'Payment Claim' to Jemena (the Payment Claim). Civmec, upon Jemena rejecting the claim, contended that a 'payment dispute' (the Payment Dispute) had arisen under the C*onstruction Contracts (Security of Payments) Act* 2004 (NT) (the Act) and made an adjudication application dated 5 June 2019 (the Application). The adjudicator appointed was Smith.

[5] Upon Jemena making its ex parte application to Kelly J an interim injunction was obtained restraining Smith from making a final determination of the Application on its merits until 4:00pm on 28 June 2019.

[6] The matter came before me as a final hearing on 27 June 2019. The matter proceeded by way of submissions. The material relied on by the parties were written submissions by counsel for both Jemena and Civmec. Affidavits of solicitor Kathryn Anne Howard, on behalf of Jemena (Howard) and solicitor Justin Walter Daly, on behalf of Civmec (Daly) were read. The last affidavit of Howard ran to two volumes and it was the third affidavit filed by Howard. The affidavit of Daly also had exhibits attached. There were substantial lists of authorities filed by both Jemena and Civmec. Senior

counsel for both Jemena and Civmec made lengthy submissions and some other documents were tendered.

[7] The eventual originating motion which I deal with in this judgement sought the following relief:

i. a declaration that Smith does not have jurisdiction under the Act to determine the Application.

ii. in order by way of Mandamus compelling Smith to dismiss the Application.

iii. costs against Civmec

iv. alternatively to (i) a mandatory injunction requiring Smith to make a request under s 34(2)(a) of the Act that Jemena provide to Smith by 4:00pm on the first working day after the date of the order of the court dismissing the proceeding a further written submission and information or documents.

[8] All aspects of the application were contested by Civmec. There was no appearance for Smith.

THE FACTUAL MOSAIC

[9] On 10 October 2018, Civmec achieved mechanical completion. It was 118 days late. This does not seem to be in dispute. On 17 of December 2018 Jemena certified that practical completion had been achieved. The Payment Claim was made on 25 February 2019. On the following day Civmec provided Jemena with a delay and disruption claim. On 11 March 2019 and

27 of March 2019 Jemena effectively rejected the claim by determining there was $NIL payable.

[10] The basis of the claim by Civmec was that there should be an extension of time (EOT) under the Contract and as a consequence delay and disruption costs and a reversal of liquidated damages should flow to Civmec. The Contract provides for EOT claims. Claims had to be made within five business days of the delay.

[11] Paragraph 17.4(a) of the Contract reads as follows:

> 'it is a condition precedent to any entitlement to an extension of time that: (a) the contractor submits an extension of time claim with all necessary supporting documentation to Pipeline Co. for an extension of time within five business days of the relevant delay commencing together with an updated contractors program'.

[12] Jemena alleges that the consequence of this failure to submit its EOT claim within 5 business days is that Jemena is not liable for the claim and Civmec is barred from making and will be deemed to have irrevocably waived any right to make the claim.

[13] Civmec alleges that Jemena had made representations that they would not rely upon time bars under the Contract and to use the words of Civmec in its submission to adjudication: '…. *The parties agreed to refrain from submitting all necessary documentation within the timeframes required by the contract'*. Civmec went on to claim in the Application that it was

entitled to have its claims for EOT's assessed without regard to time bars and that Jemena had no entitlement to assert time bars against Civmec.

THE STATUTORY MOSAIC

[14] The Act is designed to create a scheme that is intended to be rapid and informal. It affects cash flow and preserves the rights of respondents to go to court or seek arbitration. The Act has made it clear that it is the adjudicators who are the primary organs for resolution of disputes. In *Multiplex Constructions Pty Ltd v Luikens & Ano*r (2003) NSWSC 1140, Palmer J said that the scheme was one of 'pay now, argue later'.

[15] Pursuant to s 8 of the Act a payment dispute arises if a payment claim has been made under a contract and either the claim has been rejected or is in dispute.

[16] A payment claim is defined under s 4 as 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.

[17] It is not in dispute that the Contract is a construction contract to which the Act applies.

[18] Pursuant to s 27 of the Act if a payment dispute arises a party may have the dispute adjudicated. Section 28, sets out the manner of application. The process of adjudication is set out in Division 3 of the Act.

[19] At the heart of the dispute is the submission on behalf of Jemena that the adjudicator's jurisdiction is predicated upon the application being in respect of a payment dispute. Jemena claims there is no payment dispute. Civmec argues there is such a dispute on foot.

[20] Pursuant to Division 4 of the Act an adjudicator's determination is binding.

[21] Under Division 6, s 47 of the Act, a party is not prevented from commencing proceedings for an arbitration or in a court in regards to a dispute arising under the contract. Under s 48 a person aggrieved by decision made under s 33(1)(a) of the Act (a decision to dismiss without making a decision on the merits) may appeal to the Local Court for a review of this decision. Presumably, there could then be an appeal from that decision to the Supreme Court. There is some doubt as to whether the respondent to an application has a right of appeal under s 48, though on the face of it the section appears to apply to both parties. However, this issue is not a determinant in this case.

PREROGATIVE REMEDIES

[22] The relief primarily sought by Jemena is of a declaratory nature. However, it would necessarily flow from the declaration that Smith would be compelled to dismiss the Application.

[23] I do not need to deal with the issue of costs as this issue will be dealt with subsequent to the delivery of the judgement.

[24] I will however shortly address the application for a mandatory injunction requiring Smith to make a request under the Act that Jemena provide Smith with further documents. This prayer for relief is without merit. I see no legal basis for an injunction of this kind. If Jemena wishes to file further material it can do so. It would be novel to order an adjudicator to require the party seeking the order to provide further documents to the adjudicator, as it is within the power of the party to do just that.

[25] In examining the substantive claim the first principle that should be adumbrated is that a prerogative order is unlike other remedies. I say this for two reasons. In the first place, merit must be shown to enable the writ to be issued. This differs from ordinary writs or summons' that can be initiated by merely commencing a legal proceeding. Secondly, and more importantly, it is a basic principle that even when facts are shown to justify the issue of the writ, the court has the power to refuse to issue the writ on purely discretionary grounds.

[26] There are exceptions to the general rule that prerogative remedies are discretionary. In certain circumstances a Writ of Certiorari will be granted ex debito justitiae and there is a view that a Writ of Prohibition in certain circumstances is available as of right.

[27] In the case before this court a Writ of Mandamus is sought. Mandamus lies to secure the enforcement of a public duty imposed upon a public official or body. In this case as the adjudicator is appointed pursuant to the Act, I conclude that the Writ would be available to enforce his duties.

[28] The Writ generally involves a failure to perform a duty. Usually, there must be a demand for performance, as a precedent to the refusal. However, where the failure to perform the function arises from the exercise of discretion on an improper basis it would seem that there would be no necessity for a prior demand. The character of the Writ of Mandamus is such that the exercise of discretion has been more strongly asserted than in the case of the other types of prerogative writ. Certainly, in cases where the grant of the remedy would be unnecessary or where another remedy is available it often occurs that Mandamus is refused.[1]

[29] It is significant to note that the writ will be refused if there is in existence another remedy of an equally satisfactory character, for example where there is a right of statutory appeal or a remedy through the administrative hierarchy of the power within the act.[2]

[30] I conclude that Mandamus is available as against Smith, provided that the submission of Jemena is correct that Smith has refused and failed to form

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1 See, *Re Bristol & North Somerset Railway Co* (1877) 3 QBD 10; *R v Brisbane Justices: Ex Parte Treasurer of Queensland* (1901) 11 QLJ 11.

2 See, *Re Barlow* (1861) 30 LJQB 271; *R v Smith* (1873) LR 8.

his duty to dismiss the adjudication application under s 33(1)(a)(2) of the Act. It is this issue that is alive and hotly contested.

JEMENA'S CASE

[31] The case for Jemena commences with the submission that the existence of a payment dispute is the foundation of Smith's jurisdiction. It was argued that the Application does not seek the adjudication of a payment dispute under the Act. It was further argued that the claim of Civmec in the Application was based on waiver, estoppel, election, unconscionable conduct, misleading or deceptive conduct and quantum meruit. It was submitted that these concepts are not founded in contract and do not arise under the contract.

[32] Both parties rely on the Northern Territory Court of Appeal decision of *K&J Burns Electrical PTY Ltd v GRD Group (NT) Pty Ltd* (2011) NTCA 1. In that case, an appellant had submitted 13 invoices to a respondent for progress payments. The respondent paid seven of the invoices but not the remaining six. Subsequently, the appellant lodged an application for adjudication under the Act. The application was out of time. The main issue in the appeal was whether an adjudicator's decision to proceed to determination was a decision amenable to review by the Supreme Court. It was held that his decision to determine the matter on the merits under s 33(1)(b) of the Act was not reviewable by the Supreme Court and apart from the right of appeal under s 33(1)(a) the Act a decision of an adjudicator cannot be appealed or reviewed. Jemena relies on this case as the majority decision of Olsson AJ and Kelly J held that the word 'under' in the

definition of payment claim in s 4 of the Act means that to be valid the claim must be for monies in accordance with or subject to the conditions of a construction contract. The majority stated: *existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation*.[3]

[33] In *Delmere Holdings Pty Ltd v Green* (2015) WASC 148, Martin J held:

> It is also clear that the chosen phrase 'under a construction contract' is relatively narrow in ambit. For instance, the terminology of a dispute 'in relation to', or surrounding a construction contract, is not the chosen terminology. The dispute must be 'under' the parties' construction contract. So, for instance, a claim in quasi contract, such as a quantum meruit claim seeking only a reasonable remuneration, such as where the underlying contract was uncertain, or had failed for some reason, would not present a dispute arising 'under' the construction contract for the purpose of the CC act.

[34] The conclusion that Jemena asks the court to make is that there is no 'payment dispute' on foot and therefore the application is not a valid application for adjudication under the Act. The question then put is 'what follows?' Jemena argues that it is an essential precondition of jurisdiction that there must be a payment dispute that is alive.

[35] Secondly it is argued that as the application cannot comply with s 28 of the act (as there is no 'payment dispute') Smith has a duty to dismiss the application's under s 33(1)(a) of the Act.

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3 At 236-237.

[36] The conclusion the court is asked to draw is that for those reasons the declarations sought ought to be made and the injunction should be granted.

[37] Simply put it is argued that Jemena is not seeking to appeal from or review a decision of Smith. It is seeking a declaration and an injunction compelling Smith to perform is legal duty.

[38] It was also submitted that the term 'prescribed time' in s 33 refers to the outer limit of Smith's decision-making period and that he should have acted by now to dismiss the application. This submission was necessary, as it would be unlikely that a court would intervene to order an official to perform a duty when the court does not know whether or not he will comply with his obligations and he is still apprised of the duty.

[39] It was finally pointed out that the granting of the relief sought would not deprive Civmec of its right to pursue its claims in the courts. Those claims would be still alive.

CIVMEC'S CASE

[40] Civmec argued that the court has no power to interfere with the statutory procedure. It relied on s 48(3) of the Act which states: *'except as provided by sub-section (1), a decision or determination of an adjudicator on adjudication cannot be appealed or reviewed'*. Subsection (1) refers to the right of an aggrieved person to appeal to the Local Court for a review of a decision made under s 33(1)(a) where an application has been dismissed by an arbitrator without there being made a determination on the merits.

[41] It was also argued that Jemena was raising the same arguments it raises in this court to Smith in the adjudication.

[42] Alternatively, it was argued that the relief sought was discretionary in nature and that a court should not interfere with the statutory procedure save in exceptional circumstances.

[43] I was referred to the decision of A*ustralian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* (2005) NSWSC 362 where McDougall J said at 14:

> 'In circumstances where the legislature has enacted legislation to provide, as s 3 of the act makes clear, a scheme to ensure that any person who undertakes to carry out construction work or supply related goods and services is entitled to recover, and is able to recover, progress payments, I think that this court should think long and hard before interfering in the implementation, in a particular case, of that statutory scheme'.

[44] The above statement by McDougall J would suggest that there would be circumstances where a prerogative writ could be used by a superior court to enforce a remedy against an adjudicator under the Act.

[45] In any event, primarily it was argued by Civmec that the claim was a payment claim under the contract. I was referred to the *K&J Burns case* (above) and the remarks of the majority where it was said at 236-237:

> 'Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for monies in accordance with or subject to the conditions of a construction contract'.

[46] In other words, it is not merely a claim, at large, in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.

[47] It was submitted on behalf of Civmec that not only was the payment claim expressed as being a progress claim, but it was accepted by Jemena as such and a payment certificate was issued pursuant to the contract.

[48] It was further argued that the fact that Civmec relies on waiver, estoppel, election and unconscionable conduct does not change the characterisation of the claim. It is still a claim made under a construction contract by the contractor to the principal.

[49] It was finally submitted that this type of dispute comes within the routine matters that adjudicators deal with as part of their function.

DISCUSSION OF THE ISSUES

[50] The first matter that I deal with is the issue as to whether there is a 'payment dispute' alive. It is my view that this is an objective task. It is not determinative that the parties treat the dispute in a certain way. Having said that, the way the parties have treated the claim can certainly be used as evidence in support of or against the existence or non-existence of a 'payment dispute' under the Act.

[51] As previously stated, in the first place, the head contract was a construction contract under the Act.

[52] Secondly, the form of progress claim No.038, the claim the subject of the dispute does not persuade me one way or the other.

[53] It is clear that for claim No. 038 to be made there has to be an EOT. That is fundamental to the existence of the claim. It does not follow that this means the claim is outside the terms of the Contract. Payment claims are referenced in clause 22.1 of the contract. It is fair criticism by Jemena that claim No.038 is not identified as falling within a particular type of claim, but this would not necessarily disqualify the claim. EOT claims are also specifically referenced in clause 17.02 of the contract. If an EOT claim was made it would inevitably have a bearing on the time and amount of a payment claim under the contract.

[54] Though the conclusion as to the characterisation of claim No.038 is an objective task, nevertheless it is of evidentiary significance to ascertain how Jemena treated it. I do not need to deal with the manner in which Civmec has dealt with the claim, as this would be a self-serving exercise. In the first place on 11 March 2019 by letter from Jemena to Civmec the former states that having reviewed the payment claim the amount assessed as payable was $NIL. Though on one hand, it could be argued, that this was a form of rejection of the claim, it did not say so. Jemena accepted the claim as being a progress claim but rejected the obligation of having to pay the claim.

[55] I also take into account the fact that Jemena has filed a response to the Application. It is fair to say that within the document the primary position it takes is to question the jurisdiction of Smith. The response however does not stop there. It deals in detail with the various contractual terms and seeks that the adjudicator determine the Application in its favour. For example, in clause 63 the claim is made that because of the complexity of the matter the adjudicator should dismiss the application under s 33(I)(A)(iv)(a). This was no doubt a forensic decision made by Jemena, but it enables the argument to be made that in the first place Jemena recognises that there is a payment dispute on foot and further recognises that there is an adjudication on foot under which no present decision has been made.

[56] The fact that a claim is out of time would not necessarily mean that there is no payment dispute under s 28 of the act. In fact, when a payment claim has been rejected it is then that a payment dispute arises. This is exactly what has happened in this case. I would therefore accept the argument by Civmec that there was a payment claim that has led to a payment dispute and subsequently the appointment of an adjudicator under the act.

[57] In the case of *CH2M Hill Australia Pty Limited and Anor v ABB Australia Pty Ltd and Anor* (2016) NTSC 42, Kelly J dealt with an application for judicial review of a determination by an adjudicator under the Act. In that case it is interesting to note that the adjudicator was not simply being asked to determine the amount of a progress payment, but in addition needed to consider the issue of delay, responsibility for delay and whether one party

waived strict compliance with a clause of the contract. Her Honour at paragraph 73 said as follows:

> 'At paragraphs 55 and 56 the adjudicator identifies the issues in dispute and correctly includes 'Extension of Time Entitlement and Delay Costs' and 'Deduction of Liquidated Damages'. He then goes on to consider each of the claimed variations. The plaintiff makes no complaint about the adjudicator's treatment of the technical matters relating to the claimed variations'.[4]

Her Honour went on to say at paragraph 112:

> 'As set out above, in order for there to be a valid determination within the meaning of the Act, the adjudicator must make a bona fide attempt to comply with the essential requirements of the Act. The essential requirements under the Act must include the requirement under s 33(1)(b) to 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 to determine the other subsidiary matters set out in that section); and the requirement under s 34(1)(a) to make the determination on the basis of the application and its attachments and the response and its attachments.'

[58] The issues before Kelly J were not dissimilar to the issues before me. Her Honour concluded that there was a failure by the adjudicator to address critical issues that were fundamental to a defendant's asserted right to EOT's and therefore there had been a failure by the adjudicator to comply with s 34 of the Act. An order was made in the nature of Certiorari quashing the determination. The significance of this decision is that it references an adjudication that took into account matters that were pertinent to EOT claims including waiver and secondly it is authority for the proposition that

4 At 73.

this court has the power to enliven a prerogative remedy as against an adjudicator.

[59] This Contract contains written provisions relating to payment claims and EOT's. The adjudicator must go to the contract to determine whether there is a 'payment claim' and hence a 'payment dispute' for him to adjudicate. I am of the view that in considering the definition of 'payment claim' in s 4 of the Act the claim must be shown to be a claim for monies in accordance with or subject to the conditions of the contract. It must be a claim that can properly be categorised as a genus of claim provided for by that contract. There must be more than a mere causal nexus with the contract for a payment claim to exist. Having said that, there would be many legal situations that would arise where there has been a course of conduct inconsistent with the written provisions of the contract, but which would affect the determination of a payment dispute. This would include implied variations, waiver or estoppel.

[60] I would conclude that there is on foot before Smith a payment dispute arising out of a payment claim and therefore the claim of Jemena that Smith does not have jurisdiction under the Act to determine the merits of the application cannot be sustained.

[61] I would add that adjudicators would often be required to deal with the type of issue raised in this case. Construction contracts are usually compendious documents, but it is also correct to say they do not exist in a vacuum. In

assessing whether a payment should be made, even in an atmosphere where the prompt flow of money and the retention of rights exist, issues such as waiver, estoppel and most importantly EOT would confront an adjudicator.

[62] Notwithstanding my above conclusion, I will also deal with the issue as to whether Mandamus is available and, if yes, whether it should apply in this case.

[63] I conclude that judicial review of the decisions of an adjudicator under the Act is available. I have referred to the above decision of Kelly J in the *CH2M* case and I also conclude that it was not seriously argued before me that the court has no power to intervene. It was rather argued that the court should be reluctant to intervene in circumstances where the legislature has established a scheme intended to be fast, informal and inexpensive. The scheme is designed to affect cash flow and it affords a losing party full remedy by preserving its right to proceed to court or to arbitration.

[64] I accept that there would need to be exceptional circumstances before the court would intervene and that there would need to be jurisdictional error before a court would operate to review the decision.

[65] I assume for the purpose of this discussion that Jemena is correct in its argument that there is no valid payment dispute. If this was the case, it is argued by Jemena, Smith should be compelled to dismiss the application under s 33(1)(a)(ii) the act.

[66] It was submitted that the prescribed time referred to in s 33(i) simply means the outer limit for a decision and that Smith should have acted by now. I do not agree. It is my view that the definition of 'prescribed time' in the Act means that the adjudicator must within 10 working days after the date of the service of the Response or an extension of time under s 34(3)(a) make his determination.

[67] The application is on foot. Smith is yet to make a determination. There is no reason to suppose that he is going to act beyond his jurisdiction.

[68] Therefore, even if there is no payment dispute on foot this application would fail as it is premature. It was argued by Civmec that there was no general supervisory jurisdiction available under the Act on the basis of the High Court decision of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) HCA 4. The majority said the following (35):

> 'The security of payment act evinces a clear legislative intention to exclude the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record'.

[69] The High Court in *Probuild* were not dealing with jurisdictional error. I conclude that if there is jurisdictional error the Supreme Court has the power to intervene.

[70] If, in this case, there was a payment dispute, but Smith had not yet determined it and if Jemena's interpretation of 'prescribed time' is correct

this would be an example of a non-jurisdictional error where a court would not intervene.

[71] I would finally say this that even if there was no ‘payment dispute’ and even if Jemena’s interpretation of the meaning of ‘prescribed time’ is correct I would make no order in its favour as the matter still rests fairly and squarely with Smith who will be able to make a determination in due course.

[72] The bottom line of this application is that this court is asked to determine an issue which is presently alive and before an adjudicator. It is an issue where the applicant for the prerogative writ is actively participating in the procedure before the adjudicator. There is simply no reason to assume the adjudicator will make an error of any kind let alone of a jurisdictional kind.

[73] A writ of mandamus should not issue as a harbinger to a possible Certiorari Writ that may or may not need to issue in the future. Jemena conceded that this was a most unusual case. In written submissions counsel noted that the court should compel the performance of Smith’s duty ‘*because it would avoid the parties incurring unnecessary costs, and it would avoid the courts resources being called upon twice (if it turned out that the adjudicator concluded that he did not have to dismiss the adjudication application, even though that conclusion is not legally openly reached*)’.

[74] It was further argued that granting the relief would not interfere with the proper functioning of the Act as it would not deprive Civmec of its right to pursue its claim in the courts. The submissions went on to say:

'It would not be shut out from seeking to have its claims vindicated in an appropriate forum. But those claims are factually complex, hotly disputed and have been brought after the contract has come to an end. They are particularly ill suited to the rapid regime established by the act'.

[75] I would suggest that therein lies the reality of Jemena's disgruntlement. Civmec may receive an advance payment, when eventually it may have to pay it back.

[76] The granting of a Writ of Mandamus is a discretionary remedy and I would finally say that even if there was no payment dispute and even if Jemena had persuaded me that Smith should have acted by now to dismiss the application I still would not exercise my discretion to grant prerogative relief. I say this because the matter is still alive and before the adjudicator. I would note that by taking this action before this court Jemena may possibly have compromised its rights to Certiorari relief if Smith decides that there is a payment dispute. This would be because it may be argued before Smith by Civmec that there is an issue estoppel that would bind the adjudicator. I do not seek to enter into this arena and note that my enquiry relates to whether a prerogative remedy is available whilst the adjudicator's enquiry relates to whether a 'payment dispute' should be dealt with under the Act.

[77] In the light of my conclusions the application is dismissed.

COSTS

[78] I will take written submissions on costs to be filed and served by 5 PM on Wednesday, July 3 and I will then make a ruling.
