

William Forster Chambers CPD Series

Construction Contracts (Security of Payments) Act

Review by the Courts and Challenges to Adjudications

Introduction

1. There have been two Supreme Court challenges to adjudications under the Construction Contracts (Security of Payments) Act ("the Act"). Both were unsuccessful.
2. Both challenges were made on the ground that the adjudicator did not have jurisdiction to make the adjudication and that the adjudication was consequently void.
3. The grounds of appeal or review expressly permitted under the Act are extremely limited. This reflects the emphasis on speedy and cheap adjudications. Section 48(3) of the Act provides that "Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed".
4. Section 48(1) permits limited review. It provides that a person aggrieved by a decision made under section 33(1)(a) may apply to the Local Court for a review of the decision.
5. Section 33(1)(a) provides that the adjudicator must dismiss the application if
 - the contract is not a construction contract,
 - the application is not served in accordance with section 28 (in writing and within 90 days after the dispute arises),
 - an arbitrator or other person or a court or other body dealing with the matter has made an order, a judgment or other finding or
 - the adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or because the prescribed time or any extension of it is not sufficient for another reason.
6. The limited nature of the right of appeal or review means that the only practicable basis for challenge outside section 33 is a challenge to the jurisdiction of the adjudicator.

The challenges

7. In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42 the plaintiff was a principal seeking to set aside an adjudication in favour of a subcontractor. Transcon had terminated the contract and argued that progress claims made by Nilsen should be made under the contractual clause applying after termination rather than the contractual clause applying to progress claims made before termination. Transcon also argued that the progress claims lacked sufficient detail. Transcon argued that these alleged

deficiencies meant that the progress claims did not constitute a "payment claim" as defined in the Act.

8. Southwood J found against the plaintiff on the facts on both arguments. However, his Honour expressed some views which constitute important guidance on the essential requirements of the legislation. His Honour stated that the essential requirements (reflecting section 28 and the implied provisions in the schedule) of a valid payment claim under the Act are as follows:
 - The payment claim must be made pursuant to a construction contract and not some other contract;
 - the payment claim must be in writing;
 - the payment claim must be bona fide and not fraudulent;
 - the payment claim must state the amount claimed;
 - the payment claim must identify and describe the obligations the contract claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.
9. An adjudication on a "payment claim" lacking any of these essential requirements would be invalid: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390 - 391, *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.
10. In the second challenge, *Independent Fine Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46, a subcontractor challenged the validity of an adjudication in favour of a principal. The subcontractor argued that the payment claim was made outside the 90 days after the dispute arose permitted by a section of 28 of the Act. The subcontractor argued that the payment dispute arose when the principal made its claim for payment according to the terms of the contract. If so, the application for adjudication would have been out of time.
11. The subcontractor argued that the language of the Act, especially section 28 stating that the application for adjudication "must" be made within 90 days after the dispute arises and section 33(1) stating that the adjudicator "must" dismiss the application if it is not prepared and served in accordance with section 28, implied that application within 90 days was an essential requirement leading to invalidity if not satisfied.
12. In the adjudication decision, the adjudicator acknowledged that the contract had a written provision about how a party must make a claim which, if applied, meant the application was out of time. However, he found that there was no written provision, in accordance with section 20 of the Act, about
 - when and how a party must respond to a payment claim;
 - by when a payment must be made.

13. The adjudicator accordingly found that each of the provisions in division five of the schedule were implied into the contract. The consequence of this was, according to the adjudicator, that the time for payment of the principal's claim was extended by 28 days and the application for adjudication was within time.
14. Mildren J agreed with the adjudicator's findings and would have dismissed the plaintiff's claim on that basis alone. His Honour found that both elements in section 20 needed to be present so that if there was no written provision about one then both the implied conditions in the schedule relating to responding to a payment claim and when payment must be made were implied.
15. His Honour also found that the adjudicator's decision on the time when the payment dispute arose, even if wrong, was within his jurisdiction to decide. His Honour found, applying *Project Blue Sky*, that the legislature did not intend invalidity to result from an adjudicator's error about when the payment dispute arose.
16. His Honour reasoned that if the adjudicator had jurisdiction to make a wrong decision to dismiss a claim pursuant to section 33(1) (and which permitted an appeal against such a decision) then the adjudicator also had jurisdiction to make a wrong decision not to dismiss the claim.

Conclusion

17. The prospects of a successful challenge to an adjudication on the basis of absence of jurisdiction are less than encouraging. This is consistent with the legislative purpose of the legislation. The few essential requirements of an adjudication are those listed by Southwood J.
18. While the requirements of procedural fairness will apply, the content will be determined by the Act. Southwood J thought they were satisfied by the essential points he identified: *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* at [68]. Hodgson JA in *Brophy* at [55] thought that only a "substantial denial of the measure of natural justice that the Act requires to be given" would result in invalidity.

Enforcement of an adjudicator's decision

19. An adjudication decision may be registered and enforced as a debt. However, if a bona fide dispute exists it would appear (on present authority) that a statutory demand based on the debt may be set aside in whole or part: *Boutique Venues Pty Ltd v JACG Pty Ltd* [2007] NTSC 5.

Some criticisms of the legislation

20. Only the Northern Territory and Western Australia legislation provides for principal claims against subcontractors. It is difficult to see how the laudable legislative purpose of ensuring continuity of cash flow for subcontractors

necessitates claims by principals. A principal claim, as in *Independent Fire Sprinklers*, will not be for progress payments but is likely to be a summary application for liquidated damages. Where, as in that case, the payment claim was not disputed within time the adjudication, which is basically unchallengeable, can send a subcontractor broke before the merits of the dispute can be determined. That seems unnecessary and unjust to me.

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