

FIFTY PROPERTY INVESTMENTS PTY LTD V BARRY J O'MARA & ANOR
[2006] NSWSC 428
Supreme Court of New South Wales – 18 April 2006

FACTS

Maurice Tarabay entered into a contract with Fifty Property Investments Pty Ltd ("FPI") for the construction of 42 home units and townhouses at Ashfield, the stonework being face brick. Some time after the project commenced, another company, Impero Stone, offered to supply and install natural stonework for the project. The cost of the stonework was included in a variation claim submitted to FPI by Mr Tarabay. A copy of Impero's invoice, addressed directly to FPI, was attached to the variation claim.

Mr Tarabay later terminated his contract with FPI, and instituted court proceedings to recover the balance claimed to be owed under the contract, including the cost of the stonework. Soon after the termination, Impero served a payment claim directly on FPI in the amount of \$76883.40. FPI provided a Payment Schedule proposing to pay \$Nil on the basis that no contract existed between FPI and Impero. The matter was referred to an Adjudicator, who determined in favour of Impero after finding that an "arrangement" falling within the definition of a "construction contract" under the Act existed between the parties.

FPI applied to the Supreme Court to have the Determination set aside on several grounds, most significantly that the Adjudicator had failed to satisfy one of the basic and essential requirements of the Act, that is, the existence of a construction contract between the parties.

ISSUE

Whether the existence of a construction contract is a matter that can be reviewed by the Court.

FINDING

The Court held that the existence of a construction contract, being one of the basic and essential requirements of the Act, was a jurisdictional fact that could be reviewed by the court. The Court found that the Adjudicator had wrongly decided that a construction contract existed between FPI and Impero, and accordingly, the Adjudication Determination was held to be void.

QUOTE

Brereton J held at paragraph 18 that:

Where jurisdiction depends on the existence of a state of facts, a decision maker's finding that the necessary facts to found jurisdiction exist can be reviewed by a court, notwithstanding that judicial review does not ordinarily extend to errors of fact, as there is an exception in the case of the "jurisdictional fact" doctrine, under which an erroneous finding of fact, the existence of which is an essential precondition upon which jurisdiction depends, is jurisdictional error, notwithstanding its factual character. Thus the inherent jurisdiction of superior courts to review decisions on the ground of jurisdictional error includes the power to consider whether there was an absence of jurisdiction because the decision maker made a wrong finding as to the existence of such an essential precondition. While a decision maker has to decide whether or not facts which are essential preconditions of jurisdiction exist, he or she can not give himself or herself additional jurisdiction by making a wrong decision on the collateral question as to the existence of such facts.

Brereton J found at paragraph 20 that:

Brodyn establishes that absence of the essential and basic preconditions results in an adjudication being void. It follows that whether or not there was a construction contract is a "jurisdictional fact", and the adjudicator's finding that there was such a contract is open to review in this Court.

IMPACT

The question of whether a construction contract exists between the parties to is a jurisdictional fact that is subject to review by the Courts and parties should ensure that any contract is clearly reduced to writing and executed to avoid later disputes.

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