K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor
[2011] NTCA 1

PARTIES:	K & J BURNS ELECTRICAL PTY LTD (ABN 68 009 633 827) v GRD GROUP (NT) PTY LTD (ABN 42 009 645 498) AND: BRIAN GALLAUGHER
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	44 of 2010 (21014265)
DELIVERED:	21 January 2011
HEARING DATE:	6 September 2010
JUDGMENT OF:	SOUTHWOOD AND KELLY JJ AND OLSSON AJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT 2004 (NT) – Determination by adjudicator as to monies payable by contractor to sub-contractor under construction contract – application to single Judge for judicial review – declaration by him that adjudicator jurisdiction not enlivened save as to balance of retention fund payable to appellant under relevant contract – whether impugned summary invoice constituted a

payment claim giving rise to a payment dispute under the Act which was properly the subject of adjudication – whether prior invoices rendered constituted valid payment claims under cl 12.2 of contract – consideration of mandatory requirements of that clause – whether, if valid payment dispute did not arise in relation to claims for monies payable in respect of work done, it nevertheless remained open to trial Judge to uphold adjudication for payment of balance of retention monies unpaid.

Building and Construction Industry Security of Payment Act 1999 (NSW) s 9, s 11, s 13, s 17, s 22
Building and Construction Industry Security of Payment Act 2009 (Tas)
Construction Contracts Act 2004 (WA) s 25
Construction Contracts (Security of Payments) Act 2004 (NT) s 4, s 8, s 27, s 28(1), s 29, s 29(2), s 33, s 33(1)(a)(ii), s 33(2), s 33(3)
Housing Grants, Construction and Regeneration Act 1966 (UK) s 108(1) & s 108(6)

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another (2009) 25 NTLR 14
Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6; [1969] 2 AC 147, 171
Attorney-General (NSW); Ex rel McKellar v Commonwealth (1977) 139 CLR 527
Australian Communications Exchange Ltd v Deputy Commissioner of Taxation (2003) 201 ALR 271
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485
Brodyn Pty Ltd (t/as Time Cost and Quality) v Davenport (2004) 61 NSWLR 421
Buck v Bavone (1976) 135 CLR 110
Byrnes v Groote Eylandt Mining Co Pty Ltd (1990) 19 NSWLR 13
R v Carey; Ex parte Exclude Holdings Pty Ltd (2006) 32 WAR 501
Chase Oyster Bar v Hamo Industries [2010] NSWCA 190
CIB Properties Ltd v Birse Construction Ltd (QBD) [2005] 1 WLR 2252
Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) NSWLR 448
R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364
Craig v South Australia (1995) 184 CLR 163
Ellerine Bros (Pty) Ltd v Klinger [1982] 1 WLR 1375

Energy Resources of Australia Ltd v Commissioner of Taxation (2003) ATC 4024
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd (1978) 142 CLR 113
R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190
Halki Shipping Corporation v Sopex Oils Ltd [1998] 1 WLR 726
Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd (2008) 24 NTLR 15
Jennings v Credit Corp Australia Pty Ltd as assignee from Citicorp Person to Person Financial Services Pty Ltd (2000) 48 NSWLR 709
Jones and Another v Territory Insurance Office (1988) NTR 17
Kirk v Industrial Relations Court of New South Wales (2010) 239 CLR 531
Maxwell v Murphy (1957) 96 CLR 261
Minister for Immigration Affairs v Eshetu (1999) 197 CLR 611
O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2009] WASC 19
Pedersen v Young (1964) 110 CLR 162
Pegram Shopfitters Ltd v Tally Weijl (UK) [2004] 1 WLR 2082
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
Re Roberts and Repatriation Comm (1992) 27 ALD 408
R v Tkacz (2001) 25 WAR 77
Roberts v Repatriation Comm (1992) 111 ALR 436
Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another (2008) 23 NTLR 123
Wang v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 386

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC and D Alderman
First Respondent:	W Roper and T Liveris

Solicitors:

Appellant:	Ward Keller
First Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	Sou1102
Number of pages:	110

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

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[2011] NTCA 1
No. 44 of 2010 (21014265)

BETWEEN:

K & J BURNS ELECTRICAL PTY LTD
(ABN 68 009 633 827)
Appellant

AND:

GRD GROUP (NT) PTY LTD
(ABN 42 009 645 498)
First Respondent

AND:

BRIAN GALLAUGHER
Second Respondent

CORAM: SOUTHWOOD AND KELLY JJ AND OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 21 January 2011)

SOUTHWOOD J:

Security of payments legislation

[1] All State and Territory legislatures in Australia have enacted security of payments legislation[1] to address the problem of inadequate security of payment for contractors in the building and construction industry. The

[1] Tasmania was the last State to enact such legislation. The *Building and Construction Industry Security of Payment Act 2009* (Tas) was given Royal Assent on 17 December 2009.

problem was highlighted again by the Royal Commission into the Building and Construction Industry[2]. The object of security of payments legislation is to facilitate timely payment between parties to construction contracts and thereby overcome cash flow problems faced by many contractors and subcontractors during the course of fulfilling their contractual obligations. The goal is to ensure participants in the industry are paid in full and on time. To achieve its objects, security of payments legislation deliberately and intentionally interferes with the freedom to contract which parties to construction contracts would otherwise enjoy.

[2] To provide a proper context in which to resolve the issues that arise in this appeal, it is useful to briefly consider the two models of security of payments legislation which have been enacted by the State and Territory legislatures in Australia[3] because the statutory adjudication scheme established by each model is markedly different. Before doing so, it should be noted that broadly there are two types of money claims which can arise out of a construction contract. One is a claim for debt payable under the contract. The other is a claim for damages for breach of contract. Further, to try and facilitate timely payments the parties to construction contracts have created contractual procedures for making progress claims.

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[2] The Honourable T Cole RFD QC, Final Report of the Royal Commission into the Building and Construction Industry (2002), Vol 1, p 6, Vol 8, p 229.

[3] Although there are two basic legislative models, it is also true that the differences between the various Acts in the different Australian jurisdictions are multiplying.

[3] The first model of security of payments legislation which was adopted in Australia is the model which was enacted in New South Wales, Victoria, Queensland, South Australia and Tasmania[4]. This model was first introduced in Australia by the *Building and Construction Industry Security of Payment Act 1999* (NSW). The role of the adjudicator under this model is largely that of a statutory certifier. The adjudicator essentially determines the amount of the progress payment due but does not decide any claims for debt or damages. The model gives the person or entity that has undertaken to carry out construction work under a construction contract a statutory right to progress payments, a mechanism for ensuring that a contractor carrying out construction work is able to have the amount of progress payment decided by an adjudicator, and a right to obtain judgment for that amount. The only party who may make an application for adjudication under this model is the person who has undertaken to carry out construction work under the construction contract[5].

[4] Under the *Building and Construction Industry Security of Payment Act 1999* (NSW), a person who has undertaken to carry out work under a construction contract is granted a statutory right to progress payments[6]. The amount of a progress payment to which a person is entitled is the amount to be calculated in accordance with the terms of the contract, or if the contract makes no

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[4] This model of security of payments legislation is sometimes referred to as the 'East Coast model'. See for example, M Bell and D Vella, "From motley patchwork to security blanket: The challenge of national uniformity in Australian 'security of payment' legislation" (2010) 84 ALJ 565.

[5] All of the security of payments legislation which has been enacted in each Australia jurisdiction also provides for payment claims for the supply of goods to a construction site. However, it is unnecessary to deal with these provisions in this case.

[6] s 8 *Building and Construction Industry Security of Payment Act 1999* (NSW).

express provision with respect to the matter, the amount calculated on the basis of the value of the construction work carried out or undertaken to be carried out by the person under the contract[7]. A progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract, or if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 of the Act[8]. A person who is or who claims to be entitled to a progress payment may serve a payment claim on the person who is or may be liable to make the payment under the construction contract[9] and only a claimant may apply for adjudication of a payment claim[10]. An adjudicator is to determine the amount of the progress claim (if any) to be paid by the respondent to the claimant, the date on which any such amount became or becomes payable and the rate of interest payable on such an amount[11].

[5] The second model of security of payments legislation which was introduced in Australia was originally introduced in England[12] by Part II of the *Housing Construction and Regeneration Act 1996 (UK)*[13]. Similar legislation was

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7 s 9 *Building and Construction Industry Security of Payment Act 1999* (NSW).
8 s 11 *Building and Construction Industry Security of Payment Act 1999* (NSW).
9 s 13 *Building and Construction Industry Security of Payment Act 1999* (NSW).
10 s 17 *Building and Construction Industry Security of Payment Act 1999* (NSW).
11 s 22 *Building and Construction Industry Security of Payment Act 1999* (NSW).
12 The history of events leading up to the passing of the Act in England is set out by May LJ in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 WLR 2082.
13 Section 108(1) & (6) of the *Housing Grants, Construction and Regeneration Act 1996* (UK) provide that a party to a construction contract has the right to refer "a dispute arising under a contract" for adjudication and specify the relevant scheme of adjudication.

then introduced in Western Australia and the Northern Territory[14]. The *Construction Contracts (Security of Payments) Act 2004* (NT) is largely based on the *Construction Contracts Act 2004* (WA)[15]. Under the adjudication procedure established by this model of legislation, a payment claim is not limited to one specific type of money claim under a construction contract; and any party to a construction contract may refer a disputed payment claim to an adjudicator for determination[16]. Thus, principals are not barred from raising claims for liquidated damages or delay or disruption costs or for the costs of remedial works. The process mirrors a court process. The adjudicator makes an assessment on the balance of probabilities about what has already occurred under the construction contract with respect to a payment claim.

[6] Under the *Construction Contracts (Security of Payments) Act 2004* (NT) a payment claim is a claim made 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 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]. A payment dispute arises if: (1) the amount claimed in a payment claim has not been paid in

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[14] This model of security of payments legislation is sometimes referred to as the 'West Coast model'. See for example, M Bell and D Vella, "From motley patchwork to security blanket: The challenge of national uniformity in Australian 'security of payment' legislation" (2010) 84 ALJ 565.

[15] Northern Territory, Legislative Assembly, *Parliamentary Record No 22* (14 October 2004) (Second Reading Speech of the Minister of Justice and Attorney-General, Dr Peter Toyne, on the *Construction Contracts (Security of Payments) Bill 2004* (NT).

[16] s 27 *Construction Contracts (Security of Payments) Act 2004* (NT); s 25 *Construction Contracts Act 2004* (WA).

[17] s 4 *Construction Contracts (Security of Payments) Act 2004* (NT).

full by the date it is due to be paid under the contract, or the claim has been rejected or wholly or partly disputed; (2) an amount retained by a party under the contract has not been paid when it was due to be paid under the contract; (3) any security held by a party under the contract has not been returned when it is due to be returned under the contract[18]. If a payment dispute arises under a construction contract, any party to the contract may apply to have the payment dispute adjudicated by an adjudicator appointed under the Act (unless an application for an adjudication has already been made by a party; or 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 the matter arising under the contract)[19]. Within 10 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on the applicant, any other party that has been served with the application, and the adjudicator[20]. The response must provide the details of any rejection or dispute of the payment claim that has given rise to the payment dispute and state or have attached to it all of the information, documents and submissions on which the responding party relies[21]. An appointed adjudicator must dismiss the application for adjudication without making a determination of its merits if: (1) the contract concerned is not a construction contract; (2) the application has not been prepared and served

[18] s 8 *Construction Contracts (Security of Payments) Act 2004* (NT).
[19] s 27 *Construction Contracts (Security of Payments) Act 2004* (NT).
[20] s 29 *Construction Contracts (Security of Payments) Act 2004*(NT).
[21] s 29(2) *Construction Contracts (Security of Payments) Act 2004* (NT).

in accordance with s 28 of the Act; (3) an arbitrator or other person or court or body dealing with the matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or (4) the adjudicator is satisfied that it is not possible to fairly make a determination. Otherwise, the adjudicator is 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, if so, determine the amount to be paid, or security to be returned, and any interest payable on it and the date on or before which the amount must be paid or the security must be returned[22].

[7] The scope of application of both models of security of payments legislation is similar. Both models of legislation apply throughout the contractual chain and the scope of their application is governed by the type of contract made between the parties. All of the Acts in each of the various Australian jurisdictions apply to payment disputes involving construction contracts. Broadly speaking, a construction contract is a contract under which one or more of the parties has undertaken to do construction work or to supply goods or professional services to a construction site. The various legislatures have limited the scope of the application of the Acts by industry sector or type of contract rather than, for example, relative bargaining power or contract value.

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[22] s 33 *Construction Contracts (Security of Payments) Act 2004* (NT).

[8] As the decisions of the courts in the Eastern States of Australia involve security of payments legislation which is materially different to the security of payments legislation in the Northern Territory and Western Australia, the decisions of the courts in the Eastern States do not engage the principle that this Court should not depart from decisions of intermediate appellant courts in other jurisdictions[23].

The appeal

[9] On 23 April 2010 at the completion of adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT), the second respondent delivered a Determination that under the Subcontract made between them, the first respondent was liable to pay the appellant the following amounts: $73,922.75 including GST, interest of $1,254.66 to the date of the Determination, and interest accruing at the rate of $21.27 per day until payment was made. On 28 June 2010 the Judge at first instance declared that so much of the Determination of the second respondent that related to the payment of an amount in excess of $7,911.17 and interest thereon was void. His Honour also stayed the enforcement of the payment of any amount in excess of $7,911.17.

[10] The appellant has appealed against the judgment at first instance. There are three grounds of appeal. (1) The second respondent was right when he determined that the appellant's six unpaid tax invoices were not payment

[23] As to the principle, see *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at par [135].

claims within the meaning of the *Construction Contracts (Security of Payments Act 2004* (NT) and the Judge at first instance erred in holding to the contrary. (2) Alternatively, if the second respondent was wrong when he determined that the appellant's unpaid tax invoices were not payment claims within the meaning of the *Construction Contracts (Security of Payments) Act 2004* (NT) then such an error was not a jurisdictional error. (3) Further and alternatively, the *Construction Contracts (Security of Payments) Act 2004* (NT) permits repeat claims where a construction contract expressly provides for repeat claims and the Judge at first instance erred in holding to the contrary.

The facts

[11] The Judge at first instance made the following findings of fact[24].

[12] On 25 February 2009 the appellant entered into a subcontract[25] with the first respondent to undertake electrical works on land situated at Lot 7100 Brewery Lane, Woolner in the Northern Territory of Australia for a lump sum price of $354,860. The Subcontract was a construction contract. Throughout the course of the Subcontract, the appellant submitted 13 tax invoices to the first respondent for progress payments totalling $393,274.51. The total sum included claims for extras or variations totalling $38,414.50.

[13] The first respondent paid the progress payments claimed by the appellant in the first seven tax invoices totalling $309,959.47. The first respondent did

[24] I have taken the liberty of setting out Mildren J's findings of fact almost verbatim.
[25] Herein referred to as "the Subcontract".

not pay the last six tax invoices rendered by the appellant leaving a balance allegedly due and payable under the Subcontract of $83,315.04. Under cl 4 of the Subcontract, the first respondent was entitled to retain a portion of the monies payable to the appellant under the Subcontract as security. Relying upon cl 4 of the Subcontract, the first respondent withheld payment of $17,743.

[14] Disputes arose between the appellant and the first respondent which resulted in claims being made by the first respondent for back charges for the cost of remedial works and for liquidated damages for late completion. As a result, on 28 February 2010 the appellant served on the first respondent a Summary Invoice No ST4289 dated 25 January 2010 entitled "PAYMENT CLAIM IN ACCORDANCE WITH CLAUSE 12.2 OF THE CONTRACT". The Summary Invoice listed the 13 tax invoices previously rendered by the appellant, the amount claimed under each invoice, the amount paid in respect of each invoice and the total amount owing. It also set out a summary of the amounts held in retention and how much of the retention monies could be retained under cl 4 of the Subcontract. The Summary Invoice claimed $83,315.04 less retentions of $9,831.86 leaving a balance of $73,483.98. The Summary Invoice did not include any claims for amounts which were not previously the subject of the 13 tax invoices rendered by the appellant nor was it suggested that any further work had been undertaken by the appellant.

[15] Clause 12.2 of the subcontract states:

> **12.2 Payment Claims.** The Subcontractor must give GRD Group NT Pty Ltd **claims for payment of the Subcontract price:** [emphasis added]
>
> (a) at the time stated in the Subcontract Particulars;
>
> (b) in the format GRD Group NT Pty Ltd requires;
>
> (c) which include the evidence reasonably required by GRD Group NT Pty Ltd of the value of work completed in accordance with the subcontract and the amount claimed;
>
> (d) which sets out the total value of the work completed in accordance with the Subcontract to the date of the claim, the amount previously paid to the subcontractor and the amount then claimed;
>
> (e) which are based on the Schedule of Rates and Prices to the extent it is relevant;
>
> (f) which includes such documentary evidence that GRD Group NT Pty Ltd may require that all persons engaged or employed by the Subcontractor in connection with the works have been paid all monies due and payable to them in connection with their work, as at the date of the payment claim.

[16] Clauses 12.3 and 12.4 of the subcontract state:

> **12.3 Payment Statements. N/A**
>
> **12.4 Payment.** Subject to clauses 4.1 and 12.6 and CONTRACTOR'S receipt of payment from the Principal for the items claimed, CONTRACTOR must within the time period stated in the Subcontract Particulars of receiving payment from the Principal in respect of the works specified in the payment statement, pay the Contractor the amount set out as then payable in the payment statement.

[17] It was common ground between the parties that cl 12.4 of the Subcontract has no effect because it is a provision that is prohibited by s 12 of the

Construction Contracts (Security of Payments) Act 2004 (NT). By virtue of s 20 and cl 6 of Div 5 of the Schedule to the Act, the time for payment stipulated by the Subcontract was within 28 days of the receipt of a payment claim.

[18] On 2 March 2010 the first respondent sent a reconciliation statement to the appellant which claimed that the appellant was indebted to the first respondent in the sum of $19,989.07.

[19] On 23 March 2010 the appellant lodged an application with the Law Society of the Northern Territory applying for adjudication under the *Construction Contracts (Security of Payments) Act 2004* (NT). The application was served on the first respondent on 24 March 2010. On 31 March 2010 the Law Society of the Northern Territory appointed the second respondent the adjudicator of the dispute between the appellant and the first respondent. On 23 April 2010, after the receiving submissions from the parties, the second respondent delivered the Determination referred to in par [9] above.

[20] The approach taken by the second respondent in his Determination was to consider cl 12.2 of the subcontract and see if the requirements of the subclause had been met on each occasion that a tax invoice had been rendered by the appellant. He adopted this approach because the first respondent submitted that: (1) each of the tax invoices submitted by the appellant were payment claims; (2) the Summary Invoice was not a payment claim; (3) in any event, a repeat payment claim cannot be made under the

Construction Contracts (Security of Payments) Act 2004 (NT); and (4) the payment disputes in relation to the six unpaid tax invoices each arose more than 90 days before the appellant's application for adjudication was prepared and served on the first respondent. There was no dispute that this was so if each of the tax invoices amounted to a payment claim.

[21] The second respondent found that each of the unpaid tax invoices rendered by the appellant failed to comply with cl 12.2(d) of the subcontract because none of the unpaid tax invoices set out the total value of work completed in accordance with the Subcontract or nominated the amount previously paid to then yield the amount claimed. Each of the tax invoices is a stand alone document relating solely to the work as listed or nominated for the relevant period.

[22] After stating that the Act defines a 'payment claim' as 'a claim made under a construction contract', the second respondent held that strict compliance with cl 12.2 of the subcontract was a necessary requirement of a valid payment claim. As none of the appellant's six unpaid tax invoices complied with cl 12.2(d) of the subcontract, he held that none of the tax invoices were payment claims within the meaning of the *Construction Contracts (Security of Payments) Act 2004* (NT). Further, as the unpaid tax invoices were not payment claims no payment dispute had arisen about those invoices.

The issues

[23] There are three principal issues in the appeal. (1) Did the second respondent misconstrue cl 12.2 of the subcontract and the definition of 'payment claim' in s 4 of the *Construction Contracts (Security of Payments) Act 2004* (NT)? (2) Did the disputes about the payment claims listed in Summary Invoice No ST4289, which are identical to the claims made in the appellant's six unpaid tax invoices, arise more than 90 days before the appellant's application for adjudication was prepared and served on the first respondent? (3) If so, was the second respondent's decision not to dismiss the appellant's application a jurisdictional error?

[24] In my opinion, the answer to each of the questions in par [23] above is yes. The second respondent's erroneous construction of cl 12.2 of the Subcontract and the definition of 'payment claim' in s 4 of the *Construction Contracts (Security of Payments) Act 2004* (NT) were jurisdictional errors as they led the second respondent to make a determination beyond his power. The second respondent had no power to make a determination on the merits of the appellant's application because the appellant's right to apply for adjudication had been destroyed as his application was not prepared and served within the time stipulated by s 28(1)(a) and (b) of the Act.

[25] The second respondent made a jurisdictional error when he determined that the appellant's application complied with s 28(1)(a) and (b) of the *Construction Contracts (Security of Payments) Act 2004* (NT). He wrongly found each of the six unpaid tax invoices were unable to give rise to a

payment dispute under the Act because they were non-compliant with cl 12.2(d) of the Subcontract. In so doing the second respondent fundamentally misconstrued the relevant provisions of the Subcontract because he failed to have regard to the terms that were implied into the Subcontract by the Act which is an error of law[26]. He also misinterpreted the definition of 'payment claim' within s 4 of Act and he mistakenly asserted the existence of jurisdiction under the Act. An essential pre-condition to the exercise of an adjudicator's jurisdiction under the Act had not been satisfied because the appellant's application had not been prepared and served in accordance with the provisions of s 28(1)(a) and (b) of the Act. Accordingly, under s 33 of the Act the second respondent was required to dismiss the application without making a determination on the merits. The use of the word "must" in s 33(1) of the Act is not merely directory but is a word of absolute obligation and an adjudicator has no jurisdiction to determine an application on the merits unless the application has been prepared and served in accordance with s 28 of the Act[27].

Jurisdictional error

[26] In *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another*[28] this Court held that the Supreme Court of the Northern Territory may review an adjudicator's determination notwithstanding the provisions of

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[26] The misconstruction of a written contract is an error of law: *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 per Gleeson CJ at [7]; *Jennings v Credit Corp Australia Pty Ltd (as assignee from Citicorp Person to Person Financial Services Pty Ltd* (2000) 48 NSWLR 706 at 713 per Santow JA.

[27] *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386 at 391 B – D; *Posner v Collector for Inter-state Destitute Persons (Vic)* (1946) 74 CLR 461 at 490

[28] (2009) 25 NTLR 14.

s 48 of the *Construction Contracts (Security of Payments) Act 2004* (NT).

In that case Mildren J stated:

> Section 48(3) of the Act contains a privative clause. Except as provided by s 48(1) (which applies only where the adjudicator dismisses the application under s 33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act: [*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [57]]. I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*, I held that the decision of an adjudicator who wrongly determined whether the 90-day time-limit had been complied with, was not void. The judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits[29].

[27] In support of the above propositions Mildren J relied on the following passage in the reasons for decision of the majority of the members of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth*[30]:

> It should be noted at once that, in the passage last quoted, Dixon J was not speaking of reg 17, but of privative clauses generally. Even so, it is important to appreciate that his Honour's observations were confined to "decision[s] ... in fact given". Moreover and as later decisions of this Court have made clear, the expression "reasonably capable of reference to the power given to the body", has been treated as signifying that it must "not on its face go beyond ... power". *Thus, even on this general statement,* ***a privative clause cannot protect against a failure to make a decision required by the legislation*** *in which that clause is found or against a decision which, on its face, exceeds jurisdiction* [emphasis added].

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[29] *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 14 per Mildren J at par [13].

[30] (2003) 211 CLR 476 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [57].

[28] The above principle has been further confirmed by the decision of the High Court of Australia in *Kirk v Industrial Relations Court of New South Wales*[31]. The legislative assembly cannot validly take from a Supreme Court the power to grant relief on account of jurisdictional error.

[29] In accordance with these principles and based on the decisions of the High Court in a number of cases including *Minister for Immigration Affairs v Eshetu*[32]; R v *Federal Court of Australia; Ex parte WA National Football League*[33]; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd*[34]; *Buck v Bavone*[35]; and *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[36], I held in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another*[37] that:

> The structure of s 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met. The prescribed criteria being those set out in s 33(1)(a)(i)-(iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.
>
> The statutory criteria set out in s 33(1)(a)(i)-(iv) are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of the law. A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of

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[31] (2010) 239 CLR 531.
[32] (1999) 197 CLR 611 per Gummow J at par [127] to par [140].
[33] (1979) 143 CLR 190 at 214.
[34] (1978) 142 CLR 113 at 125.
[35] (1976) 135 CLR 110 at 118 to 119.
[36] (1944) 69 CLR 407 at 430.
[37] (2009) 25 NTLR 14.

> jurisdiction if he made a determination of an application on the merits. The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists.
>
> Such a construction of s 33(1) of the Act is based in the first instance upon the text of the section. Section 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s 33(1)(a)(i)-(iv) are not fulfilled. The criteria themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. The express purpose of the Act is confined to promoting the security of payments under construction contracts. The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.

[30] Upon further consideration[38], I am of the opinion that what I previously stated about the relevant jurisdictional fact, or the essential condition of the exercise of an adjudicator's jurisdiction to determine an application on the merits, is based upon a construction of s 33(1)(a) of the *Construction Contracts (Security of Payments) Act* (NT) that is too circumscribed. In a desire to achieve a uniform approach to each of the prescribed criteria in s 33(1)(a) of the Act, I gave too much weight to the wording of s 33(1)(a)(iv) of the Act. Whereas the text of each of the criteria contained in s 33(1)(a)(i) to (iii) of the Act suggests that those criteria are quite discrete. The relevant jurisdictional facts are the specific matters referred to

[38] In this regard, I have found Mr Ford's paper very helpful: C Ford, "(In) Security of Payments" (2010) 1 NTLJ 165. However, adjudicators like Sewer Commissioners of centuries ago: LL Jaffe and E G Henderson, "Judicial Review and the Rule of Law" (1956) 72 LQR 345, are subject to the rule of law and the principle of legality.

in each of s 33(1)(a)(i) to (iii) of the Act. The existence of each of those criteria is an essential condition of an adjudicator's jurisdiction to adjudicate a payment dispute on the merits. The stem of s 33(1)(a) is expressed in mandatory terms. The legislature has used the words, "must dismiss the application without making a determination on the merits". Further, as to s 33(1)(a)(i) of the Act, s 9(1) of the Act states, "this Act applies to a construction contract entered into after the commencement of this section"; and s 27 of the Act confines the right to apply for adjudication to a dispute arising under a construction contract. As to s 33(1)(a)(ii) of the Act, s 28(1)(a) and (b) of the Act states, "to apply to have a payment dispute adjudicated, a party to the contract **must,** within 90 days after the dispute arises … prepare a written application for adjudication and serve it on each party to the contract. As to s 33(1)(a)(iii) of the Act, s 27(b) provides, "if a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated … unless: 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 the matter arising under the contract." Further still, each of the criteria in s 33(1)(a)(i) to (iv) involves an integral part of the security payments system established by the Act and is fundamental to the achievement of the object of the Act.

[31] In practice there will be little difference in outcome as a result of applying one rather than the other interpretation of what is the relevant jurisdictional fact. Invariably, where an adjudicator finds an application which has been

served out of time, to be served within time, he or she will have a state of satisfaction which is based on a misconstruction of the Act or a misunderstanding of the law. Applying the principles that were enunciated by the Court of Appeal in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another*[39], Mildren J came to the correct conclusion in the court below. Further, what I stated in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another*[40] would still apply to criteria specified in s 33(1)(a)(iv) of the Act.

[32] The consequence of the construction of s 33(1)(a) of the *Construction Contracts (Security of Payments) Act 2004* (NT) which I have outlined above, is that I have come to the conclusion that *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*[41] was wrongly decided. I have hesitated long before doing so as Mildren J is a very eminent judge of this Court. However, his Honour's decision was based on Hodgson JA's decision in the New South Wales Court of Appeal in *Brodyn Pty Ltd (t/as Time Cost and Quality) v Davenport*[42] and the New South Wales Act has different provisions to the Northern Territory Act.

[33] Subsection 17(2) of the *Construction Industry Security of Payment Act 1999* (NSW) states:

> (2) An adjudication application to which subsection (1)(b) applies ***cannot be made*** unless:

[39] (2009) 25 NTLR 14.
[40] (2009) 25 NTLR 14.
[41] (2008) 24 NTLR 15.
[42] (2004) 61 NSWLR 421 at 441-443 [54] – [58].

(a) the claimant has notified the respondent within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within five business days after receiving the claimant's notice.

[34] The words, 'cannot be made', which appear in the stem of s 17(2) of the *Construction Industry Security of Payment Act 1999* (NSW) are of similar effect to the words, 'are not maintainable', which are used in Limitation Acts and have been held not to be substantive provisions[43]. As such provisions are not substantive it follows that they may be found to be a non-essential pre-condition of the exercise of an adjudicator's jurisdiction. However, the provisions of the New South Wales legislation stand in stark contrast to s 28(1)(a) and (b) and s 33(1)(a)(ii) of the *Construction Contracts (Security of Payments) Act 2004* (NT) which state that an application for adjudication '**must**' be prepared and served within the prescribed time and '**must**' be dismissed by the adjudicator if it is not. Neither s 21 nor s 22 of the New South Wales Act contain any equivalent provision to s 33(1)(a)(ii) of the Northern Territory Act.

[35] In my opinion[44], having paid due regard to the whole of the security payments scheme enacted by the *Construction Contracts (Security of Payments) Act 2004* (NT) and to the nature of the role of an adjudicator under the Act, the test for jurisdictional error is that applicable to an inferior

[43] *Pedersen v Young* (1964) 110 CLR 162 at 166 – 167.
[44] Some support is found for this view in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 per Beech J at par [102] and [103].

court or analogous tribunal. There are five types of such errors[45]. First, if an inferior court or analogous tribunal mistakenly asserts or denies the existence of jurisdiction. Second, if it misapprehends or disregards the nature or limits of its function or powers in a case where it correctly recognises that jurisdiction does exist. Third, if it is an essential condition of the exercise of jurisdiction that a certain requirement has, in fact, occurred or been satisfied (sometimes referred to as a jurisdictional fact) there will be a jurisdictional error if the tribunal purports to act in circumstances where that requirement has not, in fact, occurred or been satisfied even though the matter is the kind of matter which the tribunal has jurisdiction to entertain. Fourth, jurisdictional error will occur where the tribunal disregards or takes account of some matter which the statute conferring its jurisdiction requires to be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision. Fifth, it will exceed its authority and fall into jurisdictional error if it misconstrues the statute establishing it and conferring jurisdiction and thereby misconceives the nature and function which it is performing or the extent of its powers in the circumstances of the case.

[45] *Craig v South Australia* (1995) 184 CLR 163 at 176 – 180; *Re Carey; Ex parte Exclude Holdings Pty Ltd* (2006) 32 WAR 501 per McClure JA at par [181].

[36] Of course what is said in *Craig v South Australia*[46] is now subject to the following passage in *Kirk v Industrial Relations Court of New South Wales*[47]:

> When certiorari is sought, there is often an issue about whether the decision is open to review. If "authoritative" is used in the sense of "final", a decision could be described as "authoritative" only if certiorari will not lie to correct error in the decision. To observe that inferior courts generally have authority to decide questions of law "authoritatively" is not to conclude that the determination of any particular question is not open to review by a superior court. Whether a particular decision reached is open to review is a question that remains unanswered. *The "authoritative" decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by "jurisdiction" and "jurisdictional"* [emphasis added]. It suggests that the observation that inferior courts have authority to decide questions of law "authoritatively" is at least unhelpful.

[37] As to drawing the distinction between jurisdictional error and non-jurisdictional, the following passage of the judgment of the High Court in *Re Refugee Review Tribunal; Ex parte Aala*[48] remains an important statement of principle:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. *There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do* [emphasis added]. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error

[46] (1995) 184 CLR 163 at 176 to 180.
[47] (2010) 239 CLR 531 at [70].
[48] (2000) 204 CLR 82 at 141 [163].

concerns departures from limits upon the exercise of power. The latter does not.

[38] The case before the Court is a clear case of jurisdictional error. The second respondent made a determination which he lacked power to make.

Jurisdictional error – this case

[39] In his Determination the second respondent reached the following conclusions about when the payment dispute arose in this case and whether the appellant's application for adjudication had been prepared and served in accordance with s 28(1)(a) and (b) of the *Construction Contracts (Security of Payments) Act 2004* (NT)[49]:

> Do the [tax invoices rendered by the appellant] constitute payment claims under the contract and hence payment claims under the Act *which give rise to payment disputes under the Act* [emphasis added]?
>
> The applicant's case is based primarily on this point claiming the invoices are not valid claims and hence no payment dispute under the Act can arise from these claims. The respondent argues conversely that these are the only valid claims under the contract which could give rise to payment disputes under the contract.
>
> The *Mac-Attack*[50] decisions are based on literal interpretation of the Act and the contract and do not permit any flexibility in the interpretation of the Act in relation to threshold questions which go to establishing jurisdiction. Therefore on the basis of non-compliance with clause 12.2(d) of the contract I determine each of the ten invoices nominated as non compliant claims under the Act and hence unable to give rise to a payment dispute under the Act.
>
> Do the specific provisions of clause 12.2(d) constitute an express provision in the contract for the making of repeat claims?

[49] See par [26] and par [27] of the Determination of the second respondent.
[50] *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14.

Each claim is required to describe and value the total sum of works claimed as completed at the date of the claim. The value of the individual claim is then deduced by deducting the sum of all previous payments. So if the contractor assesses the value of the work at less than that claimed in one claim then the total payments listed in the subsequent claim will be less than the total value previously claimed. In the normal course of events this difference could give rise to a payment dispute which could be the subject of an application for adjudication. Presuming the claimant wishes to persist with the claim the payment clause in the contract requires this value to be included again in the total value of the works completed to date for the subsequent claim or claims. The timing of any application for adjudication is at the discretion of the claimant and can be related to a valid payment claim submitted within the permissible 90 day time period.

I interpret the wording of clause 12.2 as not only permitting the submission of repeat claims but expressly requiring such submission prior to payment and after payment is made. The claims would only be discontinued if the claimant eventually agreed that portion of the claim was no longer valid.

Therefore even if my interpretation at 25.1 is incorrect and the earlier invoices are in fact valid claims, the contract expressly requires all claims to be repeated in each payment claim. Hence, the applicant's referral to non payment of the January invoice as a valid payment dispute under the contract is correct and the adjudicator has jurisdiction on the matter.

Contract cl 12.4 aims to define the time period within which payment should be made to the subcontractor. The particular wording is "… the CONTRACTOR must within the time stated in the subcontract particulars of receiving payment from the Principal in respect of the works specified in the payment statement pay the contractor the amount then set out in the payment statement." Aside from the fact that the payment statements are listed as N/A as clause 12.3 the remainder of 12.4 is tantamount to a pay when paid provision which is expressly prohibited by s 12 of the Act. Accordingly the time for payment under the contract becomes 28 days after the payment claim is submitted.

In relation to the 25 January 2010 invoice a payment dispute existed not earlier than 25 February 2010 and the time for submission of the application expires 26 June 2010. I therefore determine that the

Application for Adjudication complies with s 28 of the Act and confirm the adjudicator's jurisdiction.

[40] He erred in doing so. The second respondent misconstrued cl 12.2 of the Subcontract and he failed to interpret cl 12.2 in its contractual context. He disregarded the terms that were implied into the Subcontract by the *Construction Contracts (Security of Payments) Act 2004* (NT). He misconstrued the definition of 'payment claim' in s 4 of the Act and he erred in determining that the application for adjudication complied with s 28(1)(a) and (b) of the Act.

[41] Clause 12.2 of the Subcontract facilitates the making of "claims for the payment of the Subcontract price" by the subcontractor. Under the Subcontract a payment claim is a "claim for the payment of the Subcontract price". Clause 12.2 then stipulates certain procedures for the making of a payment claim. While it is true that the six unpaid tax invoices did not comply with subclause 12.2(d) of the Subcontract, under the statutorily implied terms of the Subcontract, non-compliance with cl 12.2(d), which is a procedural provision, did not result in the payment claims contained in the six unpaid tax invoices being invalid or void, nor did it mean that the amounts claimed in the six unpaid non-compliant tax invoices did not become due and payable under the Subcontract. In fact, in the circumstance of this case, the amounts claimed in each of the six unpaid tax invoices became due and payable within 28 days after they were received by the first respondent. They became due and payable because, in breach of the

statutorily implied terms of the Subcontract, the first respondent did not within 14 days of receipt of the six unpaid tax invoices serve on the appellant a notice of dispute which stated: (1) the unpaid tax invoices were rejected because they were "not in accordance with the contract", and (2) the reasons why the first respondent believed the unpaid tax invoices were not in accordance with the Subcontract.

[42] By virtue of s 12 of the *Construction Contracts (Security of Payments) Act 2004* (NT), cl 12.4 of the Subcontract was of no effect. As cl 12.4 of the Subcontract was of no effect and cl 12.3 of the Subcontract did not state when and how the first respondent must respond to a payment claim, s 20 of the Act applied to the Subcontract.

[43] Section 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) states:

> The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter:
>
> (a) **when and how a party must respond to a payment claim made by another party;**
>
> (b) by when a payment must be made.

[44] Section 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) is a section of the Act which is critical to achieving timely payments between the parties to a construction contract. The section, in effect, requires that a construction contract not only contain provisions as to when

a payment is to be made but provisions as to when and how a party must respond to a payment claim if the claim is going to be rejected or disputed. It means that if a payment claim is not in accordance with the provisions of a construction contract the respondent must give the claimant timely notice so the matter may be rectified by the claimant or the claimant can apply for adjudication if there is a dispute about whether a payment claim complies with the terms of the construction contract.

[45] As the Subcontract did not have written provisions about when and how the first respondent must respond to a payment claim made by the appellant, or by when a payment must be made, the whole of cl 6 which is contained in Div 5 of the Schedule to the *Construction Contracts (Security of Payments) Act 2004* (NT) was implied into the Subcontract. In order to determine if and when a payment claim is due and payable it is necessary to consider all of the terms of cl 6. Clause 6 determined the consequences of non-compliance with cl 12.2(d) of the Subcontract.

[46] Clause 6 in Div 5 of the Schedule of the *Construction Contracts (Security of Payments) Act 2004* (NT) states:

> (1) This clause applies if:
>
> (a) a party receives a payment claim under this contract; and
>
> (b) the party:
>
> (i) **believes the claim should be rejected because the claim has not been made in accordance with this contract** [emphasis added]; or

(ii) disputes the whole or part of the claim.

(2) The party must [emphasis added]:

(a) **within 14 days after receiving the payment claim:**

(i) give the claimant a notice of dispute; and

(ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; ***or***

(b) **within 28 days after receiving the payment claim, pay the whole of the amount of the claim** [emphasis added].

(3) The notice of dispute must:

(a) be in writing;

(b) be addressed to the claimant;

(c) state the name of the party giving the notice;

(d) state the date of the notice;

(e) identify the claim to which the notice relates;

(f) **if the claim is being rejected under subclause (1)(b)(i) – state the reasons for believing the claim has not been made in accordance with this contract** [emphasis added];

(g) if the claim is being disputed under subclause (1)(b)(ii) – identify each item of the claim that is disputed and state, for each of the items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(4) If under this contract the principal is entitled to retain part of an amount payable by the principal to the contractor:

(a) subclause (2)(b) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of an amount retained under the entitlement.

[47] Clause 6 contemplates that there may be a payment dispute about whether a payment claim was made in accordance with the contract[51]. In substance, cl 6 states that if the first respondent believed the appellant's claims should be rejected because they were not in accordance with the express terms of the Subcontract, then the first respondent was required within 14 days of receiving the claim to give the appellant notice of the rejection of the claim and state the reasons for believing the claim was not made in accordance with the Subcontract. As the first respondent did not give the appellant the notice required under the implied terms of the Subcontract, the first respondent was required to pay the whole of the amount claimed in each of the six unpaid tax invoices within 28 days of receipt of each invoice. As the amounts claimed in each of the six unpaid tax invoices were not paid in full when they were due to be paid under the Subcontract, payment disputes arose 28 days after the tax invoices were received by the first respondent[52] and the rendering of Summary Invoice No ST4289 dated 25 January 2010 does not alter this fact. If the first respondent was insisting on strict compliance with the provisions of cl 12.2 it was required to give the appellant notice of that fact. If the first respondent did not give the appellant such notice (and it never did) it was required, in accordance with

[51] Although the present case is not such a case, it is not too difficult to envisage cases where there may be a real argument about whether a payment claim complies with the express terms of a construction contract as a result of poor drafting or ambiguity in the meaning of a particular term or expression.

[52] s 8 *Construction Contracts (Security of Payments) Act 2004* (NT).

the Subcontract, to pay the amount claimed by the appellant and it could not insist upon strict compliance with cl 12.2 until it gave such notice.

[48] In any event, it is the definition of 'payment claim' in the Act, not the terms of the Subcontract that determines whether a claim is a payment claim for the purposes of the Act. As I stated in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another*[53] it was not the intention of the legislature that an adjudicator's determination should be void if a payment claim which was the subject of a payment dispute was not made in accordance with, or did not strictly comply with, the relevant provisions of the construction contract. The *Construction Contracts Security of Payments Act* (NT) contains no such requirement. Indeed, as is demonstrated above, the Act contemplates that there may be payment disputes about whether a payment claim is compliant or non-compliant with a particular construction contract.

[49] The definition of payment claim in s 4 of the *Construction Contracts (Security of Payments) Act* (NT) does not require that a payment claim must strictly comply with the express terms of the relevant construction contract or be in accordance with the express terms of the construction contract for there to be a payment claim within the meaning of the Act. So far as is relevant to this case, s 4 of the Act defines a payment claim as a claim made "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." In

[53] (2008) 23 NTLR 123 at par [63].

other words, it must be a claim "for the payment of the Subcontract price" based on performance by the subcontractor of its obligations under the subcontract. The word 'under', which is used in the stem of the definition of 'payment claim' in s 4 of the Act, admits of degrees of precision and exactness on the one hand and of looseness and inexactness on the other[54]. The degree of precision and exactness intended in any particular case depends on the context in which the word is used. The reason why the words, "a claim made *under a construction contract* [emphasis added]" are used in the stem of the definition of 'payment claim' in the Act is to denote[55] the class or category of payment claims which are subject to the Act or that fall within the scope of the application of the Act. So far as a contractor or subcontractor is concerned, it is a claim made for payment of an amount for work performed by virtue of a construction contract[56].

[50] The *Construction Contracts (Security of Payments) Act 2004* (NT) is concerned with payment claims and disputes involving, or relating to, or arising out of construction contracts and no other contracts. The unpaid tax invoices therefore fall within the definition of "payment claim' in the Act. To construe the definition of 'payment claim' otherwise would have the effect that the operation of s 20 of the Act with regard to clauses 6(1)(b)(ii), (2)(a)(ii), (2)(b), and (3)(f) in Div 5 of the Schedule of the Act was

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[54] *Energy Resources of Australia Ltd v Commissioner of Taxation* (2003) ATC 4024 (per Lindgren J) at par [37].
[55] *R v Tkacz* (2001) 25 WAR 77 (per Malcolm CJ) at par [23] - [27].
[56] *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at [70].

redundant or completely otiose and that cannot have been the intention of the legislature.

[51] Of course, if a payment claim does not comply with the definition in the Act then there may be no payment dispute capable of adjudication under the Act. Further, if a payment claim does not comply with the construction contract, it may have the consequence that an application for adjudication is unsuccessful because the adjudicator finds the principal is not liable to make the payment because it is not due and payable under the contract. In this case, however, the six unpaid tax invoices became due and payable within 28 days of their receipt by the first respondent.

[52] The effect of s 8 of the *Construction Contracts (Security of Payments) Act 2004* (NT) is that any payment dispute about the six unpaid tax invoices arose when the amounts claimed in the invoices were due to be paid under the Subcontract and were not paid in full[57]. The only way that such a dispute can be resolved is by payment of the claims in full, settlement or compromise of the dispute, a determination of the court, forgiveness of the claim, or set-off. Such a payment dispute does not come to an end because a further claim is filed seeking payment of precisely the same amounts for the performance of precisely the same construction work; particularly, if the further claim is made with the intention of avoiding the mandatory 90 day

[57] The provisions of s 8 of the *Construction Contracts (Security of Payments) Act 2004* (NT) are consistent with the law in England where the courts have held that a dispute may be inferred from a failure to respond to a demand for payment: *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 at 761; *Ellerine Bros (Pty) Ltd v Klinger* [1982] 1 WLR 1375.

limitation period provided by s 28(1)(a) and (b) of the Act. Indeed, the filing of the further payment claim by the appellant and the response to the claim by the first respondent did nothing other than confirm that the original payment disputes persisted.

[53] The fact that a claim for payment which is made in accordance with cl 12.2(d) of the Subcontract may, on occasion, involve repetition of a previous claim for payment because the previous claim was not paid or not paid in full, does not determine when a payment dispute arose in relation to the repeated claim for payment. Section 8 of the *Construction Contracts (Security of Payments) Act 2004* (NT) determines when a payment dispute has arisen. Significantly, for the purposes of this case, s 8 of the Act states that, "a payment dispute arises if when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full". That means in this case the payment disputes arose 28 days after each of the six unpaid tax invoices were received by the first respondent.

[54] As the appellant's statutory right to apply to have the payment disputes in respect of each unpaid tax invoice adjudicated was time barred[58], the adjudicator was required to dismiss the application without making a determination on the merits[59]. Section 33 of the *Construction Contracts (Security of Payments) Act 2004* (NT) states that an appointed adjudicator **must** dismiss the application without making a determination of its merits if

[58] s 28(1) *Construction Contracts (Security of Payments) Act 2004* (NT).
[59] s 33(1)(a)(ii) *Construction Contracts (Security of Payments) Act 2004* (NT).

the application has not been prepared and served in accordance with s 28 of the Act. Likewise, s 28(1)(1)(a) and (b) state that to apply to have a payment dispute adjudicated a party to the contract **must** within 90 after the dispute arises prepare a written application for adjudication and serve it on each other party to the contract. An essential pre-condition, or in other words a necessary jurisdictional fact, for adjudication on the merits is the preparation and serving of a written application for adjudication within 90 days after the payment dispute arises.

[55] The combined effect of s 33(1)(a)(ii) and s 28(1)(a) and (b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) is that a claimant's right to adjudication of a payment dispute is destroyed unless the claimant prepares and serves the application for adjudication within 90 days after the dispute arises. The 90 day time limit is a substantive condition attached to the statutory right of adjudication of a payment dispute[60] granted by the Act.

[56] The combined operation of s 28(1)(a) and (b) and s 33(1)(a)(i) of the *Construction Contracts (Security of Payments) Act 2004* (NT) is to confer a right to adjudication which is to endure for 90 days after a payment dispute arises. The statement that, "to apply to have a payment dispute adjudicated a party to the contract **must**, within 90 days after the dispute arises prepare a written application for adjudication [and] serve it on each other party to the contract", means 'and not otherwise'. When the time limit expires the right

[60] *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13 at 33 – 39.

to adjudication of a payment dispute is terminated or defeated[61]. That this is so, is made abundantly clear by the requirement in s 33(1)(a) of the Act that the adjudicator must dismiss the application without making a determination on its merits. The right to apply for adjudication of a payment dispute is subject to a condition namely that the right be exercised within 90 days of the payment dispute arising. The condition is part of the statutory right to adjudication that is conferred by the Act. The right to apply for adjudication, being a conditional right, is lost when the condition is not satisfied[62]. The right, having been lost, cannot be revived or retriggered by the making of another payment claim for the same amount for the same construction work. The filing of a **repeat** payment claim comprised of claims for the identical amounts for the identical work cannot operate to revive a right which the Act Parliament has terminated or destroyed[63]. The condition created by s 28(1)(a) and (b) of the Act was part of the right conferred by s 27 of the Act, and the right to apply to for adjudication, being a conditional right, was lost when the condition was not satisfied.

[57] There are important reasons why Parliament has determined that the 90 day period for making an application which is established by s 28(1)(a) and (b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) is an essential precondition to an adjudicator's jurisdiction to determine an application on the merits. First, under the Act, Parliament has merely

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[61] *Maxwell v Murphy* (1957) 96 CLR 261 per Dixon CJ at 268 – 269.
[62] *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13 at 36 see also the authorities referred to in par [65] below.
[63] *Maxwell v Murphy* (1957) 96 CLR 261.

introduced an interim or provisional stage in the dispute resolution process[64]. It has not abolished arbitration and litigation of construction disputes. There is little point in a party applying for adjudication of a payment dispute if the contract is at an end. If the contract is at an end a final decision can be made by the parties or a court on the entitlement of the parties and there is no point in a payment on account. Second, it assists in achieving the object of the Act. It facilitates timely payments between the parties. Under the Act neither the claimant nor respondent can sit on their hands. Payment claims must be made and paid or made and enforced. It is clearly intended that adjudication is a timely, efficient and economic interim dispute resolution procedure. Third, given the time constraints that both a respondent and an adjudicator are under, the 90 day period helps ensure that it is possible for the adjudicator to fairly make a determination. The limitation period created by s 28(1)(a) and (b) of the Act ensures that claimants are not free to prepare large and detailed claims over whatever time periods they may choose and launch them without warning[65]. 'Ambush' tactics by claimants have been notorious in the United Kingdom for many years[66] and, as Matthew Bell and Donna Vella have stated[67], are

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64 *CIB Properties Ltd v Birse Construction Ltd (QBD)* [2005] 1 WLR 2252 at par [13].

65 Duncan Wallace, "HGCRA: A New Zealand Version" [2002] ICLR 130 at 130 – 131.

66 M Bell and D Vella, "From motley patchwork to security blanket: The challenge of national uniformity in Australian "security of payment" legislation" (2010) 84 ALJ 565 at p 569; F Kirkham, "Tomorrow and tomorrow and tomorrow: Keynote address to the Adjudication Society conference" (2004) 20 (4) Const LJ 189 at 193; *CIB Properties Ltd v Birse Construction Ltd (QBD)* [2005] 1 WLR 2252 at par [9] and par [10]; Duncan Wallace, "HGRA Adjudication: Drawing the Sting" (2001) 17(3) Const LJ 216 at 216.

67 M Bell and D Vella, "From motley patchwork to security blanket: The challenge of national uniformity in Australian "security of payment" legislation" (2010) 84 ALJ 565 at p 569.

becoming better understood in Australia[68]. Under s 33(1)(a)(iv) of the Act, when considering if it is possible to fairly make a determination, an adjudicator is required to consider the complexity of the matter and the time in which he or she is required to make a decision. It must not be forgotten that a respondent only has 10 working days to respond to an application for adjudication[69] and an adjudicator should ordinarily make a determination within 10 working days after the service of a party's response to an application for adjudication[70]. Finally, compliance with the time constraints imposed by the *Construction (Security of Payments) Act* 2004 (NT) is not burdensome for an applicant and is within the control of an applicant. Nor are the consequences of non compliance burdensome. An applicant still retains the entitlement to pursue its claims in the courts.

[58] In my opinion, the second respondent should have dismissed so much of the application for adjudication as related to the appellant's six unpaid tax invoices. The decision of the judge at first instance should be upheld and the appeal dismissed.

The cross appeal

[59] The cross appeal should also be dismissed. There is no substance in the cross appeal. Summary Invoice No ST4289 contained a completely new claim for retention monies which were due and payable at practical completion of the Subcontract works. The appellant's claim for payment of

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[68] T Shnookal, "Building Adjudication in Victoria" *Building Dispute Practitioners Society Newsletter* December 2009, p15.
[69] s 29 *Construction Contracts (Security of Payments) Act 2004* (NT).
[70] s 33(2) and (3) *Construction Contracts (Security of Payments) Act 2004* (NT).

the retention monies was disputed when the first respondent served its reconciliation statement on the appellant on 2 March 2010. Consequently, an application for adjudication of that payment dispute was made in time. Under s 8(b) of the *Construction of Contracts (Security of Payments) Act 2004* (NT) a payment dispute arises if an amount retained under a contract is not paid when it is due to be paid.

The role of the Court of Appeal

[60] While, generally speaking, it is preferable that the Court of Appeal of the Northern Territory decide a case on the arguments advanced by the parties[71], this Court is not bound by the parameters of those arguments[72]. This Court is a court of law and, subject to the requirements of procedural fairness, it is bound to determine a matter according to its own understanding of the law[73]. It does not exist merely to reach a conclusion wanted by one side of the contest. It has a higher duty to the law[74].

[61] Gleeson CJ's statement in *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation*[75] that "there is nothing unusual about this court adopting a view of the facts or the law (including the construction of a written instrument) which is different from the views to which the parties to the litigation respectively contend" is equally applicable to the practice of

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[71] *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 per McHugh, Gummow, Callinan and Heydon JJ at par [41]

[72] *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 559-60.

[73] *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 per Gleeson CJ at par [7], per Kirby J at par [51] and per Hayne J at par [101].

[74] *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 per Kirby J at par [51].

[75] *Australian Communications Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271 per Gleeson CJ at par [7].

the Court of Appeal of the Northern Territory. Unfortunately, even at an intermediate appellate level, there are occasions when one or other or both counsel appearing for the parties have not read the applicable statute in full, or have not read the whole of the contract, or have not considered all of the relevant authorities.

[62] During the course of this appeal, in accordance with the requirements of procedural fairness, the Court sent counsel for the parties a series of questions about s 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) and a list of additional authorities for their consideration and the Court invited both counsel to make further written submissions about the matters raised by the questions posed by the Court.

[63] The questions that were sent to counsel for the parties were, in substance, as follows:

1. As a result of s 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) do all of the provisions of Division 5 of the Schedule apply to the subcontract, including clauses 6 (2) and (3)?

2. If so, does this have the effect that the 13 previous invoices were payable within 28 Days notwithstanding clause 12.2(d) of the subcontract?

3. If so, was the application for adjudication not made within 90 days of the payment dispute arising?

4. If so, should the adjudicator have dismissed the application under s 33(1)(a) of the *Construction Contracts (Security of Payments) Act*?

5. If so, was the adjudicator's decision to proceed to a determination of the merits of the dispute under s 33(1)(b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) one that is reviewable by the Supreme Court?

[64] The questions that counsel were asked to address by the Court are relevant to the main contentions of the parties in this appeal. In the light of those contentions, counsels for the parties were asked to deal with the applicability of s 20 of the *Construction Contracts (Security of Payments) Act* 2004 (NT) to the Subcontract. The terms implied in to the Subcontract by s 20 of the Act have particular relevance to the construction of cl 12.2(d) of the Subcontract.

[65] Counsel for each of the parties were referred to the following cases: *Byrnes v Groote Eylandt Mining Co Pty Ltd*[76]; *Jones and Another v TIO*[77]; *Maxwell v Murphy*[78]*; Re Roberts and Repatriation Comm*[79]; *Roberts v Repatriation Comm*[80]; and *Wang v Minister for Immigration and Multicultural Affairs*[81]. All of which are relevant to the construction of s 28(1)(a) and (b) and s 33(1)(a)(ii) of the *Construction Contracts (Security of Payments) Act 2004* (NT).

[66] Ultimately, further written submissions were received by the Court in accordance with a timetable suggested by counsels for the parties. Mr Roper provided the Court with further written submissions that deal with all of the

[76] (1990) 19 NSWLR 13 at 33 – 39.
[77] (1988) NTR 17.
[78] (1957) 96 CLR 261 at 268 – 269.
[79] (1992) 27 ALD 408.
[80] (1992) 111 ALR 436 at 441 – 442.
[81] (1997) 71 FCR 386.

issues raised by the Court and the list of authorities provided to counsel. However, rather than deal with the matters raised by the Court in full, Mr Wyvill SC elected to make largely procedural submissions. Mr Wyvill has not sought to reply to the submissions provided to the Court by Mr Roper.

[67] Mr Wyvill's further written submissions may be distilled as follows. The application of s 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) to the Subcontract is an entirely new matter. Consideration of the application of s 20 of the Act to the Subcontract necessitates inquiry into: (1) how the original 13 invoices were treated by the first respondent; and (2) the first respondent's belief as to the efficacy of the same. A notice of contention was not filed by the first respondent under r 84.06(3) of the *Supreme Court Rules* and the respondent has not made a formal application for leave to raise the new basis of sustaining the reasons for decision of the judge at first instance. The new issues cannot now be raised in a manner which treats the appellant fairly.

[68] In my opinion, Mr Wyvill's further written submissions are without substance. The applicability of s 20 of the *Construction Contracts (Security of Payments) Act 2004* (NT) to the Subcontract is not new. Nor do the questions posed by the Court give rise to new lines of factual inquiry. There was no dispute between the parties that, if the six unpaid tax invoices were payment claims, the payment disputes in relation to those tax invoices each

arose more than 90 days before the application for adjudication was made[82]. From the outset of its application for adjudication the appellant has maintained that the provisions contained in Div 5 of the Schedule to the Act were implied into the Subcontract by virtue of s 20 of the Act.

[69] As Mr Wyvill acknowledges in his further written submissions to the Court, the **appellant** [emphasis added] stated the following in its written application to the Adjudicator:

> 6. Payment Schedule – Implied Provisions under the Act
>
> i) Clause 12.3 of the Contract headed "Payment Statements" is marked "N/A".
>
> ii) Whilst the [appellant] acknowledges that the time for payment of Payment Claims is referred to in the Schedule in Part B of the Contract Particulars under the heading 'Time for Payment (clause 12.4)', clause 12.4 itself reads:
>
> > "12.4 Payment. Subject to clause 4.1 and 12.6 and CONTRACTOR'S receipt of payment from the Principal for the items claimed, CONTRACTOR must within the time period stated in the Subcontract Particulars of receiving payment from the principal in respect of the works specified in the payment statement, pay the Contractor the amount set out as then payable in the payment statement."
>
> iii) The [appellant] asserts that the wording of clause 12.4 is meaningless and therefore the clause is void, and any associated time for payment referred to in the Schedule in Part B of the Contract is also void.
>
> iv) Accordingly, the Contract makes no reference as to when and how the Respondent is required to respond to a Payment Claim made by the [appellant] under the Contract.

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[82] *GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd* [2010] NTSC 34 per Mildren J at par [16].

v) **Pursuant to section 20(a) of the *Construction Contracts (Security of Payments) Act* (the Act), the [appellant] contends that the provisions in the Schedule, Division 5 of the Act (sic) apply to the Contract** [emphasis added].

Effect of the implied Provisions

i) In accordance with clause 6(2) of Division 5 of the Schedule to the Act, the Respondent is required to provide the [appellant] with a Notice of Dispute within 14 days after receiving a payment Claim under the Contract, and where partly disputed, pay that amount not disputed, or otherwise pay the whole of the Payment Claim within 28 days.

ii) The Respondent has failed to issue a Notice of Dispute within 14 days after receiving the Payment Claim. The Respondent has also failed to make a payment to the [appellant] in full within 28 days.

7. Payment Dispute

i) **The [appellant] contends that a Payment Dispute in respect of its 8 February 2010 Payment Claim arose either on 8 March 2010, being 28 days after the Respondent received the Payment Claim and failed to pay the amount in full** [emphasis added], or otherwise on 22 February 2010, being 14 days after the Respondent received the Payment Claim and by its failure to issue a Notice of Dispute in respect of those items in the Payment Claim disputed, and by its failure to pay those items not disputed.

[70] The contents of par 7 i) of the appellant's Adjudication Application paraphrase cl 6(2) of Div 5 of the Schedule to the *Construction Contracts (Security of Payments) Act 2004* (NT).

[71] In paragraphs numbered 2 and 3 of the respondent's preliminary submissions to the adjudicator dated 8 April 2010, the solicitor for the respondent, Ms Cheong, stated:

2. The tax invoice numbered ST4289 is not a proper payment claim pursuant to the Act. The tax invoice numbered ST4289 is more properly described as a Statement of all previous payment claims made by the applicant and is not in itself a payment claim that can give rise to any dispute under the Act.

3. The tax invoice numbered ST4289 lists all previous payment claims made by the applicant. The last payment claim submitted by the applicant to the respondent is dated 30 October 2009 for the sum of $521.03. **The due date for payment of this payment claim is either 28 November 2009 or sometime in early December 2009, depending on whether the [appellant] seeks to rely on the time for payment under the Act** [emphasis added] or the Contract between the parties. In any event, no payment to this last payment claim was made by the respondent and the 90 days for the adjudication arising from this dispute of this particular payment claim expired, at the latest in early March 2010. The [appellant's] application for adjudication was made on 23 or 24 March 2010.

[72] In paragraphs numbered 5 to 8 of the respondent's response to the application for adjudication dated 9 April 2010, Ms Cheong stated:

5. The [appellant] submitted payment claims throughout the period of contract works on a periodic basis as per the terms of the contract. The documents submitted by the [appellant] are referred to as tax invoices and in response to these Tax invoices, the respondent made payments based on these invoices to the [appellant]. The tax invoices contain sufficient information on the authorities to constitute payment claims both in accordance with the Act and the contract between the parties. Attached to these submissions are copies of the previous payments claims submitted by the [appellant] of various dates.

6. The [appellant] relies on the alleged Tax Invoice dated 25 January 2010. This Tax Invoice lists all accounts that the applicant has rendered to the respondent for the contract works. The accounts themselves as listed in the document headed Tax Invoice ST4289 are payment claims upon which a payment dispute may arise that would then lead to a right

by the [appellant] to seek an adjudication. The alleged Tax Invoice ST4289 is not a payment claim and cannot source an application for adjudication. In this regard, I refer to my preliminary submissions/response and rely on same.

7. The last payment claim/account from the [appellant] to the respondent for performance of its obligations under the contract/contract works is dated 30 October 2009. The [appellant] contends that Division 5 of the Schedule in the Construction Contracts (Security of Payments) Act ("the Act") applies. **For the purposes of this response and application only, the respondent is prepared to agree that Division 5 of the Schedule to the Act applies in relation to payment** [emphasis added]. The payment of this payment claim would therefore have been due by 28 November 2009. No payment was made and such a payment dispute would have arisen on or about 28 November 2009.

8. The [appellant] therefore had 90 days from 28 November 2009 to apply for adjudication. The applicant's application for adjudication was not made until 24 March 2010, well out of the 90 days period contemplated/allowed by the Act. Similar arguments/objections apply to all payment claims which remain outstanding/unpaid that predates the last one dated 30 October 2009.

[73] The application referred to in par 7 of the above quote is of course the application for adjudication brought by the appellant which is the subject of this appeal.

[74] In par 27 of the adjudicator's determination the adjudicator stated as follows:

> Contract Clause 2.4 aims to define the time period within which payment should be made to the subcontractor. The particular wording is "… the CONTRACTOR must within the time stated within the subcontract particulars of receiving payment from the Principal in respect of the work specified in the payment statement pay the contractor the amount then set out in the payment statement." Aside from the fact that payment statements are listed as N/A at

> Clause 2.3 the remainder of 12.4 is tantamount to a pay when paid provision which is expressly prohibited by Section 12 of the Act. Accordingly, the time for payment under the contract becomes 28 days after the payment claim is submitted.

[75] The 28 day period referred to in the above quote is taken from Div 5 of the Schedule to the *Construction Contracts (Security of Payments) Act 2004* (NT).

[76] In par 12 and par 16 of the Reasons for Decision the judge at first instance states:

> It is common ground that clause 12.4 is void because it is a provision prohibited by s 12 of the Act. The time for payment of a payment claim is therefore within 28 days of receipt of the payments claim: see s 20 and clause 6(2)(b) of the Schedule.
>
> …
>
> The approach taken by the Adjudicator was to consider clause 12.2 of the Subcontract and see if the requirements of that provision had been met on each occasion that an invoice had been delivered by Burns. This was because GRD submitted that: (1) each of the invoices submitted by Burns were payment claims; (2) the SI was not a payment claim; and (3) in any event, a repeat claim cannot be made; (4) the payment disputes in relation to the tax invoices each arose more than 90 days after the payment disputes arose. **There is no dispute that this is so if the tax invoices amounted to payment claims.** [emphasis added]

[77] The appellant cannot approbate and reprobate. If Div 5 of the Schedule to the *Construction Contracts (Security of Payments) Act 2004* (NT) is implied into the Subcontract it is implied into the Subcontract for all purposes not simply for the purpose of determining whether Summary Invoice ST4289 gave rise to a payment dispute or not. Further, the construction of cl 12.2(d)

of the Subcontract is a question of law and cl 12.2(d) is to be construed in the light of all of the relevant provisions of the Subcontract including the statutorily implied terms. The suggestion by Mr Wyvill that the implication of Div 5 of the Schedule of the Act gives rise to further enquiries cannot be sustained given the position the appellant has adopted throughout the proceedings.

[78] Clause 12.2 of the Subcontract provides that the subcontractor may make claims for payment of the Subcontract price then goes on to specify certain procedures for the making of a claim for payment of the subcontract price. The consequences of a failure to comply with the procedural provisions stipulated by subclauses 12.2(a) to 2(f) of the Subcontract can only be determined if cl 12.2 of the Subcontract is read in the context of Div 5 of the Schedule to the *Construction Contracts (Security of Payments) Act 2004* (NT). Clause 6 of the Schedule requires that regardless of the procedural provisions of cl 12.2 of the Subcontract the claim must be paid unless the appellant has given the respondent a notice of dispute. Clause 6 of the Subcontract sets out the procedures which the first respondent must adopt when responding to a claim for the payment of the Subcontract price which has been received from the appellant. As no notice of dispute was given to the appellant by the first respondent the monies claimed in each of the 13 original tax invoices became payable by virtue of the implied terms of the contract. The amounts claimed in the six unpaid tax invoices were payable within 28 days of their receipt because of the requirements of the

Subcontract. They were valid payment claims both according to the Subcontract and the Act.

KELLY J:

[79] I have read the judgment of Olsson AJ and I agree that the appeal should be allowed. The facts and history of the litigation are comprehensively set out in his Honour's reasons. I also respectfully agree with Olsson AJ's reason (at [249]) for deciding that the decision complained of is not reviewable. However, I would approach the disposition of this appeal on a somewhat different basis.

[80] In my view, the critical issue in this appeal is that set out in Ground 2.3 of the supplementary notice of appeal, namely whether the learned trial judge erred in failing to apply the decision of the majority in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*[83] ("*AJ Lucas*") that adjudications may only be reviewed where it is shown that the adjudicator's satisfaction as to the requirements of s 28(1) is either unreasonable or based on an incorrect understanding of the true construction of s 33 and or s 28.

[81] That is to say, the crucial question is not whether the adjudicator was right in determining that the Summary Invoice was a payment claim under the contract, and the 13 previous invoices were not; nor is it whether the learned judge at first instance was right in determining the reverse. The important question is whether the adjudicator's decision to proceed to a determination

[83] (2009) 25 NTLR 14.

on the merits on the basis of a finding that the application for adjudication had not been brought within time was a decision that was amenable to review by the Supreme Court. In my view, for the reasons which follow, it was not, and it is therefore unnecessary to go on to determine whether the adjudicator was right or wrong in determining that question.

[82] Section 48(3) of the *Construction Contracts (Security of Payments) Act* ("the Act") provides that, except as provided by subsection (1)[84], a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

[83] This section precludes judicial review of "a decision or determination of an adjudicator". However, as pointed out by the NSW Supreme Court in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor*[85] this section only has application if what is being challenged is an adjudicator's decision or determination within the meaning of the Act.

[84] In the NSW Court of Appeal in *Brodyn* Hodgson JA quoted the well established principles in *Anisminic Ltd v Foreign Compensation Commission*[86], and concluded that:

> "… where the determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues. It would be otherwise, as the High Court pointed out in

[84] Subsection 48(1) provides a right of appeal to the Local Court against a decision of an adjudicator under s 33(1)(a) to dismiss the application without making a determination of its merits.
[85] [2004] NSWCA 394.
[86] [1968] UKHL 6; [1969] 2 AC 147, 171.

Craig (echoing, I think, what Lord Reid said in *Anisminic)*, if the error of law causes the adjudicator to make one or other (or more) of the jurisdictional errors that the court identified: in such a case, relief would lie, subject to any relevant discretionary considerations."

[85] In discussing the New South Wales Act, which has similar objectives but a different scheme for achieving those objectives, Hodgson JA in *Brodyn* said:

> [T]he 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 [and] [t]he procedure contemplates a minimum of opportunity for court involvement."
>
> 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.

[86] He went on to set out the minimum conditions for the existence of a valid determination under the NSW legislation. (These are not applicable to the Territory scheme since the NSW Act is centred on the concept of the service of a payment claim under the Act whereas the NT Act is based on a payment dispute arising under the contract.)

[87] The courts have considered in a number of cases the question of when an error by an adjudicator results in something which is not "an adjudicator's

determination or decision within the meaning of the Act", and hence amenable to judicial review.

[88] In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd*[87], one of the questions for determination by the Court was whether the existence of an objectively valid payment claim was an essential requirement of the adjudication process described by the Act – ie whether there had to be an objectively valid payment claim in accordance with the provisions of the construction contract in question before there could be a valid determination.

[89] In that case Transcon's primary contention was that the existence of an objectively valid payment claim that in fact complied with the payment claim provisions of the contract was an essential precondition for the valid exercise by an adjudicator of the power conferred by the Act to make a determination. Without the objective existence of a valid payment claim there could be no payment dispute and without a payment dispute an adjudicator had no jurisdiction under the Act[88].

[90] That argument was rejected by Southwood J who said,

> In my opinion it was not the intention of the legislature that any failure to comply with the requirements of a construction contract about the making of payment claims should result in the invalidity of an adjudicator's determination under the Act. Such a construction would defeat the object of the Act. The object of the Act is to promote security of payments under construction contracts. The

[87] [2008] NTSC 42.
[88] *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42 at [40].

> object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction contracts. It also is to be noted that a payment made in accordance with an adjudicator's determination is a payment on account. It is a payment made without prejudice to the parties' ultimate contractual rights[89].

[91] *Transcon* is therefore authority for the proposition that an error by the adjudicator in determining whether a purported payment claim is in fact a valid payment claim in accordance with the contract, is not a decision reviewable by the Supreme Court. It is sufficient for the adjudicator to form a (reasonable) opinion about that matter in the process of deciding whether a payment dispute has arisen and whether the application in question has been brought within 90 days after the payment dispute arose.

[92] In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*[90]: Basten JA considered the equivalent question under the New South Wales legislation, namely whether the existence of a valid payment claim, which complies with s 13(2) of the New South Wales Act is an essential precondition to a valid determination. Basten JA came to a similar conclusion to Southwood J in *Transcon* and for similar reasons. He held, essentially, that it was not necessary that there be objective compliance with the statutory requirements for there to be a valid determination; it was sufficient that the adjudicator form the opinion that there had been compliance, subject to the following important qualification.

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[89] *Ibid* at [64].
[90] (2005) 21 BCL 364 at par [43] to par [48].

> [47] It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1994] HCA 42; (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [133], was to the following effect: If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not *bona fide*. Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that is must be undertaken in good faith, but that is not a sufficient condition of validity.
>
> [48] The approach set out above does not import into the operation of the provisions discussed some overriding principle of procedural fairness, as may, on one view, be inferred from the approach adopted in *John Holland v Cardno MBK*. Such an approach would be attended with difficulties for two reasons. The first is that it is at risk of introducing into the adjudication process some ill-defined notion of "fairness", the counterpart of which is impermissible unfairness. The danger is that the Court may be led into reassessing the merits of the decision in a manner which fails to draw a firm distinction between procedural and substantive unfairness: see generally, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [28] (Gleeson CJ), [80] (McHugh and Gummow JJ) and [148] (Callinan J). The second reason is that the relevant content of procedural fairness must be ascertained by reference to the specific statutory scheme. Where that scheme is inconsistent with some element which might otherwise have been implied under the general law, it is the general law which must give way.

[93] In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*[91], Mildren J considered the related question of whether a determination of an adjudicator would be a nullity if the adjudicator wrongly decided that a payment dispute

[91] [2008] NTSC 46.

had arisen within the 90 day period specified in the Act as the time within which a party may make application for an adjudication.

[94] In *Independent Fire Sprinklers*, the plaintiff submitted that the requirement to apply for the adjudication within 90 days was an essential pre-condition to the adjudicator's jurisdiction. The defendant submitted that the question of when a payment claim falls due for payment under the contract, and hence when a payment dispute arises for the purpose of assessing compliance under s 28(1), is a matter for the adjudicator to determine. So long as the adjudicator acts *bona fide* and in accordance with the rules of natural justice[92], the Court was precluded by s 48(3) of the Act from reviewing the decision of the adjudicator.

[95] Mildren J held that an error by an adjudicator in deciding that an application had been made within the 90 day time limit specified in the Act did not render the determination a nullity. He reasoned as follows.

> [39] As noted in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ in Project Blue Sky
>
> "Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority."
>
> [40] However, I think that it is clear that the adjudicator did have jurisdiction to decide the question of whether or not the provisions of s 28 had been complied with, because s 33(1)(a)(ii) commands him to

[92] This should be understood as referring to the rules for procedural fairness as set out in the Act, not as importing some general notion of fairness: *Coordinated Construction v Climatech* (supra).

> dismiss the application if those provisions have not been complied with. How else will the adjudicator be able to comply with s 33 if he had no jurisdiction at all? A similar conclusion was reached in Parisienne Basket Shoes Pty Ltd & Ors v Whyte.
>
> [41] If the adjudicator had jurisdiction to decide this question, he also had jurisdiction to decide it wrongly. Suppose the adjudicator had dismissed the application upon the ground that it was out of time, s 39(1) requires the adjudicator to give written notice of the decision and the reasons for it to the parties and the Registrar. Further, the adjudicator has power to make an order for costs under s 46(b) read with s 36(2). Also, the decision to dismiss the application is reviewable by the Local Court under s 48(1).
>
> [42] Section 48(3) provides:
>
> "Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed."
>
> [43] If the adjudicator had jurisdiction to decide this question wrongly that can hardly mean that the decision is void.

[96] The same question arose in a more refined form in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*[93].

[97] In *AJ Lucas*, the adjudicator wrongly found that the Application had been made within 90 days of the date when payment dispute had arisen, and that the application was therefore within time.

[98] Mac-Attack's claim was based on various invoices all of which had previously been submitted to AJ Lucas by Mac-Attack; and in relation to most of the invoices the subject of the claim, more than 90 days had elapsed since those invoices were due for payment under the contract. Relying on a mistaken interpretation of a decision of the Local Court, the adjudicator

[93] [2009] NTCA 4.

asked himself the question, "Does the contract specifically preclude the submission of an unpaid claim?" The question he should have asked was, "When did the payment dispute arise?" That question, is in turn answered by reference to s 8 of the Act. The payment dispute arises when the amount claimed in a payment claim is due to be paid under the contract, and the amount has not been paid in full (or the claim has been rejected or wholly or partly disputed). As most of the amounts claimed in the application in *AJ Lucas* would have fallen due for payment under the contract more than 90 days before the service of the application, in relation to those amounts, the adjudicator should have dismissed the application pursuant to s 33(1)(a)(ii).

[99] One of the questions for the Court to determine in *AJ Lucas* was whether the error made by the adjudicator was such as to render his decision a nullity and therefore amenable to judicial review. That in turn depended on whether there had been compliance by the adjudicator with the essential requirements for the existence of a determination.

[100] 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, AJ Lucas conceded that the adjudicator was free to make a factual error in answering the question whether the application was made within 90 days after the payment dispute arose (as determined by Mildren J in *Independent Fire Sprinklers*) but contended that if the adjudicator arrived

at the wrong answer to this question as a result of an error of law, his decision would be a nullity.

[101] At first instance I rejected that submission in the following terms:

> [34] It is clear … 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 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. I note that under the NSW Act there were also time limits which had to be complied with. In [Brodyn], Hodgson JA specifically held that the legislature did not intend that exact compliance with that provision was essential to the existence of a determination. I consider that the structure and purposes of the Act do not support a conclusion that an adjudication is void if the adjudication wrongly concludes that the time limits have been complied with."
>
> [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.

[102] On appeal to this Court, in *AJ Lucas,* Mildren J said:

> [13] Section 48(3) of the Act contains a privative clause. Except as provided by s 48(1) (which applies only where the adjudicator dismisses the application under s 33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the Court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act. I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd,* I held that the decision of an adjudicator who wrongly determined whether the 90 day time limit had been complied with, was not void. The Judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits."

[103] In the same case, Southwood J said:

> The structure of s 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met. The prescribed criteria being those set out in s 33(1)(a)(i)-(iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.

[104] *AJ Lucas* is therefore authority for the proposition that a decision of an adjudicator is not reviewable merely because he wrongly decides that the prescribed criteria in s 33(1) (and by extension s 28) are met, but that that if an adjudicator wrongly construes the Act on a matter going to his

jurisdiction, then his purported determination is not a determination and is amenable to judicial review.

[105] In my view the principle which emerges from these cases is that set out by the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport* (supra):

> 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. [emphasis added]

[106] I note, and am reassured by the fact that Olsson AJ has come to the same conclusion, at paragraph [249] of his reasons[94].

[107] That is to say, a purported determination by an adjudicator is reviewable by the Court if, by reason of misconstruing the provisions of the Act which confer power upon him, or (possibly) for some other reason, the adjudicator has failed to observe an essential pre-condition for the exercise of that power, and hence for the existence of a valid adjudicator's decision or determination. That will not include errors in determining whether or not the provisions of s 28 of the Act have in fact been complied with, provided

[94] Although, as I have said elsewhere, because of the different nature of the two pieces of legislation, great care needs to be taken in applying New South Wales decisions such as *Brodyn* on questions such as the requirements for a valid payment claim, it seems to me that there is a commonality of purpose in the two pieces of legislation on the issue of minimising the involvement of the Courts in reviewing decisions made by adjudicators.

the adjudicator acts reasonably and in good faith because, as Mildren J said in the passage of *Independent Fire Sprinklers* quoted above, deciding these matters is a core function conferred on the adjudicator by the Act. [I have one caveat to add. It is not necessary to decide in this case, but I would leave open the question of whether it is a necessary pre-condition of the exercise of power by an adjudicator that the contract concerned is in fact a construction contract, given the scope and purpose of the legislation.]

[108] In this case the adjudicator did not misconstrue the Act or otherwise fail to observe an essential pre-condition of the exercise of the power conferred on him by the Act. He addressed himself to the correct question, namely whether the application for an adjudication had been made within 90 days from the date on which the payment dispute arose. In answering this question, he correctly asked himself whether the Summary Invoice which was presented to him as the basis of the payment dispute was a valid payment claim under the contract. That in turn required him to look at whether the 13 previous invoices were valid payment claims under the contract, giving rise to payment disputes in relation to the amounts in question at various dates more than 90 days before the application for an adjudication and, again, he addressed himself to the right question and turned to the sub-contract to provide the answer.

[109] The adjudicator's decision to proceed to a determination of the dispute on the merits under s 33(1)(b) instead of dismissing the application under s 33(1)(a) is therefore not reviewable by this Court by reason of s 48 of the

Act. In these circumstances it is unnecessary to decide whether the adjudicator made an error in his characterisation of either the 13 previous invoices (which he found were not valid payment claims under the contract) or the Summary Invoice (which he found was a valid payment claim under the contract).

[110] I want to add something about four further matters.

[111] First, counsel for the respondent relied on the decision of Southwood J in *Transcon* as the basis for a submission that the adjudicator ought to have found that the 13 earlier invoices were valid payment claims, and that the payment dispute had therefore arisen more than 90 days before the application was lodged. This submission was based on par [66] and par [67] of *Transcon* in which Southwood J said:

> [66] It was the intention of the legislature that a valid payment claim must be of adequate particularity to enable a principal or head contractor to know the ambit of any potential application for a determination by an adjudicator under the Act if the claim is unpaid or disputed. To do so, a payment claim, must contain sufficient detail to put the principal or head contractor on notice of the precise amount claimed and it must sufficiently identify the obligations said to have been performed under the contract to which the amount claimed relates. If a payment claim does not contain such detail the principal or head contractor cannot determine if the progress claim should be paid, part paid or disputed. It was the intention of the legislature that a principal or head contractor must be given a fair opportunity to determine whether to pay, part pay or dispute a payment claim.
>
> [67] In my opinion the essential requirements of a valid payment claim are as follows:

1. The payment claim must be made pursuant to a construction contract and not some other contract;

2. The payment claim must be in writing;

3. The payment claim must be a bona fide claim and not a fraudulent claim;

4. The payment claim must state the amount claimed;

5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.

[112] Counsel for the respondent submitted that the effect of this was that the adjudicator was faced with a two stage process. First he must ascertain whether what was produced to him as a payment claim fulfilled the criteria set out in *Transcon*. If so, the adjudicator was obliged to accept it as such and to embark upon a consideration of the application. It was only at the stage of considering the application on its merits that the adjudicator would turn to the contract to see if the purported payment claim complied with the requirements of the contract for a payment claim[95].

[113] There is nothing in the Act which gives support to that submission, or to the notion that the adjudicator should engage in a two stage process of that kind. The Act is quite clear. The question which the adjudicator must address is whether the application was made within 90 days of a payment dispute

[95] Even if this were correct, it would not have assisted the respondent, as it was the summary invoice, not the 13 invoices in question, which was presented to the adjudicator for adjudication.

arising (s 28). To determine when a payment dispute arises, the adjudicator must look at when the amount claimed was due under the contract (s 8).

[114] The above submission takes the remarks of Southwood J in *Transcon* out of context. Those remarks were made in the course of rejecting a submission that for there to be a valid determination by an adjudicator, there must in fact have been a valid payment claim under the contract – ie a submission that for the adjudicator to have jurisdiction, he must have got that question right. Southwood J rightly rejected that submission, and in par [66] and par [67], he was attempting to delineate an area beyond which an adjudicator would be failing to observe an essential pre-condition for the exercise of his power if he accepted something as a payment claim[96].

[115] Those "requirements" would in any case be subject to the provisions of the actual contract between the parties, since s 8 of the Act provides that a payment dispute arises "when the amount claimed in a payment claim is due to be paid under the contract [and] the amount has not been paid in full or the claim has been rejected or wholly or partly disputed"; and a "payment claim" is defined (relevantly) as a claim made under a construction contract 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: s 4 of the Act.

[96] This submission highlights the necessity of not confusing the question of what the adjudicator is obliged to do [which is fairly clearly set out in the Act] and the very different question of what kinds of error by an adjudicator will render a purported determination by an adjudicator a nullity, susceptible to review by the court.

[116] If a construction contract contains a written provision about payment claims, the Act defines "payment claim" by reference to the terms of the construction contract actually made by the parties: s 4 of the Act. It is to that contract that the adjudicator must go to determine whether there is a "payment claim" and hence a "payment dispute" for him to adjudicate. If the construction contract does not contain such a written provision, the Act implies into the contract the relevant contractual provisions in the Schedule of the Act. While it is highly unlikely in practice that a given contract would provide for payment claims to be made under the contract in a manner that does not fulfil all of the requirements set out in par [67] of Southwood J's judgment in *Transcon*, it is theoretically possible for a contract to specify, for example, the making of an oral payment claim, in which case the provisions of the contract would prevail. Nevertheless, in the ordinary run of cases, in contracts containing the usual sorts of provisions for making payment claims, a decision by an adjudicator that a payment claim which failed to meet requirements 1, 2, 4 and 5 set out in par [67], or was known to the adjudicator to be fraudulent, is likely to be so unreasonable as to render the purported decision and resulting determination a nullity – and hence subject to review by this Court.

[117] If the quoted remarks of Southwood J were to be understood in the sense contended for by the respondent, then I agree with the submission by the appellant that they ought not be followed. It would not be necessary to

overrule *Transcon* (Ground of Appeal 2.1A) as these remarks are in any event *obiter*.

[118] The second matter I want to comment upon is the question of "repeat claims".

[119] In *AJ Lucas*, Southwood J made the following remarks:

> Clause 13 of the appellant's standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid tax invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat claim in respect of the performance of the same obligations under a construction contract.

[120] The underlined words in this passage were used as the basis for a submission that, as a matter of law, the Act does not allow for (indeed prohibits) what have been referred to as "repeat claims". It was said that s 8 defines when a payment dispute arises, and once a dispute has arisen about a particular amount, it cannot arise again. Read in the context of the whole passage, the underlined words are not authority for such a proposition.

[121] As Southwood J made clear, the contract in question in *AJ Lucas* provided for monthly invoices and made no provision for "repeat claims".

[122] In this case, the contract contained a form of provision for the making of payment claims which is common in construction contracts. It provided for what is effectively a "rolling claim". That is to say, each payment claim is

to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim. It is readily apparent that if any payment claim is not paid in full:

(a) a payment dispute will arise in relation to the part unpaid when the claim is due for payment under the contract; and

(b) despite that, each subsequent payment claim must include a "repeat claim" for that unpaid part.

[123] There is nothing in the Act which renders this form of contractual provision unenforceable – or takes it outside the power of an adjudicator to adjudicate upon. What the adjudicator is obliged to do when faced with a payment claim under a contract of this kind is the same as he does for any other contract: he should look at the contract and determine whether the payment claim complies with the provisions of the contract, when the amount claimed would be due for payment under the contract (if payable), and whether the application has been lodged within 90 days of that date.

[124] I agree with Southwood J (in his reasons on this appeal) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for the performance of precisely the same work. However, I also agree with Olsson AJ that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier

unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. In each case one must look to the contract to determine when a payment was due and hence when the payment dispute arose. One imagines that in most contracts, a "repeat invoice" claiming no new work and simply served in an attempt to "re-set the clock" for the purpose of an application for adjudication, would not have the desired effect. However, one cannot be dogmatic. There are contracts, for example, where the contractor is to put in a final claim setting out all amounts claimed: each of these may have been the subject of one (or more) progress claims, and there may have been no new work done. It is always a matter of going to the contract to determine when the payment dispute arose according to the express and/or implied terms of the contract.

[125] Thirdly, I have had the benefit of reading a draft of Southwood J's reasons for decision. I cannot agree that the error which the respondent asserts was made by the adjudicator was of a kind that is reviewable by the Supreme Court, and I believe it necessary to explain my reasons for disagreeing in some detail.

[126] Southwood J has concluded that the actual existence of each of the criteria in s 33(1)(a) of the Act is an essential condition of an adjudicator's

jurisdiction to adjudicate a payment dispute on the merits. This view also assumes that any "jurisdictional error" will be reviewable[97].

[127] Section 33(1)(a)(ii) of the Act requires the application for adjudication to have been prepared and served in accordance with s 28, which means that on the view now adopted by Southwood J an adjudicator will lack jurisdiction – and his decision will be reviewable by the Court – if he makes any error in relation to any of the matters set out in s 28, including the question of whether the application was made within 90 days of the payment dispute arising.

[128] I do not agree that an adjudicator's determination is reviewable [despite the plain words in s 48] merely because an adjudicator makes an error in determining whether an application has been prepared in accordance with the provisions of s 28(1). *Independent Fire Sprinklers* is authority to the contrary, and in my view was correctly decided. *Transcon* is also contrary to such a view.

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[97] I am not convinced that this is necessarily the case. In *Brodyn* the New South Wales Court of Appeal said:

> *"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." [emphasis added]"*

I think that is a better way of approaching the question and would leave open the question what "jurisdictional" error (if any) other than misconstruing those provisions of the statute which confer power on the adjudicator would lead to an adjudicator's decision being reviewable.

[129] In *Transcon*, Southwood J rejected the submission that the existence of a valid payment claim that in fact complied with the contract was an essential precondition for the valid exercise by an adjudicator of the power conferred by the Act to make a determination because without the existence of a valid payment claim there could be no payment dispute, and without a payment dispute an adjudicator had no jurisdiction under the Act, since (*inter alia*) s 28 requires an application to be made within 90 days of a payment dispute arising. That is inconsistent with Southwood J's position on the present appeal that every error by an adjudicator in determining whether an application has been prepared in accordance with the provisions of s 28(1) will render the adjudicator's decision a nullity reviewable by the Court.

[130] Nor do I think Southwood J's conclusion is consistent with the decision of this Court in *AJ Lucas*. Southwood J (at [30]) has said that he now thinks that what he said in *AJ Lucas* was based upon a construction is s 33(1) of the Act that was too circumscribed. I do not agree. I think the approach in *AJ Lucas* was correct, for reasons which I will outline below. However, my primary reason for disagreeing with this approach is based on the Act itself, and in particular, s 48.

[131] In my view, if this Court were to hold that every error by an adjudicator in determining whether an application has been prepared in accordance with the provisions of s 28(1) is reviewable by the Court, that would subvert the evident intention of the legislature, plainly expressed in s 48 that, with the exception of a limited right of appeal under s 48(1) to the Local Court

against the dismissal of an application under s 33(1)(a), "a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed".

[132] Section 48(1) provides:

> A person who is aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision.

[133] Section 33(1) provides:

> 33. Adjudicator's functions
>
> (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;
>
> (ii) the application has not been prepared and served in accordance with section 28;
>
> (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
>
> (iv) satisfied it is not possible to fairly make a determination *[for the reasons set out]; or*
>
> (b) otherwise - 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, if so, determine *[the matters set out therein].*

[134] That is to say, the legislature has provided a right to appeal to the Local Court against a decision under s 33(1)(a) dismissing an application without making a determination on its merits - for example because the adjudicator

has decided that the application has not been prepared in accordance with s 28(1); but has otherwise provided that a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

[135] It is not just a determination of the merits of an application which cannot be reviewed – it is a decision or determination. The legislative intention seems fairly clear: in contrast to a decision by an adjudicator to dismiss an application under s 33(1)(a) because it has not been prepared in accordance with s 28(1); a decision of an adjudicator to proceed to make a determination on the merits because he has found that an application has been prepared in accordance with s 28(1) "cannot be appealed or reviewed." Yet the approach taken by Southwood J would result in every such decision being reviewable by the Supreme Court.

[136] I do not think it is open to this Court to ignore the evident legislative purpose in s 48, unless s 48 were invalid – which has not been asserted or argued in this case[98].

[137] The approach now taken by Southwood J focuses on the preconditions of the power to make a determination as though it was the determination itself that was being challenged. However, it seems to me that looking at the matter that way is to lose sight of the real issue. The decision being challenged in

[98] The High Court in *Kirk* held that it is beyond the legislative power **of a State** so to alter the constitution of character of its Supreme Court that it ceases to meet the constitutional description (of "the Supreme Court **of a State**" required by Chapter III of the Constitution) and that a defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide. (See paragraph [55]). Query whether this would apply to the relationship between the Territory legislature and the Territory Supreme Court given that Chapter III contains no requirement that there be a body fitting the description "the Supreme Court **of a Territory**.

this case is not the determination, but the prior decision whether or not to embark upon a determination on the merits.

[138] The High Court in *Re Refugee Review Tribunal; Ex parte Aala*[99] repeated the distinction between jurisdictional and non-jurisdictional error in these terms:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

[139] 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.

[140] One of the first things an adjudicator must do when he is appointed (apart from dealing with possible conflict issues under s 31) is to make a decision under s 33(1). That subsection is in mandatory terms, he **must** look at the matters set out in s 33(1)(a), which includes the criteria under s 28, and he **must** make a decision. If the criteria under s 33(1)(a) are met, he must

[99] (2000) 204 CLR 82 at 141 [163].

dismiss the application without making a determination: otherwise he must proceed to a determination on the merits. Section 48 is, in my view, very clear about the reviewability of an adjudicator's decision under s 33(1). If the adjudicator decides to dismiss the application under s 33(1)(a), an aggrieved person may appeal to the Local Court: if the adjudicator decides to proceed to a determination under s 33(1)(b), then (in the normal run of cases) that decision is not appellable or reviewable by the Court.

[141] In the normal run of cases, the adjudicator will have looked at the various criteria set out in s 28 and will have made decisions about them. He will decide whether the application has been made within 90 days of the payment dispute arising, and this will necessitate his looking at the payment provisions in the contract, determining whether a payment claim has been made in conformity with the contract and, if so, when (if payable) it fell due for payment under the contract[100]. This in turn will involve questions of construction of the contract.

[142] The legislature has provided that the adjudicator must carry out this exercise in order to decide whether to dismiss the application under s 33(1)(a) or proceed to a determination under s 33(1)(b): it is an either/or choice which cannot be evaded. This process will often (perhaps always) involve the adjudicator deciding questions of law involved in construing the provisions

[100] Depending upon the express terms of the contract and/or whether the implied terms in the Schedule are deemed to apply, the adjudicator may also have to decide whether the claim is payable despite not being in strict conformity with the format requirements of the contract. The question is always the same – was the claim payable under the terms of the contract and when.

of the construction contract, yet the legislature has specifically provided that a decision other than a decision to dismiss under s 33(1)(a) [ie a decision to proceed to a determination under s 33(1)(b)] is not appellable or reviewable in this Court.

[143] It is only where the adjudicator has in truth not made a decision of the kind contemplated under s 33(1)(b) – for example because he has misconstrued the Act which gives him the power to make that decision and so embarked on a different exercise altogether – that his purported "decision" will not be a decision to which s 48 applies: it will be a nullity[101].

[144] In my view, the correct construction of s 33(1) is that set out in *AJ Lucas*[102]:

> The structure of s 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met. The prescribed criteria being those set out in s 33(1)(a)(i)-(iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits. The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.

[145] Southwood J has said that although he now thinks that what he said in this passage was based upon a construction is s 33(1) of the Act that was too circumscribed, in practice there will be little difference in outcome between applying the approach in *AJ Lucas* and an approach which treats the actual factual existence of each of the criteria in s 33(1)(a) of the Act an essential

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[101] An example might be asking whether the applicant had a reasonable excuse for not bringing the application within 90 days instead of whether it had been brought within 90 days.
[102] (2009) 25 NTLR 14.

condition of an adjudicator's jurisdiction to adjudicate a payment dispute on the merits. In my view the change of approach would materially increase the range of potentially reviewable errors in a manner inconsistent with the intent of the legislature expressed in s 48. One cannot rule out an adjudicator making purely factual errors. More importantly, many, if not most, such errors are likely to arise as a result of misconstruing the contract. While this might qualify as an error of law, an error of law is not *ipso facto* a jurisdictional error[103].

[146] I therefore remain of the view that the error which the respondent asserts to have been made by the adjudicator is not one which is amenable to review by this court because of s 48 of the Act. It is therefore unnecessary for me to deal with the other grounds of appeal.

[147] If it had been necessary to deal with the other grounds of appeal, I would also be forced to disagree with Southwood J's finding that the adjudicator misconstrued the definition of 'payment claim' in s 4 of the Act. Southwood J expresses the view that the definition of payment claim in s 4 of the Act does not require that a payment claim must strictly comply with the express terms of the contract and that, accordingly, a payment claim is any claim made for payment of an amount for work performed by virtue of a construction contract.

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[103] Whether or not Kirk is authority for the proposition that the legislature cannot remove from the SC of the Territory the power to review a proposed decision of a tribunal for jurisdictional error, there is no doubt that the legislature can validly restrict the power to review for non jurisdictional error of law (*Kirk* at para [100]). Moreover, *AJ Lucas* does not address the question of whether possible jurisdictional errors other than misconstruing the statute which confers power on the adjudicator would be reviewable.

[148] In my respectful opinion, this analysis confuses two very different questions – what the adjudicator is required to do by the Act, and the separate question of what kind of error will render an adjudicator's decision void and thereby amenable to review by the Supreme Court.

[149] So far as the adjudicator is concerned, in order to determine whether a payment dispute has arisen (and, if so, when) he is required to determine whether what is presented to him as a payment claim complies with the requirements of the contract in question (or whether it is payable under the contract even if non-compliant, for example because of the absence of a prescribed notice of dispute).

[150] Southwood J has cited his own decision in *Transcon* as supporting the proposition that a payment claim need not conform to the requirements of the contract to be a valid payment claim under the Act. In my view *Transcon* does not support that proposition. The point in *Transcon* was whether an error by the adjudicator in deciding that question would render his determination void: Southwood J held that it would not. That is a very different question from whether the adjudicator is obliged to accept as a payment claim, for all purposes, anything that purports to be a claim for payment for work performed under a construction contract, regardless of the requirements of the contract.

[151] It simply cannot be right that an adjudicator must accept as a valid payment claim anything which happens to be a claim for payment for an amount of

work performed by virtue of a construction contract, regardless of the requirements of the particular contract for making such claims, and I respectfully agree with the reasons of Olsson AJ at paragraphs [231] to [239] for rejecting the argument to this effect put forward by the respondent.

[152] Apart from anything else, if that were the case, it would be impossible for the adjudicator to work out when a payment dispute arose for the contract would not provide a time for payment of non-conforming payment claims. (Or rather, the adjudicator would be compelled to say no payment dispute had arisen.)

[153] It is true that, as Southwood J has pointed out, there may be payment disputes about contractually non-compliant payment claims in the special circumstance where the contract provides, either by implication of the terms in the Schedule, or expressly, that an amount is payable despite a claim being non-compliant – because (as in the implied terms) the principal is obliged to give notice of non-conformity within a fixed time or pay – or for some other reason expressed in the contract. However, that does not mean that an adjudicator is obliged to accept as a payment claim anything that claims payment for work done under a construction contract, regardless of compliance with the contract. It simply reinforces the fact that, under the Territory legislation, the key concept is not that of "payment claim", as in the NSW Act, but that of "payment dispute" – ie when (if at all) was the amount claimed payable under the contract?

[154] Finally, I need to deal with the questions on which supplementary submissions were invited. Southwood J has formed the view that the adjudicator was in error in deciding that the application for adjudication was made within 90 days of the payment dispute arising, because the 13 previous invoices were payable whether or not they conformed to the requirements of the contract as a result of the implication into the contract of Div 5 of the Schedule, including clause 6(2) and clause 6(3), the effect of those clauses being to require payment within 28 days unless an appropriate notice of dispute was given by the principal within 14 days. Hence a payment dispute did in fact arise in relation to each of those invoices 28 days after their delivery.

[155] Mr Wyvill SC has submitted that it is not open to this Court to uphold the decision of Mildren J at first instance on this basis as it is entirely new: the argument was not raised by the respondent before the adjudicator, or before Mildren J, or for that matter before this court on appeal. Mr Wyvill made the point forcefully that the respondent was obliged to provide the adjudicator with "all information, documents and submissions" on which it relied within 10 working days of the service upon it of the of the application for adjudication, and that no submission relying on the implication of clause 6(2) and clause 6(3) of the Schedule was put to the adjudicator. That is not actually the case. That argument was put before the adjudicator in paragraphs 6 and 7 of the application for adjudication.

[156] However, thereafter the adjudicator found (at paragraph 27 of the adjudication) and the parties and Mildren J all appear to have assumed, that the only effect of clause 12.4 being void was that invoices which complied with the requirements of the contract were payable within 28 days. Certainly the argument based on the 13 previous invoices being payable regardless of compliance with the contract because of failure to give notice, was not argued on appeal before this Court.

[157] It is not necessary for me to decide whether or not it is open to this Court to uphold the decision of Mildren J on this basis given the course that argument took below and in the Court of Appeal. For the reasons set out above, in my view, whether the adjudicator was right or wrong about the 13 previous invoices not being payable under the contract, his decision to proceed to a determination on the merits under s 33(1)(b) is not reviewable by the Supreme Court. The controversy over whether the Court is able to raise the issue on its own motion simply reinforces my view that the adjudicator's decision is not reviewable. The task of making a decision under s 33(1) is given by the legislature to the adjudicator, and he is obliged by the Act to make such a decision swiftly and on possibly incomplete material provided to him by the parties within strict time limits. Unless he decides to dismiss an application without making a determination of its merits, his decision is not appellable or reviewable, and (unlike a Court) any determination he makes does not finally determine the rights of the parties. It is not consistent with this legislative scheme for the Court to go over the

material at leisure and with a fine tooth comb, consider fresh arguments, and hold that the adjudicator has gone outside the functions conferred on him by the Act if he has made any error of fact or otherwise in the process.

[158] For the above reasons, in my view, the appeal should be allowed.

Cross Appeal

[159] I agree with Olsson AJ that the cross appeal should be dismissed for the reasons which he gives.

OLSSON AJ:

Introduction

[160] The Court has before it an appeal by the appellant from the judgment of a single judge of this court dated 28 June 2010, declaring void so much of an adjudication dated 23 April 2010 purportedly made under the *Construction Contracts (Security of Payments) Act* ("the statute") by the second respondent, as related to a sum determined to be payable by the first respondent to the appellant in excess of $7,911.17 and interest thereon.

[161] There is also a cross appeal by that respondent in respect of the order of the learned trial Judge that required payment by it of the last-mentioned amount.

[162] The judgment in question was the product of an originating motion filed by the first respondent, in which it asserted that the relevant adjudication was void and of no effect and should be stayed.

[163] In essence, that respondent had contended that the second respondent had fallen into jurisdictional error in that, in the circumstances, no relevant "*payment dispute*" amenable to adjudication under the statute had ever arisen. It, therefore, followed that Div 2 of Pt 3 of the statute had not been enlivened. Accordingly, it was said, the second respondent ("the adjudicator") had not possessed jurisdiction to make the impugned adjudication.

[164] The judgment of the learned trial Judge essentially upheld that contention as to the bulk of the monies awarded by the adjudicator against the first respondent.

[165] The appellant contends that this conclusion was erroneous and that the learned trial Judge ought to have upheld the adjudication in the terms in which it was made.

The relevant narrative history

[166] It was common ground at trial that the first respondent ("GRD") was the principal contractor in relation to a construction site at Lot 7100 Brewery Lane, Woolner.

[167] On or about 2 February 2009, GRD and the appellant entered into what was titled the former's "Standard Minor Works Sub Contract" (the "Subcontract") to perform a range of specified electrical work on site.

[168] The learned trial Judge recited that, throughout the course of the performance of the Subcontract, the appellant submitted 13 invoices ("the 13 invoices") to GRD for progress payments totalling $393,274.51. That sum included claims for extras or variations amounting to $38,414.50.

[169] He also accepted that GRD duly made progress payments amounting to $309,959.47 by way of response to the appellant's first seven invoices. No payments had been made in respect of the subsequent invoices. He noted that GRD was entitled, under the contract, to retain a portion of monies payable under the Subcontract as security -- presumably to cover any rectification requirements. He recorded that a sum of $17,743 had been so withheld.

[170] It appeared that disputes had arisen as between the appellant and GRD in relation to claims by the latter for back charges for the cost of remedial works said to have been required and liquidated damages for alleged late completion.

[171] Pursuant to clause 12.2 of the Subcontract, the appellant was required to send progressive payment claims containing prescribed information to GRD by the 25th of each month. These were required by the statute to be paid within 28 days of the end of the month.

[172] The documentation before the court indicates that the 13 invoices were as follows:

Date	Amount ($)
25/2/2009	4562.78
25/3/2009	25137.42
23/4/2009	41243.09
25/5/2009	69238.70
25/6/2009	125237.61
23/7/2009	50182.90
25/8/2009	12100.00
11/9/2009	16170.00
23/9/2009	15977.94
25/9/2009	6266.56
25/9/2009	24156.00
23/10/2009	2480.48
30/10/2009	521.03

[173] The adjudicator stated in his determination that there had been no evidence presented by either party of any particular format of invoice required by GRD. He noted that most invoices had attached to them a daily log of work on the site, together with a breakdown of costs for the billing period since the previous invoice. Certain invoices merely provided a work description and details of amounts charged for parts and labour. Three such invoices appeared to relate to claimed variations.

[174] It is clear from the documentation that none of the 13 invoices fully complied with the requirements of clause 12.2 of the Subcontract, a point specifically identified by the adjudicator in his determination.

[175] That clause is couched in these mandatory terms:

> 12.2 **Payment Claims.** The Subcontractor must give GRD Group NT Pty Ltd claims for payment of the Subcontract Price:
>
> (a) at the times stated in the Subcontract Particulars;
>
> (b) in the form that GRD Group NT Pty Ltd requires;
>
> (c) which include the evidence reasonably required by GRD Group NT Pty Ltd of the value of work completed in accordance with the Subcontract and the amount claimed;
>
> (d) which sets out the total value of work completed in accordance with the Subcontract to the date of the claim, the amount previously paid to the Subcontractor and the amount then claimed;
>
> (e) which are based on the Schedule of Rates and Prices to the extent it is relevant; and
>
> (f) which includes such documentary evidence that GRD Group NT Pty Ltd may require that all persons engaged or employed by the Subcontractor in connection with the Works have been paid all monies due and payable to them in connection with their work, as at the date of the payment claim.

[176] Whilst the respondent did, in fact, voluntarily make payments in respect of the first seven invoices, the adjudicator found that none of the 13 invoices were compliant with the requirement in subparagraph (d) above. It is to be observed, in this regard, that, although subparagraphs (b), (c) and (f) vested a discretion in GRD which it does not appear to have exercised at times of invoicing, the other requirements and particularly that in subparagraph (d) are expressed as mandatory prerequisites for the making of a valid payment

claim under the Subcontract. The adjudicator concluded that the Subcontract called for strict compliance with the requirements set out in clause 12.2, to give rise to any valid payment claim.

[177] On 8 February 2010 (i.e. some three months after the final progress payment invoice) the appellant sent GRD what was termed a summary invoice ("SI") dated 25 January 2010.

[178] The SI was titled "Payment Claim in Accordance with Clause 12.2 of the Contract". It purported to be a payment claim "for all electrical works performed at site as requested". The learned trial Judge recited that this invoice listed the 13 invoices previously rendered, the amount claimed under each, the amount paid in respect of various invoices and the total amount claimed to be due.

[179] It further set out a summary of the amounts held in retention and how much of the retention monies could then properly be retained pursuant to the provisions of clause 4 of the Subcontract.

[180] The learned trial Judge construed the SI as claiming a balance of $83,315.04, less retentions of $9,831.86. It did not claim any progress amounts that had not previously been the subject of one of the 13 invoices.

[181] The GRD response to the SI was to send the appellant a contract reconciliation statement dated 2 March 2010. This listed *its* calculations as

to the contract value, approved variations, back charges, and retention calculations.

[182] That statement appears to have been the first detailed indication of the basis on which the respondent had not paid the then unpaid prior invoices and purported to demonstrate that the appellant actually owed GRD a net amount of $19,989.07. It thus, for the first time, clearly defined a dispute between the parties. The appellant denied the validity of that statement. Ultimately, the adjudicator concluded that none of the purported back charges had validly been raised under the Subcontract[104].

[183] On 31 March 2010, in response to an application by the appellant dated 23 March 2010 (served on GRD on the following day), the Law Society of the Northern Territory (as the prescribed appointer) appointed the adjudicator to adjudicate the dispute between the parties under the provisions of the statute.

[184] GRD challenged both the jurisdiction of the adjudicator and the validity of his appointment in the circumstances as I have outlined them.

[185] Having received submissions from the parties, the adjudicator proceeded to make a determination dated 23 April 2010, in which he held that he *did* possess jurisdiction to adjudicate the claim by the appellant. He proceeded, in that determination, to award the appellant $73,922.75, including GST, plus interest to date of payment.

[104] See AB 106.

[186] The appellant thereafter registered that determination in the Local Court at Darwin pursuant to s 45 of the statute, with a view to enforcing it. Such action prompted the filing of the originating motion in these proceedings, seeking, *inter alia*, a stay against any enforcement.

The proceedings at first instance

[187] In his reasons for judgment the learned trial Judge noted that the relief claimed by GRD was said to be founded on the propositions that the adjudicator had no jurisdiction to entertain the application, because:

(1) it was not prepared and served within 90 days after the dispute had arisen and the adjudicator wrongly interpreted the statute in finding that he had jurisdiction;

(2) he ought to have been satisfied that it was not possible to fairly make a determination because of the complexity of the matter; and

(3) the SI was not a valid payment claim for the purposes of s 8 of the statute.

[188] The learned trial Judge recorded that major issues had arisen before the adjudicator as to whether each of the 13 invoices could properly be categorised as a payment claim envisaged by (i.e. "under") the Subcontract and also whether the SI itself was a valid payment claim pursuant to it.

[189] He observed that the adjudicator had found that each of the 13 invoices complied with clause 12 of the Subcontract, save that they did not satisfy

subclause (d) of that clause, because none of them listed a total value of work completed in accordance with the contract or nominated the amount previously paid, to then yield the amount claimed. Each was, in fact, a stand-alone document, solely referable to work said to have been performed for the relevant period.

[190] He also noted that it had been the view of the adjudicator that strict compliance with *all* requirements of clause 12 was a pre-requisite to the making of a valid payment claim under the Subcontract and that, in the opinion of the adjudicator, it followed that none of the 13 invoices had constituted valid payment claims for the purposes of the Subcontract.

[191] He pointed out that this had led the adjudicator to an ultimate conclusion that the SI was the sole relevant valid payment claim, even though it was, in a practical sense, a repeat claim.

[192] The learned trial Judge ultimately concluded that the adjudicator ought to have found that the 13 invoices *were* payment claims under the Subcontract and that he therefore had no jurisdiction to entertain the application to the extent that the SI was based on them -- because it was out of time.

[193] He was, nevertheless, of the view that the SI remained a valid payment claim in so far as it related to the balance of the retention fund; and that a payment dispute had arisen as to that balance. It followed that the adjudicator had jurisdiction only to entertain the application based on that payment claim.

[194] This conclusion led him to make the impugned declaration and stay that are the subjects of this appeal.

The reasoning of the learned trial Judge

[195] In the course of his reasons for judgment, the learned trial Judge noted the presence of the privative clause expressed in s 48 of the statute. This, in effect, stipulates that a person who is aggrieved by a relevant determination of an adjudicator may apply to the Local Court for a review of it, but that such an adjudication cannot otherwise be appealed or reviewed.

[196] He expressed the view, based on the reasoning in *A J Lucas Operations Proprietary Limited v Mac-Attack Equipment Hire Proprietary Limited*[105] ("*Mac-Attack*") and *Kirk and Another v Industrial Court of New South Wales and Another*[106], that such a privative clause did not prevent this Court from declaring that the determination of an adjudicator was void for any demonstrated jurisdictional error, arising from an erroneous construction of the statute.

[197] He considered that, if the adjudicator had been shown to wrongly hold that he had jurisdiction to adjudicate, such a finding clearly constituted a jurisdictional error.

[198] The learned trial Judge held that the adjudicator had erred in concluding that the 13 invoices did not amount to payment claims under the Subcontract.

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[105] (2009) 25 NTLR 14.
[106] (2010) 239 CLR 531.

[199] He concluded that such an erroneous finding by the adjudicator constituted an error going to jurisdiction. He based that conclusion on what he considered to be the reasoning of Southwood J in *Trans-Australian Constructions Proprietary Limited v Nilsen (SA) Proprietary Limited and Ford*[107].

[200] He was also of the opinion that the finding by the adjudicator that the SI was a valid payment claim which conferred jurisdiction on him, even if he was wrong as to his conclusion concerning the proper categorisation of the 13 invoices, was also erroneous. This was because the SI was a repeat payment claim, which the statute did not recognise[108].

[201] He noted the conclusion of the adjudicator that clause 12.2(d) of the Subcontract not only permitted repeat claims, but also, in effect, actually *required* them to be made. The learned trial Judge considered that he was obligated to reject that view on the basis of the reasoning expressed in *Mac-Attack*[109], although this did not negate a conclusion that the SI constituted a valid payment claim in respect of retention monies properly payable to the appellant.

[202] He rejected a submission put to him that the adjudicator ought, in any event, to have been satisfied that, in the relevant circumstances, it was not possible to fairly make a determination because of the complexity of the matter, as

[107] [2008] NTSC 42 *("Transcon").*
[108] *Mac-Attack* (ibid [12], [39]).
[109] at [15], [39].

provided for in s 33(1)(a)(iv)(A) of the statute. He noted that no submission had ever been made to the adjudicator that he should do so and said that it was unsurprising that the Adjudicator should not have been so satisfied.

The issues on the appeal

[203] Mr Wyvill SC, for the appellant, referred to the content of paragraph [21] of the reasons published by the learned trial Judge in which it was said:

> "I do not think that the Adjudicator was of the opinion that, although the tax invoices were "payment claims" the amounts claimed were not "due to be paid under the contract" because, before they fell due, there had to be strict compliance with clause 12.2. If that had been his finding, he would also have found, presumably, that no payment dispute had arisen in terms of s 8(a). The Adjudicator's finding was that they were not payment claims because they were non-compliant. There was no finding that no payment dispute had arisen."

[204] He made the point that this overlooks what was written by the adjudicator in paragraph [26.1] of his determination. That clearly records that the adjudicator *did* proceed on the basis that the amounts claimed in the six unpaid invoices were not due to be paid under the Subcontract, because they were, as he put it, non-compliant with the mandatory provisions of clause 12.2(d). No payment dispute could have arisen in relation to the subject matters of them until the issue of the SI, which *was* compliant for the first time.

[205] Mr Wyvill SC drew attention to the fact that, in *Transcon*, Southwood J had commented that, although the five essential ingredients of a valid payment

claim were those set out in paragraph [67] of his reasons, nevertheless, they were only *minimum* requirements to enliven jurisdiction.

[206] He argued that, at the end of the day, the adjudicator was required to go to the specific contract under consideration to see whether a particular document could fairly be categorised as a payment claim that *was* due and payable. As the learned trial Judge acknowledged, whether an amount claimed actually became due and payable was for the adjudicator to determine. If he got that wrong, it was an error within jurisdiction.

[207] Attention was drawn to the statutory definition of "payment claim" in s 4 of the statute. That expression, relevantly, means a claim *under a construction contract* by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under that contract. This falls to be coupled with the provisions of s 8 of the statute that, relevantly, stipulate that a payment dispute arises if an amount claimed in a payment claim is *due to be paid under the contract* and has not been paid in full, or has been rejected or wholly or partly disputed.

[208] The appellant contends that the adjudicator did correctly focus on the pertinent provisions of the Subcontract and properly concluded that, having regard to the mandatory provisions of clause 12.2(d) of it, the SI was the only claim that could properly be categorised, for the purposes of the statute, as a payment claim under the Subcontract which triggered off the commencement of a 90 day period stipulated by s 28(1), with the

consequence that a payment dispute arose in respect of it on or after 25 February 2010.

[209] It was not, in the relevant technical sense, a mere repeat payment claim. It was the *only* payment claim that effectively gave rise to a payment dispute. Mr Wyvill SC submitted that the learned trial Judge fell into error by concluding otherwise.

[210] His alternative contention was that, even if the adjudicator did erroneously assess that the non-compliant 13 invoices were not valid payment claims and, accordingly, miscalculated the commencement date(s) of any relevant 90 day period(s), this was an error within jurisdiction.

[211] He argued that, in examining the question as to whether the s 28(1) period was activated, the adjudicator was called upon to potentially make a series of factual findings related to the provisions of s 28 and s 39 of the statute.

[212] He was, for example, required to reflect on whether the payment dispute for which adjudication was sought arose from a valid payment claim identified in the application that had been duly served on the respondent; when that claim was due for payment; whether it had been rejected or disputed wholly or in part or, simply, not paid; and when any applicable 90 day period had commenced to run.

[213] In undertaking such enquiries it was, counsel submitted, necessary for the adjudicator, *inter alia*, to consider what, if any, prior claims had been made

with regard to any payment claim presently under review and, if so, whether any of them were valid claims.

[214] It was such an area of consideration that was under review in this case and the subject of the adjudicator's decision. If he fell into error in his ultimate conclusion, that was not one *of* jurisdiction, but one *within* jurisdiction.

[215] In this regard it was submitted that the adjudicator clearly addressed the matters stipulated in s 33 of the statute and, in so doing, did not err as to the construction of it. His conclusion as to the effect of clause 12.2(d) of the Subcontract was reasonably open to him, as was his decision as to whether any of the 13 invoices had generated a relevant payment dispute under the Subcontract.

[216] Mr Wyvill SC, in effect, argued that the present case was one that classically fell within the concept espoused by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*[110], who there made the points that an adjudicator clearly had jurisdiction to decide the question of whether or not the provisions of s 28 of the statute had been complied with; and that, if this was so, he also had jurisdiction to decide it wrongly, provided that he acted honestly and reasonably.

[217] The appellant contended that there was no apparent reason why the learned trial Judge should not have applied the same conceptual approach to the present case and that he erred in not doing so.

[110] (2008) 24 NTLR 15 [40] et seq.

[218] It was emphasised that such an approach recognises the obvious policy and intention of the legislation, ie. to give the construction industry a quick, informal interim remedy that does not involve court proceedings and which, nevertheless, preserves the ultimate rights of the parties to litigate disputes by way of arbitration or court proceedings[111].

[219] Mr Wyvill SC stressed that a contrary conclusion would necessarily give rise to a situation in which opportunities for challenging adjudications would be legion, thereby seriously undermining the efficacy of the statute and the clear policy evidenced by it.

[220] The primary thrust of the argument for GRD is to the effect that, when s 4 of the statute defines a payment claim as being a relevant claim "under" a construction contract, the word "under" should not be taken to convey a requirement that the subject payment claim needs to be, in all respects, objectively compliant with the subject contract. Rather, it merely indicates the need for a causal requirement that a payment claim be issued in respect of the prescribed genus of contract.

[221] Mr Roper, of counsel for GRD, sought to seek support for that proposition from dicta of Southwood J in *Transcon* to the effect that the object of the statute is to promote security of payments under construction contracts; and that it was not the intention of the legislature that any failure to comply with

[111] see provisions of s 47 of the statute.

the requirements of a construction contract about the making of payment claims should result in the invalidity of a determination.

[222] He set out, by resort to a number of hypothetical illustrations, to reason that any construction of the statute based on a need for strict objective compliance with contractual stipulations as to payment claim requirements would inevitably lead to anomalous consequences that would effectively undermine the efficacy of the scheme erected by the statute.

[223] In this regard he instanced scenarios based on possible late submissions of monthly claims and the existence and significance of possible courses of practical dealings by parties otherwise than in accordance with specific contract provisions.

[224] He proceeded to contend that the appropriate question in determining whether there is a payment claim that gives rise to a payment dispute "must always and necessarily be" -- What is a payment claim *for the purposes of the Act*? And not -- What is a claim for payment *for the purposes of the contract*?

[225] On that basis he invited the Court to conclude that, to constitute a valid payment claim for the purposes of the statute, all that needs to be established is that:

(1) a claim has been delivered to the relevant principal;

(2) for payment of an amount (i.e. a sum of money);

(3) in respect of works performed under a construction contract.

[226] It was asserted that any claim which satisfied those simple prerequisites would enliven an adjudicator's jurisdiction; and that any contract stipulations above and beyond such requirements do not go to the fundamental question of jurisdiction. Rather, they are matters to which an adjudicator would necessarily have regard in making a determination as to whether the amount claimed is in fact due and payable under the contract.

[227] Mr Roper submitted that such an approach was consistent with the dictum of Southwood J in *Transcon* to the effect that issues concerning payment claim intervals under a contract, the number of claims that may be made in a particular interval and the manner in which amounts claimed are properly calculated are all matters going to whether an amount claimed in a payment claim is due and payable. They do not go to fundamental jurisdiction.

[228] Some comfort was also sought to be derived from the content of Sch 4 of the statute, which essentially prescribes claim requirements in situations in which a relevant contract does not contain any written prescription as to the manner in which claims are to be made.

[229] So it is that GRD contends that the 13 invoices in this case constituted effective payment claims for the purposes of the statute, notwithstanding objective non-compliance with clause 12.2(d) of the Subcontract; and that the learned trial Judge correctly found that the adjudicator should have concluded that they constituted payment claims giving rise to a series of

payment disputes, all of which arose more than 90 days prior to the application for adjudication that was ultimately made.

[230] It was argued that the statute did not recognise the possibility of repeat claims and that the SI could not, in effect, re-trigger a fresh 90 day period under s 28 of the statute in relation to monies that had been the subject of an earlier payment claim.

Conclusions

[231] With respect, it seems to me that to state the approach of GRD in the above terms is to immediately reveal certain problems inherent in it.

[232] It is tantamount to asserting that *any* specific contractual provisions regulating how and when monies are to become payable under a construction contract are irrelevant to the question of when a party to that contract may raise what can properly be categorised as a payment claim, with a view to generating a payment dispute. i.e. the statute confers jurisdiction on an adjudicator to adjudicate a claim in *any* case in which a claim is made for payment of monies in relation to a construction contract, there being no requirement to even prima facie relate a payment claim to any specific contractual pre-requisites for such payment.

[233] On that argument such pre-requisites only become relevant merits considerations after the adjudicator actually embarks upon the process of adjudication.

[234] In my opinion such an approach has the practical effect of ignoring the existence and significance of the word "under" in the statutory definition of "payment claim".

[235] According to its normal English connotation, that word signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.

[236] 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.

[237] 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.

[238] Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract. i.e. in

the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of clause 12.2 of the Subcontract.

[239] The statutory construction embraced by Mr Roper would ignore the real significance of the specific contractual terms and conditions negotiated by the parties, in the sense that a principal could be compulsorily drawn into an adjudication without the claimant having demonstrated any prima facie basis of potential liability to pay in accordance with the contract.

[240] Whilst the statute certainly sets out to cater for contractual relationships that are not prescriptive in detail and, in effect, provides an implied series of terms in absence of relevant contractual provisions, it also recognises the fact that many commercial contracts contain rigorous and highly prescriptive preconditions for the making of valid payment claims and also for payment.

[241] Indeed, as was pointed out on the hearing of the appeal, compliance with the implied statutory provisions to which s 19 directs its attention, where applicable, is expressed by that section to be mandatory. It would be strange if, despite such a requirement, compliance with contractual conditions pre-requisite to the raising of a valid payment claim were held to be non-essential to the proper characterisation of a valid payment claim, for the purposes of the statute.

[242] It seems to me that some of the hypothetical anomalies sought to be portrayed by Mr Roper are more apparent than real, at least absent some contract provision that has the effect of generating seeming anomalies. For

example, a term that simply stipulated for claims to be lodged on the 25th of each month for payment by some prescribed subsequent date, could possibly be construed as meaning that any claim lodged after that date might not be paid until the following payment cycle, dependent on when the claim was lodged in relation to a prescribed payment deadline. It all depends on the precise wording of the claim prescription.

[243] If, in fact, a prescription is so strict in its terms that non-compliance might result in very serious disadvantage to a claimant, there is no real anomaly in such a scenario, because that result would be what the parties specifically contracted for. Objective compliance is not infrequently what commercial contracts are expressly designed to require and achieve.

[244] How that could fairly be said to undermine the relevant statutory scheme is impossible to perceive. In any event, an adjudicator would be bound to determine liability to make payments strictly in accordance with the contract. He or she would not be entitled, under the statute, simply to drive a coach and four through express contractual stipulations.

[245] It was argued on behalf of GRD that, given the express provisions of clause 12.2 of the Subcontract, due regard must be had to the actual course of dealings between and conduct of the parties in relation to the submission and payment of the first seven of the 13 invoices. I understood counsel to suggest that this could be relied upon as evidence that the parties themselves

did not regard compliance with clause 12.2(d) as mandatory and that there could well have been some form of implied variation or waiver by conduct.

[246] In promoting such a suggestion, GRD sought to draw some comfort from what fell from Mason P (as he then was) in *Clarence Street Pty Ltd v Isis Projects Pty Ltd*[112]. However, that was a decision based on the particular facts and terms of the specific contract under consideration in that case. It is scarcely decisive of the present problem.

[247] A variety of possible legal situations might well arise where it is established that courses of conduct inconsistent with contract provisions have occurred. No doubt, in some cases, considerations of implied variations of contract, waiver or even estoppel might loom large as possibilities bearing on such a situation.

[248] However, in the instant case, such an issue was never ventilated before the adjudicator or, for that matter, the learned trial Judge. Furthermore, the factual scenario in this case does not disclose even a consistent course of conduct over a substantial period of time. The last six invoices were, in fact, not accepted and paid by GRD. There is, in my view, no substance in this belated contention.

[249] At the end of the day the question to be posed and answered is that expressed by Hodgson JA in *Brodyn Pty Ltd v Davenport*[113], namely,

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[112] (2005) NSWLR 448 at 455-457.
[113] (2004) 61 NSWLR 421 at 441 ("*Brodyn*").

whether a requirement being considered was intended by the legislature to be an essential precondition for the existence of an adjudicator's determination.[114]

[250] The issue to be addressed in this case in considering such a question was whether objective non-compliance with the contract stipulations, pre-requisite to the raising of valid payment claims in respect of the six unpaid invoices, had the practical effect that no relevant payment claims, within the meaning of the statute, had been presented to GRD prior to receipt of the SI and, thus, no payment disputes had previously been generated in respect of them. I consider that the inevitable conclusion must be that this was the situation.

[251] To borrow an expression employed by Mr Wyvill SC, the invoices simply did not pass the requisite threshold test to constitute payment claims of the type envisaged by the statute, because, being non-compliant with clause 12.2(d) of the Subcontract, they were not, relevantly, payment claims *under* that construction contract[115], as envisaged by the statute. The "jurisdictional fact"[116] upon the presence of which the jurisdiction of the adjudicator was conditioned, was therefore clearly demonstrated in relation to the payment dispute arising from the delivery of the SI and the non-payment of the monies claimed in it.

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[114] See also *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 [172] ("*Chase*").
[115] Cf *Brodyn.*
[116] a term adverted to by Gummow J in *Minister for Immigration and Multicultural Affairs v Esheto* (1999) 197 CLR 611, and by McDougall J in *Chase* [164].

[252] The essential thrust of Mr Wyvill's submissions in that regard, as I have earlier outlined them, is compelling. They should be upheld.

[253] As to this general issue I respectfully agree with the approach expressed by Kelly J in paragraphs [147] to [153] of her reasons in relation to this appeal.

[254] I further agree in general with her comments in relation to the points canvassed in the written supplementary submissions lodged on behalf of the parties, which essentially address conclusions expressed by Southwood J in his reasons in these proceedings.

[255] Not only do I respectfully concur with the reasoning of Kelly J as to this aspect, but it is also my firm view that, as the core thrust of the point in question was not an issue debated before Mildren J, was certainly not the subject of argument on the hearing of this appeal and did not find expression in any notice of contention under the rules, it is simply not an issue that the Court may properly consider within the scope of the present appeal. The parties chose and identified the relevant issues in contention in the relevant proceedings and it is, in my opinion, inappropriate for the Full Court to seek to go outside of those issues.

[256] I would allow the appeal, set aside the orders appealed against and restore the determination made by the adjudicator.

[257] In view of that conclusion, it becomes unnecessary to dilate at length on the question of whether the statute contemplates or permits, for its purposes, the

lodgement of repeat payment claims, so as to re-trigger the relevant 90 day limit.

[258] It was argued on behalf of GRD that the issue as to whether the subject *contract*, as opposed to *the statute*, provides for or permits the resubmission of former payment claims is not to the point. Counsel contended that the critical issue is whether the *statute* permits the re-triggering of the 90 day limit in that manner, by giving rise to a valid payment dispute in relation to earlier payment claims. Reliance was placed on what fell from Southwood J in *Mac-Attack*[117].

[259] In the last mentioned case all of the members of the Court were of the opinion that the statute made no provision for and thus did not directly authorise, the resubmission or re-formulation of payment claims.

[260] Whilst I respectfully accept that the manner in which s 8 sets out to define what constitutes a payment dispute does not make any provision for the re-triggering, by a repeat payment claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which the 90 day limit has expired, nevertheless, it does not prohibit such a practical situation arising if such a situation is expressly stipulated for by the relevant construction contract.

[261] I see no reason why such a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new

[117] ibid at [24].

payment claim, attracting a fresh 90 day period. Such a situation did not arise in *Mac-Attack*.

[262] I took Mr Roper to concede that the absence of a statutory provision specifically authorising or contemplating repeat claims would not render void a payment claim that incorporated amounts that were the subject of earlier payment claims. An application for adjudication under the statute could be made in respect of so much of that claim as was not the subject of any earlier claim.

[263] In the instant case, the SI purported to be a payment claim both for the amounts unpaid in relation to the last six invoices and also for a balance said to be due and repayable from the retention fund.

[264] It is to be noted that s 8(b) of the statute expressly provides that, *inter alia*, a payment dispute arises when an amount retained by a party under a contract is due to be paid under that contract and that amount has not been paid.

[265] It follows that any balance of retention monies then due to be paid under the subject Subcontract and remaining unpaid was, on any view, properly included in the SI when it was filed, notwithstanding that the SI may also have contained repeat payment claims in respect of monies that were the subject of an earlier payment dispute.

Issues arising on the cross appeal

[266] This brings me to the issue arising on the cross appeal in this matter.

[267] As I understand the submissions made on behalf of GRD, it is contended that, even if it be the fact that the relevant retained monies had not previously been the subject of any separate payment claim, there had, nevertheless, been no separate and valid payment claim for those monies in the present matter at any stage.

[268] It was contended that a claim for repayment of retention monies ought to be made under s 8(b) and/or (c) of the statute (by way of contrast with a claim for monies due under the relevant construction contract as referred to in s 8(a)); and that no separate payment dispute had actually ever been generated in respect of them in this case.

[269] GRD contends that the adjudicator did not turn his mind to whether he had jurisdiction to deal with the issue of retention monies separately from his jurisdiction to deal with the application generally. He made no express finding pursuant to the statute as to the existence of a valid payment claim in relation to such monies. He had merely taken them into account mathematically, in computing the balance said to be payable under the SI claim.

[270] Mr Roper submitted that, in such circumstances, the finding of the learned trial Judge that the SI constituted a valid payment claim, at least in so far as

the retention monies were concerned, constituted a subsumption of the adjudicator's function.

[271] It was said that the learned trial Judge had merely acted on the basis of assumptions as to what the adjudicator may or may not have found, had he directed his mind to the specific issue -- which he had not, in fact, done.

[272] Thus, it was contended that the finding of the learned trial Judge as to retention monies was therefore not open to him in the circumstances.

[273] The riposte of Mr Wyvill SC to those propositions was, in essence, that they misconceived the relevant statutory scheme.

[274] He made the point that a payment dispute under s 8 of the statute automatically arises under that section[118] when retention monies are due to be, and have not been, paid. They are *not* dependent upon the prior making of any formal payment claim[119], whether it be separate or otherwise.

[275] In this case, the payment dispute arose when GRD wrote to the appellant on 3 March 2010 acknowledging the holding of the relevant retention sum and purporting to set it off against a claim for back charges[120].

[276] Accordingly, the 90 day period stipulated by s 28 of the statute commenced to run from the receipt of that documentation.

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[118] Sub clauses (b) and (c).
[119] Cf sub clause (a).
[120] AB 94, 95.

[277] It was pointed out that the relevant adjudication application clearly placed the issue of payment of the security retention before the adjudicator for determination as part and parcel of the dispute that had arisen between the parties and that the adjudicator had, in fact, specifically addressed the issue of the appellant's right to payment of them[121].

[278] I agree with those submissions. There is no substance in cross appeal. It should be dismissed.

Orders

1. The appeal is allowed;
2. The orders appealed against are set aside;
3. The decision of the adjudicator is restored.
4. The cross appeal is dismissed.

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[121] See par 8 of that document.