

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor
[2009] NTSC 48

PARTIES: AJ LUCAS OPERATIONS PTY LTD

v

MAC-ATTACK EQUIPMENT HIRE
PTY LTD
AND
BRIAN GALLAUGHER

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: No 123 of 2009 (20927600)

DELIVERED: 18 September 2009

HEARING DATES: 14 September 2009

JUDGMENT OF: KELLY J

CATCHWORDS:

BUILDING AND CONSTRUCTION — construction contract – adjudicator’s determination – essentials for valid determination – Construction Contracts (Security of Payments) Act (NT) – when “payment dispute” arises – was application served within time – whether adjudicator obliged to dismiss application under s 33 (1)(a)(ii) – whether requirements of s28 essential for existence of a valid determination – whether determination void – claim dismissed

Construction Contracts (Security of Payments) Act 2004 (NT)

Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd (Supreme Court of NSW, 1 April 1998, unreported), distinguished

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* [2008] NTSC 42; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46, followed

REPRESENTATION:

Counsel:

Plaintiff: A. Wyvill

Defendant: W. Roper

Solicitors:

Plaintiff: Ward Keller

First Defendant: Hunt & Hunt

Judgment category classification: A

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

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd & Anor
[2009] NTSC 48
No. 123 of 2009 (20927600)

BETWEEN:

AJ LUCAS OPERATIONS PTY LTD
Plaintiff

AND:

**MAC-ATTACK EQUIPMENT HIRE
PTY LTD**
First Defendant

AND:

BRIAN GALLAUGHER
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 18 September 2009)

- [1] By Originating Motion dated 18 August 2009 the Plaintiff, AJ Lucas Operations Pty Ltd, seeks a declaration that the adjudication of the Second Defendant reportedly made under the *Construction Contracts (Security of Payments) Act* (“the Act”) is void and of no effect.
- [2] The facts appear from the Affidavit of Clifton Baker sworn on 17 August 2009.

- [3] The Plaintiff, AJ Lucas Operations Pty Ltd (“AJ Lucas”) was a constructor of the Bonaparte Gas Pipeline Project between Wadeye and Ban Ban Springs in the Northern Territory. AJ Lucas hired certain equipment from the First Defendant, Mac-Attack Equipment Hire Pty Ltd (“Mac-Attack”) for the purposes of that Project. It is common ground that the hire contract is a construction contract within the meaning of the Act.
- [4] Mac-Attack rendered invoices to AJ Lucas for the hire of the equipment. Some of those invoices were unpaid.
- [5] On 6 July 2009 Mac-Attack made an application for an adjudication under the Act (“the Application”).
- [6] The Application had annexed to it two invoices, invoice no. 1461 for \$924,530.03 plus \$92,453.01 tax making a total of \$1,016,983.04, and invoice no. 1476 for interest in the sum of \$38,608.50. It is common ground between the parties that neither of these invoices had previously been provided to AJ Lucas. The adjudicator rejected Mac-Attack’s claim in relation to invoice no 1476 and no issue arises in this appeal in relation to that invoice.
- [7] In its response to the adjudicator, AJ Lucas advised the adjudicator that neither invoice had been served upon it and provided the adjudicator with a copy of an invoice also numbered 1461 and dated 1 May 2009 which the Plaintiff advised had been served on it. There are a number of differences

between the invoice no. 1461 which was served on AJ Lucas by Mac-Attack and the invoice no. 1461 which was attached to the Application.

- The invoice which had been provided to AJ Lucas stated its terms to be “7 days”. The invoice attached to the Application stated its terms to be “30 days”.
- The invoice which had been provided to AJ Lucas was signed. The one attached to the Application was not.
- There were discrepancies in the amounts claimed. Each invoice was in similar form. Both referred to eleven appendices. Each appendix referred to a different piece of equipment which had been hired. However there were some discrepancies in the amounts claimed in respect of each appendix. As the adjudicator noted in his determination, most but not all of these discrepancies are attributable to additional interest claimed.

[8] Also attached to the Application were schedules listing what was claimed in relation to each appendix accompanied by copies of invoices for the hire of equipment referred to in those schedules.

[9] It is common ground between the parties that each of the claims made on the invoice no. 1461 which was provided to AJ Lucas had been the subject of previous invoices and that those previous invoices were the invoices which were attached to the Application and listed in the appendices 1 to 11. It is

also common ground that many, indeed most, of those invoices had become due and payable under the contract between AJ Lucas and Mac-Attack more than 90 days before the date of the Application.

[10] In its response to the adjudicator AJ Lucas contended that the adjudicator had no jurisdiction to hear and determine the Application for adjudication for two reasons.

[11] First, AJ Lucas has contended that the Application itself was defective because it did not comply with section 28(2)(b) of the Act which requires the Application to state the details or have attached to it any payment claim that has given rise to the payment dispute. AJ Lucas contended (and this is not disputed) that the Application purported to attach the payment claim which gave rise to the payment dispute but that the document that was attached was not a true copy of that payment claim. It was materially different from the invoice which had been served on AJ Lucas in the ways set out above.

[12] Secondly, AJ Lucas contended that Mac-Attack's claim was based on various invoices all of which had previously been submitted to it by Mac-Attack; that a payment dispute within the meaning of section 8 of the Act arose when those invoices were not paid on the due date for payment under the contract; and that in relation to most of the invoices the subject of the claim, more than 90 days had elapsed since that payment dispute arose. Accordingly, the Application had not been served within the time specified

in section 28 and the adjudicator was therefore obliged by section 33(1) to dismiss the Application without a determination of its merits.

[13] The adjudicator rejected both of those arguments. In relation to the argument that the Application did not comply with the requirements of section 28(2)(b) because the document it attached was not in fact a copy of the payment claim which had been served upon AJ Lucas, the adjudicator analysed the difference between the document attached to the Application and the copy of the actual payment claim which had been served on AJ Lucas and which was provided to the adjudicator by AJ Lucas in its response. Having analysed these differences, the adjudicator made the following finding:

“Section 28(2)(b)(ii) of the Act requires the Application to “state the details of or have attached to it any payment claim which has given rise to the payment dispute. The Applicant has clearly nominated the invoice no. 1461, as submitted on 1 May 2009 and as evaluated by the Respondent in payment schedule no. 8, to be the “payment claim”. I consider that as compliance of the requirement “to state the details” I do not consider the attachment of a later version of that invoice with additional charges where it is possible to correlate values within 1% of the “payment claim” (refer paragraph 48 and appendix 1) as a fatal flaw in regard to compliance with the Act.”

[14] In relation to AJ Lucas’ contention that, in respect of the bulk of the claim, a payment dispute had arisen more than 90 days before the date of the Application and that he was accordingly obliged to dismiss the Application pursuant to section 33(1)(a), the adjudicator applied the following process of reasoning.

- (a) He pointed out that in a previous adjudication (Adjudication 18-07-05) he had dismissed the Application under section 33(1)(a)(ii) of the Act on the basis that the claim referred for adjudication was a resubmission of an earlier claim.
- (b) He noted that his decision in that adjudication was set aside on appeal by Mr Cavanagh SM who had commented that there was no limitation in the contract in that case on the number of times a contractor could lodge the same claim. Hence each claim had to be considered separately on its merits.
- (c) He noted that the agreement between AJ Lucas and Mac-Attack for the hire of equipment, does not specifically preclude the re-submission of an unpaid claim.
- (d) For that reason, the adjudicator declined to dismiss the present Application pursuant to section 33(1)(a)(ii) and went on to determine the Application on its merits.

[15] In the present proceeding, AJ Lucas contends that each of these decisions was in error and, moreover, that the errors are of such a fundamental nature as to render the adjudicator's purported determination a nullity.

[16] Mr Wyvill for AJ Lucas submits that the adjudication is invalid for failure to comply with two essential requirements for a valid adjudication:

- (a) The Application did not “state the details of or have attached to it ... any payment claim that has given rise to the dispute” in breach of section 28(2)(b)(ii).
- (b) The Application was not made within 90 days of the date when the payment dispute had arisen in breach of section 28(1).

[17] In relation to the submission that the Application did not have the details of or have attached to it the payment claim that gave rise to the payment dispute, Mr Wyvill contends that the adjudicator was obliged to have reference to the Application only and was not entitled to take into account what Mr Wyvill referred to as “the real payment claim” which had been provided to the adjudicator by AJ Lucas.

[18] Mr Roper for Mac-Attack contends that if a question arises as to whether a particular application complies with section 28(2)(b) of the Act (i.e. whether it does in fact annex a payment claim which has been served on the respondent or whether it accurately states the details of such a payment claim) then that is a question of fact which the adjudicator will need to determine by reference to the evidence, and that it was perfectly proper for the adjudicator to have reference to the evidence provided to him by the respondent, AJ Lucas, for that purpose. I agree.

[19] When the issue was raised by the respondent, it seems to me that the adjudicator quite properly had reference to the actual payment claim which had been made by Mac-Attack (namely invoice no. 1461 presented on 1 May

2009), determined that (as submitted by AJ Lucas) the Application did not in fact annex that payment claim, but went on to decide that the document annexed did “state the details” of the payment claim which had been served (and which he considered was adequately identified in the Application by reference to date and number), so as to comply with section 28(2)(b). It may be that he was wrong as a matter of fact in being so satisfied. It is not necessary for me to decide that. Suffice is to say that he asked himself the right question, (namely whether the Application stated the details of the payment claim which gave rise to the payment dispute) and did not fall into error by having regard to the evidence which was supplied to him by AJ Lucas in answering that question.

[20] If I am wrong in that, in my view, any error he made was not such as render the adjudicator’s decision a nullity for the reasons set out below.

[21] In relation to the submission that the Application was not made within 90 days of the date when payment dispute had arisen, in breach of section 28(1), Mr Wyvill points out that the decision of Mr Cavanagh relied upon by the adjudicator is not in fact authority for the proposition that, unless a contract specifically prohibits the resubmitting of claims, a party can re-start the 90 day period for making application for an adjudication under the Act simply by serving another invoice – and that if it were, it would be plainly wrong. I agree.

[22] The question which the adjudicator needed to ask himself in relation to the amounts claimed is that posed by section 28: when did the payment dispute arise? That question, is in turn answered by reference to section 8. The payment dispute arises when the amount claimed in a payment claim¹ 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). One must therefore look to the contract to determine when the amount(s) claimed in the payment claim were due to be paid.

[23] In the present case, the adjudicator found that the terms of the contract between AJ Lucas and Mac-Attack were contained in an agreement prepared by AJ Lucas and signed by AJ Lucas on 22 September 2008 and by Mac-Attack on 2 October 2008. Under clause 13 of that agreement accounts were to be rendered at monthly intervals and paid 30 days from the end of the month in which the invoice is received. It is common ground that most of the amounts claimed in the Application had been previously claimed on invoices that would have fallen due for payment under clause 13 more than 90 days before the service of the Application. In relation to those amounts,

¹ “Payment claim” is defined in section 4 of the Act.

payment claim means 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.

it is clear that the adjudicator should have dismissed the Application pursuant to section 33(1)(a)(ii) without considering the merits of the Application.

[24] Mr Roper for Mac-Attack submitted that the mere fact that invoices had been previously issued did not preclude a further payment claim being made in respect of the same amounts. He cited *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (Supreme Court of NSW, 1 April 1998, unreported) as authority for that proposition. *Algons* did not concern the provisions of the Act or its New South Wales equivalent. That case was an application for summary judgment for an amount said to be owing under a construction contract. The result turned on the mechanism for making progress claims under the particular construction contract in question, which was materially different from the contract between AJ Lucas and Mac-Attack. In any case, the question for the adjudicator to determine was not whether Mac-Attack was precluded from making further claims. The question which he was required by the combined operation of section 28 and section 8 to answer was, “When did the amounts claimed in the Application fall due for payment under the contract between the parties?” In most cases, that was more than 90 days before the service of the Application.

[25] It remains to be determined whether the error made by the adjudicator is such as to render his decision void.

[26] In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, Hodgson JA (with whom both Mason P and Giles JA agreed) said:

“51 I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: The procedure contemplates a minimum of opportunity for court involvement:

52 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 the nature of certiorari.

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).

5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. *Project Blue Sky Inc. v. Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman; Ex Parte Fox and Clinton* [1945] HCA 53; (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could

indicate that there was not a *bona fide* attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance. “[underlining emphasis added]”

[27] The precise list of “basic and essential requirements” set out in paragraph [53] of *Brodyn* needs to be treated with some caution when applied to the Northern Territory Act which contains different provisions. In particular, the New South Wales Act is based on a payment claim being made under the Act, whereas the starting point for the Northern Territory Act is a payment dispute as defined in s 8: a payment dispute arises when the amount claimed in a payment claim is due to be paid under the contract and it has not been paid in full (or has been rejected or disputed).

[28] However, the general legislative intent is essentially the same in both pieces of legislation and, like the New South Wales Act, the Territory Act “contemplates a minimum of opportunity for court involvement”.² *Brodyn* has been followed and applied by Southwood J in *TransAustralian Construction Pty v Nilsen (SA) Pty Ltd* [2008] NTSC 42 at [42] and by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [44] to [50].

² Section 48(3) of the Territory Act provides:

(3) Except as provided by subsection (1)[*which confers a right of review by the Local Court of decisions to dismiss an application under s 33(1)(b)*] **a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.**

- [29] Accordingly, if there has not been compliance by the adjudicator with the essential requirements for the existence of a determination, or there has not been a *bona fide* attempt by the adjudicator to exercise the relevant power, or if there has been substantial denial of natural justice, then the purported determination of the adjudicator will not be a determination under the Act.
- [30] In this case, there has been no suggestion that the adjudicator did not act *bona fide* in determining whether to dismiss the application without considering the merits pursuant to section 33(1)(a)(ii), and there is no suggestion that there has been a denial of natural justice. The question is therefore whether there has been compliance by the adjudicator with the essential requirements for the existence of a determination under the Act.
- [31] AJ Lucas submits that it is an essential pre-requisite to the existence of a determination that there be an application before the adjudicator which in fact complies with the requirements of section 28(2)(b)(ii) – ie that it must in fact “state the details of or have attached to it any payment claim that has given rise to the payment dispute” – and that even if the adjudicator asks himself the right question, (ie Does this application state the details of or have attached to it any payment claim that has given rise to the payment dispute?) if he gets the answer wrong, the adjudicator’s decision is a nullity.
- [32] I do not agree that actual compliance with the requirements of section 28(2)(b)(ii) was intended by the legislature to be a pre-requisite to the existence of a determination . Unlike the existence of a construction

contract to which the Act applies, the existence of a written application for adjudication, and service of that application on the other party, (this list is not intended to be definitive – there may be other essential requirements), it seems to me that the question of whether the application sets out the details of the payment claim giving rise to the payment dispute so as to comply with section 28(2)(b)(ii) – or for that matter the question of whether it sets out the details of relevant extracts of the construction contract so as to comply with section 28(2)(b)(i) – is a matter of detail which the adjudicator is required to decide and which he may decide wrongly without rendering his decision a nullity.

[33] In relation to the contention that it was an essential requirement for a valid determination that the application be made within 90 days after the payment dispute arises, Mr Wyvill conceded (as he must) that the adjudicator is free to make a factual error in answering the question whether the application was made within 90 days after the payment dispute arose³, but says that if the adjudicator gets the wrong answer to this question as a result of an error of law, his decision is void.

[34] It is clear, for the reasons set out above, that the adjudicator in the present case did make an error of law in the process of determining that the application was made within 90 days of the payment dispute arising.

However, I see no reason to distinguish between factual errors and errors of

³ This was determined by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [47] and [48]

law made by the adjudicator in determining whether the Application was made within 90 days after the payment dispute arose. As Mildren J said in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (supra) at [48]:

“If the adjudicator has jurisdiction to determine whether or not the 90 day time limit has been complied with, his decision cannot be void. In *Brodyn*, Hodgson JA specifically held that that the legislature did not intend that exact compliance with that provision was essential to the existence of a determination. I consider that the structure and purposes of the Act do not support a conclusion that an adjudication is void if the adjudicator wrongly concludes that the time limits have been complied with.” [reference omitted]

[35] The question of whether the Application was served within 90 days of the payment dispute(s) arising is one which the adjudicator was required to decide and the fact that he made an error of law in the process of making that determination does not render his decision a nullity. There is no right of appeal to this Court from the decision of an adjudicator based on error of law.

[36] The adjudicator did not fail to comply with an essential pre-requisite for the existence of a determination under the Act, he made a *bona fide* attempt to exercise the relevant power in the Act, and there has been no substantial denial of natural justice. Mr Wyvill pointed out that in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46 at [49], Mildren J specifically left open the question of whether other grounds might lead an adjudicator’s decision to be void. However, I can see no other ground upon which it might be held that the adjudicator’s decision in the present case is void.

[37] There will be judgment for the defendant on the originating motion.