

When adjudicators go wrong



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In the last issue of *Contractor* magazine my colleague, Brett Martelli, wrote about the onerous statutory provisions in the Construction Contractors Act 2002 (the Act).

The 'sudden death provisions', as Brett termed them, were inserted into the Act to facilitate the exchange of money and services between the parties in a construction contract and to ensure that payment is not withheld, and thus construction ceasing, because of disputes that may arise.

Disputes – The Act

When a dispute does arise between the parties, the Act provides a mechanism for ensuring that disputes can be resolved in a speedy and cost effective manner via a prescribed adjudication process.

The idea is that the adjudication process in the Act can be instigated at the request of either party and is an alternative to an often lengthy, and expensive, court process.

The adjudicator's decision is final and the decision cannot be appealed to the district court or high court. However, if a contractor is not satisfied with the process that was followed by the adjudicator in reaching the decision, then an application for judicial review can be filed.

Such applications are rare. However, a recent decision of the high court sets out why in certain circumstances applications for judicial review are warranted, particularly when adjudicators go wrong.

The facts of *Anderson* can be summarised briefly:

- The owner entered into a building contract with a company (later novated to the builder).
- A dispute arose between the owner and builder.
- The builder argued that payment claims were issued pursuant to the Act.
- The owner did not pay the amount of a payment claim nor did the owner issue a payment schedule. The owner said that there were issues with overcharging and defective work.
- The builder suspended work until all outstanding invoices were paid.
- The dispute went to adjudication. The owner and builder raised multiple issues against each other.
- The adjudicator concluded that because of the lack of payment schedules issued by the owner, the owner must make payment to the builder.

Judicial review

The owner applied to judicially review the adjudicator's decision.

As with any application for judicial review, the owner must be able to demonstrate that the adjudicator has made a substantial error of law or that there has been a substantial

breach of natural justice that warrants the court to intervene.

The owner argued that the adjudicator made a significant error of fact; made a mistake of law; acted outside his jurisdiction; failed to take into account relevant considerations; took into account irrelevant considerations; failed to give coherent and adequate reasons for the determination; and failed to make conclusions on the important issues that were raised for determination.

In determining that the builder was entitled to receive payment, the adjudicator relied on sections 20 and 21 of the Act. These provisions set out the nature of payment claims and payment schedules. However, these sections of the Act were never in dispute. The primary issue was whether or not the new builder was due more money under the contract following the delays, workmanship and overcharging issues.

The adjudicator was not required to make a determination with reference to sections 20 and 21. In doing so, he deprived the parties of the opportunity to make submissions on their application which Paul Davison J noted was a serious breach of natural justice.

The adjudicator also ignored other evidence provided by the owner regarding the price variations and delay. The expert evidence provided to the adjudicator demonstrated the impact the delays had on the construction. This evidence should have been taken into account rather than be ignored. In ignoring the evidence, the adjudicator was found to make a significant error of law.

The Act requires that adjudicator's reasons must be contained in the determination. It is accepted that the reasons can be brief but they must be clear and they must enable the parties to understand the basis for the decision. It was found the adjudicator failed to give clear reasons for his decision.

How is this decision helpful?

The Courts are reluctant to interfere with adjudication determinations particularly because the objective of the Act is to ensure swift resolution of disputes.

Judicial review remains available in those cases where an adjudicator has acted in a manner where there has been a significant breach of natural justice or significant error of law.

When considering an adjudicator's decision, it is important to double check that the correct process has been followed, that the evidence has been taken into account and that the parties have had an opportunity to make submissions on the issues in dispute. ⚠️