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Author: Robert Riddell
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Varying implications of jurisdictional fact errors in security of payment adjudications

It is no secret that non-jurisdictional errors of fact by an adjudicator are unreliable grounds for judicial review, but the corollary does not necessarily hold. There are categories of jurisdictional errors, some much more likely to upset a determination than others. Understanding how to categorise jurisdictional errors and the implications of each category are important considerations before investing in judicial review.

Very generally speaking, where an adjudicator makes an error in their adjudication determination that is not an error relating to a "jurisdictional fact", that error alone will not be sufficient to base a successful application to the Supreme Court to have the determination set aside. That much is well established

What may be less well known is that the Court of Appeal in New South Wales has identified two categories of jurisdictional fact, the second category of which, provided the adjudicator determines the correct question, is much less likely to be fatal to the determination. The question of whether a mistake by an adjudicator is an 'error the adjudicator was entitled to make' is more complex than the binary question of whether the issue was jurisdictional or non-jurisdictional.

The *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) does not expressly identify which of its requirements are jurisdictional. Jurisdictional issues have been described as those which define or affect the jurisdiction of an adjudicator and provide the criteria enlivening the exercise of jurisdiction by an adjudicator. A long line of case law authority already identifies many of the Act's provisions as jurisdictional in nature. Where a list of these is provided, it is always qualified as being "non-exhaustive".

In 2018, the Court of Appeal in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [13] per Basten JA (Meagher and Leeming JJA agreeing) stated:

> "It is a fundamental principle that the engagement of a statutory power may depend either upon the existence of an identified state of affairs, or a state of satisfaction of the decision-maker as to an identified state of affairs. In the first category, the actual state of affairs, being the criterion of engagement of the power, is described as a "jurisdictional fact", meaning that the lawful exercise of the power may ultimately depend upon a finding of a court exercising judicial review as to whether or not the required state of affairs existed. The second category is sometimes also said to involve a jurisdictional fact, but only in the sense that the relevant fact is an opinion formed by the decision-maker; in that case a reviewing court can only be concerned with the existence and lawful formation of the opinion." [footnotes omitted]

Basten JA also stated that a jurisdictional fact is more amenable to being construed as falling within the first category if it is "readily determined and little inconvenience is generally caused by identifying it as an essential precondition to the exercise of the relevant powers".

Straightforward time calculations fall within the first category; that is, they may ultimately depend upon a finding of a court exercising judicial review. There are many of these that are readily determined with little inconvenience. Possibly

the most discussed is whether a claimant notified the respondent, within 20 business days following the due date for payment, of its intention to lodge an adjudication application (pursuant to s 17(2)(a) of the Act). There seems to be ample judicial authority that this is a first category jurisdictional fact that can be reviewed. Applying that logic puts many of the more straightforward timing issues under the Act in the first category basket, such as the time by which a payment schedule must be provided, the date by which an adjudication application must be made and the due date for the adjudication response.

However, where the inquiry involves consideration of the payment claim itself, the authorities lean toward that being a jurisdictional fact that is left to the adjudicator rather than one that may ultimately depend upon a finding of a court exercising judicial review.

The question of whether a payment claim was served within 12 months of the construction work to which it relates last being carried out has recently being the subject of two Supreme Court decisions by Williams J in *Iridium Developments Pty Ltd v A-Civil Aust Pty Ltd* [2021] NSWSC 1601 and *EQ Constructions Pty Ltd v A-Civil Aust Pty Ltd* [2021] NSWSC 1604. This requirement is set out in s13(4)(b) of the Act.

Her Honour decided that the s13(4)(b) issue was jurisdictional, but that it fell within the second category; that is, it was a matter for the adjudicator to determine and not a matter that might ultimately depend upon the finding of a court exercising judicial review. In the latter of those cases, her Honour's finding was ultimately not of much assistance to the Claimant/Defendant, as her Honour found that the adjudicator had determined the wrong question. (The question the adjudicator actually asked herself was whether construction work had been done within the previous 12 months, but this inquiry failed to address the question of whether the payment claim related to that construction work).

Upon reflection, determining whether a jurisdictional fact falls within the first or second categories may be quite difficult. For payment claims served under contracts made prior to 21 October 2019, the absence of an available reference date was clearly fatal, if pressed. Such inquiries did not necessarily involve a detailed review of the payment claim, but the availability of a reference date was often hardly a jurisdictional fact "readily determined" with "little inconvenience generally caused by identifying it". Nonetheless, the High Court made it abundantly clear in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52 that reference dates are essential and that if the adjudicator falls into error the issue is reviewable.

The courts have made *obiter* comments indicating that the timing of a s 17(2)(a) notice (i.e. within 20 business days immediately following the due date for payment) is of the first category, and presumably that would also be the case in respect of s 17(2)(b) (the opportunity to provide a payment schedule within 5 business days) and most of the requirements of section 17(3) (the requirements as to an adjudication application).

The potential instances of the first category of jurisdictional error seem to well outnumber the second category.

The more complex the inquiry needed to determine a jurisdictional fact, the greater the likelihood a court will find that the determination of that fact is subject to the adjudicator's opinion and that a resulting jurisdictional error is one "the adjudicator is entitled to make". Whilst this could be argued as being unfair, it is one of those consequences of the coherent application of the legislative scheme and the manner in which that scheme has assigned financial risk to the parties to a construction contract, adopting the rationale of the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4.