

The End of the “Deemed Liability” Adjudication in Western Australia

IN SHORT

The Problem: The Construction Contracts Act 2004 (WA) contains a number of provisions that are to be implied into construction contracts that are silent as to those matters. These implied terms have been a steady source of confusion for those tasked with assessing when and how those terms are to be implied as well as their proper meaning and effect.

Significantly, confusion regarding the implied terms materialised in a long-standing perception that certain clauses concerning responses to payment claims if implied (and not complied with) would result in payment claims being deemed due and payable, irrespective of their merits. This in-turn led to adjudicators considering it necessary to disregard the merits of the underlying payment claims in these circumstances.

The Development: The WA Supreme Court in *Total Eden Pty Ltd v Charteris* has clarified that the terms within clause 7 Schedule 1 of the CCA are to be implied only to the extent necessary to address the gaps in a construction contract and are not necessarily to be implied in full.

The Supreme Court has also dismissed the potential deeming effect of cl. 7(3) of the CCA while sounding a warning to adjudicators that failures in properly implying or construing these implied terms can result in jurisdictional error.

Looking Ahead: This decision may come as a warning to adjudicators that errors in the process of implying provisions into a construction contract and/or failing to properly construe these provisions can amount to jurisdictional error.

ECA Systems (“ECA”) and Total Eden Pty Ltd (“Total Eden”) entered into a subcontract for electrical work in the Pilbara (“Subcontract”). In August 2016, ECA submitted an invoice that was not formally rejected or paid by Total Eden. ECA systems commenced an adjudication in respect of the outstanding invoice. In its adjudication response, Total Eden alleged a claim of set-off. An adjudicator was appointed under the Construction Contracts Act 2004 (WA) (“CCA”) who determined in favour of ECA.

In finding for ECA, the adjudicator determined that implied terms within the CCA regarding how Total Eden was to respond to a payment claim were to be implied into the Subcontract. However, the adjudicator erred with respect to the following conclusions and fell into jurisdictional error.



The court held that the adjudicator’s construction of cl. 7(3) as a ‘deeming provision’ was not supported by the text of cl. 7 (3).

Application of the Implied Terms

Once identifying that certain provisions in cl. 7 of the CCA regarding responses to payment claims were to be implied into the Subcontract, the adjudicator incorrectly determined that *all* of the terms in cl. 7 were to be implied (including cl. 7(3) concerning the time for any payment by Total Eden).

While the adjudicator was correct to seek to imply certain provisions in Schedule 1 of the CCA into the Subcontract, he erred when concluding that all of cl. 7 was to be implied. Pritchard J clarified that only the clauses necessary to fill the gaps in the Subcontract (being cl. 7(1) and 7(2)) were necessary. By seeking to imply the entirety of cl. 7 into the Subcontract, the adjudicator misunderstood what was required from him under the CCA and fell into jurisdictional error.

Deeming Provisions

After concluding that the entirety of cl. 7 was to be implied into the Subcontract, the adjudicator erred when considering the effect of these provisions, including that noncompliance with cl. 7(3) (which was erroneously implied into the Subcontract) meant that the total value of ECA’s payment claim was deemed to be due and payable and that any defence from Total Eden could not be considered in the adjudication proceedings.

The adjudicator’s construction of cl. 7(3) is not novel and has been an area of debate and confusion since the CCA was enacted in 2005. The argument that cl. 7(3) contains this form of ‘deeming provision’ was raised in submissions to Professor Evans’s review of the CCA in 2016 (Philip Evans, ‘Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)’ (August 2015) 80).

The court held that the adjudicator’s construction of cl. 7(3) as a ‘deeming provision’ was not supported by the text of cl. 7(3), which is properly concerned with clarifying when a payment dispute arises.

Importantly, Her Honour held that even if cl. 7(3) was to be implied into the Subcontract, it would not bear on the adjudicator's determination of liability, did not affect Total Eden's liability to ECA under the Subcontract, and would not exclude Total Eden's recourse to a set-off defence. Her Honour considered that the adjudicator's incorrect construction of cl. 7(3) caused him to fail to properly determine Total Eden's liability (by ignoring its set-off defence) according to the terms of the Subcontract, which amounted to jurisdictional error.

Adjudication Costs

Despite the usual starting point that each party bears its own costs of the adjudication, the adjudicator concluded that Total Eden ought to pay ECA's costs of the adjudication on the basis that Total Eden had engaged in a frivolous or vexatious dispute by asserting a defence that 'was always bound to fail' due to the implied provisions of the CCA. Her Honour held that the adjudicator's decision in this respect constituted a manifestly unreasonable exercise of the discretion and amounted to jurisdictional error.

Conclusion

Total Eden provides useful guidance as to the process to follow when implying terms into a construction contract and the proper construction of cl. 7(3) of the CCA. Importantly, this decision addresses the 'deeming provision' risk that has persisted in the CCA for over a decade. However, Pritchard J's findings should also serve as a warning to adjudicators that a failure to properly imply and construe the implied terms in the CCA can lead to jurisdictional error.

THREE KEY TAKEAWAYS

1. The Supreme Court of Western Australia has clarified that the terms within clause 7 Schedule 1 of the CCA are to be implied only to the extent necessary to address the gaps in a construction contract.
2. The construction of clause 7(3) as a 'deeming provision' has been found to be incorrect. An adjudicator is required to assess the merits of a respondent's defence.
3. An adjudicator's failure to properly imply provisions in the CCA into a construction contract can amount to jurisdictional error.

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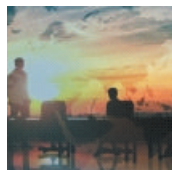
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