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Rapid Adjudication Of Construction Disputes Under The Construction Contracts Act 2004

By Peter Wittkuhn

Introduction

Applications for adjudication require a response at breakneck speed, and they are determined extremely rapidly. A local government in receipt of an application for adjudication absolutely cannot afford to delay in responding, as extremely tight timeframes apply under the Act, and once the deadline has passed for a response, a late response is counted as no response. The process is often referred to as rapid adjudication.From time to time, local governments acting as principals under construction contracts, find themselves in receipt of applications for adjudication under the Construction Contracts Act 2004 (WA) (Act). Typically they are served by their contractor with a wad of paper running to hundreds or even thousands of pages, and within a day or so they are in receipt of a letter from an adjudicator appointed by the Australian Institute of Building or a similar organization. Adjudicators are registered under the Act as competent and available to undertake adjudications.

Principals who are unaccustomed to rapid adjudication under the Act sometimes mistake it as arbitration, however both the nature of the jurisdiction, and the process, are different.

The origin and nature of rapid adjudication

One key catalyst for the Act was the regrettably high incidence of contractors holding out on paying subcontractors on spurious grounds, and running them into insolvency, making litigation ineffective. Rapid adjudication under the Act is intended to “keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes”: Explanatory Memorandum and Second Reading Speech. Subcontractors can claim against contractors, as well as contractors against principals. In a smaller range of circumstances, claims are available for principals against contractors. However, the central concept in the jurisdiction of an adjudicator under the Act is that there must be a

'payment dispute', which essentially requires that the claiming party says that the respondent party owes money under the contract to the claiming party, or has failed to release security that it is obliged to release to the claiming party. It follows from this description that the jurisdiction will much more often be invoked by a contractor than by a principal.

The relationship between rapid adjudication and arbitration or court proceedings

If a rapid adjudication concludes with an order by the adjudicator that a principal must pay a contractor, then the principal must comply with that order – it is enforceable as if it were a court order: Act, section 43.

However, a rapid adjudication is not absolutely final and definitive.

At the risk of some over-simplification, arbitration or court proceedings trump rapid adjudication orders; but until and unless arbitration or court proceedings are instituted and determined in a manner inconsistent with a rapid adjudication, the orders made in rapid adjudications are binding.If the parties have agreed on a dispute resolution mechanism such as arbitration, then it is still possible that an opposite, or different, conclusion could be reached in arbitration. Of if there is no provision for arbitration, then in court. With limited exceptions, evidence of anything said or done in a rapid adjudication process is not admissible in arbitration or court proceedings: Act, s. 45(3). However, an arbitrator or court, in making an award, judgment or order, must take into account any amount that has been paid or ordered to be paid under rapid adjudication. This could include ordering restitution or an amount paid under rapid adjudication: Act, s. 45(4).

It might be suggested that rapid adjudications resemble in some ways an interlocutory order of a court, such as an interlocutory injunction which holds the status quo until there is time for the whole case to be fully and fairly litigated. However, rapid adjudication is not fully comparable to interlocutory relief. Firstly, until and unless a party institutes arbitration or court proceedings seeking orders inconsistent with those under the rapid adjudication, there is nothing for the rapid adjudication to be subordinate to. Often no such arbitration or court proceedings are commenced. Secondly, a court when granting interlocutory relief will refrain from determining disputed questions of fact but, will in a sense, take the applicant's case at its highest in terms of factual matters; and where there are questions of law or legal interpretation, a court will only require the applicant to show a 'serious question to be tried'. A adjudicator under the Act, on the other hand, will endeavour to determine all relevant disputed questions of fact and law to his or her best ability given the time available and given the materials provided by each party. Whilst this may not be as thoroughgoing as a final arbitration or court hearing, it is not expressed as being based merely on 'a serious question to be tried'. Thirdly, in deciding whether to grant interlocutory relief, a court will consider where the 'balance of convenience' lies. An adjudicator under the Act is not concerned with that question, but only with the question of whether the respondent party owes the claimant party a payment or a release of security.

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How rapid is rapid adjudication?

The respondent has only 10 business days to lodge its response with the adjudicator and serve it on the applicant: section 27(1). The principal's response must contain all the information, documentation and submissions on which the party making it relies in the adjudication.

The response is accordingly not a mere summary, or pleading, or statement of issues facts and contentions lodged in anticipation or bringing the fuller documentary and oral case later. It is the case – it must be assumed that the local government will not have any further opportunity to make its case either in writing or orally in any way.

Often such contractual disputes have long and complex histories, and it becomes necessary to brief lawyers who must get up to speed on extremely demanding timeframes and if necessary drop everything else. The local government's contract administration team, and sometimes others, also need to be prepared to make themselves fully available to attend to the case on the same timeframe.

The adjudicator can call a conference of the parties, but is not required to do so, and many rapid adjudications are determined wholly on the papers. The adjudicator can also call for further submissions or further information, but is not obliged to.

Unless the parties agree to a longer timeframe, the adjudicator has another 10 business days from receipt of the respondent's materials (or the deadline for receipt in cases where the respondent did not respond in time) to determine the dispute: section 31. The adjudicator may extend the time, but only with the consent of both parties: section 32(3).

The parties must bear their own costs of the dispute unless the adjudicator determines that one party has engaged in frivolous or vexatious conduct or made an unfounded submission: section 34. The parties are liable to pay the costs of the adjudicator in equal shares: section 44(6). If a party has paid more than the party's share of the costs of an adjudication, the adjudicator may order the other party to pay the relevant amount so as to achieve equality: section 44(10).

The adjudicator must determine the application on the balance of probabilities as to whether the respondent is liable to make any payment to the contractor: section 31(2)(b). The object of adjudication is to determine the dispute fairly and as quickly, informally and inexpensively as possible: section 30.

Conclusion

Most local governments are principals at some stage to construction contracts. As such, it is vital that local governments have at least a basic understanding of rapid adjudications under the Construction Contracts Act 2004. Otherwise, by the time they have ascertained the nature, process and implications of the adjudication process, vital time is likely to have been lost in a demanding and unforgiving jurisdiction in which deadlines are absolute – and principals can find themselves liable

to make onerous payments or release security in circumstances where a good defence could have been raised if only the response time had been optimally utilised.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Peter Wittkuhn by email to pwittkuhn@mcleods.com.au.