

**AIR DYNAMICS CONTROL & SERVICES CONTRACTING V DURHAM & ANOR [2005]
NSWSC 366**

Supreme Court of New South Wales – 22 April 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 a 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 16 December 2004. Ishtar then submitted an Adjudication Application dated 4 January 2005, but this was not received by Air until 10 January 2005, 14 days after service of the Payment Schedule.

Following that, the Adjudicator, Durham, determined the matter in Ishtar's favour. Air submitted that the Act imposed a strict requirement that the Adjudication Application was to be received by Air within 10 working days of the Payment Schedule and that, therefore, the Adjudication Application was out of time and the Adjudicator acted without authority. Accordingly, Air sought an injunction restraining Ishtar from enforcing the Adjudication Determination and that payment of the Adjudicated amount should be paid into court as security.

Ishtar submitted that the Adjudication Application was received by the nominating authority 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 payment should be made into court.

FINDING

The Court held that there was a genuine dispute and that, accordingly, the order that the Adjudicated amount be paid into court as security was dismissed.

QUOTE

At paragraph 21 Studdert J held:

"The statute pursuant to which the adjudication was made provides machinery for the prompt resolution of disputes over building payments.

Having taken time to reflect on the competing submissions of counsel, there is plainly a genuine dispute about the determination of [Durham]. Until that dispute has been determined upon the final hearing of the summons, either [Air] or [Ishtar] must be out of pocket for the amount the subject of the adjudication.

Having reflected upon the matter, and since I cannot presume that [Air] will ultimately succeed on the summons, I do not consider that I should make the order for payment into court which [Air] seeks.”

IMPACT

Where there is a genuine dispute as to the validity of an Adjudication Determination, it is unlikely that the Adjudicated Amount will be paid into court in interlocutory proceedings.

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com