

CITATION: *Ichthys LNG Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2019] NTSC 71

PARTIES: ICHTHYS LNG PTY LTD
(ABN 42 150 217 299)

and

INPEX OPERATIONS AUSTRALIA
PTY LTD
(ABN 48 150 217 262)

v

JKC AUSTRALIA LNG PTY LTD
(ABN 14 154 383 409)

and

FISCHER, Warren David

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 19 of 2019 (21910538) and
22 of 2019 (21911778)

DELIVERED: 16 September 2019

HEARING DATES: 29 and 30 July 2019

JUDGMENT OF: Barr J

CATCHWORDS:

BUILDING AND CONSTRUCTION – SECURITY OF PAYMENT –

Adjudicator appointed to adjudicate two payment disputes between same parties – appointments overlapped – plaintiff contends jurisdictional error – seeks order in the nature of certiorari or declaratory relief - whether adjudicator adjudicated the two disputes simultaneously without consent of the parties – consideration of meaning of “adjudicate simultaneously” – concept of simultaneity temporal in nature – simultaneity of adjudications a question of fact – consideration of defined term “appointed adjudicator” - overlapping of appointments not conclusive – plaintiff fails to prove that adjudicator commenced to adjudicate second payment dispute before completing the adjudication of the first

Construction Contracts (Security of Payments) Act 2004, s 4, s 33(1), s 34(3)(b)

Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30; 333 FLR 58, followed/distinguished in part

REPRESENTATION:

Counsel:

Plaintiffs:	J Sheahan QC and J Redwood
Defendants:	M Crawley SC

Solicitors:

Plaintiffs:	Allen & Overy
Defendants:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	Bar1911
Number of pages:	13

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

Ichthys LNG Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor [2019] NTSC 71

No. 19 of 2019 (21910538) and No. 22 of 2019 (21911778)

BETWEEN:

ICHTHYS LNG PTY LTD
(ABN 42 150 217 299)
First Plaintiff

AND:

**INPEX OPERATIONS AUSTRALIA
PTY LTD**
(ABN 48 150 217 262)
Second Plaintiff

AND:

JKC AUSTRALIA LNG PTY LTD
(ABN 14 154 383 409)
First Defendant

AND:

WARREN DAVID FISCHER
Second Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 16 September 2019)

Introduction

- [1] The plaintiffs (together referred to as “INPEX”) have applied to the Court by separate summonses on originating motion, in proceedings 19 and 22 of

2019. Both proceedings relate to adjudications made by the second defendant pursuant to the *Construction Contracts (Security of Payments) Act 2004* (“the Act”). Proceeding 19 of 2019 concerns an adjudication determination issued 6 January 2019. Proceeding 22 of 2019 concerns an adjudication determination issued 4 February 2019. The plaintiffs seek orders in the nature of certiorari that both adjudication determinations be called up and quashed; alternatively, declaratory relief.

Facts

- [2] On 8 November 2018, the first defendant (“JKC”) submitted an adjudication application claiming in excess of \$10.5 million from the plaintiffs. I will refer to that as “the first adjudication application”. On 12 November 2018, the second defendant was appointed to adjudicate the payment dispute the subject of that application. He obtained an extension of the prescribed time within which he was required to issue a determination,¹ from 7 December 2018 to 4 February 2019. He wrote to INPEX and JKC on 14 November 2018 to notify them of his appointment and of the time extension. After INPEX submitted its response to the adjudication application on 22 November 2018, the second defendant issued a determination on 6 January 2019 (the first adjudication determination).
- [3] Meanwhile, on 21 December 2018, JKC submitted two further adjudication applications. Relevantly, one of those related to a payment dispute over

¹ Pursuant to s 33(1) read with s 34(3)(a) of the Act.

invoices for reimbursable works in excess of \$30 million. I will refer to that as “the second adjudication application”.

- [4] On 2 January 2019, the parties were informed that the second defendant had been appointed to adjudicate the payment dispute the subject of the second adjudication application.²
- [5] On 7 January 2019, the second defendant wrote to INPEX and JKC to notify them of his appointment.³ He stated in the letter that he had received a copy of the second adjudication application on 4 January 2019.
- [6] On 9 January 2019, INPEX submitted its response to the second adjudication application, in which it disputed the adjudicator’s jurisdiction on the basis that the application was in relation to two payment disputes,⁴ but not on the basis of simultaneous adjudication of the first and second payment disputes without the parties’ consent.
- [7] On 4 February 2019, the adjudicator found that he did have jurisdiction, and made a determination (the second adjudication determination) that INPEX was liable for the amount of the disputed invoices and would have been required to pay same to JKC but for the existence of a separate off-setting claim.

The parties’ contentions

² The lawyers acting on behalf of INPEX in the first adjudication were not notified at that time.

³ Annexure ‘BRP-6’ to the affidavit of Blake Primrose affirmed 22 March 2019.

⁴ See Annexure ‘BRP-7’ to the affidavit of Blake Primrose affirmed 22 March 2019. The plaintiffs relied on *Gwelo Developments Pty Ltd v Brierty Ltd* [2014] NTSC 44; 35 NTLR 1 at [48].

[8] The plaintiffs contend that both the first and second adjudication determinations are affected by jurisdictional error because the adjudicator adjudicated those payment disputes simultaneously, without the consent of both parties. Such consent was required by s 34(3)(b) of the Act, which is underlined in the extract below:

(3) An appointed adjudicator may:

(a) ...

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties; or

(c) with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with another payment dispute.

(4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information or documents the adjudicator receives in relation to the other and vice versa.

[9] The principal object of the Act is to facilitate timely payments between the parties to construction contracts by providing for the rapid resolution of payment disputes arising under such contracts. In that context, it appears that the legislative intention underlying the requirement for consent in s 34(3)(b) is to give disputing parties control over whether the same adjudicator should be burdened with an additional concurrent adjudication which could affect the timeliness and quality of both the existing and additional adjudications. Another possible reason for the requirement of the parties' consent is that, if simultaneous adjudications take place, the adjudicator is able to take into account the evidence ("information or

documents”) received in one application in the adjudication of the other, pursuant to s 34(4) of the Act.

[10] The plaintiffs’ application for judicial review raises two questions:

1. Did the appointed adjudicator ‘adjudicate simultaneously’ the two payment disputes between the parties?
2. If ‘yes’, did he do so with the consent of both parties?

[11] I summarise the plaintiffs’ case in [12] and [13] below.

[12] The plaintiffs contend that the first and second adjudication determinations were the product of simultaneous adjudications. The second defendant was appointed to adjudicate the second adjudication application on 2 January 2019.⁵ At that stage, he had not completed the adjudication of the first adjudication application, and did not do so until 6 January, when he issued the determination referred to in [2]. It should be inferred that the second defendant commenced to adjudicate the second adjudication application on 2 January 2019, the date of his appointment (alternatively, on 4 January 2019, when he received the claim documents in relation to the second adjudication application). Because the second defendant had not by then finished adjudicating the first adjudication application, there was a period of overlap of four days or thereabouts (alternatively, two days or thereabouts) during which, it should be inferred, he was adjudicating both applications without having obtained the consent of the parties.

⁵ That was the date on which The Royal Institute of Chartered Surveyors Dispute Resolution Service (RICS DRS) emailed the parties to confirm the appointment of the second defendant, by implication that day, to determine the second adjudication application. See Exh ‘BRP-5’ to the affidavit of Blake Primrose affirmed 22 March 2019.

[13] The plaintiffs contend that there is no scope for any factual enquiry into the work carried out by the adjudicator in the first and second adjudication applications in order to ascertain whether simultaneous adjudication took place. The Act's objectives are promoted only by a strict temporal interpretation of simultaneity. Because the parties' consent to simultaneous adjudications is a jurisdictional requirement, simultaneity must be capable of being readily ascertained and identified at the outset, before the adjudicator undertakes any actions in respect of a second application between the parties. Simultaneity in the present case should be inferred from the temporal overlap. The temporal overlap of four (or two) days is sufficient to engage s 34(3)(b) of the Act and, in prospect, required the adjudicator not to proceed without the consent of the parties.

[14] The plaintiffs rely on the decision of this Court in *Northern Territory of Australia v Woodhill and Sons Pty Ltd*.⁶

[15] The adjudicator in *Woodhill* was appointed to adjudicate two payment disputes between the same parties. The appointments were made four days apart: the first appointment on 1 March 2018 and the second on 5 March 2018. After accepting the first appointment, the adjudicator was approached by the prescribed appointer to adjudicate a second payment dispute, and, after indicating his availability, he was appointed to adjudicate the second dispute. The parties were not consulted in advance of the second appointment, and the adjudicator did not himself ask the parties whether

⁶ *Northern Territory of Australia v Woodhill and Sons Pty Ltd* [2018] NTSC 30; 333 FLR 58 ("*Woodhill*").

they had any objection to his acting as adjudicator in the second payment dispute. However, after the second appointment, the adjudicator's attention was drawn to s 34(3)(b) of the Act. In correspondence with the parties, the adjudicator then expressed the view that there was no reason consent could not be given after the appointment, but that, in the absence of such consent, he would adjudicate the first application only. The plaintiff's solicitors replied to state their view that the adjudicator did not have jurisdiction to adjudicate either payment dispute, in circumstances where his appointment to adjudicate the second dispute was made without the plaintiff's consent. The adjudicator determined that, in the absence of the parties' consent under s 34(3)(b), he could not adjudicate the second payment dispute, but that he could continue the adjudication of the first payment dispute. The plaintiff commenced proceedings for declaratory relief, arguing that the second appointment necessarily gave rise to circumstances of simultaneous adjudication.

[16] Grant CJ analysed the plaintiff's contention as predicated on a construction which would treat the concept of simultaneity as temporal in nature, in the sense of "occurring or operating at the same time". His Honour observed that, on the plaintiff's construction, simultaneous adjudication would arise when two payment disputes fell to be adjudicated by the one adjudicator at the same time or overlapping times, but "perhaps subject to questions of degree".⁷ His Honour then analysed the defendant's contention, that the

⁷ *Woodhill*, at [30].

concept of simultaneous adjudication was functional in nature and directed only to circumstances in which the evidence in one adjudication was to stand as evidence in the other adjudication. His Honour observed that, on the defendant's contention, the adjudication of two payment disputes might be conducted in parallel in a temporal sense without being conducted simultaneously.⁸ After referring to the decision in *Brierty Limited v Gwelo Developments Pty Ltd*,⁹ his Honour rejected the defendant's contention and stated the following conclusion:¹⁰

... the appointments of Mr Baldry to adjudicate in both the first and second applications (made four days apart) gave rise to a situation of simultaneous adjudication within the meaning of s 34(3) of the Act. That situation having arisen, the adjudicator was precluded from determining both payment disputes without the consent of the plaintiff, which consent was not forthcoming.

[17] His Honour's decision, that the appointments of the adjudicator to adjudicate in both the first and second applications gave rise to a situation of simultaneous adjudication, was a clear endorsement of the concept of simultaneity as being temporal in nature.

[18] I am not bound to follow the decision in *Woodhill*, it being a decision of coordinate authority. Nonetheless, a single judge of this Court should as a matter of judicial comity and precedent follow the decision of another single

8 *Woodhill*, at [34].

9 *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTSC 44; 35 NTLR 1, at [48]. Kelly J there held that the fact that a contractor had made a single application for adjudication of two payment disputes under the Act without obtaining the principal's consent to simultaneous adjudication under s 34(3)(b) triggered a statutory provision (s 27) which prevented the contractor withdrawing the application and making two fresh applications, one for each payment dispute.

10 *Woodhill*, at [38].

judge of this Court unless persuaded that the earlier decision is clearly or plainly wrong.¹¹ In my opinion, the concept of simultaneity is temporal in nature, as held by Grant CJ, and to that extent I agree with the decision in *Woodhill*. However, I note that his Honour was required to decide different issues to those in the present case and, for reasons I explain below, I do not consider that the fact of overlapping appointments resolves this case in the plaintiffs' favour.

[19] As mentioned, the plaintiff in *Woodhill* sought declaratory relief with a view to preventing the adjudicator – who had been duly appointed to adjudicate two payment disputes, and who acknowledged that he could not adjudicate both without consent – from retaining the first adjudication and withdrawing from the second, in circumstances where the legislation did not permit the latter course. If he had continued as he intended, the adjudicator would in prospect have been adjudicating the first dispute while still required by law to remain the adjudicator in respect of the second dispute, with no possibility to decline or disavow the subsequent appointment.

[20] An obvious point of distinction between the present case and *Woodhill* is that Grant CJ was examining the adjudicator's dual roles prospectively, only a week after the second appointment, in circumstances where the proximity in time of the two appointments made it probable, even inevitable, that there would be a situation of simultaneous adjudication. That consideration was

11 See, for example, *Undershaft (No 1) Limited v Commissioner of Taxation* (2009) 175 FCR 150 at [68]; *Snedden (aka Vasiljkovic) v Minister for Justice (Cth) and Anor* (2013) 306 ALR 452 at [17].

clearly in his Honour's mind when he observed, in the passage extracted in [15] above, that the appointments were "made four days apart".

[21] Whether the adjudicator in the present case "adjudicated simultaneously" the first and second payment disputes is a question of fact. The plaintiffs bear the legal and evidential onus to prove that he did so. The plaintiffs contend that the only relevant fact required to be proved is that the appointments overlapped. In my opinion, however, such proof is insufficient for the plaintiffs to succeed; the plaintiffs must prove on the balance of probabilities that the adjudicator started to conduct the adjudication of the second payment dispute before he had finished adjudicating the first payment dispute.

[22] It is necessary to bear in mind that the appointment of the adjudicator to adjudicate the second payment dispute did not require the consent of the parties. As Grant CJ observed in *Woodhill*,¹² consent is not a precondition to appointment; the sub-section operates only to preclude a duly appointed adjudicator from adjudicating payment disputes simultaneously in the absence of consent. Therefore, the fact of simultaneous appointments does not of itself result in a situation of simultaneous adjudications, such as to trigger the requirement for the consent of the parties.

[23] Insofar as the plaintiffs' case relies on the sole fact of overlapping appointments, it fails to take into account that the term "appointed

12 At [41].

adjudicator”, appearing in the opening words of s 34(3), is defined in s 4 of the Act as follows:

appointed adjudicator, for a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication.

The definition thus reflects or acknowledges the practical reality that an adjudication does not commence before the adjudicator is served with the application for adjudication, irrespective of the date of his or her appointment. For the purposes of s 34(3), the date of the adjudicator’s appointment is of minimal relevance. Therefore, in the present case, the relevant period for determining whether or not the adjudicator simultaneously adjudicated the two payment disputes started on 4 January 2019, the date stated in the adjudicator’s letter referred to in [5] above.

[24] The situation can be usefully considered through the filter of this simplified chronology:

- 4 January 2019 – adjudicator served with application for adjudication of the second payment dispute.
- 6 January 2019 – adjudicator issues the first adjudication determination.
- 7 January 2019 – adjudicator writes to parties – see [5] above.

[25] It is clear that, by the time the adjudicator wrote to the parties on 7 January 2019, he had commenced to adjudicate the second payment dispute. In that letter, he sought confirmation from the parties in relation to the date of service of the application on the respondent, a relevant enquiry for the

purposes of s 33(1)(a)(ii) of the Act, which mandates the dismissal of an application if it has not been prepared and served within 90 days after a payment dispute arises pursuant to s 28 of the Act. The adjudicator had clearly started the process of adjudication. Further, the letter contained a request for payment of a specific sum by each party by way of security for the anticipated costs of the adjudication, which indicates that the adjudicator had made at least some assessment of the nature of the dispute and the issues he would be required to decide.

[26] However, the evidence does not disclose when the adjudicator started the preliminary steps in the adjudication of the second payment dispute, referred to in [25]. It is possible that he did so between receiving the papers in relation to the second payment dispute on 4 January and the time he completed the adjudication of the first payment dispute on 6 January. However, it is also possible that he did nothing in relation to the adjudication of the second payment dispute until after he had completely finished the first. He may have commenced to adjudicate the second payment dispute sometime on 6 January (after completing the adjudication of the first payment dispute), or he may have commenced on 7 January.

[27] In relation to the plaintiffs' onus, there is no evidence that the adjudicator started to adjudicate the second payment dispute before he had completed the first. Further, there is no proper basis to draw an inference to that effect. In those circumstances, I am not satisfied on the balance of probabilities that the adjudicator adjudicated the two payment disputes simultaneously.

Indeed, consideration of the chronology inclines me to the view that he did not; the adjudicator appears to have finished the first before turning to the second adjudication. Further, as a practical consideration, it seems unlikely that the adjudicator would have interrupted his final work in the adjudication of the first payment dispute to commence the adjudication of the second. I finally note, to the extent it is relevant, that there is no indication that the adjudicator took into account evidence in one application in the adjudication of the other.¹³

[28] Given my conclusion, it is not necessary for me to consider the second question set out in [10] above.

[29] The plaintiffs' applications should be dismissed. I will hear the parties on the questions of costs and final orders.

13 As acknowledged by the plaintiffs in par 10 of Supplementary Submissions dated 13 August 2019.