

**AIR DYNAMICS CONTROL & SERVICES CONTRACTING PTY LTD V DURHAM
[2005] NSWSC 861**

Supreme Court of New South Wales – 13 September 2005

FACTS

Air Dynamics Control & Services Contracting ('Air') engaged Ishtar Painting Pty Limited ('Ishtar') to carry out painting work at the Chatswood Telephone Exchange. A dispute arose concerning the quality of the painting work and level of indebtedness by Air to Ishtar. This prompted Ishtar to make an Payment Claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') to facilitate payments.

Air submitted a Payment Schedule within the meaning of the Act on 15 December 2004. Ishtar submitted an Adjudication Application on 16 December 2004. Durham was nominated as Adjudicator and she accepted this nomination on 7 January 2005. Ishtar submitted additional material entitled "Payment Claim" to the Adjudicator on 4 January 2005 but a copy of this additional material was not received by Air until 10 January 2005, 14 days after service of the Payment Schedule. Following that Durham determined the matter in Ishtar's favour stating that she had proceeded on the basis that the Adjudication Application had been made within the prescribed statutory period of 10 business days. Air did not pay the Adjudicated Amount and Ishtar filed the Adjudication Certificate as a judgment debt in the Local Court pursuant to section 25 of the Act.

Air then commenced proceedings seeking a declaration that the Adjudication was void and of no effect submitting that the Act imposed a strict requirement that the Adjudication Application was to be received by Air within 10 business days of the Payment Schedule and that, therefore, the Adjudication Application was out of time and the Adjudicator acted without authority. Ishtar submitted that the Adjudication Application was received by the nominating authority within the prescribed period of 10 business days and Air on 16 December 2004 and that the determination of the Adjudicator was made within the time frame provided by the Act.

ISSUE

Whether the Adjudication was void.

FINDING

The Court found that "indisputably" the Adjudication Application was made within the prescribed period of 10 business days, as the prescribed period did not apply to the service of the copy of the Adjudication Application. The Court held that the failure to serve the Adjudication Application would not constitute an essential precondition of the Act making an Adjudication void. In any event, the Court found that as the Adjudication Certificate had already been filed in the Local Court, the judgment and the Adjudicator's Determination is not void.

QUOTE

Associate Justice Malpass at paragraph 34 held:

[38] Whilst it was open to [Air] to either act prior to the entry of judgment or to apply to have set aside after entry (subject to the restrictions to be found in s25 of the Act), neither course was taken. Instead, the judgment became satisfied before taking the action. In the circumstances, it may be that no action can now be successfully taken to have the judgment set aside.

[39] The purpose of the Act has been said [sic] to obtain prompt interim payment on account pending final determination of all disputes. In the present case, the payment sought by [Ishtar] has been effected. The purpose of the Act would appear to have been exhausted in relation to it.

[40] In the circumstances, I am not satisfied that there can be any utility in the present proceedings. This is not to say that [Air] is without remedy. It retains its contractual rights (these are preserved under s32). Any remedy that it may have in relation thereto remains available to it and can be pursued in other proceedings.

IMPACT

Where an Adjudication Certificate has been filed as a judgment debt and paid, the Courts are unlikely to entertain any further action that an Adjudication Determination is void, as the purpose of the Act will be exhausted.

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NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com