JUDGMENT : Angel J; Supreme Court, Northern Territory. 20th March 2008.

[1] This is a summons upon an originating motion seeking a declaration that the Construction Contracts (Security of Payments) Act 2004 (NT) does not apply to a contract between the parties dated 20 April 2005 as varied by a Deed of Variation dated 5 October 2007.

[2] On 20 April 2005 the plaintiff as principal and the defendant as contractor entered into a contract to carry out certain structural, mechanical and piping works with the Alcan Gove Third Stage Expansion – G3 Project. That contract comprised a formal written agreement, certain general conditions of contract and other documentation. By Clause 4 of that formal agreement provision was made for the modification, changing or amending of the agreement and by Clause 7 the agreement was said to be governed by the laws of the State of Queensland.

[3] On 1 July 2005 the Construction Contracts (Security of Payments) Act 2004 (NT) commenced. By s 9 of that Act it is provided that the Act applies to a construction contract entered into after the commencement of s 9 and that it applied irrespective of where the construction contract was made or that it was expressed to be governed by the law of a place other than the Territory.

[4] The parties entered into a Deed of Variation on 5 October 2007.

[5] The question arising on the summons is whether the parties entered into a construction contract as defined in s 5 of the Act after 1 July 2005.

[6] It is common ground that the contractual arrangements effected between the parties on 20 April 2005 constitute a construction contract as defined by s 5 of the Act.

[7] The Deed of Variation dated 5 October 2007 contains, inter alia, the following provisions:–

"BACKGROUND

…

F. Clause 4 of Section 1 of the Contract permits the parties to modify, change or amend the Contract by agreement.

G. By this Deed, each party agrees to amend the terms of the contract on the terms set out in this Deed.

…

OPERATIVE PROVISIONS

3.1 Contractor agrees that all work under the Contract will be performed by the Contractor in accordance with all the provisions of the Contract, consisting of:
(a) this Deed; and
(b) the Contract.
…

4. VARIATIONS TO THE CONTRACT
The Contract is amended as follows:
(Here follow extensive provisions relating to, inter alia, changes in rates of pay, release of the defendant from previous obligations, work variations and extras).
…

13. EFFECTIVE DATE
This Deed takes effect, and the parties agree to be bound by the Contract as amended or varied by this Deed, on and from the Date of this Deed.

14. RETROACTIVE APPLICATION
Each party agrees that:
(a) clause 4 and Annexure A of this Deed apply retroactively from the Date of the Contract; and
(b) all other clauses of the Deed apply from the Date of this Deed.

15. REMAINING PROVISIONS UNAFFECTED
(a) Except as specifically amended or varied by this Deed, all terms and conditions of the Contract remain in full force and effect. With effect from the Date of this Deed, the Contract as amended or varied by this Deed is to be read as a single integrated document incorporating the amendments and variations effected by this Deed.
(b) To avoid doubt, nothing in this Deed alters the Contractor's liability for:
(i) the first $250,000 of each and every occurrence of damaged work under the Contract or Works for which the Contractor is responsible under Section 3 – Clause 15.2(b) of the Contract or the first $250,000 of each and every occurrence of loss or damage to the property of the Principal for which the Contractor is responsible;
(ii) for Defects; and
(iii) for Normal Construction Defects; and
(c) Except as specifically amended or varied by this Deed, all terms and conditions of the Master Project Agreement remains in full force and effect.
…

19. GENERAL
To avoid doubt, the parties:
(a) affirm all of the terms of the Contract as amended by this Deed; and
(b) agree that except as provided in this Deed, this Deed does not limit the liability of parties, nor have any impact on the rights and obligations of the parties under Contract."

[8] Did the parties enter into a construction contract as defined in s 5 of the Act after 1 July 2005? In my opinion they did not.

[9] As Kitto J – dissenting but not on this point – said in **Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd** (1956–57) 98 CLR 93 at 135:

"*… a long line of authorities has committed the law to an acceptance of the doctrine that an agreement which deals with subsisting rights and obligations of the same parties under an earlier contract may vary that contract without terminating it, and that whether it effects a variation on the one hand or a discharge on the other is a question depending upon the intention of the parties as appearing from the new agreement.*"

[10] In *FCT v Sara Lee Household and Body Care* [2000] 201 CLR 520 at 533, 534 Gleeson CJ, Gaudron, McHugh and Hayne JJ said:

"*When the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts. For one reason or another, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with a second, or whether the effect is to leave the first contract standing, subject to the alteration. For example, something may turn upon the place, or the time, or the form, of the contract, and it may therefore be necessary to decide whether the original contract subsists. In the present case, if the effect of what occurred on 30 August 1991 had been to rescind the agreement of 31 May 1991, then that would go a long way towards providing an answer to the appellant's argument that the assignment which occurred on 30 August was pursuant to the agreement of 31 May, with whatever that entails for the application of Pt IIIA of the Act.*

In ***Tallerman & Co Pty Ltd v Nathan's Merchandise (Vict) Pty Ltd*** Taylor J said:

'*It is firmly established by a long line of cases … that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.*'

That passage was cited with approval by Wilson and Dawson JJ in ***Dan v Barclays Australia Ltd****. It accords with principle and with authority.*" (Citations omitted).

[11] The "authority" to which their Honours referred at the conclusion of that passage were the well known cases of ***Morris v Baron & Co*** [1918] AC 1; ***British and Benningtons Ltd v NW Cachar Co*** [1923] AC 48; and ***United Dominions Corporation (Jamaica) Ltd v Shoucair*** [1969] 1 AC 340. In the ***British and Benningtons Ltd*** case Lord Sumner (at 69) said that the discharge of the old contract must depend on intention, tested in the manner settled in ***Morris v Baron & Co.*** Lord Sumner had previously posed the question (at 67) as follows:

"*… whether the common intention of the parties 'was to 'abrogate', 'rescind', 'supersede' or 'extinguish' the old contracts by a 'substitution' of a 'completely new' and 'self contained' or 'self subsisting' agreement, 'containing as an entirety the old terms, together with and as modified by the new terms incorporated'".*

[12] The agreement of 20 April 2005 was in my view not made an end of by the Deed of Variation of 5 October 2007. As a matter of construction that Deed is to be regarded – as it describes itself – as a deed of variation not of extinguishment and renewal. The Deed did not supersede the original contract but to the contrary expressly preserved the rights and obligations of the parties under the original contract subject to the amendments and variations effected by the Deed: clauses 13, 15 and 19.

[13] It was argued that the Deed of Variation standing alone constituted a construction contract to which the Act applies. However this is not so. The Deed is not a '*stand alone*' contract but wedded to the earlier agreement. If, which is not immediately apparent, a discrete construction contact can be carved from other of its provisions nevertheless any such 'contract' is to be treated as an addition by way of amendment to the original contract, that is, as part of the original contract, even though "*as a matter of formal logic*" it is a new and different contract, cf. ***British and Benningtons Ltd*** at 68–69, per Lord Sumner, ***United Dominions Corporation (Jamaica) Ltd v Shoucair*** at 347–348, per Lord Devlin. The parties never intended that there be a '*self contained*' or '*self subsisting*' agreement in addition to or substitution for the agreement of 20 April 2005.

[14] Mention should be made of some other matters.

[15] Both the contract and the Deed have choice of law provisions to the effect that Queensland law applies. Thus the question whether the Act applies to the contractual arrangements between the parties is a matter for Queensland law. Counsel for both parties accepted that there was no relevant difference between the law of Queensland and the law of the Northern Territory on the question.

[16] It was submitted by the defendant that the Court should not grant any declaration on discretionary grounds.

[17] In ***Blank v Beroya Pty Ltd (***1967) 92 WN (NSW) 24 at 26 Street J said:

"*As a general proposition the jurisdiction of this court to grant declaratory relief will not be exercised where another tribunal has full jurisdiction to investigate and determine the matters raised and where that other tribunal can be seen to be the tribunal either expressly indicated by Parliament or indicated by considerations of convenience to be the preferable tribunal to entertain the contest.*"

[18] It was submitted that having regard to the functions that an adjudicator need perform under the Act it would be inappropriate for the court to declare whether or not the contract in question is a construction contract under the Act. It was said that is a question of jurisdiction to be determined by an adjudicator under the Act.

[19] The general scheme of the Act was outlined by ***Southwood J in Boutique Venues Pty Ltd v JACG Pty Ltd*** [2007] NTSC 5 at paras [16] – [18]. The object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible: s 26. This is a fast track progress payment dispute resolution mechanism which contemplates a minimum of court involvement. See E G ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 at para [51].

[20] One of the functions of an adjudicator is set out in s 33 of the Act as follows:

"*(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;

…"

[21] The defendant having on 22 February 2008 served an application for adjudication for a claimed amount pursuant to s 28 of the Act the parties were notified on 25 February 2008 that an adjudicator, one Mr Roger Davis, had been appointed by the prescribed appointer to adjudicate an existing payment dispute between the parties. Although not joined as a party to these proceedings Mr Davis is familiar with the summons and accepts he is bound by any declaration made.

[22] It was submitted that an important element in the exercise of the court's discretion as to whether it will grant declaratory relief was whether sufficient alternative means were available to the plaintiff to pursue the issue of whether the Act applied to the contractual arrangements between the parties. It was submitted that whereas s 33(1)(a)(i) required an adjudicator to dismiss an application without making a determination of its merits if the contract concerned was not a construction contract raised the issue of whether the contractual arrangement between the parties was a construction contract to which the Act applied. I find it unnecessary to decide that question but note that on its face that sub–section appears to concern whether the contractual arrangement was a construction contract within the definition of s 5 rather than whether an admitted construction contract is one to which the Act applies by reason of s 9 of the Act. Section 33(1)(a)(i) requires dismissal if "the contract concerned is not a construction contract" not if "the contract concerned is not a construction contract to which this Act applies".

[23] Be that as it may and even assuming the adjudicator has the same question before him it seems to me the court ought to make a declaration in the circumstances. The question is a short discrete one shortly argued and readily answered. A substantial issue can be decided here and now rather than later. It seems to me convenience and expense favour an immediate decision by the court. In my opinion the cases to which I have been referred where courts have declined to grant injunctions against tribunals, arbitrators, adjudicators and the like are distinguishable. The present plaintiff is not seeking an injunction. It is to be noticed that s 33(1)(a)(iii) provides that an adjudicator must dismiss an application without making a determination if "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; …" The Northern Territory legislation in contrast to interstate legislation expressly contemplates concurrent jurisdiction to resolve disputes.

[24] I should also mention that the defendant sought an adjournment of the hearing in the event the Court in its discretion decided to entertain the application for declaratory relief. The Court, it was said, was being asked to construe the contract and Deed of Variation in the absence of the surrounding circumstances or factual matrix and the defendant wanted the opportunity to call such evidence, which, it was emphasised, was admissible even in the case of an unambiguous contract. Reference was made to ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** (2004) 219 CLR 165 at [40]. See also ***Pacific Carriers Ltd v BNP Paribas*** (2004) 218 CLR 451 and L***ion Nathan Australia Pty Ltd v Coopers Brewery Ltd*** (2006) 156 FCR 1 at [51], [100], [238]. However this is not to say that it is now obligatory for the Court in every case involving the construction of a contract in writing to endure evidence of the surrounding circumstances. The intentions of the parties is not to be ascertained "*at the expense of the actual language of the written contract*", cf. ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337 at 352 per Mason J. Here the Deed of Variation in its terms plainly preserves the agreement save in so far as it is varied. In my judgment no surrounding facts admissible within the confines of the parol evidence rule could alter that conclusion.

[25] The plaintiff is entitled to a declaration.

[26] I direct the plaintiff to bring in minutes of order and there will be liberty to speak to the minutes. I shall hear the parties as to costs

For the Plaintiff: D Robinson SC instructed by Clayton Utz
For the Defendant: R A Holt SC and S A McLeod instructed by Cridlands