Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC 44

PARTIES:	GWELO DEVELOPMENTS PTY LTD (ABN 25 051 085 762) v BRIERTY LIMITED (ABN 65 095 459 448)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 98 of 2014 (21443873)
DELIVERED:	7 October 2014
HEARING DATES:	6 October 2014
JUDGMENT OF:	KELLY J

CATCHWORDS:

CONTRACTS – Building - Construction contracts - *Construction Contracts (Security of Payments) Act* (NT) – meaning of s 27 – whether the words "an application has already been made" refer only to applications for adjudication that are still on foot - whether s 27 precludes a party to a construction contract from making an application for an adjudication under the Act where the first application has been withdrawn - whether s 27 precludes a party to a construction contract from making an application for an adjudication under the Act where the first application sought adjudication of more than one payment dispute without the consent of the other party – whether the court should refuse to grant a remedy on discretionary grounds

HELD – there is no reason to refuse to grant a remedy on discretionary grounds – s 27 applies to preclude a party from making a further application for adjudication where an application in relation to the same payment dispute has been made at any time in the past – no need for the application

to be still on foot – s 27 precludes a part from making application for an adjudication where the applicant has withdrawn the earlier application and where the first application sought adjudication of more than one payment dispute without the consent of the other party

Construction Contracts (Security of Payments) Act (NT) ss 27, 28, 28A, 31, 33, 34(3)(b), 39, 46

Justice and Other Legislation Amendment Act (NT) 2009

Justice Legislation Amendment Act (No 2) (NT) 2007

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421; *Josephson v Walker* (1914) 18 CLR 691, considered

A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd [2009] NTCA 4; *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1995-97] 187 CLR 384; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1; *M&P Builders Pty Ltd v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25, referred to

REPRESENTATION:

Counsel:

Plaintiff:	D Robinson QC
Defendant:	A Wyvill SC with W Roper

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Minter Ellison

Judgment category classification:	B
Judgment ID Number:	KEL14004
Number of pages:	19

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

Gwelo Developments Pty Ltd v Brierty Limited [2014] NTSC 44
No. 98 of 2014 (21443873)

BETWEEN:

GWELO DEVELOPMENTS PTY LTD
(ABN 25 051 085 762)
Plaintiff

AND:

BRIERTY LIMITED
(ABN 65 095 459 448)
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 7 October 2014)

Chronology

[1] On 13 August 2013 the plaintiff and defendant entered into a construction contract for the performance of subcontract works in connection with civil works for the development of a shopping centre at Coolalinga.

[2] Payment disputes arose (or allegedly arose) on 30 June 2014 and 31 July 2014, and on 12 September 2014 the defendant served on the plaintiff an application for an adjudication ("the first application") under the *Construction Contracts (Security of Payments) Act* ("the Act"). The first

application sought adjudication of both the 30 June payment dispute and the 31 July payment dispute.

[3] On 19 September 2014 the plaintiff's solicitors wrote to the defendant's solicitors pointing out that the consent of the parties is required for the adjudicator to adjudicate simultaneously two or more disputes,[1] advising that the plaintiff did not consent, and inviting the defendant to withdraw its application on pain of adverse costs consequences.

[4] The defendant's solicitors wrote to the plaintiff's solicitors on the same day saying that if the plaintiff did not consent to both disputes being dealt with together, they would ask the adjudicator to proceed with the application in relation to the 31 July dispute only, and file a new application in relation to the 30 June payment claim.

[5] On 20 September 2014 the plaintiff's solicitors wrote to the defendant that the position the defendant was in was of its own making as it had filed an application relating to two disputes without asking if the plaintiff consented. They pointed out that there was no provision in the Act for withdrawing part of an application and requested the defendant to withdraw the first application before 22 September.

[6] The defendant presumably agreed with the analysis by the plaintiff's solicitors. They withdrew the first application on 22 September 2014.

[1] Section 34(3)(b)

[7] On 25 September 2014 the defendant served on the plaintiff two fresh applications, one seeking an adjudication of the 30 June payment dispute and one seeking an adjudication of the 31 July payment dispute ("the second and third applications"). These were accompanied by a declaration by the defendant's solicitor, Ms Sophie Cleveland, setting out the history of the matter and stating that the defendant had incurred additional costs because of the plaintiff's failure to consent to the two payment disputes being adjudicated together.

[8] On 26 September 2014 the solicitors for the plaintiff sent a letter to the solicitors for the defendant to the effect that each of the above payment disputes had been the subject of an earlier application and that s 27(a) of the Act precludes a further application being made in relation to those disputes. The letter requested that the second and third applications be withdrawn by 5.00 pm that day or further steps would be taken.

[9] On 29 September 2014, the defendant's solicitors responded, "We do not agree with your textual approach to the construction of the Act. Further, we disagree with your interpretation of the Act," and threatened to apply for indemnity costs.

[10] The plaintiff's response was to apply to the Court by originating motion seeking the following urgent relief:

> "1. Pursuant to Rule 45.05(2) the Court dispenses with the requirements of Rules 5.03(1) and 8.02 and authorises the

plaintiff to commence this proceeding by originating motion in this form.

2. A declaration that the defendant is not entitled to apply to have:

   (a) the payment dispute the subject of the document entitled Application for Adjudication of Payment Dispute dated 25 September 2014 (being annexure 'RS-11' to the affidavit of Romi Slaven made 1 October 2014) (Second Application) adjudicated under the provisions of the *Construction Contracts (Security of Payments) Act*; and

   (b) the payment dispute the subject of the document entitled Application for Adjudication of Payment Dispute dated 25 September 2014 (being Annexure 'RS-12' to the affidavit of Romi Slaven made on 1 October 2014) (Third Application) adjudicated under the provisions of the *Construction Contracts (Security of Payments) Act*.

3. An order that the defendant forthwith withdraw the Second Application and the Third Application pursuant to section 28A of the *Construction Contracts (Security of Payments) Act*.

4. The defendant pay the plaintiff's cost of this proceeding.

5. Such further or other order as the Court deems fit."

[11] The defendant consented to the orders sought in paragraph 1 and the matter was set down for urgent hearing on Monday 6 October 2014.

[12] The two issues for determination in this proceeding are:

(a) whether the Court should decline to entertain the plaintiff's application on discretionary grounds; and

(b) assuming the court exercises jurisdiction, whether s 27 of the Act precludes the defendant from bringing fresh applications for adjudication (the second and third applications) after withdrawing the first application.

The jurisdictional question

[13] The defendant submits that I should decline to make the declaration, or grant the other relief sought on discretionary grounds.

[14] The defendant relied on the statement of principle in *Josephson v Walker*:[2]

> "Prima facie, where the same statute creates a new right and specifies the remedy, that remedy is exclusive. The natural presumption to begin with is that Parliament in creating the novel right attaches to it the particular mode of enforcement as part of its statutory scheme. To that extent the enactment is a code."

[15] The defendant further relied on the decision of Walsh J in *Forster v Jododex Australia Pty Ltd*:[3]

> "In my opinion, when a special tribunal is appointed by a statute to deal with matters arising under its provisions and to determine disputes concerning the granting of rights or privileges which are dependent entirely upon the statute, then as a general rule and in the absence of some special reason for intervention, the special procedures laid down by the statute should be allowed to take their course and should not be displaced by the making of declaratory orders concerning the respective rights of the parties under the statute. In other words, I think that it will ordinarily be a wise exercise by the Supreme Court of the discretion which it has under s 10 of the *Equity Act* to decline to undertake the tasks which have been committed by the Parliament to a specialised tribunal. Whilst I agree with Gibbs J that s 10 ought not to be construed as if it

[2] (1914) 18 CLR 691 at p 701
[3] (1972) 127 CLR 421 at p 427

> contained words excepting from its operation cases arising under the Act, I think that the procedure set out in the Act itself should be regarded as the normal procedure for dealing with such cases."

[16] The applicability of these particular principles depends upon acceptance of the proposition that the Act "specifies the remedy" in relation to a contention by a supposed respondent to an application for adjudication that the person making the application had no right under the Act to make the application, and the related proposition that there is a "special procedure laid down by statute" for determining the controversy.

[17] The defendant contends that this is indeed the case; that the Act gives the responsibility for deciding whether or not s 27(a) applies to preclude the defendant from making the second and third applications to the adjudicator. As Mr Wyvill SC for the defendant framed the submission thus: a decision as to whether s 27 applies in a particular case to preclude the bringing of a further application is one of the core functions of an adjudicator which the legislature has entrusted to the adjudicator.[4]

[18] The defendant submits that the most appropriate way for the matter to proceed would be for the plaintiff to file and serve its response (due this Thursday if the defendant was entitled to make the present applications), in which it would run the argument which was run before me; for the adjudicator to proceed to make a determination; and if the adjudicator's decision on s 27 is adverse to the plaintiff, for the plaintiff to apply to the

[4] See *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [107]

court for judicial review. I am not sure whether the defendant was acknowledging that a mistaken finding by the adjudicator that s 27 did not preclude the bringing of the applications would be the kind of jurisdictional error amenable to judicial review (ie one which falls outside the privative provisions of s 48) or whether the defendant would feel free to argue that it fell within the privative provision. (In light of the defendant's starting point for this submission – that a decision under s 27 was one of the core functions given to the adjudicator under the Act - the latter would seem to be more likely.)

[19] The defendant also submitted that the court should be slow to intervene at such an early stage in a process that does not determine the final rights of the parties.

[20] Counsel for the plaintiff, on the other hand, submitted that an adjudicator has no role to play in determining whether a person is precluded from making an application for adjudication by s 27. Simply put, he said it was "none of the adjudicator's business".

[21] I do not accept either extreme position.

[22] Dealing first with the defendant's contention, I do not accept that determining whether a party purporting to make an application for an adjudication is entitled to do so under s 27 is one of the core functions conferred upon the adjudicator by the legislation.

[23] Counsel for the defendant relied on the analysis of the Act in *Burns* (supra). One of the issues in *Burns* (and in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*)[5] was whether a decision of an adjudicator not to dismiss an application under s 33(1) was reviewable by this Court. In *Burns*, I held:[6]

> "Under s 33(1), the power to make the decision whether to dismiss the application under s 33(1)(a) or proceed to a determination of its merits under s 33(1)(b) is given to the adjudicator. In fact he is obliged by s 33(1) to make that decision. Hence deciding those matters is within, and not outside, the limits of the functions and powers conferred on the adjudicator by the Act."

[24] That is not the issue here. First, the issue here is not the effect of the privative clause in s 48 of the Act on an existing decision of an adjudicator; the issue is whether this court should decline to grant relief on discretionary grounds. Second, and more importantly, if this matter had come before the adjudicator, he would not be asked to decide any of the matters set out in s 33(1) – ie whether or not:

> (a) the contract concerned is a construction contract; or
>
> (b) the application has been prepared and served in accordance with section 28; or
>
> (c) an arbitrator or other person or a court or other body dealing with the matter has made an order, judgment or other finding about the dispute that is the subject of the application.

[5] [2009] NTCA 4
[6] Olsson AJ came to the same conclusion, at paragraph [249].

[25] With specific reference to s 33(1)(a)(ii) – ie whether the application has been prepared and served in accordance with s 28 – no question arises as to whether any of the criteria set out in s 28 have been complied with. The requirements of s 28 are as follow.

> (1) 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; and
>
> (b) serve it on each other party to the contract; and
>
> (c) serve it on:
>
> (i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator; or
>
> (ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or
>
> (iii) otherwise – a prescribed appointer chosen by the party; and
>
> (d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).
>
> (2) The application must:
>
> (a) be prepared in accordance with, and contain the information prescribed by, the Regulations; and
>
> (b) state the details of or have attached to it:

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

(3) Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection.

[26] If the issue of whether the defendant was precluded from making the second and third applications were before the adjudicator, he or she would not be required to consider any of the matters in s 28, that is to say whether:

(a) the application was made within the time limits specified; or

(b) whether the other, more formal, requirements of s 28 had been met.

Rather, the question before the adjudicator would be the one before this Court (apart from the discretionary arguments) that is to say:

(i) whether (the facts not being in dispute), as a matter of law, on the true construction of s 27, that section precludes a person who has previously withdrawn an application for adjudication from bringing a fresh application in respect to the same payment dispute; and

(ii) if so, whether the first "application" was in fact an application for adjudication within the meaning of the prohibition in s 27.

[27] Thus stated, it does not seem as though this is the kind of decision the Act contemplates being made by the adjudicator, let alone a "core function" such as those set out in s 33(1). Rather it looks like an appropriate question to be dealt with by the Supreme Court, bearing in mind that not all adjudicators appointed under the Act are legally qualified.

[28] Mr Wyvill for the defendant submitted that I ought to read s 33(1) as though the words "(not precluded from making an application by s 27)" appeared after the words "a party" in line 1. That would introduce into s 28 [and thus into s 33(1)] the decision about whether a person is precluded by s 27 from making an application. I see no reason to insert words into s 28.

[29] Moreover, the issue of whether or not the defendant is entitled to make an application at all under the legislation is logically one to be answered prior to the appointment of an adjudicator. All in all, I do not think it can be said, on a fair reading of the Act, to be a question which the legislature intended to be answered by an adjudicator to the exclusion of the court.

[30] Dealing briefly with the plaintiff's contention that an adjudicator has no part at all to play in any determination of whether a person is precluded by s 27 from bringing an application for adjudication, that it is, in effect "none of his business", that is clearly stating the position far too broadly, more broadly indeed than is necessary to support the proposition that the court ought not decline to make the declaration sought on discretionary grounds.

[31] There is longstanding, uncontroversial authority that a tribunal necessarily has jurisdiction to determine questions upon which its jurisdiction depends, albeit obviously not conclusively. However, it does not follow, simply because an adjudicator would have jurisdiction to deal with the issue should it arise before him or her (subject to the prospect of possible judicial review in the case of error) that this Court should not determine the matter if asked and issue an appropriate declaration.

[32] So far as other discretionary considerations are concerned, Mr Wyvill submitted (in general terms) that if the court were to entertain applications for declarations that s 27 precluded the making of particular applications, that would result in the inability to preserve the status quo in the event of an appeal. The argument was as follows.

(a) The time limits under the Act continue to run without possibility of extensions of time.

(b) An application to the court might be made when the relevant time limits were about to expire. (I was told from the bar table that the relevant time limit would not expire for 25 days in this case, but was urged to consider what might be the case in other matters.)

(c) Therefore, if the court made a declaration that the defendant did not have the right to make the second and third applications, the defendant would ask for a stay of that order, allowing the adjudication to proceed

in any event, there being no other method of preserving the subject matter of the appeal.

(d) Assuming the adjudicator followed the decision of the court, holding that the second and third applications were not validly made and hence dismissing the application for adjudication without enquiring into the merits under s 33(1)(a)(ii), the defendant would then appeal to the Local Court under s 48 and the same question would be before the Local Court and the Court of Appeal.

[33] I do not say that the fact that time limits under the Act might be about to expire might not be a relevant consideration in a particular case, but I do not accept that this is a principle of general application; nor do I accept that it has particular application in this case, or provides a compelling reason for refusing a remedy to the plaintiff on discretionary grounds.

[34] The plaintiff argued that this case involves a short discrete issue on a question of law (there being no dispute about the relevant facts) and that convenience and expense (in particular the saving of time and expense for the plaintiff in responding to the purported second and third applications) favour an immediate decision by the Court.[7] I agree.

[35] In all of the circumstances I do not think I should decline to entertain this application on discretionary grounds.

[7] See *Alcan Gove Development Pty Ltd v Thiess Pty Ltd* [2008] NTSC 12 per Angel J at [23]

Does s 27 preclude the bringing of the second and third applications?

[36] Section 27 of the Act provides:

> If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless:
>
> (a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2); or
>
> (b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract.

[37] There are two questions for determination on this issue.

[38] The first issue is one of interpretation raised by the defendant. The defendant submits that s 27, properly construed, refers only to applications which remain in existence at the time a subsequent application is made. In support of this submission (no doubt because the literal meaning of the words does not support the construction contended for) counsel for the defendant placed heavy emphasis on the principle that when construing a statute, "context" (including the mischief the statute was intended to remedy) should be considered in the first instance, not merely at some later stage when ambiguity may have been detected; also that inconvenience or

improbability of result may lead to the court favouring an alternative construction over the literal meaning of the words.[8]

[39] The principle is not in doubt, but I do not think it has particular application in the present case. Section 26 sets out the object of Part 3 of the Act (which deals with adjudication of disputes). It states that the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible. It is difficult to see how this object would be advanced by a construction of s 27 that allowed a party to withdraw an application for adjudication and then make as many further applications (within the time frames set out in the Act) as it chose. When pressed, the only particular utility Mr Wyvill could point to for acceptance of the proposed construction was that it might encourage respondents to be more reasonable in responding to requests by applicants for two or more payment disputes to be adjudicated together.

[40] The plaintiff relies on the literal meaning of the words in s 27: "any party to the contract may apply to have the dispute adjudicated under this Part unless … an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to ss 31(6A) and 39(2)."

[41] There is nothing in the section to suggest that the prohibition on making an application where "an application for adjudication has already been made" is

[8] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1995-97] 187 CLR 384 at 408

intended to be limited to the case where the previous application is still on foot. The plaintiff submitted that the meaning is plain on its face. If an application "has already been made" – at any time in the past – the party may not make another application, subject only to the two exceptions set out in the section. Section 31(6A) covers the case where an adjudicator has been disqualified, and s 39(2) covers the situation in which the time limited for the adjudicator to make a determination has expired without a determination having been made and the legislation deems the application to have been dismissed. In both cases the adjudication process has been brought to an end without a result through no fault of the parties.

[42] Counsel for the plaintiff also relied on the fact that when s 27 was amended in 2009 to include reference to s 31(6A),[9] the legislature did not include as a third exception in s 27, "s 28A" – the section allows an applicant to withdraw an application in the circumstances set out in that section.[10]

[43] In my view s 27 should not be construed as limited in its effect in the manner contended for by the defendant.

[44] The next question for determination is whether the first application is, as contended by the defendant, a "non-application" – ie invalid and not therefore an application within the meaning of s 27 because it sought an adjudication of more than one payment dispute.

---

[9] *Justice and Other Legislation Amendment Act* 2009

[10] Section 28A was introduced by the *Justice Legislation Amendment Act (No 2)* 2007, before the amending Act which introduced s 31(6A) and amended s 27.

[45] The defendant contends that although the first application was initially an application for an adjudication, once the plaintiff refused to consent to the two payment disputes being dealt with together, it ceased to be an application. Mr Wyvill characterised it as having "conditional validity" and submitted that once the event giving rise to invalidity occurred (namely the withholding of consent by the plaintiff to the adjudicator dealing with both payment claims together) the "application" thereafter had "no existence for all purposes". I do not see how this could be said to be the case. It is, on the face of it, an application for adjudication and was clearly intended by the defendant to be such.

[46] I note that an application which has not been filed in accordance with s 28 is nevertheless "an application" for the purposes of s 33(1), and the Act does not allow a fresh application to be made where an "application" has been dismissed by an adjudicator without a determination on the merits under s 33(1)(a)(ii). Section 31(1)(a) provides:

> (1) 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) the contract concerned is not a construction contract; or
>
> (ii) the application has not been prepared and served in accordance with section 28; or (the other matters in s33(1) are made out). [emphasis added]

[47] Further, the first application did indisputably have some operative effect. It resulted in the appointment of an adjudicator,[11] in the adjudicator becoming entitled to remuneration in accordance with the Act;[12] and in the plaintiff and defendant becoming jointly and severally liable to pay the costs of the adjudication.[13]

[48] The first application was an application. It is just that the adjudicator was precluded from determining both payment disputes contained in the application together without the consent of the plaintiff, which was not forthcoming.[14] Mr Wyvill complained that such a result subjects applicants to a form of Russian roulette. They gamble on including more than one payment dispute in an application for an adjudication and, if consent is not forthcoming from the other party, the applicant is precluded from obtaining an adjudication on those disputes altogether. The answer to that is that the gamble is one of the defendant's own making. The law is clear – an adjudicator may not adjudicate two or more payment disputes simultaneously without the consent of the other party – and the defendant chose to take the risk of making an application for adjudication containing two distinct payment disputes without first asking the plaintiff if it would

[11] Section 30
[12] Section 46(1) and (1A)
[13] Section 46(4)
[14] See also *M & P Builders Pty Limited v Norblast Industrial Solutions Pty Ltd & Anor* [2014] NTSC 25 per Southwood J at [47]

consent to this course.[15] (It must also be borne in mind that the loss of the opportunity to adjudicate a payment dispute under the Act does not entail the loss of any substantive rights.)

[49] In my view, s 27 does apply to preclude the defendant from making the second and third applications. They have not, therefore, been validly made and are of no effect under the Act.

****

[15] This submission also assumes that the plaintiff's solicitors were correct in stating in their letter of 20 September 2014 that it would not have been possible for the defendant to withdraw that part of the first application relating to one of the payment claims. That matter was not argued before me and I express no opinion on it.