

Recent Project Dispute Cases in Australia

IN SHORT

The Situation: Statutory adjudications continue to be deployed readily on projects in the construction and engineering fields.

The Result: There have been a host of cases on the operation and scope of such adjudications in the Australian courts.

Looking Ahead: The cases provide important practical guidance on adjudication for those operating in this industry.

***Probuild Constructions v Shade Systems; Maxcon Constructions v Vadasz* [2018] HCA 4 & 5**

High Court concluded that security of payment legislation prohibits state courts from reviewing adjudication decisions for nonjurisdictional errors of law.

The decision provides clarity on the utility and risk profile of the adjudication process for claimants and respondents alike. For more information, please read our [earlier Commentary](#).

***All Seasons Air v Regal Consulting Services* [2017] NSWCA 289**

Adherence to the reference date for progress claims is critical, and a payment claim cannot be served early irrespective of any deeming provisions in the contract.

All Seasons made a progress claim on the contract designated date of 20 June 2016, but also made a further claim on 12 July 2016. Regal resisted the further claim on the basis that it did not have a valid reference date.

On adjudication, All Seasons argued that the second claim was served early in respect of the reference date for the following month and was thus valid on the basis of service deeming provisions in the contract. This was accepted by the adjudicator, but overturned by the NSW Supreme Court and an appeal to the Court of Appeal was dismissed, confirming that a claim cannot validly be served early.

***Parkview Constructions v Total Lifestyle Windows* [2017] NSWSC 194**

An adjudication delivered on a USB is not served until the recipient accesses the documents on it.

Total Lifestyle Windows delivered an adjudication application to the respondent, Parkview Constructions ("Parkview"), on a USB stick, but Parkview did not open it until the next day. Parkview submitted its response 5 days after opening the document on the USB but the adjudicator treated it as late on the basis of the date the USB was received rather than opened.

The NSW Supreme Court overturned the decision on the basis that until the USB was accessed it did not amount to writing within the meaning of s21 of the *Interpretation Act* (NSW).

***Probuild Constructions (Aust) v DDI Group* [2017] NSWCA 151**

Where a principal has a discretionary EOT power, it will usually be obliged to exercise it for delays it has caused, even if the contractor makes no proper EOT claim.

An adjudication determined that Probuild had acted unreasonably in not exercising a discretionary power to grant EOTs in circumstances where Probuild had instructed additional works—applying the 'prevention principle' whereby a party cannot insist on a contractual obligation if it has prevented the other party from performing it.

Probuild sought to overturn this in the NSW Supreme Court, contending that DDI had not advanced the prevention principle in its adjudication application.

Probuild was unsuccessful at first instance and on appeal, the Court of Appeal holding that the adjudicator's 'inferential application' of the prevention principle was 'squarely in issue'.

The decision reinforces the application of the prevention principle, even where it is not specifically articulated in an adjudication.

***Quickway Constructions v Paul J Hick* [2017] NSWSC 830**

An adjudicator has a sufficient interest in judicial review of an adjudication to create an apprehension of bias where the adjudicator is to adjudicate another claim between the same parties ...

Electrical Energy ("Electrical Energy") served Quickway Constructions ("Quickway") with two payment claims under NSW security of payment legislation. While these claims progressed through adjudication, it served another payment claim. On 28 July 2017, the earlier claims were determined by the adjudicator in favour of Electrical Energy.

Quickway commenced proceedings in the NSW Supreme Court against Electrical Energy and the adjudicator in relation to the 28 July 2017, decision and the Court reserved its decision on 15 August 2017.

The same adjudicator was appointed on the second claim on 21 August 2017. Quickway sought to disqualify the adjudicator from acting in the second claim given the adjudicator was a defendant in the pending decision on the earlier adjudication.

The court disqualified the adjudicator from acting in the second adjudication on the basis that the risks of an adverse outcome in the litigation relating to the first claim (including costs orders), gave the adjudicator a sufficient personal interest in the outcome of the proceedings, adverse to that of Quickway, which could reasonably create apprehended bias.

KEY TAKEAWAY

Adjudication continues to play a significant role in projects disputes so it is important for principals and contractors to keep up-to-date on practical guidance provided by the courts on adjudication matters.

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