



CONSTRUCTION LAW UPDATE No. 710

Adjudication News

Introduction

In the last 10 years or so, adjudication has been widely accepted in the construction industry around the world as a means of resolving payment disputes during construction. South Australia is now the only mainland Australian State without adjudication legislation, although there is a private members bill, the *Building and Construction Industry Security of Payment Bill*, currently before State Parliament, and the State Government has recently transferred consideration of the issue from SafeWork SA (which was always a curious choice of department) to the Attorney-General's Department.

We have had considerable experience of adjudications, both interstate and overseas, and had a considerable hand in the recent Contractual Adjudication Group scheme, which enables parties in SA to reap the benefits of adjudication, notwithstanding the absence of legislation.

Abroad, the courts have recognised the huge cost benefits of adjudication, and will in appropriate cases stay court proceedings in order for adjudication to take place; see for example the recent case of *DGT Steel and Cladding v Cubitt Building*, noted on the Cases page of our website (www.feg.com.au/Cases.htm).

The Case for Uniformity

It is hard to see any benefit in each State having its own adjudication system. Originally, Victoria adopted the NSW legislation, when that system still allowed a loser to provide security instead of parting with the cash: hence the name "security of payment". That title is really now a misnomer, since NSW amended its legislation to require the loser to pay cash. Victoria amended its own legislation only last year, introducing a new scheme that is so complex that it appears to be very little used. The only current uniformity is between WA and NT. As a matter of interest to SA, when NT introduced its adjudication legislation – the *Construction Contracts (Security of Payment) Act 2004* – it felt able to dispense with its *Workmen's Liens Act*, and it has been suggested that SA might follow suit – at least in non-domestic cases – when adjudication is eventually introduced here.

We understand that there will shortly be moves afoot in Canberra to bring some uniformity to the system; that sensible step would follow the model of commercial arbitration law, which was unified throughout Australia in the 1980s.

In the meantime, the interstate nature of some adjudications is illustrated by a recent case, in which Fenwick Elliott Grace acted for a client in setting aside the unfavourable decision of a WA adjudicator in a NSW Court. The case shows the need for adjudicators to adhere to the principles of natural justice.

The background to *Ace v ECR*

ECR International ("ECR") needed experienced rigging supervisors to work on a large project at Port Hedland in WA. In November 2006, ECR hired two riggers from Ace Rigging ("Ace"), a Sydney labour hirer. When the riggers arrived in Port Hedland, ECR considered them to be incompetent for the work they were required to carry out.

Ace denied the riggers were incompetent and in December 2006 invoiced ECR the sum of \$25,000. In January 2007 ECR refused to pay, claiming that the riggers were incompetent and that the number of hours invoiced was excessive.

A brief period of negotiation ensued. On 20 March 2007, ECR made a "without prejudice offer" to Ace to settle the dispute. The offer was rejected.

The adjudication commences

On 1 June 2007, Ace served ECR with an application for adjudication in WA under the *Construction Contracts Act 2004* (WA). Amongst the papers Ace's lawyers sent to the adjudicator was a copy of the 20 March 2007 "without prejudice offer".

On 8 June 2007, we discovered that the adjudicator had been given and read the without prejudice correspondence in which ECR had offered Ace a sum of money to settle the dispute. ECR wrote to the adjudicator seeking that he disqualify himself on the grounds of apprehended bias. The adjudicator refused to do so.

On 15 June 2007, under continuing protest as to the bias point, ECR sent its response by email to the adjudicator and to Ace. This was within the 14 day period required by s27 of the Act. However, the adjudicator refused to consider it. The adjudication response had been received by email by Ace's lawyers on Friday 15 June, but due to its spam filter, and perhaps the time difference between States, the response had not been noticed until the following Monday morning.

On 29 June 2007, the adjudicator handed down his decision. He granted to Ace its entire claim and gave no consideration to ECR's response on the basis that it had not been provided by fax or post before the required time.

On the same day, ECR told Ace it would challenge the adjudicator's determination and outlined the grounds on which it proposed to do so; denial of natural justice and that the application for adjudication was time barred. Notwithstanding the notification, Ace proceeded to enter judgment in the NSW Local Court against ECR. On learning that judgment had been entered, ECR applied to the Court to have the judgment set aside.

Robert Fenwick Elliott appeared as counsel for ECR. Ace contended that the Court did not have the jurisdiction to set aside the adjudicator's determination. However, ECR contended that the adjudicator's determination was void, and therefore the Court had jurisdiction to consider the application.

The Court agreed it had jurisdiction and proceeded to examine whether the adjudicator's determination was a nullity. There were three separate bases for the Court to make such a finding: firstly, that the reading by the adjudicator of the without prejudice letter gave rise to apprehended bias in the mind of the adjudicator. Secondly, that the failure by the adjudicator to consider ECR's submissions amounted to a denial of natural justice. Thirdly, that the application for adjudication had been made too late. The WA Act requires that an application for adjudication be made within 28 days of the dispute arising. In this instance, much more than 28 days had passed, and so Ace had reissued the invoice, hoping to restart the dispute timeframe and then applied for adjudication soon after the reissuing of the invoice.

In relation to the first, the Court considered a number of authorities and concluded that the bias rule does apply. However, on the facts of this case, the court concluded that there was no apprehended bias due to the disclosure of the offer.

In relation to the second, the Court noted that where a person is made aware of the contents of a document the legislative provisions that prescribe means of service should not (unless expressly

drafted to say so) exclude service in another way. In other words, the fact that email was not mentioned in the Act as a means of service was not decisive when there was no dispute that the document had been transmitted by email and arrived on the due date. The fact that Ace's spam killer diverted the document into its junk mail was no different to Ace misplacing and failing to open a postal delivery.

In any event, the Act entitled the adjudicator to inform himself in any way he thought fit. The Court set aside the judgment, declared the adjudication a nullity and awarded costs to ECR.

Given this finding, the Court did not make a determination on the third point; see the Legal Notes page on our website for a discussion of this (www.feg.com.au/LegalNotes.html).

Conclusion

The case is a further reminder that adjudication is about the just and economical resolution of disputes, not just about imposing deadlines and insisting on form.

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Robert has been a construction law specialist since 1977, and founded Fenwick Elliott LLP in London, the largest specialist construction law practice in the Commonwealth. He is admitted in NSW, the United Kingdom, as well as SA, and has had a particular interest and role in adjudication since the 1990s.

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