COBRA AUBEA 2015

Sydney, Australia

8 – 10 July 2015

UTS UNIVERSITY OF TECHNOLOGY, SYDNEY

AUBEA

University of Western Sydney

rics.org/cobra

RICS COBRA AUBEA 2015

The Construction, Building and Real Estate Research Conference of the Royal Institution of Chartered Surveyors

The Australasian Universities' Building Educators Association Conference

Held in Sydney, Australia in association with AUBEA, the University of Technology Sydney and University of Western Sydney

8 -10 July 2015

ISBN: 978-1-78321-071-8

Royal Institution of Chartered Surveyors

Parliament Square

London

SW1P 3AD

United Kingdom

www.rics.org/cobra

HOW SHOULD ADJUDICATORS DEAL WITH EXPERT REPORTS IN AUSTRALIA?

Samer Skaik[1], Jeremy Coggins[2] Anthony Mills[3]

[1] *School of Architectural & Built Environment, Deakin University, Australia*
[2] *School of Natural & Built Environments, University of South Australia, Adelaide, Australia*
[3] *School of Architectural & Built Environment, Deakin University, Australia*

ABSTRACT

Since its introduction in to Australia fifteen years ago, statutory adjudication has become increasingly used by parties seeking to recover payment claims which are large in amount and technically and legally complex in nature. This has inevitably led to the formalisation of the adjudication process with parties often submitting, amongst other documents, expert witness reports to support their arguments. The increase in documentation that an adjudicator must consider poses a threat to the integrity of the adjudicator's determination. This paper adopts a 'black letter' approach to distil the law concerning the way in which adjudicators should deal with expert reports, and reveals there are many pitfalls that an adjudicator should be aware of. Moving forward, this paper seeks to inform the PhD study of the lead author which eventually aims to formulate a roadmap with recommendations that may be applied to help optimise the various Australian adjudication schemes for the determination of large and/or complex payment claims.

Key words: adjudication, expert witness, natural justice, security of payment legislation.

INTRODUCTION

Over the past 15 years, each of the Australian States has enacted security of payment legislation ('the legislation') introducing statutory adjudication for the swift and provisional[4] resolution of payment disputes in the construction industry. It is due to the brevity and provisional nature of statutory adjudication that the courts have adopted the approach that adjudicators' decisions containing non-jurisdictional errors of law on the face of the record remain valid, leading many to describe adjudication as a 'quick and dirty' process. The parliamentary objective of the security of payment legislation is to ensure the timely flow of cash down the hierarchical contractual chains that typically exist on construction projects. Further, it appears from the NSW Second Reading Speech[5] that the *Building and Construction Industry Security of Payment Act 1999* (the 'NSW Act') – upon which Victoria, Queensland, ACT,

[1] sskaik@deakin.edu.au
[2] Jeremy.coggins@unisa.edu.au
[3]Anthony.mills@deakin.edu.au
[4] Meaning that a dissatisfied party has the right to subsequently pursue the resolution of the dispute in arbitration or litigation.
[5] The NSW Act, which came into operation on 26 March 2000, was the first security of payment legislation to be enacted in Australia.

Tasmania and South Australia closely modelled their Acts[6] – was very much targeted towards the financial protection of the smaller contractor (such as trade contractors).[7] Despite the legislation having been enacted with the smaller contractor in mind, the scope of the legislation covered all works carried out and/or goods supplied under a construction contract regardless of size of contract or amount of payment claim. As such, each of the Acts as enacted adopted a "one size fits all approach" with respect to the payment and adjudication schemes prescribed. It is only very recently,[8] that one of the Acts, the Queensland Act, has deviated from this approach by enacting an amendment to introduce a dual scheme of adjudication which treats 'complex' payment claims (more than $750,000) differently to 'standard' payment claims (up to $750,000).

As a consequence of the legislation's broad coverage, an increasingly significant proportion of the payment claims determined by adjudicators in practice since the commencement of the legislation are large in amount and technically and legally complex in nature ('large and complex payment claims'). Of the 471 adjudications determined in Queensland in 2013/14, for example, around a quarter were for claims in excess of $100,000, and around 13% were for payment claims over $500,000. With such large sums of money at stake, it is not surprising that many parties have taken to engaging lawyers to prepare their adjudication applications and responses, and often submit copious amounts of documentation to support their cases. Such documentation typically includes statutory declarations, contemporaneous documents, programmes, site inspections, photographs and expert witness reports. Indeed, it is for this very reason that the Queensland Act's recently implemented dual scheme of adjudication (as mentioned above) allows 15 business[9] for an adjudicator to make their decision for 'complex' payment claims as opposed to 10 business days for 'standard' payment claims.[10]

Given that the courts have held that there must be a good faith attempt by the adjudicator to exercise their powers under the Act and no substantial denial of natural justice in the adjudication procedure,[11] an adjudicator determining a complex claim is often placed in a difficult and demanding position whereby he or she is required to consider vast amounts of information in a very short timeframe. Any failure on the part of an adjudicator to properly consider a duly submitted document could, therefore, lead to the adjudicator's determination being quashed upon judicial review. Having said this, the courts have also recognised the adjudicator's predicament in such circumstances: "*Adjudicators provide their determinations in a "somewhat pressure cooker environment". In some instances the adjudicator "cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing". The Court should be slow to conclude that adjudicators who work under the very tight*

[6] Collectively these five Acts together with the NSW Act have been referred to by many commentators as the 'East Coast model' Acts, as opposed to the Western Australia and Northern Territory Acts which were more closely modelled on the UK Act and have been referred to as the 'West Coast model' Acts.
[7] See Iemma (1999: 1594).
[8] The Queensland Act's dual scheme of adjudication came into force on 15 December 2014.
[9] This time starts to run under the Queensland Act from the date on which the adjudicator has or should have been provided with a copy of the adjudication response.
[10] See Wallace (2013: 203).
[11] See *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 at [52].

deadlines imposed by the Act, and who, in seeking to do their best, make a mistake, have not acted in good faith."[12]

Against this background, this paper aims to identify the legal obligations which an adjudicator in Australia is under when receiving expert witness reports. The paper adopts a 'black letter' approach, examining several judicial challenges to adjudicators' determinations that have considered issues relating to the way in which adjudicators have dealt with expert witness reports. The paper reveals that there are many pitfalls of which adjudicators need to be aware when dealing with expert reports, and concludes that as long as parties are permitted to submit large amounts of supporting documents, such as expert reports, for adjudicators to consider in a very short timeframe there will likely be ample opportunity for disgruntled parties to mount judicial challenges to adjudicators' determinations.

EXPERT EVIDENCE IN ADJUDICATION

The function of an expert witness has been described as 'to determine the facts, form its own opinion derived from those facts and reach its own conclusions on those facts' (Scott 2004). It has traditionally been common practice for parties in litigation and arbitration to engage experts to provide evidence in an attempt to influence the inferences drawn by the tribunal in a dispute. More recently, the use of expert witnesses by parties in statutory construction adjudications concerning large and complex payment claims has become more frequent. Unlike their counterparts in litigation and arbitration, however, adjudicators must make their determinations under severe time constraints (typically 10 business days unless extended by agreement of the parties[13]). This makes it all but impossible for expert witness evidence to be tested through cross-examination, or for the adjudicator to even meet with the parties and their expert witnesses. In some cases, adjudicators even struggle to consider expert witness evidence in its entirety in their determinations. As one Queensland adjudicator commented in his determination: "*In the premises, there will be sections of submissions which I have not commented upon. This should not be misinterpreted that I have not read or considered those submissions and all of the supporting material relied upon by the parties. If I were to comment on every point made by every expert and person who provided a statement or report, I fear that I would be still writing my reasons one year from now.*"[14]

It is for these reasons that many have questioned the appropriateness of expert evidence for adjudication,[15] as well as the suitability of adjudication to address payment claims for matters such as disruption, prolongation/extension of time/delay costs, damages and contested variations.[16] A further concern with respect to the use of expert witness reports in adjudication, as explained by Wallace (2013), is that the routine endorsement of payment claims as being made under the legislation results in a significant administrative burden upon respondents who then *need* to routinely prepare comprehensive payment schedules. This *need* is generated due to the legislation (as it

[12] *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205 at [66].
[13] See, for example, NSW Act, s 21(3).
[14] *O'Donnell Griffin Pty Ltd v Siemens Ltd* [2009] at [24], Adjudication Application No. 1057866_154. Available online: http://xweb.bcipa.qld.gov.au/ars_xweb/Pages/PDFViewer.aspx?APP_NO=1057866_154&SEQ_NO=1
[15] See, for example, the panel debate entitled "Expert evidence in adjudication, a contradiction in terms?", held by the Adjudication Society in the UK on 18 Jan 2012.
[16] See, for example, several submissions to the Wallace Report at pp 78 to 80.

then stood in Queensland) restricting the reasons for withholding payment in the adjudication response to those previously raised in the payment schedule.[17] As Wallace (2013: 201) observed: "*For instance, is it reasonable that a respondent should be put to the costs associated with obtaining expert evidence from a quantity surveyor or engineer and provide that expert report in a payment schedule every time it disagrees with a payment claim?... This requirement in my view places an intolerable cost and inconvenience on a respondent, when they do not even know whether the referencing of the Act is a genuine prelude to an adjudication application or whether it is simply company policy of the claimant.*"

Following Wallace's observations and recommendations, the Queensland Parliament amended the Queensland Act (on 15 December 2014) to allow a respondent to raise new reasons for withholding payment in their adjudication for 'complex' payment claims.[18]

JUDICIAL DECISIONS CONCERNING EXPERT EVIDENCE IN ADJUDICATION

In *Owners Strata Plan 61172 v Stratabuild Ltd*,[19] the respondent served a payment schedule indicating its reasons for withholding payment were because there were defects in painting work carried out by Stratabuild and the likely cost to rectify those defects would exceed the claim. The payment schedule further stated that the respondent both: understood that testing had been undertaken in relation to the quality and compliance of the relevant painting works which showed the painting works were substantially defective and specifically that the paint should be on average 2.5 times its thickness as applied; and had relied on an annexed quotation from Skillco Design & Construct Pty Ltd which provided a cost for undertaking rectification to the relevant painting works. Subsequently, in its adjudication response, the respondent relied upon a technical report on paintwork ('the Bayliss Report') regarding defects in the painting work and an updated quotation from Skillco regarding the cost to rectify those defects in its adjudication response. The adjudicator did not take into account the Bayliss Report or the Skillco quotation when making his determination on the basis that, pursuant to section 20(2B) of the NSW Act, the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the respondent's payment schedule. The adjudicator viewed that the Bayliss Report was very detailed and it should have been made available in the payment schedule and consequently the respondent should have reduced its arguments in its adjudication response to the thickness of the paint and not relied on the report. The court, however, disagreed with the adjudicator, finding that the contents of the payment schedule were appropriately worded and specific enough to sufficiently indicate the reasons for withholding payment and the adjudicator had confused the use of the words reasons and submissions in the Act. As such, the court found the adjudicator had misconstrued the Act, misapprehending the nature of or limits on his functions and powers and thereby committing a jurisdictional error.[20]

[17] Although the Queensland Act has now been amended to allow new reasons for withholding payment to be introduced in the Adjudication Response, the NSW, ACT, Tasmanian and South Australian Acts all continue to restrict the reasons to those initially raised in the Payment Schedule – see, for example, NSW Act, s 20(2B).
[18] See Queensland Act, s 24(5).
[19] [2011] NSWSC 1000.
[20] See *Kirk v Industrial Court of NSW* [2010] HCA 1 at [72], *Chase Oyster Bar PtyLtd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [158].

Furthermore, the court held that by failing to consider the reports that were relevant to the adjudication, the adjudicator had failed to comply with his statutory obligations with the result that the adjudicator failed to afford procedural fairness to the plaintiff. On these bases, the court declared the adjudicator's determination void.

Notably, the court's decision in *Stratabuild* represents a development, post *Chase Oyster Bar PtyLtd v Hamo Industries Pty Ltd* ('*Chase*'),[21] in the way in which the courts interpret section 20(2B) of the NSW Act with respect to enforceability of an adjudicator's determination. This development is demonstrated by comparing *Stratabuild* with the earlier (pre-*Chase*) decision in *Broad Construction Services (NSW) Pty Limited v Michael Vadasz*[22] where the court refused to declare an adjudicator's determination void on the basis that the adjudicator had failed to consider a geotechnical report submitted by the respondent in its adjudication response, stating (at [37]) that, "it is a matter for the adjudicator to decide… whether a submission has been "duly made" in support of a payment schedule. It is not a matter for the Court to determine on the basis of some objective test."

In *Patrick Stevedores Operations No. 2 Pty Ld v McConnell Dowell Constructors (Aust) Pty Ltd*,[23] the claimant served an expert report prepared by Hinds Blunden in support of its claim. In some cases, the amount claimed was greater than the amount supported by the report. The respondent submitted that the adjudicator should have accepted the amount set out in the expert report and that it was denied natural justice because the adjudicator did not deal with the expert report and, in particular, did not explain why he accepted the amount claimed by the claimant rather than the amount supported by its own expert. Ball J, however, rejected the respondent's submission stating at [59]: *"I do not accept that submission. The adjudicator was entitled to accept McConnell Dowell's submissions whether or not those submissions were supported by the Hinds Blunden report. He was obliged to give reasons for doing so having regard to the nature of the task that he was undertaking. He was not obliged to explain why he rejected any number of possible alternatives."*

In *Laing O'Rourke Australia Construction v H&M Engineering & Construction*,[24] the claimant submitted a payment claim comprising a number of distinct claims including three which sought payment for disruption costs. The respondent provided a payment schedule stating that it did not propose to make any payment and containing detailed reasons for withholding payment. Subsequently, the respondent served an adjudication response including an expert report (prepared by SJA Construction Services) as well as four statutory declarations. McDougall J viewed (at [39]) that, in accordance with *Tickner v Chapman*,[25] the obligation of the adjudicator to consider various matters imposed by s 22(2) of the Act (which includes all submissions duly made by the respondent in support of its payment schedule) should be read as requiring an 'active process of intellectual engagement'.[26] The adjudicator did not accept the expert report served by the respondent as an independent expert report as the expert stated on numerous occasions, in one or other form of words, "I am instructed that..." as to some particular factual proposition. The adjudicator drew from this that "SJA has not done

[21] [2010] NSWCA 190.
[22] [2008] NSWSC 1057.
[23] [2014] NSWSC 1413.
[24] [2010] NSWSC 818.
[25] [1995] FCA 1726.
[26] This approach was also followed by Lyons J in *QCLNG Pipeline v McConnell Dowell Constructors* [2011] QSC 292 at [110].

an independent analysis of the project but essentially relied upon instructions". Despite doubting the independence of the expert report, the adjudicator spent 24 paragraphs of his determination analysing the expert report and saying why, amongst other things, the expert report did not substantiate to his satisfaction the respondent's allegations with respect to the disruption claims (Davenport 2011: 7). McDougall J, however, disagreed with the adjudicator's position, and viewed it to be 'entirely appropriate for an expert to state the assumptions on which he or she relies in coming to the views that he or she expresses' (at [105]). Regardless of the adjudicator's analysis of the expert's report in his determination, however, the court found that the way in which the adjudicator dealt with the SJA report supported the drawing of the inference as to want of proper consideration. As McDougall J stated (at [108]): "*The adjudicator could have disagreed with the opinions expressed by Mr Abbott, even if he had regarded Mr Abbott as an independent expert who had complied with his duty to state, among other things, assumptions of fact on which his opinion was based. But to take a dismissive view of the opinions, simply because they were based on assumptions of fact, indicates a lack of attention to the case that LORAC put."*

With respect to the statutory declarations in the context of the disruption claims, the adjudicator only made two references: that they did not demonstrate to his satisfaction that the disruption costs were due to the claimant's own fault, and they include countless matters not mentioned in the payment schedule. The court found (at [95]) that, although it was clear from the adjudicator's determination that he had read the statutory declarations, his failure to refer to their substance when dealing with the disruption cost claims, except in a dismissive and unreasoned way, showed that he had not considered them in the requisite way. Due to the way in which the adjudicator had dealt with the expert report and statutory declarations, the court quashed the adjudicator's determination on the grounds that the adjudicator had denied natural justice to the respondent and failed to perform his statutory obligations in good faith in the requisite sense.

In *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd*,[27] the claimant made a first adjudication application in relation to a payment claim for delay damages. In support of its delay damages claim, the claimant submitted a report prepared by an organisation known as 'iSet' ('the iSet Report'), which relied on logic, calculations and programming performed by iSet in order to calculate the number of days of compensable delay. Whilst the adjudicator, found that the claimant had been delayed by the respondent and was entitled to delay damages, he identified a number of issues with the way in which the iSet Report had calculated the length of compensable delay. The adjudicator concluded (at [24]): *"From the information before me and given that the analysis employed in the iSet Report is computer driven, I am unable to replicate the assessment process in order to assess the true extent of [Ichor's] entitlement to an EOT. This should not be interpreted to mean that I have assessed it as Nil. I have simply been unable to assess it. It follows, that I am unable to assess the quantum of the delay costs claims."*

Subsequently, the claimant made a further payment claim which included the delay costs that the first adjudicator had been unable to assess and served a second adjudication application that included a 'Supplementary iSet Report' which had been prepared to address the shortcomings identified by the first adjudicator. The

[27] [2014] NSWSC 1534.

respondent sought a declaration that the second adjudication application was an abuse of process and void. The court held that, whilst the circumstances did not give rise to issue estoppel (as the first adjudicator had not made a determination with respect to the delay damages claim), there had been an abuse of process in that the claimant had used the first adjudicator's observations as advice on evidence and was making a second attempt to prove the same case thus requiring the respondent, for the second time, to meet it. The court went as far as to note (at [47]), obiter dicta, that the first adjudicator could have, and arguably should have, determined that the claimant had failed to make out its case so far as concerns delay damages and determined that the amount of the claim was nil. Furthermore, the court rejected the claimant's submission that the first adjudicator should have sought further submissions from the parties to overcome the shortcomings of the iSet Report on the basis the adjudicator had only 10 business days to complete the complex task of adjudicating the issues in question.

SUMMARY OF THE LAW

From the analysis of the relevant case law carried out above, the law concerning how adjudicators should deal with expert reports may be summarised as follows:

(i) Expert witness reports are duly submitted with an adjudication response and, therefore, must be considered by an adjudicator if they give further detail on reasons for withholding payment stated in the payment schedule. The reasons in the payment schedule only need to be expressed to a 'degree reasonably sufficient to apprise the parties of the real issues in dispute.'[28] As such, an adjudicator must be careful not to confuse content in an expert report that supports reasons given in the payment schedule with new reasons for withholding payment. To do so will not only be a breach of natural justice, but also a jurisdictional error of law.[29]

(ii) If the amount sought by a claimant in its payment claim is higher than that recommended by the claimant's own expert, an adjudicator will not be denying the respondent natural justice by awarding the claimed amount and failing to explain why he or she has chosen to do so in preference to the expert's opinion.

(iii) Adjudicators need to be wary about expressing a view on the independence of an expert because if the court disagrees with an adjudicator's reasons for such a view, the adjudicator's determination may well be quashed for breach of natural justice or want of good faith. Even where an adjudicator has proceeded to explain reasons for rejecting the expert's opinions, this consideration may be tainted where the adjudicator has, in the eyes of the court, unjustifiably brought into question the expert's independence.

(iv) Apart from the circumstances previously described in (ii) above, an adjudicator must engage intellectually with the expert's report, adequately addressing in his or her reasoning why he rejected the expert's reasoning and opinions.

(v) Where the adjudicator has considered shortcomings in an expert's report, the party seeking to rely on the report will not be allowed to submit an updated version of the expert report (which has been revised in accordance with the adjudicator's

[28] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC at [76]; *Owners Strata Plan 61172 v Stratabuild Ltd* [2011] NSWSC 1000 at [36].

[29] This guidance, however, does not apply to all payment claims under the Victorian Act and payment claims over $750,000 under the Queensland Act, where a respondent is permitted to raise new reasons in their adjudication response. Neither does this guidance apply to the Western Australia and Northern territory Acts, whose adjudication scheme is closer to that of the UK Act than the NSW Act.

consideration) in a further adjudication application. To do so would be an abuse of process.

(vi) Where shortcomings exist in an expert's report that prevents an adjudicator from making use of the report to ascertain a claim, it is unlikely that an adjudicator will be held to have denied a party natural justice by failing to call for further submissions due to the time pressure the adjudicator is under to deliver their determination.

CONCLUSION AND FURTHER RESEARCH

Since its introduction in to Australia fifteen years ago, statutory adjudication has experienced mission drift. Although originally intended to provide a quick and relatively simple dispute resolution process to assist smaller parties get paid for construction work done and/or goods supplied, adjudication is now regularly being used to resolve large and complex payment. As a consequence, the adjudication process for such claims has become far more formalised than envisaged, involving lawyers and large volumes of supporting submissions which often include expert witness reports. Judicial guidance suggests that generally an adjudicator must engage intellectually with (i.e., consider) the expert's report, adequately addressing in his or her reasoning why he rejected the expert's reasoning and opinions. There is, however, a limit to how much material a single adjudicator can intellectually engage with in just 10 business days. This has led many to question the appropriateness of adjudication as a dispute resolution process for large and complex payment disputes. Although the courts have acknowledged that any judicial review of an adjudicator's determination must consider the rough and ready nature of the adjudication process given its tight timeframes, the failure of an adjudicator to demonstrate that he or she has considered all the opinions raised in an expert's report due to being overwhelmed by sheer volume of paperwork will, it seems, always leave the door ajar for a potential judicial challenge on the grounds of breach of natural justice and/or want of good faith.

Barring the exclusion of large and complex payment claims from the scope of the legislation, other suggestions for ensuring the robustness of large and complex adjudication determinations may include improving the appointment and regulation of adjudicators as well as increasing their powers in a similar manner to The Scheme for Construction Contracts Regulations30 in the UK such as taking the initiative in ascertaining the facts and the law, appointing experts, limiting the length of written documents. In addition, it is worthwhile to draw upon the notation of a dual scheme for adjudication which specifically caters for the needs of large and complex adjudications as developed in the recently amended Queensland model or the dual scheme proposed by Coggins (2011). Having said that, such suggestions will need further research to evaluate their validity and effectiveness. Moving forward, this paper seeks to inform the PhD empirical study of the lead author which mainly aims to formulate a roadmap with recommendations that can be applied to help optimise the various Australian adjudication schemes for the determination of large and/or complex payment claims.

[30] Part I, s 13.

REFERENCES

Coggins, J.K. (2011), 'From Disparity to Harmonisation of Construction Industry Payment Legislation in Australia: a Proposal for a Dual Process of Adjudication based upon Size of Progress Payment Claim', Australasian Journal of Construction Economics & Building, 11(2), pp 34-59.

Davenport, P., 2011, "Adjudication – Moving the goal posts – 'active process of intellectual engagement'", Adjudication in the Building Industry, 3rd edition, Federation Press.

Iemma, M. (1999). *NSW Parliamentary Debates, Legislative Assembly*, 29 June 1999.

Scott, D. (2004), The Expert Witness – Construction, Adjudication Society website, viewed 28th Jan 2015, at http://www.adjudication.org/papers-talks?title_op=contains&title=expert+witness&body_op=contains&body=

Wallace, A. (2013), Final Report of the Review of the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry, Queensland Building Services Authority.